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(9 May 2013)*

Office of The Ombudsman, Hong Kong



***Direct Investigation into
Regulatory Measures and Enforcement Actions against
Illegal Extension of Business Area by Restaurants***

The Ombudsman has completed a direct investigation into the regulatory measures and enforcement actions of the Food and Environmental Hygiene Department (“FEHD”) and Lands Department (“Lands D”) against illegal extension of business area by restaurants.

Our investigation reveals that FEHD has neither fully utilised the law enforcement power of its frontline staff nor made good use of its resources to control the illegal extension of business area by restaurants. It has not set objectives and formulated strategies for its enforcement actions. Moreover, restaurant licensees may take advantage of the lengthy appeal process to defer the effective date of licence suspension or cancellation brought about by their contravention of the laws.



Furthermore, Lands D, though being land administrator, has not dutifully tackled the problem of illegal occupation of Government land by restaurants.

The Ombudsman has made a total of 17 recommendations to FEHD and Lands D for improvement. In particular, FEHD is urged to set up a taskforce and use diverse strategies to deal with unauthorised food operations in public places, and to regularise the setting up of alfresco dining areas at suitable locations.

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

***Summary of Investigation Report
Complaint against Lands Department
for Delay in Taking Lease Enforcement Actions***

The Ombudsman has recently completed an investigation into a complaint against the Lands Department (“Lands D”) for delay in taking lease enforcement actions.



Our investigation found that in the past 8 years, Lands D had been receiving complaints about some units of an industrial building being used for providing funeral services for pets including cremating pets and keeping their ashes, thus violating the restrictions on land use stipulated in the land lease. After confirming such violations, the local District Lands Office (“DLO”) however did not accord high priority to the cases. It merely issued warning letters to the property owners as a matter of routine, without taking any substantive lease enforcement action. As a result, the problem not only persisted but also proliferated.

The Ombudsman urged Lands D to instruct DLO to expedite substantive lease enforcement actions on the violation of the land lease by the property owners concerned, so as to deter similar offences.

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

***Summary of Investigation Report
Complaint against Three Government Departments
for Failing to Implement Properly the Restriction on Vehicular
Entry into a Country Park on General Holidays***

Vehicular entry into a road inside Kam Shan Country Park is prohibited on general holidays. As early as 2003, members of the public had lodged complaints about vehicles violating this restriction. They had also noticed that there was neither a crash gate nor a watchman to prevent vehicles from entering the road.



Our investigation found that the Government departments concerned had agreed in late 2003 to install crash gates at the entrance of the road. This simple project, nevertheless, was delayed time and again. It was only after much twists and turns, and rounds of debates and negotiations among the departments concerned that installation of the gates was finally completed in March 2012. The incident also showed a lack of commitment on the part of both the Agriculture, Fisheries and Conservation Department (“AFCD”) and the Transport Department (“TD”). They shifted their responsibility to each other over the management of the road and division of work.

Upon completion of our investigation, this Office recommended that AFCD take the lead in holding discussions with TD and other departments concerned to clarify the division of work regarding traffic management of the road, and set up an incidents report mechanism in order to resolve the problem of illegal entry into the road by vehicles. We also recommended that TD take steps to improve its internal administration.

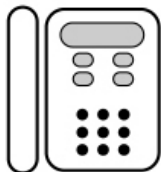
The summary of the investigation report is at **Annex 3**.

5-Day Week

With effect from 1 July 2013, the Office will implement the five-day week arrangement. Accordingly, the opening hours of the Reception Counter will be revised as follows:

Monday to Friday : 8:45 am – 5:45 pm
Saturday, Sunday and Public holidays : Closed

Enquiries



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Office of The Ombudsman, Hong Kong
9 May 2013

Executive Summary

Direct Investigation Regulatory Measures and Enforcement Actions against Illegal Extension of Business Area by Restaurants

Background

Alfresco dining (for example, in piazzas, on pedestrian passageways or underneath footbridges) has always been popular among some people. Restaurant operation outside the boundary of licensed premises does not constitute a serious offence, but in densely populated districts where space is limited, such activities often lead to obstruction of streets, cause environmental hygiene and noise problems, and bring nuisance to upstairs and nearby residents. The Food and Environmental Hygiene Department (“FEHD”), the licensing authority of restaurants, has failed to effectively curb or contain the problem, despite its regulatory and enforcement actions. The Lands Department (“Lands D”) has also seldom taken enforcement actions against illegal occupation of Government land by restaurants, although it is responsible for land administration.

2. This direct investigation aims to identify any inadequacies and room for improvement in the current regulatory and enforcement regime.

Our Findings

Inefficient Use of Resources and Underapplication of Relevant Laws by FEHD

3. FEHD’s enforcement actions against restaurants, including prosecutions for illegal extension of business area, are mainly carried out by its Health Inspectors (“HIs”), whose normal working hours are 8:30 am – 6 pm, Monday to Friday. In certain districts, Hawker Control Officers (“HCOs”) also participate in enforcement operations, but they just play a supporting role. HCOs work from 7 am to 11 pm on two shifts, seven days a week.

4. FEHD can put offenders to different charges according to the circumstances. If the licensee is at the scene and there is sufficient evidence to prove that he/she is operating outside the licensed premises, FEHD will invoke section 34C of the Food Business Regulation (Cap. 132X) to prosecute the licensee for “operating a restaurant otherwise than at the place delineated in the plan”. If there is no evidence to prove that the licensee operates business outside the licensed premises, but articles are placed in public areas by the restaurant causing obstruction, FEHD will prosecute the licensee for “street obstruction” pursuant to section 4A of the Summary Offences Ordinance (Cap. 228). If someone is selling cooked food on Government land or a common passageway and is not related to any restaurant nearby, FEHD will consider that

person's setup an unlicensed restaurant and prosecute that person for operating a restaurant without licence under section 31(1)(b) of the Food Business Regulation.

5. FEHD does not deny that its HCOs can also invoke section 83B(1) of the Public Health and Municipal Services Ordinance ("PHMSO") (Cap. 132) to prosecute the person for illegal hawking in the street. However, due to the division of work as mentioned above, FEHD has rarely asked its HCOs to take enforcement action under this legislation.

6. In our view, under the aforesaid arrangement, FEHD has not fully utilised the law enforcement power of its frontline staff, and has not made good use of its resources and all the relevant laws. Indeed, restaurants selling cooked food on Government land are no different from unlicensed itinerant hawkers selling snacks on pavements. Both are in essence illegal hawking activities in the street. HCOs have not only the statutory power to take enforcement action against them, but also the duty to stop them. Moreover, the shift duty hours of HCOs are much longer than the normal working hours of HIs. HCOs could effectively supplement HI's efforts in tackling the problem at night when illegal extension of business area by restaurants is especially rampant.

FEHD's Lack of Determination and Objectives

7. FEHD has been taking enforcement actions against restaurants with illegal extension of business area, through daily inspections, complaint investigations and raids. Our case analysis reveals that FEHD does take enforcement actions which might be as frequent as two to three times a month. Nevertheless, it mainly prosecutes offenders for "street obstruction", which is relatively a minor offence.

8. Apparently, FEHD is concerned only about its frequency of inspections and number of prosecutions. It has not set objectives and formulated strategies for enforcement actions. It does not deal with recalcitrant offenders with greater determination and increase its frequency of operations and change its mode of operation for more effective enforcement actions. As a result, its enforcement actions have been superficial and produced little results to curb the problem.

9. Furthermore, FEHD usually only prosecutes restaurants with illegal extension of business area, without arresting the culprits on the spot and seizing the articles involved. We understand that arrest and seizure require considerable manpower and other resources, and such actions might lead to confrontation between the law enforcers and the restaurant staff and customers. However, such actions have a stronger deterrent effect and should be taken especially against recalcitrant offenders.

10. Many restaurants start business even before having obtained a licence from FEHD; others continue to operate even after their licences have been suspended or cancelled under FEHD's Demerit Points System. For those unlicensed restaurants with illegal extension of business area, FEHD conducts inspections once a week.

Restaurants charged and convicted are normally fined by the Court. Nevertheless, our case study shows that the restaurant operators seemed not worried and continued to occupy public places for unlicensed operation. Although FEHD could have applied for a closure order from the Court against the unlicensed restaurants under section 128B of the PHMSO, this “trump card” has never been invoked to tackle those cases, which significantly weakens FEHD’s power of enforcement.

11. Lastly, according to FEHD’s records, the fines imposed by the Court for “operating a restaurant otherwise than at the place delineated in the plan” have usually been between \$2,000 and \$3,000, and those for “street obstruction” around \$1,000. The profits brought about by occupying public places for business are more than enough to offset the fines payable. Such punishment is clearly insufficient to deter illegal extension of business area by restaurants.

Cumbersome Three-tier Appeal Mechanism under the Demerit Points System

12. A restaurant licensee contravening the food or hygiene stipulations under the PHMSO or its by-laws is liable to prosecution and will be fined upon conviction. FEHD will also register demerit points against the licensee under its Demerit Points System. Accumulation to a certain number of demerit points may result in suspension or cancellation of the restaurant licence.

13. When suspending the licence of such a persistent offender, FEHD will publicise by way of a press release details of the restaurant, which will also be available on the GovHK portal and the FEHD website for public information.

14. Any restaurant licensee dissatisfied with a decision of licence suspension or cancellation may appeal to FEHD, and thereafter may further appeal to the statutory Licensing Appeals Board and eventually the Municipal Services Appeals Board. Taking advantage of the lengthy appeal process and FEHD’s discretion to suspend the implementation of the decision, the licensee can defer the effective date of licence suspension or cancellation. Meanwhile, the restaurant can carry on its business despite the continuing offence, thus undermining the effectiveness of the system of licence suspension or cancellation.

15. In a case in 2012, it took a total of 336 days to go through all the stages, from FEHD’s issuance of the notice of licence cancellation to the Municipal Services Appeals Board’s decision to dismiss the licensee’s appeal. Furthermore, in the same year, there was no successful appeal case at all. This shows that the current three-tier appeal mechanism is too cumbersome. A two-tier appeal mechanism should suffice.

Narrow Coverage of “Non-standard Requirements” in Provisional Licence

16. FEHD may issue a provisional licence to food premises which have satisfied all essential health, fire safety, ventilation and building safety requirements.

The licence applicant may then operate the restaurant for a limited period pending the issue of a full licence.

17. Since 2012, FEHD has adopted the following special measure for food premises located in black spots where illegal extension of business area is rampant and for those with multiple previous convictions for illegal extension of business area. On receiving their licence applications, FEHD will impose “non-standard requirements” in the provisional licences, prohibiting the applicants from encroaching on Government land or common passageways outside their premises. To ascertain whether an applicant has complied with the requirements, FEHD will check relevant records for the two weeks prior to the applicant’s declaration of compliance. It will only issue a provisional licence after confirming that the restaurant concerned has not been prosecuted for any “street obstruction” offence during the 14-day “observation period”.

18. We support the above special measure in principle but consider the coverage too narrow. After all, no provisional licence applicant or licensee should ever occupy Government land outside his/her premises. There is no reason why not all of them are subject to the special measure. Besides, while an “observation period” of 14 days can to some extent deter restaurants from illegal extension of business area, it is not long enough to have a strong effect.

Lenient Licensing System

19. Under the current licensing system, a person whose restaurant licence has previously been suspended or cancelled can still apply for a new licence afterwards without any restrictions, irrespective of whether that involves the same premises or the same restaurant name, provided that he/she has not voluntarily surrendered his/her former licence to evade the penalty of licence suspension or cancellation. We consider FEHD’s system too lenient. It does not duly consider whether the applicant is a “fit and proper person” to become a licensee.

Lands D’s Inadequate Efforts to Curb Illegal Occupation of Government Land by Restaurants

20. According to the division of departmental responsibilities agreed by the Steering Committee on District Administration (“SCDA”)^{Note}, Lands D should tackle illegal occupation of Government land by articles of a “more permanent nature” (such as a fixed platform), while, FEHD will deal with movable articles of a transient nature. Since street obstructions by restaurants usually does not involve articles of a “more permanent nature”, Lands D seldom takes enforcement action in such cases.

^{Note} SCDA is an inter-departmental high level committee set up by the Administration for the purpose of resolving district management issues.

21. Lands D has indicated that in cases where enforcement action is necessary, it will first post a notice under section 6(1) of the Land (Miscellaneous Provisions) Ordinance (Cap. 28), ordering the occupation of Government land to cease before the date specified in the notice. If the occupant complies at first but subsequently places the same or similar articles on the spot again, Lands D will have to post another notice, requiring the removal of the articles by a newly specified deadline. Lands D argues that it cannot just invoke the first notice to remove the articles and institute prosecution immediately. We have doubts about Lands D's interpretation of the law.

22. We note that the notice issued under the above Ordinance clearly requires the occupant to "cease occupation" of the land, not just to "temporarily remove" the articles placed on the land. Accordingly, a notice posted should remain valid until the occupation substantively ceases. There is no reason why Lands D cannot rely on the notice to clear or confiscate any articles placed on the land and institute prosecution.

23. We also consider that Lands D, as the administrator of Government land, has an undeniable responsibility to control the occupation of Government land by restaurants for profit-making operation. Indeed, where a restaurant applies for setting up an alfresco dining area in a public place, FEHD's approval for the application is subject to Lands D's grant of a land tenancy. It is, therefore, inconceivable that Lands D does not actively take enforcement actions against illegal occupation of Government land by restaurants. The Department's current enforcement policy is incongruous with its land administration responsibility.

Need to Promote Legitimate Alfresco Dining

24. Restaurant licensees may apply to FEHD for setting up an alfresco dining area outside their premises. Such applications will only be approved after all relevant Government departments have given their consents and any public objections settled. The number of such applications has been small. In 2012, there were only 104 applications and only 17 were successful. Applications were refused mainly because objections from the local community had not been properly resolved.

25. We consider that the Administration should encourage more alfresco dining areas to be set up in a legitimate and regularised manner. This will not only bring more convenience to restaurant operators and customers, but also reduce the pressure on FEHD in taking enforcement actions. FEHD will then be able to concentrate its resources on tackling those cases causing serious environmental nuisance.

Recommendations

26. The Ombudsman makes the following recommendations to FEHD and Lands D:

FEHD

- (1) to actively explore the best use of existing resources and relevant legislation, consider setting up a taskforce comprising HIs and HCOs, deploying more manpower and using diverse strategies to deal with unauthorised food operations in public places; before these could be implemented, to allow HCOs more participation in dealing with the problem so as to increase the Department's enforcement strength;
- (2) based on the situation of each district, to set objectives and formulate strategies for tackling illegal extension of business area by restaurants;
- (3) to conduct targeted raids on recalcitrant offenders, taking more frequent enforcement actions against them, making arrests and seizure of articles;
- (4) to exercise more stringent control on those unlicensed restaurants which persistently extend their business area outside their premises, conducting more frequent inspections and bringing more prosecutions, applying for closure orders from the Court, as well as publicising information about those restaurants through the media and uploading such information on FEHD's website for easy public access;
- (5) to continue to submit charge records of offenders to the Court in the hope that it would impose heavier penalties on them;
- (6) to consult the District Councils, which represent the local communities, on its enforcement plans, seek their views and support for the purpose of gaining public recognition and reducing resistance from those who are benefiting from illegal operations;
- (7) to consider amending the relevant legislation to simplify the mechanism for appeal against suspension or cancellation of licences from three-tier to two-tier;
- (8) except under very special circumstances, to refrain from withholding the suspension or cancellation of licences pending appeals by restaurant licensees; to draw up relevant assessment criteria and procedures;
- (9) to consider extending the applicability of the non-standard licensing requirements of prohibiting encroachment on Government land or common passageways to all premises under application for restaurant licences;

- (10) to lengthen the “observation period” before the issuance of provisional licence;
- (11) in respect of an applicant whose restaurant licence has previously been cancelled due to repeated offences, to refuse to process, for a specified period of time, his/her application, or an application made by his/her representative, for any restaurant or related licence in relation to the same premises;
- (12) to consider, in the long term, how to restrict applications from recalcitrant offenders for restaurant or related licences in relation to any premises;
- (13) to suggest to District Councils the designation of spots for alfresco dining in suitable areas, and to facilitate applications from restaurant operators for setting up outside seating accommodation at those spots;
- (14) to deliberate with Home Affairs Department on how to balance stakeholders’ interests with regard to public consultation on applications for setting up outside seating accommodation;

Lands D

- (15) to study with the Department of Justice how to more effectively exercise statutory powers to deal with illegal occupation of Government land by restaurants, in fulfilment of its responsibility as land administrator;
- (16) subject to the outcome of their study, to actively support FEHD in rigorous actions against recalcitrant offenders; and
- (17) subject to the outcome of their study, to review with SCDA the arrangement whereby Lands D only deals with illegal occupation of Government land involving structures of a “more permanent nature”.

**Office of The Ombudsman
May 2013**

Summary of Investigation Report

Complaint against Lands Department for Delay in Taking Lease Enforcement Actions

Details of Complaint

Since 2005, the Owners' Corporation ("OC") of an industrial building had been complaining to the Lands Department ("Lands D") about some units of the building being used for providing funeral services for pets, including cremation, provision of columbarium niches and adornment of the ashes, thus violating the restrictions on land use stipulated in the land lease.

2. In June 2012, OC complained to this Office against the local District Lands Office ("DLO") under Lands D for failing to take effective actions, thereby allowing the problem to persist.

Our Findings

Response from Lands D

Restrictions on Land Use

3. The land lease stipulates that the building can accommodate industrial and/or warehouse uses only. Any owner who uses his premises for purposes other than these breaches the land lease and Lands D may take the following lease enforcement actions:

- to issue a warning letter to the owner and copy it to the Land Registry ("LR") for registration against the title of the property; and
- to vest the property in Government.

Sequence of Events

4. In **March 2004**, DLO received for the first time complaints about some units of the building being used as animal crematoriums. Investigation revealed that 2 units ("Units A and B") were being used for cremating pets and keeping their ashes. According to the legal advice obtained by DLO, such uses violated the restrictions on land use stipulated in the land lease.

5. DLO also consulted the Government departments concerned and was advised that such uses did not violate any laws relating to environmental hygiene, environmental protection or fire safety. As Units A and B had not contravened any

legislation relating to fire safety, the complaints were not regarded as high priority cases under Lands D's internal guidelines. Therefore, it was not necessary for DLO to take immediate lease enforcement action.

6. In **November 2004**, similar public complaints regarding another unit ("Unit C") of the building were received. After a site inspection, DLO found that the unit was used for keeping ashes of pets.

7. In **May 2005**, DLO conducted further inspections and found that Unit A was vacant but Units B and C were still in violation of the restrictions on land use stipulated in the land lease. However, DLO decided not to take lease enforcement action at that stage. It merely:

- issued warning letters to the property owners, stating the actions that Government might take at any time (including vesting the property in Government) if such violation continued; and
- copied the warning letters to the mortgagee banks concerned.

8. In **November 2007**, DLO received a complaint about yet another 2 units of the building. During inspection, DLO confirmed that one ("Unit D") was being used for cremating pets. However, the owner of Unit D refused to let DLO staff take pictures. DLO then sought legal advice to ascertain whether the report by its staff and the information on the website of the pet funeral service provider were adequate to substantiate a case of violation of the land lease. In **February 2008**, DLO issued a warning letter to the owner of Unit D, but did not take further enforcement action.

9. In **May 2008**, DLO received public complaints again about Unit D and also about 2 other units ("Units E and F") being used for funeral services for pets. After investigation, DLO found that Unit D was still being used for cremating pets while Units E and F were being used for keeping ashes of pets and as offices. Later in **June**, DLO issued warning letters to the owners of those 3 units.

10. Between **June 2008 and March 2012**, DLO received numerous similar complaints regarding the building. DLO conducted a number of site inspections and found that in addition to Units D, E and F being used for funeral services for pets, another unit ("Unit G") was also being used for cremating pets. On confirming that the units concerned had violated the restrictions on land use stipulated in the land lease, DLO merely issued warning letters to the property owners. Afterwards, DLO staff made several attempts to inspect those units, but either they were refused entry or nobody answered the door.

11. In **June 2012**, DLO staff were finally admitted to inspect Units D and G. The property owners argued that while the retorts inside the units were for cremating animal bodies, that was an industrial manufacturing process, as the ashes from the cremation would be adorned and turned into mementos; hence no violation of the land lease was involved. Furthermore, the owners of Units E and F did not agree that

keeping ashes of pets and office operation were uses that violated the land lease. DLO then sought legal advice on the new arguments presented by the owners of those 4 units.

Development since Commencement of Our Investigation

12. According to legal advice, the uses of Units E and F had violated the land lease. DLO, therefore, issued warning letters to the property owners. In **December 2012**, as the property owners had not rectified the irregularities, DLO registered the warning letters at LR.

13. As regards Units D and G, DLO acted according to the legal advice to collect facts and evidence. Once it is confirmed that the uses of those units are in violation of the land lease, DLO will take appropriate enforcement actions against their owners including registration of warning letters at LR.

Lands D's Comments

14. Lands D admitted inadequacies on the part of DLO in handling the complaint cases. It had since required DLO to submit reports on complaint cases from time to time for its close monitoring of the progress of lease enforcement actions.

Our Comments

Delay in Taking Substantive Actions

15. DLO had in fact received many complaints on the issue since 2004. Although DLO had launched investigation and sought legal advice, it had not taken any substantive lease enforcement actions except for the issuance of warning letters, which were not legally binding. It was not until after our intervention that it started registering such warning letters at LR, even though that was nothing complicated. As a result of DLO's delay in taking enforcement action, violation of the restrictions on land use had continued for more than 8 years. The number of the culpable units had grown from 2 in the beginning to 4 in the end, with a total of 7 units involved.

16. We considered DLO to have been lax in handling those cases. Even though they were not regarded as cases of high priority, DLO ought to have set a schedule for enforcement actions instead of procrastinating indefinitely. As similar public complaints had been received repeatedly, DLO should have given higher priority to them rather than using low priority as an excuse to delay actions.

Seeking Legal Advice Repeatedly

17. We noticed that during investigation, DLO had twice sought legal advice on the uses of the units concerned for cremating pets and keeping ashes (paragraphs 4 and 8 above). In fact, all the units of the building were bound by the same land lease

conditions and the unauthorised uses identified were similar. It was, therefore, unnecessary for DLO to waste time seeking legal advice time and again. Lands D's explanation for seeking legal advice again as stated in paragraph 8 above sounded sophisticated. DLO had tried to confirm whether the evidence to hand was adequate. One would have thought that it had an intention to take substantive actions such as registration of warning letters at LR. And yet no such enforcement action was taken afterwards. We found DLO self-contradictory.

18. In the light of paragraphs 15-17 above, The Ombudsman considered the **complaint substantiated**.

Recommendations

19. The Ombudsman urged Lands D to expedite further lease enforcement actions on the violation of the land lease by the property owners concerned to deter similar offences.

**Office of The Ombudsman
May 2013**

Summary of Investigation Report

Complaint against Agriculture, Fisheries and Conservation Department, Transport Department and Highways Department for Failing to Implement Properly the Restriction on Vehicular Entry into a Country Park on General Holidays

The Complaint

There were traffic control signs at the entrance of a road (“the Road”) within Kam Shan Country Park, prohibiting vehicles from entering on general holidays. However, on one Sunday in August 2011, the complainant found several vehicles using the Road. There was neither a crash gate nor a watchman at the entrance of the Road to prevent vehicles from entering on general holidays.

2. Country park management, road traffic management and installation of crash gates at the entrance of the Road are the responsibilities of the Agriculture, Fisheries and Conservation Department (“AFCD”), Transport Department (“TD”) and Highways Department (“Hy D”) respectively. This complaint, therefore, involved the three Government departments.

Sequence of Events

3. Towards the end of 2003, in response to complaints from some members of the public, the Government departments concerned (including AFCD, TD and Hy D) held a meeting and decided to install crash gates at the entrance of the Road to prevent vehicular entry on general holidays. AFCD was tasked with putting up and removing the gates before and after general holidays.

4. Hy D completed installation of the gates and AFCD planned to start in late May 2006 to put up the gates on general holidays.

5. In mid-June 2006, AFCD sent an email to TD, claiming that the crash gates were not positioned far away enough from an expressway which ran perpendicular to the Road. When a large vehicle stopped in front of the gates, the rear part of the vehicle would stick out to the expressway and pose a potential safety risk. AFCD, therefore, suggested that the gates be relocated farther away from the expressway. Meanwhile, it would not put up the gates until further notice. TD, in its reply to AFCD, stated that it had conducted a site inspection and confirmed the positioning of the crash gates as correct. Nevertheless, in view of AFCD’s request, it would re-assess the need to relocate the gates. Moreover, TD advised AFCD not to put up the gates in bad weather so that vehicles could enter the park for emergency repairs. In early July, TD sent a memorandum to the departments concerned to seek their views on relocation of the gates.

6. In November 2008 and January 2010, further complaints were received from members of the public about vehicles using the Road on general holidays.

7. Then in May 2010, TD sent a work request of “normal priority” to Hy D, which put the request on its list of small-scale traffic improvement projects. In mid-October, Hy D informed its contractor of the proposed project to relocate the crash gates. The contractor drew up a temporary traffic arrangement (“TTA”) in early December and applied to TD and the Police for approval. TD informed the contractor in November 2011 that it had no objection to the arrangement.

8. The contractor completed the relocation works in March 2012. Starting from 1 April, AFCD staff would put up and remove the crash gates before and after general holidays.

Response from the Departments

AFCD

9. AFCD opened up the Road to bicycles and other vehicles. However, out of road safety concern arising from the large number of visitors on public holidays, TD prohibited vehicular entry into the Road on general holidays, pursuant to the Road Traffic Ordinance. As AFCD did not have the power to enforce the Ordinance, its staff could not take up vehicular control on the Road. Nevertheless, violations of the above restriction, if found, would be reported to the Police for follow-up action.

10. Besides, the potential safety risk posed by the gates previously installed had not yet been resolved and TD had asked AFCD not to put up the gates in bad weather. AFCD, therefore, suspended putting up the gates on general holidays.

TD

11. TD had already consulted AFCD in 2004 regarding the design of the crash gates. Its site inspection in 2006 also confirmed that the location of the gates was correct and that the distance between the gates and the expressway was sufficient for parking an ordinary vehicle or a light goods vehicle. In fact, AFCD staff could use a vehicle of suitable length for putting up and removing the gates. Nonetheless, TD later agreed to review the location of the gates at the request of AFCD as mentioned in **paragraph 5** above.

12. As there were already traffic control signs at the entrance of the Road to prevent vehicles from entering on general holidays, the crash gates were meant to be just a supplementary facility. Relocation of the gates was in no way urgent. TD issued a “work request” to Hy D in May 2010 and the contractor applied for approval of the TTA in December. However, the application did not reach the TD staff

responsible for the matter due to an error in internal dispatch. This resulted in a delay of the approval, and eventually of the relocation works.

13. Works proposals would be discussed at the regular meetings held between Hy D and the Regional Office of TD at the district concerned. As a large number of works projects were trying to scramble for the limited resources, only urgent projects or those that might have a significant impact on the public would be brought up at those meetings. The relocation works had never been discussed during the past few years and the Department was not aware of the delay.

Hy D

14. Hy D, a works department, would act on TD's requests and proposals in arranging and supervising the work of its contractors. Relocation of the gates, regarded only as some enhancement works, was accorded a priority lower than that of the other projects. Nevertheless, when Hy D learned that TD expected an early completion of the relocation, it promptly commenced the works. The gates were finally relocated in March 2012.

Our Observations and Comments

AFCD

15. While AFCD is not empowered by the law to enforce vehicular control on the Road, it has a statutory duty to manage and protect country parks, and hence a responsibility to stop any irregularities within those areas. If vehicles were frequently driven into the country park on general holidays against the restriction, AFCD should have taken effective measures to prevent vehicular entry or asked the relevant authority to step up enforcement action. It should not treat the matter indifferently and do nothing.

16. AFCD cited a potential safety risk posed by the location of the crash gate in certain circumstances and stopped putting up the gates during general holidays altogether. It also did not consider other feasible interim measures to prevent vehicles from entering the Road on general holidays before relocation of the gates. This reflected its negative attitude and inflexibility in handling the problem and amounted to dereliction of duty entrusted to it by the other departments in the inter-departmental meeting in 2003. Besides, AFCD kept silent when TD consulted it regarding the design of the gates in 2004, only to identify the problem and ask for rectification after their installation. This was clearly a waste of time and resources.

TD

17. When TD learned of AFCD's intention to stop putting up the crash gates on general holidays, it should have discussed a relocation works schedule with AFCD

promptly. TD should also consider taking interim measures to implement effectively the general holiday restriction on the Road. Moreover, without a bring-up system for monitoring non-urgent projects such as relocation of the gates, the follow-up on these projects could easily be neglected. In addition, the contractor's application for approval in December 2010 regarding the TTA was delayed for about a year because of an internal dispatch error on the part of TD. We found such delay unacceptable.

Hy D

18. Hy D only acted on TD's request and proceeded with the relocation works according to its proposal. We found no impropriety on the part of Hy D regarding the installation of the gates.

Conclusion

19. Although it was not the responsibility of the three departments involved to take enforcement actions and prosecute motorists who violated the restriction and entered the Road on general holidays, AFCD had just tried to stay away from the problem, while TD had failed to properly follow up the matter and communicate effectively with AFCD. The gates were rendered useless as a result. In the course of our investigation, we could not find any documentary records on the jurisdiction and division of work among the departments concerned regarding the management responsibility of the Road. Both AFCD and TD shifted the responsibility to each other. This case once again exposed that Government departments just took a narrow view of their responsibilities in handling cross-department issues. They lacked commitment and did not coordinate with each other. The measure of putting up the gates on the Road was only implemented after much twists and turns.

20. We expected that management problems of the Road might still arise in the future. Since AFCD staff were responsible for putting up and removing the gates and would conduct regular patrols in the country park, it should be easier for them to spot problems on the Road. Therefore, it would be more appropriate for AFCD to be the coordinating department in arranging inter-departmental meetings to discuss in detail the division of work.

21. Overall, The Ombudsman concluded that:

The complaint against AFCD was substantiated;

The complaint against TD was substantiated; and

The complaint against Hy D was unsubstantiated.

Recommendations

22. The Ombudsman made recommendations to AFCD and TD for service improvement. They included:

- (1) AFCD to take the lead in holding discussions with other departments concerned (such as TD and Hy D) to clarify the division of work among them regarding the traffic management responsibility of the Road and set up an incidents report mechanism. Any of their decisions made should be clearly recorded and properly filed;
- (2) TD to devise a bring-up system for monitoring non-urgent works; and
- (3) TD to review its internal dispatch and file records mechanism.

Departments' Follow-up Actions on Our Recommendations

23. The departments concerned have held inter-departmental meetings to discuss traffic management of the Road, incidents reporting mechanism, complaint handling and the division of other management responsibilities. Meanwhile, TD has implemented the other two recommendations.

Office of The Ombudsman
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