

The handling by Lands Department of a short-term tenancy at nominal rent

Investigation Report

A member of the public (“the complainant”) made a complaint to this Office against the Lands Department (“LandsD”).

The Complaint

2. According to the complainant, a Government site in the New Territories (“NT”) leased out by way of a short-term tenancy (“STT”) was used for performing funeral rituals, the activities of which included scattering of paper money offerings, burning of joss paper and playing of music. The complainant complained to a District Lands Office (“DLO”) under LandsD that the STT site had caused environmental and noise nuisance to residents in the neighbourhood, and he requested DLO to terminate the tenancy. DLO informed him that the STT was granted in 1988 and its approved use was farewell hall and any ancillary purposes. The hall was open for use by the residents of a village (“Village A”) free of charge. Moreover, DLO had granted the STT in accordance with relevant applicable procedures. The complainant was dissatisfied with DLO for giving him a bureaucratic reply and failing to terminate the STT. His complaints can be summarised as follows:

- (1) The number of residents living in the vicinity of the STT site had increased over the past 30 years, and many people were affected by the nuisance. However, DLO had renewed the STT without regard to the changes in circumstances and failed to review whether the Government site was still suitable for such use as a farewell hall, etc.
- (2) DLO unreasonably leased the site to the tenant at no charge.
- (3) In the email reply to the complainant, DLO staff failed to answer his queries in detail, including matters about the termination and renewal of the STT concerned.

Our Findings

Relevant Government Policy on STT at Nominal Rent

3. Generally, for effective use of land resources, the DLOs under LandsD may consider putting unleased or unallocated Government sites not reserved for long-term use or development to appropriate temporary uses, such as leasing out those sites by way of STT.

4. Currently, if the proposed use of an STT is non-profit-making with support obtained from relevant policy bureaux/departments (“B/Ds”), the DLOs may consider directly granting the tenancy for non-profit-making purposes.

Background of the STT in this Case

5. The Government implemented the Hillside Burial Policy starting from 1983. Under this policy, Permitted Burial Grounds (“PBGs”) are designated in rural areas for burial of deceased indigenous NT villagers for upholding the traditional rights of indigenous villagers. The location of PBGs is based as far as possible on the rural burial grounds existing prior to introduction of the Hillside Burial Policy. Most PBGs are located on hill slopes.

6. According to the general burial customs of indigenous NT villagers, a series of funeral rituals will be performed to pay final tribute to the deceased before the burial. Nevertheless, it is inconvenient for family members to perform those rituals at PBGs, which are generally located on hill slopes. Therefore, in order to give respect for the customs of indigenous villagers and to show sympathy for their actual needs, if applications are received from the rural committees or indigenous village representatives for performing traditional funeral rituals within a PBG or its adjoining Government site, the Government will generally approve such applications according to circumstances of each case and applicable procedures.

7. After the indigenous residents of Village A passed away, their family members might apply for their burial at a nearby PBG. In 1988, in response to the request from indigenous residents of Village A, DLO (being a sub-office under the then Buildings and Lands Department) granted the Government land within and adjoining the aforesaid PBG by way of STT to the village representative of Village A after consulting other Government departments, including the local District Office (“DO”) under the Home Affairs Department, and stakeholders. The site is used as a farewell hall of a non-profit-making nature, which is open for use by residents of Village A free of charge. A nominal rent of \$1 is payable annually.

Response from LandsD

8. LandsD asserted that DLO had adequately considered the views of relevant departments and stakeholders when granting the STT in 1988.

9. DLO had regularly reviewed whether the site was required for long-term use or development. It had also conducted regular inspections every three years to prevent any subletting, unauthorised building works or illegal occupation of Government land adjacent to the STT site, and to ensure that the STT was used for the approved purpose and the site was used by the STT holder or tenant (i.e. the relevant village representative). If a tenant is found to have breached tenancy conditions, DLO will take proper follow-up action, including issuing a warning letter to the tenant to request rectification, and considering terminating the tenancy. Since the tenant had not been found to have breached tenancy conditions, DLO continued to automatically renew the STT granted to the tenant for the site every quarter.

10. Taking into account that the site, at the time concerned, was not required for long-term use and development, the needs of indigenous residents of Village A, and the use of land in the vicinity (the site is largely located within the PBG and not adjoining any residential area), DLO considered the site to remain suitable for use by indigenous residents of Village A as a farewell hall.

11. To follow up on the complainant's allegations that the STT holder was operating illegally a funeral parlour, and that the use of the site for farewell hall purposes had caused hygiene problems and noise nuisance to the neighbouring environment, DLO had sent its staff to conduct site inspection. However, they had not found any breach of tenancy conditions, nor was there any information showing that the hall was being used for profit-making purposes.

12. LandsD stated that upon request from indigenous residents of Village A, the STT holder would open the site, free of charge, to needy villagers. Where there was no such need, the site was ordinarily locked up. The STT conditions only stipulate that the farewell hall shall be open for use by residents of Village A free of charge. The villagers are not prohibited from engaging burial service providers to perform rituals at the hall.

13. DLO had referred the complainant's allegations (see para. 11) to the Food and

Environmental Hygiene Department (“FEHD”) and the Environmental Protection Department for follow-up. FEHD notified LandsD that it would seek legal advice on the issue of whether the STT holder was illegally operating a funeral parlour. If any one department confirmed that the STT has got involved in any activities in contravention of relevant laws, DLO would consider taking further action, including terminating the tenancy. LandsD will continue to monitor the situation of the STT and the views from relevant departments (such as DO) and residents in the vicinity in order to prudently handle the tenancy renewal matter.

14. LandsD also explained that the STT was granted in 1988 and policy support from relevant B/Ds was not required under the procedures at that time. Since it does not belong to the STT category where the STTs are granted **initially** with policy support from relevant B/Ds, LandsD’s current guidelines^{Note} on renewal of STTs at nominal rent are **not applicable**. In other words, when renewing the STT in this case, DLO does not need to seek policy support from relevant B/Ds for its renewal and the granting of tenancy at nominal rent. And this renewal procedure is different from that applicable to the STTs granted at nominal rent with relevant B/Ds’ policy support.

Our Comments

Allegations (1) and (2)

15. LandsD’s explanation for granting and continuous renewal of the STT at nominal rent can be summarised as follows:

- (1) The Hillside Burial Policy is implemented in order to give respect for the customs of indigenous villagers and to show sympathy for their needs (see para. 6).
- (2) Since the site in this case is largely located within a PBG and not adjoining any residential area, it is suitable for farewell hall purposes. The site is not required for long-term use or development (see para. 10).
- (3) No information shows that the STT holder has breached any tenancy

^{Note} According to the current guidelines (first issued in 2010), for an STT site initially leased at nominal rent by direct grant with policy support obtained from relevant B/Ds, the DLOs are required to inspect the site every three years after the STT is granted, or three to six months before expiry of its first tenancy term. The DLOs also need to seek advice from the B/Ds originally giving policy support on whether they still support the site to be leased at nominal rent.

conditions (such as operating an illegal funeral parlour as alleged by the complainant) (see para. 11).

- (4) DLO had not obtained policy support before leasing the site at nominal rent because it was not required under the applicable leasing procedures (see para. 14).

We consider the explanations in points (1) to (3) justified, but that for point (4) arguable. It is inexplicable that LandsD has all along failed to draw up proper operational guidelines on the renewal of this type of STTs (i.e. tenancies granted at nominal rent, and at the time of granting of which, no policy support from B/Ds needs be obtained), thereby creating significant inconsistency between the processing of such tenancies and those that require policy support before renewal.

16. Currently, an essential principle for LandsD's decision on whether to approve or renew an STT at nominal rent is policy support from relevant B/Ds. Nevertheless, the processing of the type of STTs as the one in this case (i.e. tenancies the initial granting of which does not require policy support) is not realising this principle. In our opinion, LandsD should have been aware of this issue and resolved it properly.

17. Based on our views in paragraphs 15 and 16, The Ombudsman considers Allegations (1) and (2) partially substantiated.

Allegation (3)

18. Regarding the complainant's allegation that DLO had failed to reply to his email enquiry in detail, we consider that DLO had, in its reply to the complainant, only responded that it had granted the STT concerned according to relevant applicable procedures, elaborated on the approved use of the STT and its commencement date, and informed him that it had referred the complaint about "any illegal funeral business allegedly operated by the tenant" to FEHD for further action. It had failed to address some of his queries, such as whether DLO would consider the surrounding conditions of the site when processing the renewal of the STT, and whether it would terminate the STT in response to opposition from members of the public. We find DLO's reply unsatisfactory.

19. The Ombudsman, therefore, considers Allegation (3) substantiated.

Recommendations

20. The Ombudsman recommends that LandsD:
- (1) draw up operational guidelines on the processing of STTs at nominal rent whose **initial** granting does not require policy support from relevant B/Ds in order to give guidance to its staff on the handling of such matters as tenancy renewal and granting of tenancy at nominal rent, and to make its work in line with the current principle of having to have policy support;
 - (2) in respect of the STT in this case and other STTs of the same nature, seek advice from relevant B/Ds on whether they will give policy support to applications for tenancy renewal; and
 - (3) remind its staff to carefully read the enquiries from members of the public, so as to give them specific replies.

LandsD's Feedback on Our Comments and Recommendations

21. LandsD accepted our Recommendation (1). It will take stock of the number, categories, approval background, etc. of the STTs at nominal rent whose initial granting did not require policy support from relevant B/Ds. After thoroughly studying such data and consulting relevant B/Ds, it will draw up proper operational guidelines.

22. In response to our Recommendation (2), DLO has sought advice from DO on whether it will give policy support to the STT concerned. Subject to DO's reply, DLO will handle the renewal according to the existing applicable guidelines or such guidelines to be drawn up in the future. When handling the renewal of other STTs of the same nature, LandsD will take further action based on the study as mentioned in paragraph 21.

23. Regarding our comments in paragraphs 18 and 19, LandsD indicated that the complainant's enquiry about the renewal of the STT and whether it would be terminated immediately due to opposition from members of the public concerned such matters as the customs of indigenous villagers and the actual needs of local residents. DLO could not make a decision without prior consultation with relevant departments and stakeholders. Hence, DLO staff were unable to address the complainant's queries specifically in the email reply. However, DLO staff subsequently provided the

complainant with elaboration on the renewal of STTs, etc. via telephone. LandsD considered that DLO staff had made their best endeavours to address the complainant's queries within their scope of knowledge. In response to our Recommendation (3), LandsD had reminded its staff to provide members of the public with more detailed information as far as practicable, and give more specific replies.

Our Further Response and Final Remarks

24. We accept that for the reasons in paragraph 23, DLO was unable to specifically address the complainant's queries about the renewal of the STT concerned, etc. in its reply to the complainant. Nonetheless, DLO should have explained that in its reply. As DLO had failed to do so, The Ombudsman maintains her conclusion that Allegation (3) is substantiated.

25. We are pleased to learn that LandsD has reminded its staff to address future enquiries from members of the public in a specific manner, and will implement the recommendations in paragraphs 20(1) and (2). We will continue to follow through until our recommendations are fully implemented.

Office of The Ombudsman
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