

*Issue No. 1 of Reporting Year 2012/13
(31 May 2012)*

Office of The Ombudsman, Hong Kong



***Direct Investigation into
Granting of Short Term Tenancies at Nominal Rent***

The Ombudsman has completed a direct investigation on the granting of short term tenancies (“STTs”) at nominal rent by the Lands Department (“Lands D”).

Our investigation reveals that Lands D has not taken it upon itself to manage this kind of STTs with due care and diligence. Neither has it formulated any comprehensive mechanism and procedures for the vetting, renewal and monitoring of such STTs. As a result, the District Lands Offices (“DLOs”) under Lands D and the bureaux/departments that gave “policy support” for the tenancy applications each followed their own principles and practice when handling the tenancies. When problems arose, they shifted the responsibility to each other.



We also find that DLOs often ignored the few guidelines from Lands D. For example, they did not conduct regular inspections, so they failed to detect that some STT sites were misused: being left idle for a long period or sublet by tenants for private gains.

The Ombudsman has made a number of recommendations to Lands D for improvement.

The executive summary of the investigation report is at **Annex 1**.

***Direct Investigation into
Effectiveness of Administration of Temporary Closure of Metered
Parking Spaces during Road Works carried out by Public Utilities***

The Ombudsman has completed a direct investigation into the effectiveness of administration of temporary closure of metered parking spaces during road excavation works carried out by public utilities.



Our investigation has revealed deficiencies in Transport Department's ("TD") and Highways Department's ("HyD") procedures and practices. Prior to September 2010, there had been no monitoring of utilities undertakers' ("UUs") actual occupation of temporarily closed metered parking spaces. Although enhanced measures have been introduced since late 2010, TD's monitoring remained unsatisfactory. Unnecessary closure of metered parking spaces causes inconvenience to drivers and wastage of public resources. As such, TD has the responsibility to keep it to the minimum.

We have made a number of recommendations to TD and HyD for improvement.

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

***Summary of Investigation Report
Complaint against Three Government Departments
for Failing to Curb the Unauthorised Activities of a Hawker Stall***

The Ombudsman recently completed an investigation into a complaint against the Food and Environmental Hygiene Department ("FEHD"), the Lands Department ("Lands D") and the Buildings Department ("BD"). The complaint was that FEHD had failed to eradicate the unauthorised extension of business area by a licensed wall stall and that Lands D and BD had shirked their responsibilities, haggling about which of them should clear the unauthorised building works ("UBW") items of the unauthorised extension.



Our investigation revealed that the unauthorised extension of the stall amounted to unlicensed hawking, but FEHD had never taken enforcement action, giving the lame excuse that business was carried out within some structure and, therefore, not illegal hawking on the street. We also found that both Lands D and BD in fact had the powers and duties to deal with the UBW items. All three departments, with their compartmental mentality, had attempted to evade their responsibilities, thereby allowing the situation to worsen.

We urged FEHD to take prompt and stringent enforcement action against the unlicensed hawking and Lands D and/or BD to clear all the UBW items as soon as possible.

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

The Office Updates Its Online Information

This Office has continued to make use of different channels, including the Internet, to publicise and promote our work.

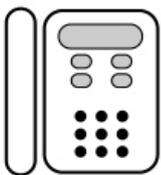
In April 2012, we adopted a new website address, www.ombudsman.hk, to better reflect the independent role of The Ombudsman. However, the old website address, www.ombudsman.gov.hk, is still valid.



In addition, there are two new online games on our web page. The two new games, namely “The Smart Complainant” and “Ombudsman Ambassador”, developed with a view to enhancing public understanding of our jurisdiction, use quizzes to provide information about the functions and role of our Office.

Meanwhile, a facebook fanpage has been launched. We hope to use this popular online platform to widen our reach. General information about our Office, our corporate video, online games and various publicity materials will be included. We will also release our news through this fanpage.

Enquiries



For press enquiries, please contact Ms Kathleen Chan, Senior Manager (External Relations) at 2629 0565 or by email kathleenchan@ombudsman.hk.

Office of The Ombudsman, Hong Kong
31 May 2012

Executive Summary

Direct Investigation Granting of Short Term Tenancies at Nominal Rent

Background

It is Government policy to grant short term tenancies (“STTs”) for vacant Government land that has no intended use or is not required for development in the near future. Where an STT is for a non-profit-making purpose and has the “policy support”¹ of the relevant policy bureau or Government department, the District Lands Office (“DLO”) concerned under Lands D will approve the application directly and grant the tenancy at nominal rent.

2. From public complaints, we noticed impropriety in some cases of DLOs’ handling of STTs at nominal rent, including failure to inspect the leased sites over a long period and to take enforcement actions against tenants who violated the tenancy agreements. The sites either became derelict or were misused. The Ombudsman, therefore, decided to initiate a direct investigation into how Lands D and its DLOs handle STTs at nominal rent. We examined:

- (1) the criteria and procedures of granting STTs at nominal rent;
- (2) the mechanism for renewing such STTs; and
- (3) the monitoring of such STTs.

Current Situation

Procedures of Processing Applications

3. According to the Lands D guidelines which are still in use (“established guidelines”), upon receipt of an application, the DLO concerned will refer it to the relevant bureau/department for its indication of “policy support” or otherwise to the application. The DLO will also copy the application to other departments to make sure that the STT to be granted is acceptable to them. If the bureau/department gives its “policy support” and there is no objection from the other departments, the DLO will grant an STT normally of three months to seven years and usually with a clause for “automatic renewal”².

¹ “Policy support” means that the relevant bureau/department, based on its policy, supports and recommends that the DLO grant an STT at nominal rent to the applicant directly.

² “Automatic renewal of tenancy” means that if, before the expiry of a tenancy, both the DLO and the tenant have not indicated any intention to terminate it, then the tenancy will automatically continue until either party terminates it in accordance with the terms of the tenancy agreement.

Roles and Responsibilities

4. Lands D deems that, as far as the processing of STT applications is concerned, DLOs only act as an agent of Government land whose duty is to execute the decisions of the relevant bureaux/departments. They would, therefore, not participate in the bureaux/departments' deliberations on providing "policy support" to any particular application, nor do they have any responsibility to query the latter's justifications for giving "policy support". Lands D also has no authority to formulate guidelines to specify how bureaux and departments should provide "policy support" to STT applications.

Criteria and Procedures of Renewal

5. The "established guidelines" state that, at the end of an STT, if there is still no intended use or development plan for the site concerned, the STT can normally be renewed on a monthly or quarterly basis. Every three years or before the expiry of the STT, the DLO will write to seek confirmation from the tenant on his/her continued occupancy of the site. With his/her confirmation, the STT will not be terminated.

6. After we started our preliminary inquiry, Lands D issued further guidelines ("supplementary guidelines") stipulating that within three to six months before the expiry of the original STT or every three years, the DLO concerned should ask the relevant bureau/department whether it still supports the STT, and request it to confirm the following:

- (1) that the existing occupant of the site is still the organisation to which the bureau/department gave its support for granting the STT at nominal rent; and
- (2) that the existing use of the site still conforms to the purpose specified when the STT was granted.

With confirmation by the bureau/department, the DLO will not terminate the STT.

Monitoring System

7. According to the "established guidelines", the DLO should conduct site inspections of the leased land at least once every three years. Under the "supplementary guidelines", the DLO should conduct site inspections within three to six months before the expiry of the original tenancy or every three years to prevent subletting of the land, unauthorised building works on the land or illegal occupation of the adjoining Government land by the tenant.

Our Comments

Confused Roles and Responsibilities

8. We accept that it is unnecessary for the DLOs to participate in the deliberations of the bureaux/departments on their “policy support” for the granting of tenancies. Nevertheless, to ensure proper use of land resources and compliance with tenancy conditions, the DLOs, as the land administrators, should play the leading role in processing STT applications and renewals and monitoring the implementation of tenancy conditions, and take the necessary actions accordingly.

9. Lands D, however, has never defined with the bureaux and departments their respective roles and responsibilities in relation to the granting of STTs, including what factors the bureaux/departments should take into account in giving their “policy support”, what information they should provide to the DLOs, which level of staff in the bureaux/departments should make decisions on “policy support”, and what responsibilities the bureaux/departments and the DLOs should take in processing applications and renewals as well as the monitoring of STTs. As a result of the lack of such delineation, the DLOs and the bureaux/departments each follow their rules in handling STTs. When problems arise, they tend to shift the responsibility to each other.

Inadequate Justification for Giving ‘Policy Support’

10. In the cases we studied, most of the bureaux/departments had not explained in detail the justifications for their “policy support” and the DLOs had never raised queries.

11. In granting STTs at nominal rent Government essentially allows the tenants to use the land, a public resource, almost for free. We consider it only reasonable for the DLOs to request background information and detailed explanation from the bureaux/departments on their “policy support”. That should by no means be construed as the DLO’s undue intervention in the decisions of the bureaux/departments. Moreover, such requests would help the bureaux/departments to think twice before giving “policy support”. This would also facilitate subsequent monitoring of the STTs by the DLOs and the bureaux/departments.

Failing to Follow the Procedures of Tenancy Renewal

12. The cases studied reveal that DLOs had not, in accordance with the “established guidelines”, written to seek confirmation from the tenants on their continued occupancy of the land once every three years or before the expiry of the STTs. All the tenancies were also renewed automatically without the DLOs having consulted the bureaux/departments which had originally given “policy support”. This shows that the tenancy renewal system is lax and that the DLOs have neglected their duty in handling renewals.

Lack of Regular Inspections

13. According to the “established guidelines”, Lands D requires the DLOs to inspect each STT site at least once every three years. However, in most of the cases studied, the DLOs had not complied with this requirement. Nor had the bureaux/departments which had given “policy support” to the tenancies conducted any inspection of the STT sites.

14. We consider that both the DLOs and such bureaux/departments have a responsibility to monitor the tenants’ utilisation of STT sites, and that the DLOs should play the leading role. Lands D should, in consultation with the bureaux/departments, set up a mechanism to enable both sides to effectively monitor the utilisation of STT sites. Lands D should also step up its supervision of the DLOs to ensure that they do regularly inspect STT sites as stipulated in the “supplementary guidelines”.

Failing to Take Enforcement Actions against Tenancy Breaches

15. In one case studied, a DLO discovered in 2001 breaches of the conditions of an STT, including unauthorised building works on the site and illegal sub-letting. In 2002, it issued a “final warning” to the tenant and ordered rectification as soon as possible. However, the DLO has failed to follow through and the irregularities have continued for more than ten years after they were first discovered.

16. In another case, a DLO found in 2006 advertisement signboards erected on an STT site in breach of the tenancy conditions. Though the DLO subsequently contacted the tenant twice on some other matters, it did not request the tenant to rectify the breach, thus allowing the tenant to make private gains with public resources over a long period.

Delay in Handling Applications for Regularisation

17. Yet another case reveals that a tenant had applied for regularisation of an anomaly on an STT site, but the DLO just sat on the application for nearly four years.

Recommendations

18. The Ombudsman recommended that Lands D:
- (1) discharge its duty as the land administrator by taking the initiative to formulate with the bureaux/departments providing “policy support” feasible objectives and procedures for the vetting of applications, renewal and monitoring of STTs, so as to define clearly the roles and responsibilities of both parties to facilitate cooperation and division of work;

- (2) request the bureaux/departments to provide sufficient background information when giving “policy support” and to state clearly their justifications for supporting the granting/renewal of the STTs, so as to facilitate subsequent monitoring of those tenancies;
- (3) inspect STT sites once every three years as pledged in the “supplementary guidelines”, in order to step up the monitoring of those sites;
- (4) adopt measures to ensure that STT conditions are strictly enforced by its staff and all breaches by tenants are thoroughly dealt with; and
- (5) set up a proper mechanism and performance pledges regarding the handling of applications for regularisation of breaches of tenancy conditions.

19. Lands D basically accepted our recommendations.

**Office of The Ombudsman
May 2012**

EXECUTIVE SUMMARY

Direct Investigation

Effectiveness of Administration of Temporary Closure of Metered Parking Spaces during Road Works carried out by Public Utilities

Background

We noted from complaint cases that some metered parking spaces have been closed for periods much longer than actually necessary for the approved road excavation works. In view of the limited number of metered parking spaces and the high demand for such facilities, we consider that closure should be kept to the minimum.

2. Our preliminary examination showed some deficiencies in Transport Department's ("TD") and Highways Department's ("HyD") procedures and practices in the administration of temporary closure of metered parking spaces involving road excavation works. In late 2010 and early 2011, TD and HyD initiated some enhancement measures. However, there were still many cases of non-compliance. Hence, The Ombudsman initiated this direct investigation on 15 July 2011 to examine:

- (1) deficiencies in administering temporary closure of metered parking spaces during road excavation works carried out by public utilities;
- (2) effectiveness of the enhanced measures introduced by TD and HyD in 2010 and 2011 to monitor temporary closure of metered parking spaces during road excavation works carried out by public utilities; and
- (3) other measures, if any, for further improvement.

Procedures for Processing Application for Temporary Closure of Metered Parking Spaces

3. Utility undertakers ("UUs") which need to carry out road excavation works have to apply to HyD for excavation permits ("XPs"). HyD will assess whether the excavation works will have serious traffic impact and, if so, require UUs to submit temporary traffic management ("TTM") proposals to TD and the Hong Kong Police Force ("HKPF") for assessment and approval. If temporary closure of metered

parking spaces is required, the UU concerned should include such proposal in the TTM submission, and TD will comment on its acceptability. HyD will then determine the overall XP period, taking into account the TTM endorsed by HKPF and TD, and issue XP to the UU concerned.

4. With the overall XP period given, the UU concerned will liaise with TD on the period of closure of metered parking spaces before formally applying for the closure. TD will assess the acceptability of the proposal, taking into consideration various traffic factors and direct adjustments as required. Upon receipt of the formal application, TD will approve or modify the closure period where necessary, and issue a Works Request to its contractor to effect the closure.

Monitoring before September 2010

5. Prior to September 2010, there was no monitoring of UU's actual occupation of temporarily closed metered parking spaces. Although HyD conducted regular audit inspections on active sites to check their compliance with XP conditions, it did not cover any unnecessary closure of such parking spaces, as reflected in one of the four case studies of the investigation – **Case 1**, in which six parking spaces were closed for one month for road works that required only one week to complete.

Enhanced Measures introduced in 2010 and 2011

HyD's Audit Inspections

6. Starting from late September 2010, HyD agreed to notify TD of unnecessary closure of such parking spaces discovered during audit inspections on a trial basis.

TD's Interim Measure

7. In November 2010, as an interim measure, TD started to remind UUs of the need to report and to arrange re-opening of the parking spaces in case of late start of works by putting remarks to that effect in the Works Request copied to UUs.

TD's Routine Inspections

8. In February 2011, TD began to exercise some control over the implementation of temporary closure of metered parking spaces by monitoring UU's work progress through conducting routine site inspections shortly after the start of the closure period and periodically thereafter, in addition to HyD's audit inspections.

HyD's New XP Condition

9. In February 2011, HyD also promulgated the inclusion of a new condition in para. 26 (D) of the XP conditions requiring UUs to obtain TD's prior approval for occupying parking spaces for road works. This new condition also serves to remind UUs of their obligation to obtain TD's prior approval for temporary closure of such parking spaces to be affected by their road excavation works.

TD's New Approval Conditions

10. From 1 April 2011 onwards, TD started to issue formal approval letters with specified Approval Conditions to UUs for closure of metered parking spaces, requiring UUs to confirm to TD the scheduled start date of closure in advance, to inform TD in case of early completion of works and to submit updated site photos regularly to TD for checking work progress.

Case Studies

11. Four cases were studied, which illustrated the extent (sometimes more than three weeks) of unnecessary closure of metered parking spaces due to road excavation works. The nature of non-compliance included late start and/or early completion of works or cancellation of works without informing TD to re-open the parking spaces. **Case 1** occurred in 2009 when there was no monitoring on the subject. **Cases 2, 3** and **4** took place at different periods after introduction of the enhanced measures in 2010 and 2011.

Our Observations

Demand for Metered Parking Spaces

12. According to TD, the average utilisation rates¹ of metered parking spaces for Hong Kong, Kowloon and New Territories and in the busiest Districts of these three Regions during the period of August to November 2010 during weekdays and holidays were:

¹ This is the percentage ratio between the number of space-hours occupied and the total number of space-hours provided.

		Weekdays (%)	Holidays (%)
Hong Kong	Region	53.73	58.39
	Causeway Bay	71.30	75.88
Kowloon	Region	59.38	64.33
	Yau Ma Tei	79.57	73.58
New Territories	Region	37.95	47.06
	Tsing Yi	85.38	58.19

However, the actual utilisation rate in busy areas could be much higher, particularly in busy hours. Our recent site inspections at two busy locations of **Cases 1** and **4** of the case studies revealed much higher utilisation rates, ranging from 89.6% to 97.3%.

13. With a ratio of about one space to 35 licensed vehicles², the demand for metered parking spaces is very high, especially in busy locations and during busy hours. TD has the responsibility to keep the closure of such parking spaces to the minimum in order to reduce unnecessary inconvenience to drivers and wastage of public resources.

Monitoring after enhanced measures introduced

14. HyD's audit inspection (**para. 6**) on sites involving closure of metered parking spaces was a positive measure, resulting in cases of non-compliance being identified.

15. TD's interim measure (**para. 7**) was, however, not drawn to the attention of all UUs. After the introduction of the measure, parking spaces were still found to be closed unnecessarily due to late start of road works, as reflected in **Case 2**.

16. Regarding TD's new Approval Conditions (**para. 10**), the consequence of non-compliance with the requirements of informing TD about early completion of works and submitting regular site photos was unclear. We consider it necessary for TD to spell out the consequence, whether by refining its Approval Conditions or by otherwise conveying the message to UUs.

17. TD's monitoring of the UU's work progress after implementation of the enhanced measures remained unsatisfactory. As shown in **Case 4**, the UU did not comply with the Approval Conditions in submitting updated site photos but TD failed to discover this. We consider it important for TD to check closely the submission of site photos by UUs. If necessary, TD should consider setting up a computerised database for this purpose.

² According to TD, as at September 2011 there were 18,008 metered parking spaces and 624,438 licensed vehicles in Hong Kong.

Approval of Duration of Closure

18. **Cases 1, 2 and 3** were typical cases involving “late start” and “early completion” of works without informing TD to re-open the parking spaces. Also, actual works took only 7 days to complete versus 31 days approved for temporary closure of parking spaces in **Case 1**, 15 versus 43 days in **Case 2** and 18 versus 94 days in **Case 3**. This suggested that TD’s approval for estimated time required for closure was over-generous.

Magnitude of Problem

19. The magnitude of the problem is unknown, as TD all along did not conduct checks on UU’s actual occupation of the closed metered parking spaces until February 2011. Besides, before November 2010, UUs were only verbally requested to report changes of commencement/completion date of the works, which could again be made verbally. Also, TD kept no statistical records of non-compliance cases. As a result, the situation of non-compliance so far discovered may be just the tip of the iceberg. TD should continue to review the situation regularly to see if further measures are necessary to tackle the problem.

Action against UU for Non-Compliance

20. TD indicated that, upon identification of any non-compliance of the Approval Conditions, it will liaise with the UU concerned for swift rectification. If the UU fails to rectify promptly without a valid justification, TD will consider withdrawing the approval given.

21. We note that no approval given to UUs was ever withdrawn. We also note that there was a rebound in the number of non-compliance cases since April 2011. In view of this, we consider it necessary for TD to review the situation regularly, say, half yearly, to see if further measures are necessary.

Role of HyD

22. HyD recently indicated its intention to stop checking compliance following TD’s implementation of its Approval Conditions since 1 April 2011. In this regard, we note that the majority of the non-compliance cases were identified through HyD’s audit inspections. We also note that audit inspections involving closed parking spaces only constitute about 1.37% of HyD’s total audit inspections carried out from October 2010 to September 2011. In the circumstances, and having regard to HyD’s overall coordinating role in the XP system, we consider it cost-effective for HyD to

continue to report to TD non-compliance of TD's new approval conditions, at least until TD's monitoring measures have shown to be fully effective.

Recommendations

23. The Ombudsman has made six recommendations as follows:

- (1) HyD to continue conducting audit inspections on sites involving temporary closure of metered parking spaces and reporting non-compliance to TD, until TD's monitoring measures have shown to be fully effective (**para. 22**);
- (2) TD to emphasise to UUs, by refining the contents of the Approval Conditions or otherwise, the importance of:
 - (a) submitting site photos on time and the consequences of non-compliance (**para. 16**); and
 - (b) informing TD of "early completion" of works and the consequences of non-compliance (**para. 16**);
- (3) TD to check closely the submission of site photos by UUs and, if necessary, to set up a computerised database for this purpose (**para. 17**);
- (4) TD to keep statistical records and details of non-compliance cases (**para. 19**);
- (5) TD to review the situation of non-compliance at half yearly intervals to see if any further measures are necessary (**paras. 19 and 21**); and
- (6) TD to enhance its assessment of the time required for closure of parking spaces (**para. 18**).

Office of the Ombudsman
May 2012

Summary of Investigation Report

Complaint against Three Government Departments for Failing to Curb the Unauthorised Activities of a Hawker Stall

Background

Since July 2009, the complainant had repeatedly complained to the Food and Environmental Hygiene Department (“FEHD”), the Lands Department (“Lands D”) and the Buildings Department (“BD”) about the unauthorised extension of business area by a FEHD-licensed hawker stall (“Stall A”) which stood against the external wall of a building. The unauthorised extension comprised the illegal construction of another stall (“Stall B”) next to Stall A, encroaching on the pavement.

2. Stall B consisted of the following unauthorised building works (“UBW”):

- a concrete platform that occupied part of the pavement;
- a display rack affixed to the external wall of the building;
- a canopy as well as an overhanging structure projecting from the external wall of the building, similar to the roller shutter hoods of street-level shops.

3. FEHD considered that as Stall B was operating within some structure, it did not constitute unlicensed hawking “on the street”. Accordingly, FEHD only focused on whether there was street obstruction caused by goods placed in front of Stall A. The Department disregarded the illegal hawking activity at Stall B.

4. Lands D had posted a notice under the Land (Miscellaneous Provisions) Ordinance (“LMPO”) on the platform of Stall B and ordered its owner to cease occupation of Government land before a specified date. Subsequently, the stall operator removed a portion of the platform. As the remaining part of the platform could not be removed without affecting the other UBW items, Lands D decided to wait until BD took enforcement actions against such items under the Buildings Ordinance (“BO”).

5. BD’s subsequent inspections revealed that the operator of Stall B had replaced the overhanging structure with a new one, while the other UBW items remained.

Details of Complaint

6. In July 2011, the complainant complained to this Office that FEHD, Lands D and BD had failed to rectify the situation. In fact, Stall B had even widened its range of merchandise. The complainant alleged that:

- (1) **FEHD** had failed to eradicate the unauthorised extension of business area by Stall A; and
- (2) **Lands D** and **BD** had failed to reach an agreement on whether the UBW items could be removed separately and had shirked their own responsibilities, thus allowing the problem to persist.

Our Findings

Response from FEHD

7. Upon our further queries, FEHD sought legal advice from the Department of Justice (“DoJ”) again and eventually revised its stance and practice as follows:

FEHD not only could take enforcement action against Stall A for causing obstruction by placing goods in front of the stall, but also treat Stall B as engaging in unlicensed hawking on the street and institute prosecution if there is sufficient evidence.

Response from Lands D

8. Lands D reiterated that while under LMPO, it can deal with unauthorised platforms that occupy Government land, the UBW items projecting from the external wall of a building, such as overhanging structures and canopies should be handled by BD under BO. That was the usual division of work between the two departments when coping with similar problems.

9. Furthermore, all the UBW items of Stall B were inter-connected structurally. According to the advice of Lands D’s demolition contractor, for the sake of safety, the UBW items should be removed sequentially from top to bottom. Since the overhanging structure was quite bulky, it might collapse if the display rack below was removed first. Hence, Lands D could only remove the platform and the display rack in tandem with BD’s action on the other UBW items, i.e. the overhanging structure and canopy.

Response from BD

10. BD indicated that unleased land (i.e. Government land) and streets belonging to Government are exempt from the provisions of BO. The overhanging structure in this case fell outside the purview of BO for the following reasons:

- (1) Although the overhanging structure was affixed to the external wall of the building, it belonged to the operator of Stall B, not the owners of the building.
- (2) The overhanging structure and the other parts of Stall B formed an integral structure that was solely used by the stall operator.
- (3) Stall B was entirely on Government land.

11. Under BO, a removal order for UBW items issued by BD “shall be served on the owner of the land or premises on which the building has been erected”. Since Stall B was located on Government land, BD would have to serve such removal order on Government, which is, nevertheless, not feasible.

12. In short, BD considered itself not having the power to take enforcement action.

Our Comments

Allegation (1)

13. FEHD had all along ignored the illegal hawking activity at Stall B and refused to take enforcement action. Its arguments showed a total disregard of the plain fact that illegal hawking on the pavement had been going on at Stall B.

14. DoJ’s latest advice demonstrated that FEHD’s arguments for not taking enforcement action had no grounds.

15. In light of the above, The Ombudsman considered **allegation (1)** against FEHD **substantiated**.

Allegation (2)

16. According to BD’s analysis, all the UBW items of Stall B could together be regarded as one large object occupying Government land. We considered that Lands D could have invoked LMPO to take enforcement action and remove all the UBW items all by itself.

17. Nevertheless, it is also true that UBW items projecting from the external wall of a building fall within BD's jurisdiction under BO. Hence, BD could well have followed the usual division of work between it and Lands D (paragraph 8 above) in handling the case of Stall B. In this event, BD had unnecessarily curtailed its own enforcement powers. In fact, BD could have served a removal order on the owners of the external wall of the building. Any dispute between those owners and the stall operator should be resolved between themselves.

18. Evidently, both BD and Lands D had powers to deal with the UBW items in this case. Even though they might have doubts or concerns, the two departments should have addressed the problems jointly in a proactive manner at the outset, rather than shifting the responsibility to each other.

19. The Ombudsman, therefore, considered **allegation (2)** against both Lands D and BD **substantiated**.

Final Remarks

20. The unauthorised activities in this case were serious and blatant. The illegal extension was of the resemblance and scale of a shop, with fixed bulky UBW items such as a concrete platform, display rack and roller shutter. And yet all the three departments, with their compartmental mentality, had attempted to evade their responsibilities with such excuses as Government policy, limitation of powers and technical difficulties, thereby allowing the situation to worsen. Their performance was disappointing.

Recommendations

21. The Ombudsman urged:

- (1) FEHD to take prompt and stringent enforcement action against the unlicensed hawking; and
- (2) BD and/or Lands D to clear all the UBW items in the most efficient way as soon as possible.

22. If BD and Lands D still had divergent views, they should resolve their differences by consulting the Development Bureau together with DoJ immediately.

Latest Developments

23. FEHD has recently instituted prosecution against the stall operator for illegal hawking. Lands D has also agreed to assume the responsibility of taking

enforcement action against all the UBW items. It has issued a notice ordering the stall operator to demolish all the UBW items before a specified date.

Office of The Ombudsman
May 2012