

Lands Department's handling of occupation of Government land by an arch canopy Investigation Report

The complainant complained to this Office against the Lands Department (“LandsD”) between May and June 2021.

The Complaint

2. According to the complainant, who owns a flat in Housing Estate A, the incorporated owners (“IO”) of the housing estate built an arch canopy (“the Canopy”) at the main entrance of the housing estate many years ago. The Canopy, which was more than 30 feet long and 10 feet above the ground, occupied Government land. In March 2017, LandsD posted a notice at Housing Estate A to request the IO to remove before July 2017 the unauthorised structure that occupied Government land. Instead of complying with the notice, the IO applied to LandsD for regularisation of the structure concerned. In 2019, LandsD approved the application on the condition that the IO pay a prescribed rent for the Government land occupied (“the Site”), take up its repair responsibility and take out insurance for it. Subsequently, the IO decided not to proceed with its application. The complainant together with some flat owners of Housing Estate A had repeatedly requested LandsD to take enforcement action against the Canopy. Nevertheless, LandsD continued to extend the deadline of the IO’s application on the grounds that the IO had signed an undertaking to acknowledge that it would assume the repair responsibility for the Canopy and would take out insurance for it. The complainant pointed out that the management company (“the Company”) of Housing Estate A had engaged professionals to assess the condition of the Canopy. The professionals found the Canopy structurally unsafe and that it might endanger the safety of the residents. Besides, the IO had in fact no intention to accept LandsD’s conditions. But LandsD still allowed the extension of the application’s deadline. Hence, the complainant complained against LandsD for failure to properly handle the occupation of Government land by the Canopy.

Our Investigation

3. After conducting a preliminary inquiry, we decided to initiate a full

investigation into this complaint.

Our Findings

Relevant Information

4. The structures on the Site included the cover of a walkway (i.e. the Canopy) and its supporting structure, an L-shaped wall¹ and a metal gate.

Relevant Policy

5. On 28 March 2017, LandsD announced that it would strengthen enforcement actions against unlawful occupation of Government lands and tighten its arrangements for processing applications for “regularisation of unlawful occupation of Government lands” (“Regularisation Applications”). For cases involving unlawful occupation of Government lands that have commenced before 28 March 2017, LandsD will examine whether the basic requirements for regularisation of the unlawful occupation are met if an occupier submits a Regularisation Application and require the occupier to pay a fee before accepting his/her application. The occupier will not be required to reinstate the occupied Government land. Where a Regularisation Application is rejected, LandsD will resume its enforcement action. For cases where unlawful occupation of Government Lands started on or after 28 March 2017, LandsD will not accept any Regularisation Applications made by occupiers.

Sequence of Events

6. In March 2016, having found that a public rear lane was fenced off by the wall mentioned in paragraph 4, the Highways Department (“HyD”), as the department responsible for repairing the lane, checked with the District Lands Office concerned (“DLO”) the land status of that location.

7. In August 2016, when DLO conducted a site inspection for following up on matters regarding the land lease of a housing estate (“Housing Estate B”) next to Housing Estate A, the Canopy, L-shaped wall and metal gate on the Site were found. In January 2017, DLO confirmed that the L-shaped wall and Canopy had been unlawfully erected on the Site.

¹ The L-shaped wall has two walls, namely Wall A and Wall B.

8. On 7 February 2017, DLO issued an advisory letter to request the IO to promptly remove any structures that it had built and cease the occupation of the Site.
9. On 5 April 2017, DLO requested the IO, the Company and the society (“the Society”) that built Housing Estate B to remove the aforesaid unauthorised structures before 5 July and cease the occupation of the Site.
10. In June 2017, the Society informed DLO that it was willing to remove the walls and metal gate. Nevertheless, the Company pointed out that the IO did not build or own the covered walkway, hence the flat owners considered removing the Canopy not their responsibility. Moreover, as the street lighting was inadequate, the flat owners of Housing Estate A were worried that removing the Canopy and the implicated lighting system of the walkway would affect the safety of the residents commuting to the estate.
11. Between August 2017 and February 2018, DLO checked when the Canopy was built, and liaised with the Government departments concerned to explore how the Canopy could be removed having regard to the IO’s concern.
12. On 17 August 2017, the Society notified DLO that it had engaged an engineering consultant company (“the Consultant”) to carry out the removal works, and planned to complete the works in January 2018.
13. The Consultant wrote to DLO twice on 18 November 2017 and 17 March 2018 to provide an updated works plan and inform DLO that the completion date of the works was postponed to February and August 2018 respectively.
14. In May 2018, the District Review Board of DLO decided to request the Society to remove the walls and metal gate first before considering further land enforcement action against the Canopy in order to make space for the residents of Housing Estate A to access the estate and for the installation of a street lighting system during the time when the Canopy was being removed.
15. On 14 December 2018 and 11 June 2019, the Consultant wrote again to DLO to revise the works plan and inform it that the completion date of works was postponed to April and July 2019 respectively.
16. On 9 and 10 October 2019, DLO received the referral of complainant’s

complaint from 1823/the Buildings Department (“BD”). The complainant alleged that the Canopy was structurally unsafe.

17. On 15 October 2019, the Consultant notified DLO that the removal works would commence after the upgrading of Housing Estate B’s security facilities and would be completed in December 2019.

18. In October 2019, DLO conducted a site inspection to examine the structural safety of the Canopy, followed up on the matter with the IO and consulted the Government departments concerned. Follow-up actions had continued afterwards.

19. In December 2019, DLO reminded the Society twice to complete the removal works as soon as possible.

20. On 7 and 16 January 2020, the Consultant informed DLO in writing that the expected completion date of the removal works was February 2020.

21. In January 2020, the IO indicated that most residents wished that the covered walkway be kept and it would apply for its regularisation by way of applying for a short-term tenancy (“STT”) for renting the Government land occupied by the walkway. In April the same year, the IO submitted a Regularisation Application.

22. Between April and December 2020, DLO processed the IO’s application. DLO’s actions included: requesting the IO to sign an undertaking to assume the responsibility for the maintenance and structural safety of the covered walkway, requesting the IO to pay the related fee, consulting the Government departments concerned, etc. During the period, DLO had repeatedly urged the IO to sign the undertaking and pay the fee. And the IO had indicated that it would accept the terms in the undertaking.

23. On 28 May 2020, the Consultant informed DLO in writing that the Society could not hold a meeting to discuss the removal works due to the pandemic, and that the completion date of the works was postponed to July 2020.

24. On 29 June 2020, DLO issued a letter to the Consultant to remind it that the removal works had to be completed before the end of July.

25. On 7 August 2020, the Consultant wrote to inform DLO that the worsening

situation due to the pandemic had made holding a meeting by the Society to discuss the removal works impossible and that the completion date of the works was postponed to December 2020.

26. On 21 November 2020, the Society completed the removal works of Wall B (Wall A could not be removed as it was supporting the Canopy) and the metal gate.

27. On 15 December 2020, the IO replied to DLO that it had already taken measures to reinforce the supporting poles of the Canopy.

28. Between January and June 2021, the IO/the Company had written to DLO, explaining that a consensus had to be reached among the flat owners as to whether they should proceed with the application (see paragraph 21). As the flat owners were unable to hold a meeting due to the pandemic, the IO/the Company would reply later. During the period, DLO had met with the IO and the Company. According to the IO, the flat owners had divided views on the Regularisation Application. After considering various factors, DLO accepted that the IO/Company could reply later. On 27 July, the Company replied to DLO that during a special meeting, the flat owners had decided not to proceed with the Regularisation Application.

29. On 3 August 2021, DLO posted a notice at the Site, demanding the occupier to cease the occupation of the Site and remove all the unauthorised structures before 3 November.

30. During its site inspection on 3 November 2021, DLO found that the unauthorised structures were still there and instructed a contractor to remove them. Before removing those structures, the contractor needed to build a temporary access to protect the safety of pedestrians during the time when the removal works were being carried out. The completion date of the removal works was expected to be before February 2022.

Response from LandsD

Follow-up Actions Taken Prior to 2016

31. DLO received from the IO an STT application in January 1994 for renting the Site. DLO held that the Site should be open to the public and therefore rejected the application.

32. In November 2013, BD found the metal gate at the Site when removing unauthorised structures in the vicinity. BD then checked with DLO the land use of the area around the Site. Hence, DLO became aware of the occupation of the Site by unauthorised structures and issued two advisory letters to the Society to request it to cease the occupation of Government land. No record showed that DLO had continued to take follow-up actions afterwards.

33. LandsD admitted that DLO had failed to open a file in 1994 and 2013 in respect of the structures that were unlawfully occupying the Site. LandsD had reminded its staff not to neglect or delay any actions. Besides, upon completing its internal review, DLO reminded the staff responsible for land enforcement action to be more alert about enquiries from other Government departments on land use and examine whether any land enforcement matters warranting its enforcement action may be involved.

Follow-up Actions Taken in and after 2016

34. In March 2016, HyD enquired about the land status of the Site upon finding that it was fenced off by the walls. As it was an enquiry from HyD, DLO did not open a file for land enforcement action. In August 2016, DLO noticed the unlawful occupation of Government land during a site inspection for handling a land lease issue relating to Housing Estate B. In January 2017, DLO opened a file to handle the unlawful occupation.

35. After the deadline in DLO's notice of 5 April 2017 had passed, DLO prepared to take land enforcement action. However, the IO expressed worries about inadequate street lighting at the Site subsequent to the removal of the Canopy and the associated lighting system, and the safety of the residents commuting to the housing estate. After considering the complexity of the removal works and the IO's opinion, DLO decided not to take action against the Canopy and on other related matters until Wall B and the metal gate were removed. The time that the Society had taken to handle the matters concerning the removal of the illegal structures was acceptable because the removal works had involved such professional jobs as tender invitation and evaluation and preparation of removal works schedule. Moreover, the progress of the works had indeed been affected by the pandemic. Separately, the Society had all along reported the progress of the works to DLO.

The Regularisation Application

36. As the covered walkway had existed before 28 March 2017, DLO had to process the IO's Regularisation Application in accordance with the guidelines applicable to "regularisation of unlawful occupation of government lands". Accordingly, the IO did not need to reinstate the Site first. Since the IO said that a special meeting had to be held so that the flat owners could deliberate and decide on the details regarding the IO's application, and the pandemic had indeed necessitated the postponement of the meeting, DLO accepted that the IO would reply to it later.

37. Moreover, since LandsD had implemented special work arrangements during the pandemic, its work (including the processing of the Regularisation Application in question) had experienced delays.

Conclusion

38. In this complaint case, removing the Canopy, L-shaped wall and metal gate involved a complicated process, in which views from different stakeholders should be considered. DLO had already taken land enforcement action and processed the Regularisation Application in accordance with the established guidelines. In the process, DLO had to liaise with the Society, the IO, the Company and the relevant Government departments, and give due consideration to various factors. Besides, DLO had indeed needed more time to process the case during the pandemic. As regards the IO's change in its stance concerning the Regularisation Application, DLO could not have foreseen it. DLO would continue to follow up on the case in accordance with the law.

Our Comments

39. The complaint was about DLO's failure to properly handle the Canopy's occupation of Government land. As the matter was related to DLO's handling of the Society's occupation of Government land and the IO's Regularisation Application, we included both issues in our investigation.

Follow-up Actions on the Society's Occupation of Government Land

40. In June 2017, the Society indicated its willingness to carry out removal works.

When Wall B was removed and other related works were completed, it was already November 2020, which was more than three years later. While we understand that the tender exercise and removal works had needed time to arrange and complete, we consider DLO to have failed to discharge its monitoring duty as it had not requested explanations from the Society when it sought approval for postponement of its removal works for four times without justification between November 2017 and June 2019. While the outbreak of the pandemic was indeed unforeseeable, its impact on the progress of the works could have been avoided had DLO discharged its monitoring duty proactively.

41. As DLO had to wait until the Society removed Wall B and the metal gate before it could deal with the Canopy, the matters regarding the removal of the Canopy could not be handled before the completion of the removal works for Wall B and the metal gate.

Handling of the IO's Regularisation Application

42. Since IO's submission of the Regularisation Application in April 2020, DLO had continued to follow up on the matter with the IO and consulted the Government departments concerned. Although the complainant alleged that the IO had no intention to accept the conditions imposed by DLO, the IO had in fact once indicated that it agreed to the terms of the undertaking, and said that the flat owners had divided views on the Regularisation Application. And they would discuss the application details during a special meeting. Hence, DLO could not simply reject the IO's application.

43. Regarding DLO's acceptance of the IO's postponement of reply due to its failure to hold an owners' special meeting under the pandemic, we consider the decision not unreasonable.

44. When the IO decided not to proceed with the Regularisation Application, DLO immediately resumed its land enforcement action.

Follow-up Actions on Occupation of Government Land by the Canopy

45. In April 2017, DLO first requested the IO to remove the Canopy before the deadline of 5 July. After the IO denied having built or had the ownership of the Canopy, DLO checked with the Government departments concerned regarding when the Canopy was erected, and tried to work out a removal plan. We consider that DLO had

not set the matter aside.

46. Since there were objections from the residents of Housing Estate A and they were worried about the lighting after the removal works, which would become inadequate, DLO decided to request the Society first to remove Wall B and the metal gate before considering taking land enforcement action against the Canopy. This was to ensure that the residents of Housing Estate A could have access to the estate and to facilitate the installation of a street lighting system during the removal of the Canopy. We find such decision of DLO reasonable.

47. Although the removal works of Wall B and the metal gate were completed in November 2020, and DLO should then be able to follow up on the removal of the Canopy, DLO did not immediately request the occupier to reinstate the Site as the IO had submitted a Regularisation Application in April 2020. We consider DLO to have acted in accordance with the prevailing policy. When the IO finally decided not to proceed with the Regularisation Application in July 2021, DLO promptly posted a notice to demand the occupier to remove the unauthorised structures including the Canopy. We find no information suggestive of maladministration on the part of DLO.

48. As regards the complainant's safety concern about the Canopy, DLO had followed up on the matter with the IO and sought the opinions of the Government departments concerned. In the processing of the IO's Regularisation Application, DLO had also requested the IO to confirm that it would take up the responsibility for the maintenance and structural safety of the covered walkway. And in late 2020, the IO had already taken measures to reinforce the supporting poles of the Canopy.

Other Matters

49. DLO was aware of the unlawful occupation of Government land by the Canopy in 1994 and 2013. Moreover, when HyD found that the rear lane it was responsible for was fenced off, it asked DLO about the land status of the Site. DLO, however, did not open any file to deal with the unlawful occupation of Government land. We consider DLO's inaction a fault. LandsD categorically admitted the fault and had taken remedial measures.

Conclusion

50. Removing the Canopy included not only its removal but also Wall B and the metal gate, which had to be removed first. It also involved the handling of the IO's Regularisation Application. During the process, DLO had to liaise with the IO, the Company, the Society, the Consultant and the Government departments concerned on different matters. Nevertheless, we consider DLO to have failed to monitor properly the Society in the matters regarding the removal of the illegal structures. Moreover, although the complainant had not mentioned the fault pointed out in paragraph 49, we consider that the fault should be taken into account when determining whether this complaint should be substantiated.

51. In view of the investigation findings and analysis mentioned in paragraphs 39 to 50, we consider this complaint **partially substantiated**.

52. We wish that LandsD could learn from the experience in this case and would endeavour to accomplish its duties.

Office of The Ombudsman
18 November 2021