

*Issue No. 2 of Reporting Year 2006/2007
(14 September 2006)*

Office of The Ombudsman, Hong Kong



***Direct Investigation into the Monitoring of Cases with Statutory
Time Limit for Prosecution
by the Food and Environmental Hygiene Department***



This Office is initiating a direct investigation into the monitoring of cases with statutory time limit for prosecution by the Food and Environmental Hygiene Department, pursuant to section 7(1)(a)(ii) of The Ombudsman Ordinance. The background, purpose and scope of this direct investigation are at **Annex A**.

***Direct Investigation
into the Administration of the Mid-Levels Moratorium***



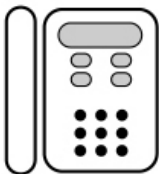
The executive summary of the investigation report is at **Annex B**.

Arrangements for Saturdays: Service as Usual



The details of this arrangement is at **Annex C**.

Enquiries



For press enquiries, please contact Ms Kathleen CHAN, Senior External Relations Officer at 2629 0565 or by email kathleenchan@omb.gov.hk.

**Office of The Ombudsman, Hong Kong
14 September 2006**

Issue No. 2 of 2006/07

**OMBUDSMAN PROBES
MONITORING OF CASES WITH STATUTORY TIME LIMIT
FOR PROSECUTION
BY FOOD AND ENVIRONMENTAL HYGIENE DEPARTMENT**

The Ombudsman is initiating a direct investigation into the monitoring of cases with statutory time limit for prosecution by the Food and Environmental Hygiene Department (“FEHD”), pursuant to section 7(1)(a)(ii) of The Ombudsman Ordinance.

“FEHD is responsible for enforcing a number of ordinances and regulations concerning food safety and environmental hygiene. Certain offences must be prosecuted within six months from the date of the offence. Once the statutory time limit is reached, the action becomes ‘time-barred’,” Ms Alice Tai, The Ombudsman, said today (14 September 2006).

“In the course of handling complaints, we note that FEHD’s actions to pursue some offenders had been frustrated because the time limit for prosecution had expired. Our preliminary examination shows that there might be deficiencies in FEHD’s procedures and practices. I have therefore decided to initiate a direct investigation into this matter. However, this investigation will not touch on decisions on prosecution,” Ms Tai said.

This direct investigation will cover the following aspects:

- (a) Procedures and practices for processing cases with statutory time limit for prosecution (**not** decisions to prosecute or not);
- (b) system, if any, for monitoring progress of such cases for prosecution to ensure timely action.

The Office of The Ombudsman welcomes views from members of the public on the matter. Comments should reach the Office of The Ombudsman at 30/F, China Merchants Tower, Shun Tak Centre, 168-200 Connaught Road Central, Hong Kong (or by fax to 2882 8149 or e-mail to complaints@ombudsman.gov.hk) by 13 October 2006.

**Office of The Ombudsman
September 2006**

EXECUTIVE SUMMARY

Direct Investigation on Administration of the Mid-Levels Moratorium

Background

1. Traffic congestion has been a long-standing problem in Mid-Levels. In 1972, Government introduced an administrative moratorium (“the Moratorium”) to restrict building development in Mid-Levels to ease traffic congestion. It has remained in force ever since. Our investigation into a complaint raised questions as to how the Moratorium has been administered.

2. Against this background, The Ombudsman initiated a direct investigation in August 2004 to examine:

- (a) the rationale for the Moratorium;
- (b) the roles and responsibilities of the relevant bureaux and departments in administering and monitoring its application; and
- (c) the mechanism, if any, for reviewing the measure.

3. Owing to the technical nature of the matter, the many changes in Government structure in the intervening years and the inherent complexity and complications, we have had taken an unusually long time to research into the background of the subject matter. In this connection, we had some difficulties tracing developments over the decades since the 1970s.

The Moratorium

4. Traffic congestion was serious between Pok Fu Lam and the North-west of Hong Kong Island, with Caine Road and Bonham Road being the main thoroughfare. In June 1972, the then Governor-in-Council approved an administrative Moratorium to restrict building development in Mid-Levels, pending improvement to the road network. The Moratorium comprised the following measures:

- (a) public land – sale to be deferred;
- (b) sites under restricted leases – to defer all further lease modification which would give rise to a greater intensity of development

- (c) sites under unrestricted leases – to use the powers under the Buildings Ordinance and Regulations to prevent more intensive redevelopment.

Roles and Responsibilities of Bureaux and Departments

5. The following bureaux and departments (and their predecessors since 1972) are involved in the administration of the Moratorium:

- (a) Lands Department (“Lands D”) – sale of Government land and lease modification;
- (b) Buildings Department (“BD”) – enforcement of the Buildings Ordinance and Regulations;
- (c) Planning Department (“Plan D”) – processing planning applications under Outline Zoning Plans (“OZPs”) for the Mid-Levels area;
- (d) Transport Department (“TD”) – conducting or commissioning studies to assess the traffic situation;
- (e) Environment, Transport and Works Bureau (“ETWB”) – overall coordination (including monitoring, assessing and reviewing the need for the Moratorium); and
- (f) Housing, Planning and Lands Bureau (“HPLB”) – policy bureau for (a), (b) and (c).

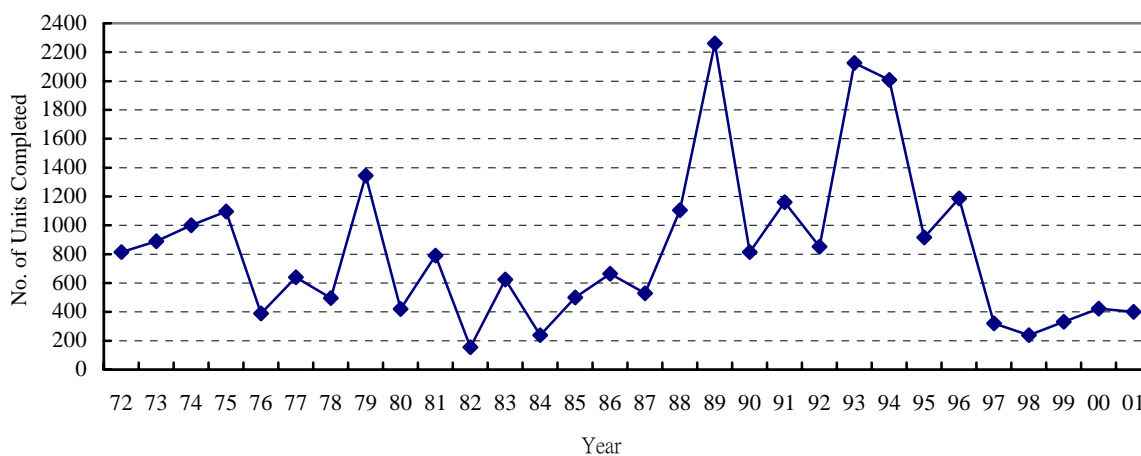
Effectiveness of the Moratorium

Number of Residential Units

6. In traffic engineering terms, the volume of traffic generated by residential developments is essentially related to the number of residential units.

7. **Table I** below shows the number of residential units completed on sites under restricted or unrestricted leases in Mid-Levels between 1972 and 2001.

Table I: Number of Residential Units Completed 1972 - 2001



8. Despite the Moratorium, the number of residential units has continued to grow, particularly during the period from 1985 to 1996. In terms of its stated objective, the Moratorium has clearly failed: the continued building developments and redevelopments have resulted in a rise in the number of residents and traffic volume in Mid-Levels.

Traffic Situation

9. Eight traffic studies on Mid-Levels were undertaken in 1973, 1983, 1986, 1989, 1993, 1996 (twice) and 2005.

10. These studies show that even with the Moratorium in place, the traffic condition in Mid-Levels has never been satisfactory. The eighth traffic study completed in 2005 confirmed the futility of the Moratorium:

- (a) all major junctions had accumulated traffic trails;
- (b) travel speeds on almost all road sections were lower than the average on Hong Kong Island; and
- (c) the practical maximum capacity of the road network had been reached.

Evaluation

11. Such limited effectiveness, or failure, is attributable to the following factors.

Inherent Limitations

12. Only four Government sites were available in Mid-Levels so the deferment of public land sale could have little impact (cf. para. 4(a)).

13. Most private sites in Mid-Levels are under unrestricted lease (147 unrestricted vs 28 restricted as at 2005) and hence lease modification is not necessary for redevelopment (cf. para. 4(b)).

14. As regards sites under unrestricted leases, an Appeal Tribunal determination in late 1972 showed that the Buildings Ordinance could not be used to refuse building development on the ground of intensity (cf. para. 4(c)).

15. In view of the ineffectiveness of the *administrative* Moratorium, a temporary statutory restriction on building development was urgently passed by the Legislative Council in August 1973, requiring the Building Authority to refuse all building plans submitted for the first time. This stop-gap measure was eventually lifted in 1978. Second statutory restriction on building development, imposed on geotechnical considerations, lasted from 1979 to 1982. Thereafter, building development in Mid-Levels has boomed, only curbed to some extent by the imposition in 1990 of a plot ratio of 5 in “Residential Group (B)¹” zone in the Mid-Levels West OZP.

Poor Planning

16. It would appear that the initiator(s) of the Moratorium was (were) not fully aware of (or did not properly focus on) the inherent limitations as discussed above, and in particular paragraph 14.

Varying Degrees of Support from Key Players

17. **BD** (and its predecessors) could not apply the Buildings Ordinance and Regulations to refuse building development on grounds of intensity, but had enforced the temporary statutory restrictions which had helped control building developments; **Plan D**, in processing planning applications in Mid-Levels, has consulted the relevant bureaux and departments and taken account of the Moratorium among other factors as land use compatibility, traffic, environmental and visual impacts; while **TD** has conducted studies to monitor the traffic situation. These were all efforts in

¹ This zone is intended primarily for medium-density residential development.

support of the Moratorium.

18. As regards **Lands D**, from a complaint case (para. 1), we have found that the Department's somewhat "liberal" or "loose" approach to lease modification had the net effect of facilitating rather than restricting building development, thus generating more traffic, against the intent of the Moratorium.

Complaint Case on Lease Modification

The case concerned a site comprising two lots under a common lease with an imposed height limit of 35 feet on any building on the site. In addition, the maximum permitted height for any building under the Outline Zoning Plan was ten storeys above carports or the height of the existing buildings, whichever was the greater.

On application from the developer, the Lands Department allowed lease modification to remove the 35-foot height restriction, subject to the maximum gross floor area permitted under the lease. This enabled the site, meant originally for one "house", to be developed into a condominium with two towers, each ten storeys high above three levels of carports and other facilities.

Weak Coordination

19. ETWB has recently acknowledged its role as the lead bureau in coordinating and overseeing the implementation of the Moratorium. However, neither the Bureau nor its predecessors have demonstrated the necessary leadership or initiative by calling for regular assessment or comprehensive review or directing the departments concerned to implement the Moratorium more stringently and effectively.

20. Poor coordination has resulted in the following:

- (a) If a proper review had been conducted in the early 1980s, the Administration would have noted that sites under unrestricted leases could be restrained only by statutory measures.
- (b) The use of plot ratio restriction as planning control mechanism was belatedly introduced in 1990, eight years after the lifting of the second statutory restriction.
- (c) More effective restriction on development intensity could have been achieved through more stringent planning control, but somehow was

not considered.

- (d) The “liberal” or “loose” approach adopted by Lands D to lease modification does not seem to have been monitored by the coordinating branch/bureau (now ETWB) or its own policy branch/bureau (now HPLB).
- (e) Bureaux and departments have been left to define its own role and develop its own strategy. In reality, all have minded their own business (各自為政) .
- (f) The number of residential units completed has increased, despite the Moratorium and the plot ratio restriction.

Repercussions of Government Restructuring

21. The need for continuity of responsibility and coordination in implementation can be said to have been compounded, or overlooked, by the multiple restructuring exercises of Government over the years. In the 1970s, one policy branch (Buildings and Lands Branch followed by Environment Branch) had policy responsibility over lands, planning, traffic and transport matters with a single operational department, i.e. the Public Works Department (“PWD”) overseeing lands, traffic engineering, town planning and buildings matters. PWD was the *de facto* overall coordinator for the introduction and implementation of the Moratorium. However, major Government restructuring in 1982 split the land and traffic/transport policies between different branches and defederalised PWD. In effect, this demolished central coordination without an effective replacement mechanism. There was not even an inter-bureau or inter-departmental working group for monitoring the implementation of the Moratorium.

Conclusions

22. This investigation examines the effectiveness of the implementation of the Moratorium. Our focus is on public administration aspects, namely, its enforcement and effectiveness in meeting the stated objective. It remains a policy decision for Government whether or not to continue with the Moratorium.

23. The Moratorium was well-intentioned, to ease traffic congestion pending improvement to the road network. However, it was ill-conceived and poorly planned, with considerable inherent limitations. The need for effective coordination was apparently overlooked in Government’s multiple restructuring and insufficient efforts were put in by the branch/bureau supposed to

coordinate (now ETWB); the branches/bureaux and departments concerned have each been attending essentially to its own turf and the Moratorium poorly coordinated and inefficiently monitored. Consequently, its effect has not been adequately assessed or properly reviewed.

24. Against such background and on Government's stated objective of restricting development in Mid-Levels, the Moratorium was practically doomed to fail from the outset.

Recommendations

25. In this light, The Ombudsman makes the following recommendations.

Effectiveness

- (a) The bureaux and departments concerned should consider what measures are necessary to supplement, strengthen or replace the Moratorium.

Coordination and Delineation of Responsibilities

- (b) The coordinating body (currently ETWB) should:
 - (i) review the need, or otherwise, for the continuation of the Moratorium; and
 - (ii) if such need is established, give clear guidelines to the bureaux and departments concerned for proper implementation and close cooperation in coordination.

Transparency

- (c) On completion of the review, Government should make a clear statement on the way forward.
- (d) Thereafter, the bureaux and departments concerned should keep the public posted on developments or changes from time to time.

Impact of Reorganisation

26. As the Moratorium was introduced over 30 years ago, some of the comments made in this report are directed at former branches/bureaux and departments, not the current incumbents. However, this case and its development over the decades offer invaluable experience for future reference with the reorganization of the Government structure and good lessons on the need for continuity of responsibility and coordination in implementation of major policies.

Office of The Ombudsman

Ref. OMB/DI/119

September 2006

Arrangements for Saturdays: Service as Usual

From October 2006, the Office of The Ombudsman will introduce arrangements for staff to be on five-day week. However, service to the public will **remain as usual** for:

- enquiry counter
- Duty Officers for fresh complaints
- telephone complaints

No additional resources will be incurred.

Opening hours will **remain unchanged**:

	Complaint and Enquiry Service	Resource Centre
Monday to Friday	9:00 am – 5:00 pm	9:00 am – 1:00 pm 2:00 pm – 5:00 pm
Saturday	9:00am – 12:00 noon	
Sunday & Public Holidays	Closed	

We are committed to serving our community in redressing grievances and addressing issues of maladministration in the public sector. We aim to improve the quality of service and promote open and accountable governance.

Office of The Ombudsman
September 2006