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Office of The Ombudsman*



***Direct Investigation into
Government's Regulation of Guesthouses***

The Ombudsman's direct investigation has found that the number of guesthouses in the territory has been on the rise in recent years, and residents in buildings with guesthouses tend to feel that their daily lives are being adversely affected. Nevertheless, the Home Affairs Department ("HAD") had failed in its duty as the regulatory authority to proactively review the Hotel and Guesthouse Accommodation Ordinance ("the Ordinance") at an early stage. When processing applications for guesthouse licences, HAD does not consider the restrictive provisions in the Deeds of Mutual Covenant and land leases nor the residents' views. There is a lack of consideration for the demands of those affected.



This investigation has also revealed that the number of prosecutions against unlicensed guesthouses by HAD has been exceedingly low. We consider that HAD should have formulated new strategies to enhance the effectiveness of its enforcement actions.

At long last, HAD has conducted a public consultation exercise on review of the Ordinance. While The Ombudsman generally supports HAD's proposals for enhancing the licensing regime and stepping up enforcement actions, she urges the Department:

- (1) to draw up a set of reasonable and workable criteria for assessing the residents' opinions if it decides to conduct local consultation during the licensing process, so as to ensure fair and impartial vetting of licence applications;
- (2) to consider including compliance with land lease conditions as a licensing requirement; and

- (3) to conduct more decoy operations to obtain evidence during its investigation of unlicensed guesthouses so as to increase the effectiveness of its enforcement actions.

The investigation report is at **Annex 1**.

***Summary of Investigation Report
Improper Arrangements in Allocating Columbarium Niches by
Food and Environmental Hygiene Department***

The Ombudsman has recently completed an investigation into a complaint against the Food and Environmental Hygiene Department (“FEHD”) about its arrangements in allocating columbarium niches. The complainant had applied to FEHD in 2012 for purchasing a new niche. However, under FEHD’s ballot system, he was unsuccessful for two times and, in the absence of a waitlisting mechanism for leftover niches, he could only hope for better luck the third time.

Our investigation shows that the construction of the new niches at Wo Hop Shek and Diamond Hill had been completed some time ago, but FEHD put those niches up for allocation in phases over three years, turning a blind eye to the anxiety of the waiting public and acting against Government’s policy objective of increasing the supply of niches as soon as practicable. Besides, the niches were allocated randomly by computer ballot. Applicants unsuccessful in the earlier phases could only keep waiting for their luck to come. We consider that provision of public niches, much like public housing and medical care, is a basic service of Government to the community. It would be more reasonable to adopt a registration system to allocate niches on a first-come, first-served basis.



The Ombudsman finds inadequacies in FEHD’s arrangements in allocating niches. It should not put its own administrative convenience above public interests and should quickly conduct a comprehensive review of the arrangements. FEHD should consider allocating niches by way of a queuing system and strive to allocate all available niches in an efficient and orderly manner. The ballot system, if the Department chooses to keep it, should also be enhanced. For instance, priorities should be given to those unsuccessful in the earlier phases, and a waitlisting mechanism be established so that any leftover niches will be made available for re-allocation immediately to avoid wastage of resources.

The summary of the investigation report is at **Annex 2**.

***Summary of Investigation Report
Refusal by Water Supplies Department and Lands Department
to Take Over and Maintain Waterworks
in Government Road Areas***



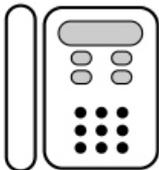
The Ombudsman has completed an investigation into a complaint against the Water Supplies Department (“WSD”) and the Lands Department (“Lands D”). There are five streets owned by Government within a private estate, with various types of facilities, including the roads, road signs, street lights, sewers and road markings, taken over by the Government departments concerned for management, maintenance and repairs. However, the two departments argued that they had never taken over the waterworks and fire hydrants in the areas of the five streets, and they refused to provide maintenance and repairs. The complainant alleged that the departments concerned had unreasonably shifted their responsibilities to the estate owners.

Our investigation found that the complaint was justified. There was indeed maladministration on the part of WSD and Lands D. As a result, the matter had dragged on for 16 years.

We made a number of improvement recommendations and they have all been accepted by the two departments.

The summary of the investigation report is at **Annex 3**.

Enquiries

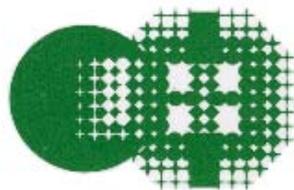


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**Office of The Ombudsman
13 October 2014**

DIRECT INVESTIGATION REPORT

**GOVERNMENT'S REGULATION
OF GUESTHOUSES**



**Office of The Ombudsman
Hong Kong**

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1

INTRODUCTION

BACKGROUND

1.1 In Hong Kong, operation of guesthouses is regulated by the Office of the Licensing Authority (“OLA”) under the Home Affairs Department (“HAD”). Pursuant to the Hotel and Guesthouse Accommodation Ordinance (“the Ordinance”), OLA assesses the fire and structural safety of the premises to be used for the guesthouse when processing a guesthouse licence application. Where a guesthouse is found to have violated any regulations or to be operating without a licence, OLA will prosecute the operator when sufficient evidence is to hand.

1.2 This Office has received, from time to time, public complaints about OLA loosely issuing licences to guesthouses in multi-storey buildings without taking into account the dangers and nuisances that those guesthouses may cause to other people living in the same building. In some cases, the complainants alleged that OLA had issued licences even though operation of guesthouses was in violation of the deeds of mutual covenant (“DMCs”) of the buildings.

1.3 Other complainants reproached OLA for its ineffective enforcement against unlicensed guesthouses, which had resulted in the proliferation of such unlicensed establishments. Many such cases appeared to pose fire risks and structural safety problems to the buildings.

1.4 In December 2013, a fire broke out at Continental Mansion in North Point, resulting in one death and more than 20 injuries, involving tourists staying in the guesthouses in the building. The incident revealed that there were not only licensed but also many unlicensed guesthouses in the building. The public were greatly concerned whether Government had been properly regulating the operation of guesthouses.

PROCESS AND SCOPE OF INVESTIGATION

1.5 Against this background, we initiated a direct investigation assessment (“DI assessment”) (in other words, a preliminary inquiry) in January 2014 to examine the need for a direct investigation to probe into the systemic and procedural inadequacies in the current regime for regulation of guesthouses.

1.6 During the DI assessment, we studied the Ordinance, the Administration’s guidelines on application for licences to operate guesthouses and other businesses, as well as relevant media reports. We also sought information from HAD direct.

1.7 Having examined the above information, we considered it necessary to delve into the following two areas:

- (1) whether the current system for guesthouse licensing is sufficient to protect the safety and interests of lodgers and the public; and
- (2) whether Government’s mechanism and measures are effective in combating unlicensed guesthouses.

1.8 Accordingly, on 5 June 2014, The Ombudsman declared her initiation of a direct investigation, under section 7(1)(a)(ii) of The Ombudsman Ordinance, against HAD, so as to obtain further information from the Department. On 12 June, we issued a press release on our commencement of the direct investigation to invite views and information from the public on the subject.

1.9 Since some guesthouses are allegedly operating in violation of not only the DMCs of the buildings but also the restrictions on land use stipulated in the land leases, we also made enquiries to the Lands Department (“Lands D”), which is responsible for enforcement of land lease conditions.

1.10 To better understand the actual operation of licensed and unlicensed guesthouses, our investigation officers conducted inspections in districts where the guesthouse business is particularly thriving, including Causeway Bay, North Point, Tsim Sha Tsui and Mong Kok.

1.11 On 4 July, HAD launched a public consultation exercise on the review of the Ordinance. On 10 July, we held a meeting with HAD officials to exchange views on the proposals in the consultation paper.

1.12 On 25 July, we issued a draft investigation report to HAD and relevant parts to Lands D, to invite their comments. Having considered such comments, we finalised the report on 14 August 2014.

2

OUR FINDINGS

LICENSING REGIME

Origin of the Licensing Regime

2.1 In 1988, a fire broke out in a guesthouse in Chungking Mansions in Tsim Sha Tsui, causing the death of a tourist. The incident aroused wide public concern. In the wake of the incident, Government decided to establish a licensing regime through legislation to regulate the hotel and guesthouse business. The Ordinance was enacted in June 1991.

2.2 In drafting the legislation, Government had consulted various stakeholders and the then Legislative Council. In the paper presented to the Council, the Administration stated that:

- (1) The primary objective of legislation was to ensure, through a licensing regime, that the premises used as guesthouses meet the prescribed standards in respect of **building structure** and **fire safety** so as to protect the lodgers and the public.
- (2) Compliance with the provisions of the **land lease** or **DMC** is **not** a licensing requirement. Any breach of such provisions should be dealt with by the relevant Government department or owners of the building through exercising their legitimate powers to take appropriate action.

Relevant Legal Provisions

2.3 As stipulated in section 8(3) of the Ordinance, the Hotel and Guesthouse Accommodation Authority (i.e. the Secretary for Home Affairs; with OLA

delegated the authority to perform the relevant functions) may refuse to issue a licence in respect of a guesthouse if it appears to him:

- (a) that for reasons connected with –
 - (i) the situation, means of ingress or egress, design, construction, size, equipment, or type of building; or
 - (ii) the protection of life and property under the Fire Services Ordinance,

the premises to be used for the guesthouse are not fit to be used for the purposes of a guesthouse;
- (b) that such premises do not comply with any requirement relating to design, structure, fire precautions, health, sanitation and safety set out in the Buildings Ordinance; or
- (c) that the operation, keeping, management and other control of the guesthouse would not be under the continuous and personal supervision of the person to whom the licence is issued.

2.4 Section 8(4) of the Ordinance provides that where the Hotel and Guesthouse Accommodation Authority refuses to issue a licence, he shall make a written order to that effect stating the ground in the above paragraph on which he has refused to issue a licence.

Factors Not Considered in Licensing

2.5 HAD has explained to us that it is not empowered by the Ordinance to reject a licence application for reasons other than those specified in section 8(3) of the Ordinance (**para. 2.4**). The Department, therefore, will not refuse to issue a licence to a guesthouse on the grounds that its operation is in breach of the provisions of the land lease or DMC, or has met with public objection.

2.6 HAD has also pointed out that the DMC is a private covenant among the owners, the property manager and the developer of the building. Those parties are entitled to exercise their powers conferred by the DMC and take appropriate

actions against those who have breached the DMC provisions. The contents of DMCs differ from building to building. Whether a DMC contains any provisions restricting operation of guesthouses in the building involves interpretation of a private agreement. HAD is not in a position to intervene.

2.7 Nonetheless, guesthouse licences issued by OLA will not waive any conditions in any lease, tenancy agreement or other licence granted by Government, nor will they affect or change the provisions of the DMC of the building or other private agreements. OLA has clearly reminded all licensees that they are liable for any consequences if operation of guesthouses on the premises concerned is in violation of the terms and conditions of the relevant lease or covenants.

Licensing Procedures

2.8 Upon receipt of a licence application, the professional staff of OLA, seconded from the Buildings Department (“BD”) and the Fire Services Department (“FSD”), will inspect the premises concerned to conduct surveys relating to building structure and fire safety. OLA may require the applicant to carry out improvement works. With reference to the requirements on means of escape in the Buildings Ordinance and the layout plans approved by BD, OLA will specify in the licensing conditions the maximum number of lodgers that the guesthouse may accommodate, so as to ensure that the total number of occupants expected within the building after the establishment of the guesthouse will not exceed the maximum capacity specified in the approved plans.

2.9 In processing an application for licence renewal, OLA officers will likewise conduct site inspections. Licence renewal will only be approved after OLA has confirmed that the premises concerned still comply with the safety standards.

Statistics

2.10 Between 2011 and 2013, the numbers of licensed guesthouses and new guesthouse licences issued are as follows:

Year	2011	2012	2013
Number of licensed guesthouses	1,400	1,493	1,600
Number of new guesthouse licences issued	64	125	145

MEASURES TO COMBAT UNLICENSED GUESTHOUSES

Inspection and Investigation

2.11 Since 2011, FSD officers with law enforcement experience have been seconded to the Enforcement Team of OLA to step up enforcement against unlicensed guesthouses. OLA has also increased its manpower and recruited frontline officers with law enforcement experience to achieve this end. Where suspected cases of unlicensed guesthouse operation are found or reported, OLA will conduct inspections. If there is sufficient evidence that the premises in question involve unlicensed guesthouse operation, OLA will institute prosecution. Moreover, OLA will concentrate its efforts on inspecting buildings with higher risk of fire.

2.12 In recent years, some unlicensed guesthouses have tried to camouflage their operations by advertising and conducting transactions on the Internet only. In view of this trend, OLA has formed a dedicated Internet enforcement team to closely monitor websites, discussion forums, blogs, etc., to collect intelligence on suspected unlicensed guesthouses as well as to advise tourists to choose licensed guesthouses.

2.13 According to HAD, in case of OLA officers' repeated failures to enter a suspected unlicensed guesthouse for inspection, OLA will write to the owner of the premises and the guesthouse operator to request their cooperation to enable its officers to enter the premises.

Penalty and Statistics on Enforcement

2.14 Any person who operates an unlicensed guesthouse commits a crime and is, upon conviction, liable to the maximum penalty of a fine of \$200,000 and imprisonment for two years, as well as a fine of \$20,000 for each day during which the offence continues.

2.15 For the period 2011-2013, the statistics in connection with enforcement actions against unlicensed guesthouses are as follows:

	Year	2011	2012	2013
(1)	Number of complaints about unlicensed guesthouses	696	1,418	1,225
(2)	Number of inspections of unlicensed guesthouses	3,125	6,791	9,889
(3)	Number of prosecutions against unlicensed guesthouses	53	128	171
(4)	Number of convictions	39	110	161
(5)	Highest fine imposed	\$20,000	\$50,000	\$20,000
(6)	Longest term of imprisonment imposed	3 months	2 months	2 months

2.16 HAD attributes the low albeit rising prosecution figures (**item (3) of para. 2.15**) to the very high standard of proof (i.e. beyond reasonable doubt) required by the court in prosecutions against unlicensed guesthouse operations because operation of unlicensed guesthouses is a criminal offence, conviction of which can lead to imprisonment and constitute a criminal record. Therefore, OLA must prove that the premises in question are providing rent-charging short-term accommodation before bringing a prosecution against the operator. OLA officers can often find circumstantial evidence (including subdivisions of the premises, receipts for daily rental provided by tourists, etc.) during inspections. However, most tourists refuse to give a witness statement or are reluctant to travel to Hong Kong again to give evidence in court. Legal advice from the Department of Justice is that mere circumstantial evidence is not sufficient to prove unlicensed guesthouse operations on the premises on the material day and, therefore, prosecution is not recommended in such cases.

2.17 HAD also indicated that the successful convictions of unlicensed guesthouse operations between 2011 and 2013 (**item (4) of para. 2.15**) were all achieved by decoy operations by OLA officers enabling their collection of sufficient evidence for prosecution.

Findings from Our Site Inspections

2.18 During site inspections (**para. 1.10**), our officers noticed that it was not unusual for licensed guesthouse operators to also run unlicensed guesthouses in other units within the same building (commonly known as “shadow guesthouses”). Our officers actually witnessed staff of the licensed guesthouses unscrupulously showing visitors to those “shadow guesthouses”, which had been subdivided into a number of guestrooms connected by only one narrow corridor. Such units were clearly not on the list of licensed guesthouses on OLA’s website.

PUBLIC VIEWS ON THE EXISTING REGULATORY REGIME

2.19 Based on the public comments received during our direct investigation (**para. 1.8**) and relevant newspaper reports, we note the following views of residents and guesthouse operators.

Views of Residents / Owners’ Corporations

2.20 People residing in multi-storey buildings where guesthouses exist have found their daily lives adversely affected by the increasing number of guesthouses in recent years. Problems include:

- environmental hygiene condition deteriorates due to the increasing amount of refuse, with additional cleaning costs to be borne by all owners of the building;
- conflicts often arise between residents and guesthouse lodgers over the use of lifts;
- frequent repairs are required due to over-use of lifts, with all owners having to share the costs;
- water and electricity supply and sewage are also affected; and
- the large number of strangers entering the building causes security concern.

2.21 Some residents consider it irresponsible of HAD to suggest owners of the building to take legal action against guesthouse operators for violating the provisions of the DMC (**paras. 2.6 and 2.7**). They criticise Government for creating conflicts by issuing licences to guesthouse operators in full knowledge that such operations may be in violation of DMC provisions. The owners of the buildings are left with the problem and the associated legal costs.

2.22 In general, residents of buildings are of the view that HAD should, when processing guesthouse licence applications, examine whether the operation of guesthouses is in violation of the DMC provisions of the buildings concerned, and that HAD should consult residents on each licence application.

Views of Guesthouse Operators

2.23 However, in guesthouse operators' view, the existing regulatory regime is adequate to ensure the safety of lodgers of licensed guesthouses and residents of the buildings concerned. All Government has to do is to combat unlicensed guesthouses. DMC provisions and residents' views should not be included as conditions for guesthouse licensing, since there is no difference between the operation of guesthouses and that of other businesses like coffee shops, hair salons and tutorial schools in multi-storey buildings in terms of their impact on residents. It would be unfair to guesthouse operators if Government imposes additional licensing requirements only on this trade.

GUESTHOUSE OPERATION VIOLATING LEASE CONDITIONS

2.24 As regards whether guesthouse operation may violate the land use restrictions stipulated in the land leases of some premises, Lands D has explained to us that, generally speaking, if the land lease stipulates that the premises are designated for "private residential use" or "industrial use" only, guesthouse operation will be considered to be in breach of the land lease.

2.25 Lands D has also told us that it will conduct an investigation whenever it receives a complaint or referral about violation of lease conditions by guesthouse operation. Where such violation is confirmed, Lands D will seek legal advice if necessary and then take appropriate lease enforcement action. It may first issue a warning letter to the offender and have it registered with the Land Registry. If the

warning is not heeded, Lands D may consider re-entering the site.

2.26 According to the information provided by Lands D, it received a total of 12 relevant complaints/referrals between 2011 and 2013. After investigation, the Department confirmed that none of those cases had violated the lease conditions.

3

THE CONSULTATION PAPER

3.1 After we publicly declared our commencement of this direct investigation, HAD, in view of the concerns of different sectors of the community about the existing regulatory regime for guesthouses, launched on 4 July 2014 a public consultation exercise on review of the Ordinance (**para. 1.11**). In its consultation paper, HAD made a number of improvement proposals, which focus on two areas:

- (1) enhancing the licensing regime; and
- (2) stepping up enforcement against unlicensed guesthouses.

ENHANCING THE LICENSING REGIME

3.2 Regarding the licensing regime, HAD made, *inter alia*, two proposals of amending the Ordinance to allow the Department in processing applications for guesthouse licences:

- (1) to refuse to issue/renew licences or cancel existing licences on the ground that the DMC provisions of the building concerned explicitly prohibit the operation of guesthouses; and
- (2) to take into account residents' views collected through local consultation.

STEPPING UP ENFORCEMENT AGAINST UNLICENSED GUESTHOUSES

3.3 As regards enforcement against unlicensed guesthouses, HAD made, *inter alia*, three proposals of amending the Ordinance:

- (1) to add “deeming provisions” to the Ordinance for admission of “circumstantial evidence”, such that the standard of proof by OLA can be lowered to facilitate prosecution against owners and operators of unlicensed guesthouses;
- (2) to make provisions empowering OLA to apply for a court warrant for entry into, and breaking in if necessary, any suspected unlicensed guesthouses for inspection; and
- (3) to increase the maximum penalty for operating unlicensed guesthouses to a fine of \$500,000 and imprisonment for three years, in the hope that the court would impose heavier sentences compared with the present.

4

COMMENTS AND RECOMMENDATIONS

COMMENTS

4.1 Based on our findings in Chapter 2, we have the following comments on the current licensing regime for guesthouses and enforcement measures against unlicensed guesthouses.

Licensing Regime for Guesthouses

4.2 Given the legislative intent of the Ordinance (**para. 2.2**) and the relevant provisions (**paras. 2.3** and **2.4**), this Office considers that HAD, in processing applications for guesthouse licence, has been acting in accordance with the law and within the powers conferred by the Ordinance when it takes into account only such factors as building structure and fire safety but not the provisions of the land lease or DMC. From an administrative point of view, we cannot say that there is impropriety.

4.3 Nevertheless, the number of guesthouses has been continuously on the rise in recent years owing to tourists' surging demand. Understandably, some residents feel that their daily lives have been affected by the operation of guesthouses in their buildings (**para. 2.20**). They clearly expect that Government's regulation of guesthouses should address not only safety concerns, but also the basics of their daily lives. The fact that DMC provisions and residents' views are left out in the current licensing regime is an issue that Government must tackle. We consider that HAD, as the licensing authority for guesthouses, should have much earlier reviewed the issue and introduced improvement measures or even legislative amendments, so as to address the community's concerns.

4.4 At long last, HAD has embarked on a public consultation exercise on review of the Ordinance and proposed in the consultation paper that explicit restrictive provisions in the DMC (**para. 3.2(1)**) (“proposal (1)”) and residents’ views (**para. 3.2(2)**) (“proposal (2)”) be taken into account when the Department processes applications for guesthouse licence.

4.5 We support proposal (1), as it would spare the owners of the building the hassles and costs of litigating with the guesthouse operator after the latter has been issued a licence by HAD (**para. 2.21**).

4.6 As for proposal (2), we also find it worthy of support in principle. However, we note the concern of the guesthouse operators about the likely impact of imposing such an additional licensing requirement on the trade. We, therefore, consider it necessary for details of the proposal to be carefully worked out. For those licence applications that have fully met the legal requirements (including the possible new requirements of compliance with the DMC and even the land lease after legislative amendment (**para. 4.7**)), HAD should exercise prudence when conducting local consultation and considering residents’ views on licence applications. To this end, the Department is recommended to devise a set of reasonable and workable criteria for assessing the objections raised by residents so as to ensure fair and impartial vetting of licence applications.

4.7 In its consultation paper, HAD has not proposed that it can refuse to issue/renew licences or cancel existing licences on grounds of the restrictions on land use stipulated in the land lease. HAD does not consider that necessary as cases of breach of land lease conditions are few and far between. Indeed, the information provided by Lands D indicates that there were no proven cases of breach of land lease between 2011 and 2013 (**para. 2.26**). Nevertheless, one cannot rule out the possibility of such cases in the future. In our view, Government should seriously consider taking this opportunity of legislative amendment to include compliance with land lease conditions as a licensing requirement, such that any cases of breach of land lease can be prevented.

4.8 We understand that Lands D has all sorts of land administration matters to deal with. Some of those matters can be rather complex. It may take the Department a long time to take lease enforcement action. If HAD could at the outset consult Lands D when processing licence applications, any breach of land lease can

thereby be averted. That can save residents of the buildings concerned the troubles of complaining to Lands D against such breach later on and of waiting for the Department to take lease enforcement action.

Enforcement Measures against Unlicensed Guesthouses

4.9 Although OLA has, in the past few years, increased manpower and stepped up inspections and investigations of the proliferating unlicensed guesthouses (**paras. 2.11** and **2.12**), the seriously low prosecution rates (**item (3) of para. 2.15**) show that its enforcement actions have been largely ineffective. The main reasons are:

- (1) currently, Government cannot institute prosecutions merely based on “circumstantial evidence” (**para. 2.16**);
- (2) uncooperative owners and operators of guesthouses make it difficult for OLA officers to enter the premises for investigation (**para. 2.13**);
- (3) the penalties are too lenient (**paras. 2.14** and **2.15**); and
- (4) more decoy operations for collecting evidence are called for (**para. 2.17**).

4.10 We consider that HAD should have sought to change its enforcement strategy much earlier in the face of the abovementioned unsatisfactory situation (e.g. to redeploy resources to conduct more decoy operations for collecting evidence). In fact, in our previous investigations of complaint cases, we had already suggested that HAD devise new strategies to counter the ever-changing ploys of unlicensed guesthouses. The consultation paper recently released by the Department has included several proposals for improvement in the right direction, including: the introduction of “deeming provisions” that will allow admission of “circumstantial evidence”; the empowerment of OLA to apply to the court for entry warrants, as well as the imposition of heavier penalties (**para. 3.3**). We believe that those measures will enhance the effectiveness of HAD’s enforcement actions. Since HAD has acknowledged that admissible evidence can be collected by decoy operations (**para. 2.17**), we would suggest that OLA further extend its use of decoy operations.

RECOMMENDATIONS

4.11 In sum, this Office generally supports the improvement proposals in HAD's consultation paper. The Ombudsman, however, urges the Department:

- (1) if it decides to conduct local consultation during the licensing process, to draw up a set of reasonable and workable criteria for assessing residents' objections (**para. 4.6**); and
- (2) to consider including compliance with land lease conditions as a licensing requirement (**paras. 4.7 and 4.8**).

4.12 We appreciate that the legislative amendments proposed by HAD would take time. The Ombudsman, therefore, also urges that HAD should in the interim:

- (3) further enhance OLA's investigation of unlicensed guesthouses by conducting more decoy operations to obtain evidence in order to increase the effectiveness of its enforcement actions (**para. 4.10**).

ACKNOWLEDGEMENTS

4.13 The Ombudsman is grateful to HAD for its full cooperation and to Lands D for the assistance rendered during the course of this investigation.

Office of The Ombudsman

Ref: OMB/DI/354

August 2014

Summary of Investigation Report

Complaint against Food and Environmental Hygiene Department for Improper Arrangements in Allocating Columbarium Niches

The Complaint

In May 2014, a citizen lodged a complaint with this Office against the Food and Environmental Hygiene Department (“FEHD”) for its improper arrangements in allocating columbarium niches (“niches”). As a result of such improper arrangements, he had not yet been allocated a niche after a long wait.

2. The story went that the complainant had applied to FEHD in September 2012 for a niche for his deceased relative in the newly completed Wo Hop Shek Kiu Tau Road Columbarium Phase V (“Wo Hop Shek”) or Diamond Hill Columbarium Extension (“Diamond Hill”). Allocation of those niches was in three phases and by ballot. Unfortunately, he was unsuccessful in the ballot of the first two phases. As FEHD had not put in place a waitlisting mechanism for the leftover niches, he had to try his luck at the ballot of Phase Three.

Our Findings

Supply and Demand of Niches in Hong Kong

3. According to Government statistics, the projected numbers of deaths and cremations in the territory for the next five years (i.e. 2014 to 2018) are 233,600 (around 46,720 per year on average) and 215,875 (around 43,175 per year on average) respectively. Experience shows that the public’s demand for niches provided by Government (i.e. FEHD) and the Board of Management of the Chinese Permanent Cemeteries¹ (“BMCPC”) is roughly equivalent to 40% of the number of cremations, in other words, around 86,350 niches provided by FEHD/BMCPC in the next five years, an average of around 17,270 niches per year.

4. Currently, there are around 213,300 niches in the eight public columbaria under FEHD and most of them have already been allocated. As at July 2014, only around 24,000 niches in Wo Hop Shek and Diamond Hill were still in the process of allocation. The four cemeteries-cum-columbaria managed by BMCPC have around 224,800 niches. Save for a small number of niches available for re-use, all have been allocated. Cemeteries operated by various religious groups provide around 126,700 niches altogether. As at November 2013, some 28,400 of those niches were in the

¹ The Board of Management of the Chinese Permanent Cemeteries is a statutory non-profit-making organisation set up under the Chinese Permanent Cemeteries Ordinance (Cap. 1112). Its main purpose is to provide various kinds of burial grounds and niches for persons of the Chinese race permanently resident in Hong Kong.

process of allocation. Government does not have any figures on the number of niches provided by other private organisations.

Arrangements for Allocating Niches

5. The new niches at both Wo Hop Shek and Diamond Hill were completed in 2012. Of those 45,250 new niches, 43,710 were at Wo Hop Shek and 1,540 at Diamond Hill. In September 2012, FEHD started Phase One allocation of the niches. The niches at Wo Hop Shek and Diamond Hill were put up for allocation together. The applicant was not allowed to choose between the two columbaria in the application form.

6. The niches were allocated by computer ballot. The successful applicants were assigned priority numbers, according to which they were invited to select and purchase niches. For the first two phases of allocation, FEHD had not put in place a waitlisting mechanism: all those niches not taken up by applicants were carried forward to Phase Three for re-allocation.

7. Details of each phase of niche allocation are at the **Appendix**.

8. After examining the information provided by the complainant and FEHD, this Office found the following inadequacies in the Department's niche allocation arrangements.

Phased Allocation Left Many Niches Vacant for Too Long

9. The 45,000 plus completed niches were long available, but FEHD allocated them in phases over three years, and processed only about 110 applications each day. FEHD explained that its objective was to:

- (1) ensure a continuous and steady supply of niches over the years for deceased persons in each phase; and
- (2) minimise the risk of errors by allocating a small number of niches in Phase One as a pilot project to allow staff to gain experience and improve work efficiency.

10. We can understand FEHD's rationale for carrying out a small-scale pilot project initially to minimise risks and gain experience.

11. However, with FEHD's allocation-by-ballot method, applicants with family members passing away during each phase might not be those lucky enough to succeed in the ballot of that phase. The Department's intention to meet, in each phase, the needs of such applicants was just wishful thinking.

12. What we find most unreasonable is that FEHD allocated the niches in phases over three years and left niches vacant for too long: more than 24,000 niches had stayed idle for two years before they were put up for allocation in Phase Three. In fact, all 45,000 plus niches were long available. “A continuous and steady supply of niches over the years” was merely an illusion created by FEHD’s phased allocation. By not promptly allocating all the available niches, FEHD was not only turning a blind eye to the anxiety of the waiting public, but also acting against Government’s policy objective of increasing the supply of niches as soon as practicable.

13. Besides, the number of applications processed each day (i.e. 110 cases) was obviously too small.

People Unsuccessful in Ballot Might Have to Wait Endlessly

14. FEHD’s allocation of niches by computer ballot was in accordance with a recommendation of the Independent Commission Against Corruption for corruption prevention and fairness. We agree that allocation-by-ballot is a fair approach.

15. However, allocation of niches by ballot also means that some applicants may be unsuccessful in ballot time and again and have to wait endlessly for a niche. Given the current undersupply situation, there are bound to be people feeling distressed when their family members have passed away long time ago and they still cannot secure a niche for the deceased. They may resort to private columbaria, but then the legality of such columbaria and associated risks are causes for concern. FEHD should pay serious attention to this problem relating to long waiting, unfortunate applicants.

16. In our view, provision of public niches is a basic service of Government to the community. Similar to public housing and medical care, it would be more reasonable to adopt a registration system to allocate niches on a first-come, first-served basis. We believe that corruption loopholes can be avoided by careful mapping out of procedures. Even if FEHD chooses to continue allocating niches by ballot, it can certainly enhance the system by giving priorities to those applicants who have been unsuccessful in previous allocations so as to save them from waiting endlessly.

No Waitlisting Mechanism and Leftover Niches Not Handled Immediately

17. According to FEHD statistics, in this allocation exercise, 5,607 successful applicants in the first two phases did not take up a niche, representing about 20% of the total number of niches available for allocation in those two phases.

18. Clearly, the number of such applicants not taking up the niches was not insignificant. We consider that the situation was not difficult to predict. First, as FEHD’s allocation exercise took a long time, some applicants might choose to purchase niches provided by private cemeteries or organisations instead in the meantime. Second, since the niches at Wo Hop Shek and Diamond Hill were put up

for allocation together, applicants who were interested only in niches in the urban areas might not take up any niche at Wo Hop Shek when those at Diamond Hill were sold out.

19. While a waitlisting mechanism might lengthen the processing time for the first two phases, it would shorten that for Phase Three. FEHD's concern about processing time could be alleviated by putting a cap on the waiting list. The crux of the matter is that a waitlisting mechanism will help meet sooner applicants' demand for niches and their expectations, reduce the number of leftover niches in each phase, and avoid wastage of resources. Therefore, we find it desirable to have a waitlisting mechanism. FEHD should not put its own administrative convenience above public interests.

Conclusion

20. Overall, The Ombudsman finds inadequacies in the niche allocation arrangements of FEHD. **The complaint was substantiated.**

Recommendations

21. With an expanding and aging population, it is foreseeable that public demand for niches will continue to increase. In view of this, The Ombudsman urges FEHD to quickly review its allocation arrangements in the following directions so as to provide niches to the public in an efficient and orderly manner:

- (1) to consider allocating niches on a first-come, first-served basis and strive to resolve the problem of long waiting applicants;
- (2) even if the existing method of allocation by ballot is to remain, to enhance the arrangements, such as giving higher priorities to applicants who have been repeatedly unsuccessful in ballot, and establishing a waitlisting mechanism for speedier allocation of niches in future exercise; and
- (3) to explore ways of further streamlining the allocation procedures.

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**Number of Niches Allocated by FEHD in Different Phases
and Time of Allocation**

	Phase One	Phase Two	Phase Three
Number of niches available for allocation (Wo Hop Shek and Diamond Hill)	10,742	15,562	24,474 (including niches not taken up by applicants in the first two phases)
Number of eligible applications	24,267	28,038 (including applicants not allocated a niche in Phase One)	31,342 (including applicants not allocated a niche in Phase Two)
Number of successful applicants who did not take up a niche (% of allocation)	1,765 (16%)	3,842 (25%)	Not applicable
Commencement date of application	3 September 2012	18 June 2013	24 June 2014
Completion date of allocation	8 May 2013	14 May 2014	End of 2015
Time taken	8 months	11 months	18 months

Summary of Investigation Report

Complaint against Water Supplies Department and Lands Department for Refusal to Take over and Maintain Waterworks in Government Road Areas

Details of Complaint

The Owners' Corporation of a private estate ("the complainant") lodged a complaint with this Office against the Water Supplies Department ("WSD") and the Lands Department ("Lands D"). The complainant stated that there were five streets ("the Streets") owned by Government within the estate, with various types of facilities on the Streets, including the roads, road signs, street lights, sewers and road markings, taken over by the relevant Government departments concerned for management, maintenance and repairs. However, WSD and Lands D argued that they had never taken over the water supply facilities and fire hydrants in the areas of the Streets. They refused to provide maintenance and repairs and shifted their responsibilities to the complainant. The dispute has dragged on for 16 years.

Our Findings

Background

2. According to Lands D's guidelines, when the Buildings Department ("BD") receives an application for Occupation Permit ("OP"), the local District Lands Office ("DLO") will commence the procedures for issuing a Certificate of Compliance ("CoC"). BD will request the relevant Government departments to check whether the land owner has complied with the requirements and obligations stipulated by them in the land lease conditions and to advise DLO directly of the results. DLO will only issue the CoC upon confirmation from all the departments that the land lease conditions have been fulfilled to their satisfaction. The above procedures of issuing a CoC have been in place for over 30 years. In the present case, under a special condition in the land lease, the land owner was required to complete the land formation work in some areas marked on the site plan (which would become the Streets afterwards) and then return possession of those areas to Government. Upon issuance of the CoC, the Streets would be deemed to have been taken over by Government.

3. The estate concerned was developed in three phases with the CoCs issued by Lands D in 1986, 1992 and 1997. In August 1997, the Streets were taken over by Government for management and maintenance. In September 1997, WSD liaised with DLO in preparation for taking over the waterworks in the areas of the Streets (including the underground pipelines and fire hydrants).

WSD's Handling of the Case and Its Stance

4. In October 1997, the complainant provided a set of drawings to WSD upon its request. Between 1997 and 2004, WSD made repeated requests to the complainant through DLO for another set of as-built drawings with clear indications of the pipeline alignments and associated fittings because the set submitted earlier was unclear. WSD also reiterated that it would not take over the waterworks concerned without such drawings. Furthermore, WSD indicated that it had never requested the developer to install any water pipes for Government. Hence, the water pipes installed by the developer could not be regarded as public water supply facilities to be taken over by WSD. In 2010, the complainant started communicating directly with WSD in writing, but WSD remained firm in its stance and claimed that the complainant should be responsible for the maintenance and repairs of the waterworks concerned.

5. WSD indicated that accurate as-built information, such as the layout, materials used and depths of water pipelines and the locations of the valves, was necessary for operation and maintenance of the waterworks. The Department had followed Government guidelines on handing over of completed works as stipulated in the Project Administration Handbook for Civil Engineering Works as well as industry practices in requesting, through DLO, the complainant to submit as-built drawings containing the above information. WSD had also suggested the complainant to engage a licensed plumber to find out the exact locations of the underground pipelines. Since WSD had yet to take over the waterworks concerned, the complainant remained in possession of such facilities and should be responsible for their management, maintenance and repairs.

6. From an engineering perspective, the as-built drawings are essential for the management and maintenance of the water pipelines. Apart from complying with Government guidelines on handing over of public works in the Project Administration Handbook for Civil Engineering Works, the submission of such drawings is a normal arrangement in the engineering profession when the constructing party is handing over the completed works to the maintenance party. WSD considered it a responsible act to the maintenance department for ensuring proper maintenance of the relevant facilities in future.

7. WSD pointed out that the land grant conditions did not mention that Government needed to take over the pipelines. Therefore, when responding to the aforementioned consultation regarding the estate's application for an OP, WSD did not indicate at that time that the development project on the site in question failed to comply with the requirements. Neither did it ask the developer to submit the as-built drawings of the waterworks. Nevertheless, in view of the special circumstances of this case and upon intervention by this Office, WSD had taken the initiative to meet the complainant on 12 December 2013 for preparing the as-built drawings so that the problem could be resolved as soon as possible. The Department also undertook to discuss with the complainant the arrangements for taking over the waterworks upon completion of the as-built drawings. Meanwhile, WSD would, where necessary, act

on the complainant's request to repair the waterworks for them. In fact, it already repaired for the complainant a leaking pipe and replaced the valve pit cover on 30 December 2013 and 16 January 2014 respectively.

Lands D's Handling of the Case and Its Stance

8. Before issuing the CoC for Phase III of the estate, DLO had consulted the relevant Government departments, including WSD, and was confirmed of the project's compliance with the requirements. DLO had issued three CoCs in 1986, 1992 and 1997, meaning that the Streets (including the underground waterworks) had already been taken over by Government in those years. Records showed that WSD had confirmed the project's compliance with the requirements before Lands D issued a CoC for each Phase of the estate.

9. According to the land grant conditions, upon issuance of the CoC, the Streets and the responsibility for their maintenance and repairs were taken over by the relevant Government departments. In October 1997, the complainant submitted the underground piping layout plans to WSD via DLO. When transferring those layout plans to WSD, DLO pointed out in its memorandum that the estate had been issued a CoC. So legally, the Streets had been taken over by Government. WSD, therefore, had to take over the waterworks concerned.

10. Since WSD refused to take over the waterworks on the grounds that the drawings submitted by the complainant were unclear, DLO therefore followed up the matter at WSD's request and conveyed WSD's demand to the complainant. It also wrote to the complainant time and again, reiterating WSD's stance and stating that if the complainant failed to submit the drawings required, the maintenance responsibility for the waterworks would still rest with them.

11. Lands D explained that the maintenance and repairs of waterworks were not within its purview and the Department did not have the technical expertise and resources to handle waterworks projects. Therefore, it could only ask the complainant to comply with WSD's demand and submit the drawings required for WSD to consider taking over the installations. Lands D was currently discussing with WSD regarding the processes of issuing CoC and taking over of waterworks, with a view to identifying areas for improvements such that similar situations would not recur.

Our Comments

WSD

12. As stated in para. 4 above, WSD asserted that the pipelines concerned could not be regarded as public water supply facilities to be taken over by WSD. We consider that had this been the case, WSD should have made it clear in its reply to

DLO that it would not take over such waterworks, rather than just requiring the complainant to submit the as-built drawings. Moreover, in its letter to WSD in October 1997, DLO pointed out that prior to issuance of the CoC, WSD had confirmed the relevant conditions, and so it should take over the water pipes according to established guidelines. However, WSD did not make any clarification at that point and it only reiterated that submission of the as-built drawings was necessary. This inevitably gave the public an impression that WSD was trying to shirk its responsibility without making an effort to identify the problems. While the other relevant Government departments had taken over their responsibilities for the Streets, WSD still refused to do so on the grounds that no as-built drawings of the facilities was available. WSD obviously failed to follow the guidelines and its handling procedures were not appropriate.

13. Since WSD had all along stayed aloof from the matters, it missed the opportunities to request the as-built drawings from the estate developer. It was not until 1997 that WSD suddenly realised that it had to take over the facilities concerned. WSD then requested the as-built drawings from the individual flat owners, who never possessed such drawings, and even asked them to hire professionals at their own expense to survey the distribution of pipelines, putting an unnecessary burden on those individual owners without helping to resolving the problem. Despite the long delay of the matter, the senior management of WSD seemed to take no notice of it. We have doubts about WSD's claim that the responsible engineer and senior engineer had brought it to the attention of their supervisor because they could not provide any records to prove this. Given that the case had dragged on for years, the complainant's dissatisfaction with WSD was justified.

Lands D

14. When Lands D transferred the drawings provided by the complainant to WSD in October 1997, it did point out that the responsibility for the Streets was taken over by Government since the CoC had been issued. Nevertheless, when WSD refused to take over the underground pipelines, Lands D failed to uphold this stance or discuss with WSD to resolve their differences. Rather, Lands D left the problem to the complainant. When the complainant refused to accept this, Lands D only reiterated WSD's incorrect views.

Conclusion

15. This case had dragged on for 16 years. We can hardly imagine how long it would have continued if the complainant had not lodged a complaint with this Office. The complaint about WSD's shifting of responsibility to the complainant was not unjustified. The Ombudsman, therefore, considers the complaint against WSD **substantiated**.

16. Lands D was initially taking the right stance. However, when WSD denied its responsibility, Lands D just conveyed WSD's request to the complainant instead of upholding its own stance. There was impropriety on the part of Lands D. As such, The Ombudsman considers the complaint against Lands D **partially substantiated**.

Recommendations

17. The Ombudsman has made the following recommendations to the two departments:

WSD

- (1) to take over immediately all the waterworks and fire service installations within the site and consider requesting the as-built drawings from the estate developer. Professional surveys should be arranged for preparing the as-built drawings if necessary;
- (2) to draw up guidelines on taking over of waterworks and fire service installations built by developers in order to provide clear handling procedures and workflow, contents of which should include the consultation exercise prior to issuance of the CoC by Lands D, the actions and measures regarding the taking over of facilities, as well as when and in what circumstances should a case be escalated to a more senior level for handling; and

Lands D

- (3) to review the consultative arrangements prior to issuance of any CoC and to discuss with WSD and other relevant departments on the demarcation of responsibilities among all the departments concerned. Where necessary, Lands D should draw up relevant guidelines to avoid recurrence of similar incidents.

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