

Executive Summary

Direct Investigation Report

Lands Department’s Enforcement against Commercial Use of Public Pedestrian Passages and Public Atria in Private Malls

Introduction

The lot owners (“owners”) of some private developments (including malls) are required under land lease (“lease”) conditions to provide in their developments public pedestrian passages (“public passages”) and/or public atria. The use of these public facilities is governed by lease conditions, which may stipulate, for instance, that no commercial activities be carried out within the public passages and atria.

Our Findings

2. According to the operational guidelines of the Lands Department (“LandsD”), if a breach of lease is found, the District Lands Office (“DLO”) concerned would issue a warning letter to the owner concerned and/or the management company appointed by the owner, demanding rectification of the breach before a specified deadline. Upon expiry of the deadline, DLO would conduct a compliance check within one to three weeks to confirm rectification of the breach or otherwise. Should the breach remain unrectified, DLO would register the warning letter at the Land Registry (“LR”) and reserve the right to take further lease enforcement action, including, for cases with serious breaches (e.g. those that pose serious threats to public safety), re-entry of the lot or vesting of the relevant interest to the Government pursuant to the Government Rights (Re-entry and Vesting Remedies) Ordinance. For cases that fall within the ambit of other Government departments or where handling by other departments would be more appropriate, DLO may, in addition to taking lease enforcement action, refer them to the relevant departments for follow-up.

3. Our investigation has identified the following inadequacies and areas for improvement in LandsD’s handling of the problem of unauthorised use of public passages and atria in private malls for commercial purposes (“the Problem”).

Enforcement

(I) No or delayed enforcement

4. A case showed that DLO had found the Problem in a mall (“Mall B”) during an annual inspection but did not take any enforcement action. It only issued a warning letter to the owner of Mall B upon finding the same problem ten months later during the annual inspection for the following year. In two other cases, DLOs only issued warning letters to the owners of the two malls in question (“Mall D” and “Mall A”) more than four and five months respectively after finding the Problem. We note that LandsD has not specified in its operational guidelines the time limit for issuing warning letters after a breach is found. We consider that the Department should review the relevant guidelines and set a time limit for issuance of warning letters so that DLO staff can have an objective standard to follow for timely enforcement.

5. Besides, two cases showed that staff of DLOs conducted compliance checks at two malls with the Problem (“Mall B” and “Mall C”) as late as two months and 81 days respectively after the deadline for rectification specified in the warning letters had expired. This far exceeded the normal time limit of one to three weeks for conducting a compliance check.

(II) Insufficient enforcement

6. In the case of Mall C, there were shop owners breaching the lease, thus constituting the Problem. For some of those shops, DLO issued warning letters to the shop owners only, but not to the owner of the mall at the same time. We are of the view that owners of malls should ensure that the public passages and/or atria in their malls are in compliance with lease conditions. It follows that in similar cases where the lease conditions are also applicable to shop owners in a private mall, DLO should also issue a warning letter to the owner of the mall.

(III) Failure to register warning letters at LR

7. LandsD’s operational guidelines do not stipulate a time limit of when DLO should register a warning letter at LR upon finding that a breach remains unrectified. Two cases showed that DLOs, during compliance checks, found the Problems at Mall B and Mall C persisted but failed to register the warning letters at LR. As a result, the Problems lingered. We consider that LandsD should review its operational

guidelines to include a time limit for registering warning letters at LR, and to specify the time limit in the warning letter. This can heighten the awareness of DLO staff and provide them with an objective standard for taking further enforcement action, as well as exerting a greater deterrent effect on offenders.

(IV) Failure to refer suitable cases of breach to other relevant departments for follow-up

8. In the case of Mall A, some restaurants might have violated the provisions of the Food Business Regulations by extending their business areas to the public passages of the mall. Nevertheless, DLO never referred the case to the Food and Environmental Hygiene Department for follow-up. Fortunately, after we had raised queries about this, LandsD issued a memorandum in October 2018 to remind DLOs to follow the requirements of the operational guidelines and refer cases that fall within the ambit of other government departments for follow-up in parallel.

(V) Failure to proactively recover waiver fee from owners who have breached the lease

9. Under the current mechanism, owners of private malls who intend to hold commercial activities at public passages or atria provided under the lease should apply for a Short Term Waiver (“STW”) from DLO. If approved, the STW would carry additional conditions stipulating, *inter alia*, that the owner must pay an administration fee and a waiver fee. If the owner of a mall applies for an STW only after the Problem in the mall has been found by DLO, the waiver fee payable would usually be dated back to the first day when DLO found the breach. If the owner of the mall does not apply for an STW even a breach has been found, DLO may take the initiative to recover the waiver fee, depending on the actual circumstances. DLOs can recover a waiver fee of up to six years.

10. During the five years between 2014/15 and 2018/19, LandsD found a total of 65 cases with the Problem. In only two of those cases, STWs were applied for after the Problems had been found, and in only one of those two cases did DLO take action to recover from the owner of the mall (Mall A) the waiver fee, which exceeded a hefty \$24 million for a breach that had persisted for as long as five and a half years. We consider LandsD to have failed to make good use of its enforcement power to proactively recover waiver fees from owners of malls having the Problem. In the 60 odd remaining cases where no applications for an STW were ever submitted and

where LandsD took no action to recover any waiver fees, the waiver fees involved could easily be in the zone of hundreds of millions of dollars. LandsD should take serious action to recover waiver fees in order to exert deterrent effects, bringing in revenue for the Government coffers at the same time. It should take prompt/timely action to recover waiver fees for all known cases upon revisiting them, and for newly found cases.

(VI) Unclear enforcement objective and ineffective enforcement

11. LandsD's enforcement against the Problem has been lax. Besides, its measures for tackling the problem, such as registration of warning letters at LR, re-entry of the lot or vesting of the relevant interest to the Government in serious cases as well as recovery of waiver fees from the owners of malls, have all been ineffective in eradicating the Problem. On the other hand, LandsD allows owners to hold commercial activities at public passages and atria in their malls through application for an STW. It is not clear whether LandsD's policy objective is to strictly ban all forms of the Problem, or to permit owners of malls to hold commercial activities at public passages and atria through application for an STW.

12. This Office takes the view that LandsD should set a clear objective for its enforcement action against the Problem. If it considers that the Problem must be eradicated, it should devise practical and feasible enforcement measures with deterrent effects, such as adoption of more effective regulatory procedures, and consider specifying in the leases of future developments that once the Problem is found, DLO would not only recover the waiver fee, but also impose an additional administration fee. If LandsD considers that the Problem poses no threats to public interest, it should then find ways to regulate commercial activities at public passages and atria in private malls, such as regularisation of such activities.

Information Dissemination

(VII) Inadequate information provided to the public about public passages/atria in private malls

13. Information about private developments in which public passages and/or atria are provided under lease conditions is uploaded on LandsD's website. Such information is just brief text descriptions, not sufficient for members of the public to know the specific locations and areas of such public facilities and for them to monitor

their use. In response to our comments on the inadequacy of the information being provided, LandsD has sent letters to the owners or management companies of all the 118 private malls, suggesting that layout plans be displayed at the entrances/exits of the public passages/atria in their malls to show clearly the locations and routing of such facilities for public use. Besides, LandsD completed in December 2019 uploading on its GeoInfo Map website information about provision of public facilities (including public passages and/or atria) in private developments required under lease. More information (including photographs or videos) will be uploaded to that website so that the public can have a better idea about the locations and areas of such facilities.

Recommendations

14. In the light of the above comments, The Ombudsman recommends that LandsD:

Enforcement

- (1) review relevant operational guidelines to stipulate the time limits for issuing warning letters and registering warning letters at LR. The time limit for registration should be clearly specified in warning letters;
- (2) revisit as soon as possible all known and newly found cases with the Problem and take the initiative to recover promptly/in a timely manner waiver fees from the owners of the malls concerned;
- (3) consider seeking legal advice on cases in which the Problem involving shop owners persists for determining whether warning letters can be issued to those owners;
- (4) set a clear objective for enforcement action against the Problem and devise enforcement/regulatory measures for achieving the objective;

Information Dissemination

- (5) follow up regularly with private malls concerning their implementation of the Department's suggestion that layout plans which show the locations and routing of public passages and/or atria in the malls be

displayed at the entrances/exits of those facilities, and consider stipulating in the leases of new private developments (including malls) that owners of the developments must display such layout plans at the entrances/exits of the public passages and/or atria in their malls;

- (6) follow its schedule in uploading more information (including photographs or videos) about public passages/atria in private malls on the GeoInfo Map website to enhance transparency and public access to information; and
- (7) upload regularly on the GeoInfo Map website information (including photographs or videos) about public passages/atria in new private developments (including malls).

Office of The Ombudsman
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