

*Issue No. 3 of Reporting Year 2004/2005
(26 August 2004)
Office of The Ombudsman, Hong Kong*



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

This Office will conduct a direct investigation into the administration of the Mid-Levels Administrative Moratorium under 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 Enforcement Action on
Unauthorised Building Works in New Territories Exempted Houses*

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



Enquiries

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**Office of The Ombudsman, Hong Kong
26 August 2004**

Issue No. 3 of 2004/05

**OMBUDSMAN PROBES
ADMINISTRATION OF THE MID-LEVELS
ADMINISTRATIVE MORATORIUM**

The Office of The Ombudsman will conduct a direct investigation into the administration of The Mid-Levels Administrative Moratorium (“the Moratorium”).

“The Moratorium, introduced by Government in 1972, is an administrative measure intended to ease traffic congestion in Mid-Levels by restricting the intensity of building development. During an investigation into a complaint, we noted that a somewhat arbitrary approach had been adopted by the Lands Department in defining the intensity of development. If widely applied, such approach would impair the effectiveness of the Moratorium and undermine the intention of the measure,” Alice Tai, The Ombudsman, said today (26 August 2004).

The Ombudsman has decided to conduct a direct investigation pursuant to section 7(1)(a)(ii) of The Ombudsman Ordinance. The investigation will cover:

- the rationale for the Moratorium
- the roles and responsibilities of departments concerned in administering and monitoring the application of the Moratorium
- any mechanism for reviewing and rescinding the Moratorium

The Ombudsman has notified the Director of Lands, Director of Buildings, Director of Planning and the Commissioner for Transport of her decision. They have not raised any objection to the investigation.

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 (fax: 2882 8149, e-mail: complaints@ombudsman.gov.hk) by 27 September 2004.

**Office of The Ombudsman
August 2004**

Executive Summary of Investigation Report on Enforcement Action on UBWs in NTEHs

UBWs in NTEHs

1. The Buildings Ordinance ("BO") prescribes that all building works require the prior approval of the Buildings Department ("BD") as the Building Authority. However, in the New Territories ("NT"), construction of village-type houses may be exempted from part of the BO subject to their meeting the development conditions and specifications set out in the land lease and the Buildings Ordinance (Application to the New Territories) Ordinance ("BO (NT) O"). These New Territories exempted houses ("NTEHs"), commonly dubbed "small houses", should have not more than three storeys nor exceed a height of 8.23 m (27 ft.), and their maximum roofed-over area should normally not exceed 65.03 sq. m (700 sq. ft.). The Lands Department ("Lands D") is the approving authority for NTEHs.

2. Unauthorised building works ("UBWs") are building works that have not been approved by BD or Lands D, as appropriate. Common examples of UBWs in NTEHs are rooftop structures, canopies, enclosed balconies, ground floor extensions and additional storeys. The most serious are entire buildings constructed without approval. UBWs in NTEHs are a long existing problem.

1996 Direct Investigation

3. In 1996, The Ombudsman conducted a direct investigation and concluded that insufficient resources and low priority accorded to lease enforcement had resulted in the proliferation of UBWs in NTEHs. Recommendations were made to Lands D and the then Planning, Environment and Lands Branch for more effective enforcement. Regrettably little progress has been made in implementation. As there are signs that the problem has deteriorated, The Ombudsman decided in November 2003 to conduct a second direct investigation into enforcement against UBWs in NTEHs.

2003/04 Direct Investigation

4. This investigation tracks the development since 1996 and examines the factors contributing to the continued proliferation of UBWs in NTEHs. We also study the appropriateness and effectiveness of the enforcement measures so far taken by Lands D and BD.

Development since 1996

5. The 1996 investigation report recommended that Government should:

- (a) accurately assess the problem through a sampling survey;
- (b) review its priority for lease enforcement action;
- (c) consider the need for additional resources;
- (d) explore alternatives to lease enforcement action; and
- (e) step up publicity on its position regarding UBWs in NTEHs.

6 To date, little has been done to implement these recommendations, due to a combination of factors. It is mainly insufficient resources and lack of a positive attitude or focus on the problem.

Magnitude of Problem

7. Lands D considers the problem to be serious in five out of the nine NT districts. As at the end of 2003, Lands D has detected 6,575 UBWs in NT. However, the problem is far more serious than that. For example, District Lands Office ("DLO")/Tuen Mun found from a survey in 2003 that the number of detected UBWs was five times that in 2001. On average, there are about 500 complaints on UBWs in NTEHs each year but due to resource constraints, Lands D could act on only about half of them. DLOs also estimated that it

would take them years (e.g. 50 and 97 years for two districts) to complete action on existing UBWs.

Policy and Purview

8. Both BD and Lands D have a responsibility to tackle UBWs. BD's prime concern, under the BO, is building safety and so its efforts focus on multi-storey buildings in the urban area. Under its enforcement policy revised by Government in April 2001, BD gives priority to tackling new UBWs, especially those under construction (works-in-progress or "WIP" cases) and UBWs causing imminent danger to life and property. Lands D, as the land administrator, has the responsibility to ensure that land leases are complied with. UBWs in NTEHs are in breach of lease conditions, necessitating lease enforcement action by Lands D. However, due to resource constraints, Lands D gives higher priority to action against misuse of residential buildings for dangerous industrial undertakings than UBWs in NTEHs.

Authority and Organization

9. The BO empowers BD to issue statutory orders requiring owners to remove any illegal or dangerous structures within a stipulated period and to prosecute them for the UBWs and non-compliance with removal orders. Under the Land (Miscellaneous Provisions) Ordinance and the Government Rights (Re-entry and Vesting Remedies) Ordinance, Lands D staff can enter premises for inspection, demolish UBWs, re-enter the land and cancel the lease.

10. BD has a Special Action Unit responsible for tackling reported WIP cases. Enforcement action is carried out by professional consultants on contract to BD. The lease enforcement teams of DLOs in Lands D are responsible for taking lease enforcement action against UBWs, including UBWs in NTEHs.

Enforcement Strategy

11. In 2001, an internal working group was set up by the Housing Planning and Lands Bureau ("HPLB") with representatives from Lands D and BD to map out a strategy to contain UBWs. The strategy is as follows:

- (a) BD
 - to take priority action against UBWs in NTEHs that are under construction, i.e. WIPs; and

- (b) Lands D
 - (i) to take priority action against cases of blatant breach;

 - (ii) to tolerate minor breach subject to payment of a penalty premium by the owners, and

 - (ii) to take lease enforcement action in all other cases according to DLOs' lease enforcement programmes.

WIP Operations

12. BD takes action against WIPs, helped by DLOs in the detection of WIPs and provision of relevant data. For confirmed WIP cases, BD will issue warnings and then statutory removal orders, followed by prosecution for non-compliance. For new UBWs already completed, BD refers them back to Lands D for action. Premature cases, which BD cannot confirm as WIP cases, will be recorded for follow-up inspections within four to six weeks.

13. Between February 2002 to June 2004, Lands D referred 570 cases to BD resulting in the issue of 108 removal orders, with 21 complied with. BD is following on another 146 cases. Some 200 cases considered as "new UBWs" by BD has been returned to Lands D for which the Department does not have the resources for priority action. Hence, no action has been taken on these 200 cases.

Action against Blatant Breach

14. DLOs may take re-entry action on blatant breach cases. The lease enforcement team first issues a warning to the owner, requiring purge (i.e. removal) of the UBW within 28 days. The grace period could be extended up to six months subject to payment of a forbearance fee. If the UBW is still not removed, DLO will notify the owner of its impending re-entry action and then register the re-entry documents with the Land Registry, cancelling the land lease. The land will become Government land. Legal advice is necessary in every step of the re-entry process. The ex-owner could appeal against the re-entry action within the following six months. There had been two re-entry cases in the last four years. Lands D is taking re-entry action on three cases.

Toleration of Minor Breach

15. Minor breach refers to slight deviations from the development specifications, e.g. marginally exceeding the height or area restrictions. Subject to the payment of a penalty premium by the owner, Lands D may tolerate a minor breach for the life of the house. In each of the past four years, about 53 cases were tolerated, for which penalty premium of around \$770,000 was collected.

Lease Enforcement Programmes

16. These are DLOs' schedules for action against selected villages. The lease enforcement team patrols the village to detect UBWs. An advisory letter specifying the breach of the lease conditions will be issued to the owner concerned requesting purge of the UBW, failing which the letter will be registered against the property title at the Land Registry. Monitoring of purged cases will continue with periodic inspections in the following 12 months. Due to shortage of staff, recurrent breach detected after the monitoring period is not acted on immediately. Between December 1998 and December 2003, about 2000 advisory letters were issued, with some 947 unpurged cases registered with the Land Registry.

17. In the early 1990s, Lands D engaged term contractors to carry out demolition to cope with cases of persistent breach. However in recent years, the shortage of funds, manpower and technical expertise (including support from other departments) has limited Lands D's demolition action.

Rates Exemption for Indigenous Villagers

18. The Home Affairs Department ("HAD") has the authority to grant rates exemption to indigenous villagers subject to their meeting certain criteria, one of which requires the house to be UBW-free, and applicants are required to make a declaration on this. Theoretically, this can help to curb the growth of UBWs. HAD relies on Lands D to conduct spot checks to ensure that the exempted properties remain UBW-free. If a UBW is detected, the owner will be required to clear it, failing which the rates exemption will be withdrawn. From 1997 to the end of 2003, Lands D conducted 851 site inspections and identified 131 cases of UBWs, resulting in the withdrawal of rates exemption in 29 cases.

Problems in Enforcement

Resource Constraints

19. Lands D's lease enforcement teams have remained small in number, resulting in follow-up action not being taken against UBWs not purged and recurrent breach. BD's assistance was necessary in action against WIPs. The delineation of responsibilities between Lands D and BD is not conducive to greater cooperation and can result in buck-passing between the two departments. See paragraphs 27 and 28(a) below.

Proof of Breach of Lease Conditions

20. Gathering proof of breach of lease conditions may not be straightforward as some leases are decades old and conditions not clearly set out. In some cases, records are missing or boundaries inaccurate. Legal advice is often necessary. DLOs sometimes have difficulties in gaining entry into premises for investigation.

Owners and Villagers Attitude

21. Many owners are reluctant to clear their UBWs and challenge enforcement action. Some villagers think that they can construct their own houses without approval from the authorities. DLOs' enforcement action is often seen as infringement on villagers' rights. Straightforward enforcement issues can become politicised.

Unauthorised Developments on Old Schedule Lots

22. Some villagers have built or redeveloped four or five-storey houses on old schedule lots without approval from the authorities. As the villagers have not sought exemption, Lands D considers the houses to be outside the parameters of NTEHs and in breach of the BO. Such cases are referred to BD for action. However, BD is unable to give them priority. As a result, the number continues to grow and enforcement action becomes increasingly difficult with the passing years.

Organisation Culture

23. Lands D has always taken a low-key and non-confrontational approach to enforcement as it is wary of getting involved in disputes over villagers' rights and village politics. Some owners can take advantage of this to stall or delay enforcement action. Lease enforcement teams have to spend much time and efforts in liaison with owners for clearance of UBWs, very often to no avail.

Follow-up Action

24. The average success rate of enforcement action in the past few years was less than 50%. For many districts, lease enforcement action stops upon the registration of advisory letters with the Land Registry. Such registration (see paragraph 16) has therefore been building up over the years.

25. A UBW can be re-erected, sometimes almost immediately after clearance. More often than not, DLOs do not act immediately on such recurrent breach, resulting in a waste of earlier efforts.

Inconsistent Practices among DLOs

26. Each DLO has the authority to decide on its own lease enforcement action, resulting in different practices. For instance, DLO/Sai Kung initiates re-entry action under its programme, while DLOs/Yuen Long and Tuen Mun do not. Some DLOs tolerate unenclosed rooftop structures that take up less than 50% of the roof; others do not.

Differences in Opinion between BD and Lands D

27. BD and Lands D hold different views as to when a UBW is a "WIP". If the structural framework has been completed, BD will not take action despite signs of works still going on. Some 200 cases have thus been returned to Lands D as "new UBWs". However, Lands D does not have the resources and have not taken action on the cases returned.

Case Studies

28. Some of the cases that we have studied illustrate that:

- (a) BD and Lands D disagree on "WIP" cases;
- (b) uncooperative owners could delay enforcement action for more than five years;
- (c) DLOs could delay or abort re-entry action in the face of difficulties, e.g. when the house with UBWs is already occupied by several households, causing problems in eviction;
- (d) DLOs do not take action on cases of recurrent breach;
- (e) villagers' objections have created obstacles for BD enforcement action; and
- (f) a new owner might unknowingly assume responsibility for the ex-owner's UBWs.

Observations and Opinions

NTEH Policies

29. Government policy on NTEHs or "small houses" for indigenous villagers was established long ago. With the development of NT, it raises the question whether exemption should continue to apply. We note that HPLB has been conducting a review of

the small house policy since 1995. We consider that this aspect of the policy should be examined and the review in general expedited.

Causes for Concern

30. UBWs in NTEHs are a difficult problem, given the limited resources and low priority for action. The situation has deteriorated since our last direct investigation in 1996. We recognise that Lands D's resource constraints have made firmer enforcement difficult but continued proliferation will simply allow the problem to get out of control. Lands D's mode of enforcement is ineffective and a cause for concern. Much time is spent on preparation but cases are not enforced as the Department backtracks from initiated action in the face of difficulties. We consider that when situations call for enforcement, the Department should firmly exercise its powers and take enforcement action to completion.

The Strategy

31. Given the history of the problem, the 2001 working group's focus of action on WIPs and blatant breach is a step in the right direction. However, the strategy fails to address the fundamental issues of resource constraints and the limitations of enforcement measures. There is a need for HPLB to revamp the current strategy on UBWs in NTEHs, and develop and communicate to the community an enforcement policy setting out clear priorities and focus of action.

Effectiveness of Enforcement Measures

32. The measures under the existing strategy have not effectively contained the problem.

33. BD's WIP operations have a success rate of only about 20%. Neither BD nor Lands D takes action on over 30% of the cases of new UBWs detected. BD's follow-up action on outstanding cases has also been slow.

34. Re-entry action is labour-intensive and time-consuming. Due to resource limitation and the serious implications of re-entry action, Lands D has rarely taken, and at times not followed through, such action.

35. Lands D's toleration of minor breach while charging a penalty premium is a reasonable alternative to enforcement, but this has limited application and little impact on containing the problem.

36. The commonest action taken is registration of advisory letters against property titles. However, it only serves to alert potential buyers to the presence of UBWs on the property. Owners having no intention to sell their properties are not deterred. As no further action is taken against them after the registration of letters, their readiness to purge their UBWs is bound to decline. The success rate of such action has dropped from 80% in 2000 to about 21% in 2003.

Inefficiencies Observed

37. Staff shortage has always been a problem for lease enforcement. In the current financial climate, additional resources are unlikely to become available. Much of DLOs' resources for lease enforcement is wasted on repeated site inspections, requests for legal advice and for entry for inspections, etc., which often may not yield results. We consider that Lands D should revise work processes and practices to optimise use of its limited resources.

38. Each DLO is allowed to decide on its own action plans, resulting in inconsistencies among DLOs. These inconsistencies could lead to accusations of unfair treatment from owners.

39. Lands D HQ has a responsibility to guide and advise front-line staff in coping with the difficulties encountered in their lease enforcement work. However, it has actually not done much in this respect.

40. Lands D and BD both have an enforcement role, each observing its own legislation and priorities. Their differences in opinions have deterred them from taking a coordinated approach on enforcement matters and given the public the impression that they tend to pass the buck.

Publicity and Owners Attitude

41. We consider that ineffective enforcement action has reinforced owners' and

villagers' perception about DLOs' toleration of UBWs and hence given rise to the complaints and objections against lease enforcement teams in action. To correct this perception, Lands D needs to inform the public of its enforcement responsibility on UBWs in NTEHs, followed by firm and consistent enforcement action.

Other Actions

Rates Exemption

42. Inspections show that about 15 % of the rates-exempted houses have UBWs, thus breaching one of the criteria for exemption. This calls for a closer working relationship between HAD and Lands D, with DLOs checking ownership of detected UBWs for HAD's action against those who are enjoying rates exemption.

Protection for Potential Buyers

43. A purchaser buying an NTEH without knowledge of its UBWs could have serious consequences. There should be more publicity on what prospective buyers should know for the purchase of village houses.

Conclusions and Recommendations

44. The Ombudsman acknowledges that due to the widespread problem and limited resources, it would not be possible for Government to eliminate it in the foreseeable future. Strategies and measures should, therefore, aim for containment of the problem, with **rationalisation** of non-serious cases and **rigorous enforcement** for serious ones, with **re-entry** as the last resort.

45. On this basis, The Ombudsman makes 18 recommendations for consideration by HPLB, Lands D, BD and HAD:

Overall Directions

- (a) To review the current enforcement strategy and develop a realistic enforcement policy for containment of UBWs in NTEHs;

- (b) To explore the feasibility of rationalisation of existing UBWs that are safe, not serious and thus tolerable, subject to payment of a penalty. This is an extension of the concept of “penalty premium”;
- (c) To assess and monitor the situation regarding UBWs in NTEHs through the regular use of aerial photographs;

Enforcement

General

- (d) To review the inefficiencies identified in this report for developing improvement measures and to set targets for achievement;

WIPs

- (e) To step up action against non-compliance with removal orders;
- (f) To explore the feasibility of expanding the current WIP operations to cover new UBWs;

Lease enforcement

- (g) To closely monitor enforcement action to ensure due completion and to suspend actions only on good grounds;
- (h) To develop an action plan against owners of UBWs not purged and recurrent breach;
- (i) To develop a plan for tackling unauthorised four or five-storey houses;
- (j) To standardize enforcement practices among DLOs as far as possible, given local differences;

Cooperation and Coordination

- (k) To reconcile any differences between Lands D and BD over WIP operation;
- (l) To set up a joint team to tackle WIPs and new UBWs;

Optimization of Resources

- (m) To train and guide front-line staff to instill greater confidence in them;
- (n) To simplify work processes and streamline procedures, to redeploy staff and optimise the use of limited resources.

Publicity

- (o) To publicise widely Government's revised strategy for public awareness;
- (p) To enlist Heung Yee Kuk's assistance in explaining and disseminating Government's stand on UBWs to villagers;
- (q) To alert potential NTEH buyers to the risk of UBWs by widely publicising Lands D's pamphlet on the purchase of the village houses.

Monitoring of Rates Exempted Houses

- (r) To work out a system under which Lands D conducts matching checks on ownership of detected UBWs to see if any of such owners are enjoying rates exemption and report such cases to HAD for action

Final Remarks

46. HPLB, Lands D, BD and HAD generally accept the above conclusion and recommendations.

- End -

Office of The Ombudsman

August 2004