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Unauthorised structures in a high-rise high-density environment

The case of Hong Kong

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Abstract *Extending the ground works of Ho (1993), Baldwin (1994), Walters and Hastings (1998a, 1998b) on property management in Hong Kong, this short paper documents the context[1] of research on illegal structures, explains the incentive for building illegal structures on government land and private property and discusses the significance of illegal structures for the proprietor and the property manager, as well as the relevant legislative provisions and policies.*

Research on illegal structures in Hong Kong

Illegal structures[2] or “unauthorised building works” (UBW) (referred to as unauthorised structures below) as means for human habitation in Hong Kong attracted international academic attention in the past as an issue of squatting. This issue was regarded as a “housing problem” from the economic, bio-social or social points of view, when Hong Kong was a “sweat shop colony” (Drakakis-Smith, 1979, 1980).

The squatting issue was largely one of illegal occupation of Crown land by people with small means who could not afford high rents in the private housing sector (Lai, 1985). Because of the frequent fire hazards, which put stress on government’s relief expenditure, the colonial government introduced low-rent public housing in 1954. Such public housing took the lead in experimenting with high rise build forms[3] for residential properties (Lai, 1993). In fact, squatting and fires have become problems for the colonial administration since the first day of colonialisation in 1842 (Pryor, 1983).

Since the late 1970s, when Hong Kong emerged as an “international financial centre”, attention has shifted to the potency and progress of government “town planning” in eradicating illegal structures as substandard housing (Pryor, 1983). By the late 1980s, all hillside squatting on Government land (the term which has replaced “Crown land” since the making of the Sino-British Joint

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Declaration concerning the future of Hong Kong in 1984) was cleared (Smart 1992). Unauthorised structures in Hong Kong have apparently ceased to be an interesting case for the international researcher.

The reality is that the development of illegal structures has persisted and indeed proliferated on private property in both the urban and rural areas. Local professional and academic research interest was largely captured by the emergence of statutory planning enforcement (Chan, 1998; Lai, 1998b, 1998c, 1999; Tang and Leung, 1998), which is applicable under the *Town Planning (Amendment) Ordinance* only to rural areas once covered by Interim Development Permission Area Plans (Lai 1999).

The phenomenon of unauthorised structures on private property, however, is equally interesting for a number of academic and practical reasons. One such reason is that they fall within the ambit of the modern property management of a uniquely high-density high-rise built environment (Nield, 1989; Davison, 1990). As the legislative, policy and political context of illegal development in the rural areas is far more complicated, we shall defer a discussion of the rural area to a separate paper and focus in this paper on unauthorised structures in high-rise buildings in the urban areas.

The economic incentive to build unauthorised structures in private property in the urban areas

In functional terms, unauthorised structures comprise three broad types, namely:

- (1) Type 1: advertisement sign boards projecting from external walls or resting on roof tops and satellite discs for television and mobile phones.
- (2) Type 2: improvised measures to enhance the amenities of property, such as canopies above windows, flower racks.
- (3) Type 3: structures to create space for human habitation.

For the purpose of this paper, we shall deal with Types 2 and 3 structures only, though the analysis of the latter two would also inform on that for type 1 structures, which merit a separate treatment.

The incentive to build illegal structures to enhance amenities in private property in the urban areas is largely created by the mismatch between approved architectural design and actual needs or preferences of inhabitants. On the other hand, the incentive to build illegal structures for habitation in private property in the urban areas is largely economic. The existence of these structures reflects the fact that urban land, or in fact space, in Hong Kong is scarce and that the population in Hong Kong is hungry for urban space. One attraction of urban space is because it is where most employment opportunities are found. With a density standard of 2,500 persons/hectare (Planning Department, u.d.) and a population growth rate of one million per decade, Hong Kong has to resort to an extremely high population density as well as a high-rise architectural solution for all kinds of land uses. This solution applies not

only to office and housing uses, but also to industrial and community uses (the latter includes schools for the youth and columbaria for the dead).

The high-rise solution has produced residential blocks, ranging from ten to more than 40 storeys, which are mostly developed according to planning by contract (Lai, 1998a) and according to the terms specified in the lease. Residents dwell in small units in these blocks. A typical private housing block built in the form of a “twin tower” with 30 storeys and 12 units on each floor would house more than 1,000 people. In recent years, public and private buildings exceeding 40 storeys have become popular.

The units are owned under strata titles as assignees of shares of leasehold title to the land occupied by the blocks. The qualities of property management of these blocks vary substantially, depending on whether they are governed by Deeds of Mutual Covenant (DMC) or managed by professional management companies. One crucial aspect of property management in respect of illegal structures is the control of common areas within a building block, which may include the roof top, podium deck, canopies above the ground floor and fire escapes.

Generally, private housing estates comprehensively developed according to a master layout plan as specified in the lease and/or statutory zoning for the land are better managed, where *ad-hoc* or “piecemeal” development, other than for “luxurious” apartments, are less well managed. Units in comprehensively developed and centrally managed estates, which often have ten to 30 blocks of buildings with community facilities, fetch better prices than those in piecemeal development (Lai, 1998b).

In property management terms, unauthorised structures can be categorised into two categories, namely:

- (1) those built in comprehensively planned estates; and
- (2) those in *ad-hoc* or “piece meal” development.

The buildings in an estate under the former categories built by the private sector is mainly managed by a property management company, normally a subsidiary of the developer, specified in the DMC. The owners of both categories of development (residential/non-residential) can incorporate under the *Building Management Ordinance* for the purpose of replacing the property management company associated with the developer with one appointed by the incorporated owners. In practice, however, the owners of most large private housing estates have remained unincorporated, though those in most small-scale housing developments have been incorporated.

The occurrence of Types 2 and 3 unauthorised structures is easily understood in older and non-comprehensively planned private housing blocks, a few of which were built before the Second World War. They reflect the absence or defective nature of property management. As space is valuable in Hong Kong, proprietors of units have an incentive to enclose common areas and construct Type 3 structures for their own use or to “lease” them to squatters for gain.

These structures may be a hut on the podium deck or canopy or an outright addition of one extra storey or a penthouse on the roof top. The appearance of these structures varies. While a visual inspection can establish that some are clearly improvised measures, others have the appearance of forming part of the approved building. Another popular method is to construct a hanging iron cage structure, which projects onto streets and is cantilevered from the external wall of the building block.

Types 2 or 3 unauthorised structures are comparatively less common and less conspicuous but not absent from comprehensively planned private housing estates, as revealed in the discussion below.

Relevance for proprietors and property managers

While unauthorised structures are obviously serving a number of needs, they are problematic in terms of a number of property management considerations, apart from the fact that they are unauthorised. These considerations include structural loading, fire risk, visual and aesthetics, lighting, ventilation, conveyancing and estate duty. These considerations are briefly explained below.

Loading implications

Unauthorised structures add to the loading of buildings. Though the safety factors of Hong Kong buildings are very high, failure and collapse of building structures (authorised or otherwise) due to illegal alteration or addition is particularly hazardous in a high-rise and high-density built environment. Fatal accidents do occur (refer Table I). The presence of unauthorised structures is a

Date	Accidents	No. of injuries and deaths
17-8-90	An illegal 1-tonne canopy fell from one building in Mong Kok	1 killed
27-10-90	An illegal 50-tonne reinforced concrete canopy fell from an industrial building in To Kwa Wan	6 killed and 9 injured
15-10-93	A balcony collapsed in Yau Ma Tei	4 injured
1-8-94	A 12-tonne reinforced concrete canopy collapsed in Aberdeen	1 killed and 16 injured
15-11-95	An illegal canopy collapsed in Kwun Tong	1 killed and 2 injured
16-4-97	A concrete canopy collapsed in Kwun Tong	1 killed
19-7-97	A concrete balcony from a residential building collapsed in North Point	5 injured
21-10-97	An illegal cantilevered metal cage for squatters collapsed in Yau Ma Tei	1 injured
31-7-98	An illegal canopy collapsed in Kwun Tong	1 killed and 3 injured
10-8-99	A portion of an illegal concrete canopy fell from one building in Mong Kok	1 killed

Table I.
Accidents caused by dilapidated building elements and illegal structures in recent years

Source: Excerpt from news and partly from Chen (1999)

source of hazards for Hong Kong, particularly in the typhoon season, which lasts from May to November.

Fire risk implications

Where unauthorised structures create potential fire loads or obstruct “means of escape” (MOE) requirements under the Buildings Ordinance, they create fire hazards for users of the property and the public and/or render fire fighting more difficult when fires break out in the building. It should be noted that it is the Building Authority, not the Director of Fire Services, which is the approval (and enforcement) authority regarding MOE (Lai and Ho, 2000).

Visual and aesthetics implications

Because these structures are illegal and visually obstructive or intrusive, users of the building block or neighbouring blocks affected by the unauthorised structures have an incentive to make a complaint to the Building Authority, with the hope that enforcement measures can be taken to their advantage.

Lighting and ventilation

Unauthorised projections, such as canopies and hanging iron cages, obstruct natural lighting and ventilation. It is particularly relevant in office and residential buildings in which certain areas of “prescribed windows” have to be provided to habitable rooms. Typically these windows need to face into a space uncovered and unobstructed vertically. In cases where there are unauthorised projections from the external walls, this requirement is likely to be infringed for windows below the unauthorised projections.

Conveyancing implications

Property with unauthorised structures, irrespective of types, may entail that the title to the property is defective. This consideration may not be significant when property prices are rising. However, when property prices fall drastically after a sale and purchase agreement is made, buyers may seek grounds to evade the completion of the transaction, rescind the contract to purchase and get back any consideration paid to the sellers. The presence of unauthorised structures is one of the common grounds used by buyers in their attempts to rescind sale and purchase agreements (Davision, 1990; Nield, 1989, 1998; Chan and Wong 1998), as revealed in the Court of First Instance (formerly the High Court before 1997) case of *Mexon Holdings Ltd v. Silver Bay International Ltd* [1998] MP No. 589/98, which arose in the context of the “Asian financial crisis”.

Estate duty implications

Unauthorised structures are “property” in Hong Kong and is therefore subject to estate duty under the Stamp Duty Ordinance, as confirmed in the Court of First Instance case *Man Kam-hung v. Commissioner of Estate Duty* [1965] HKLR 407 (Halkyard and Vanderwolk 1997). Proprietors should bear this in mind for tax planning purposes.

The relevance and weight of these considerations as part of the duty of the property owner or manager depends on the terms of reference of the property manager and the time of appointment. As regards loading and fire risks, the property managers have a fiduciary duty to ensure that occupants of property for which they are responsible do not create dangerous situations for others, even where this duty is not expressed in the Deed of Mutual Covenant (DMC). Needless to say, the considerations listed have budget (i.e. insurance, liability, removal) implications.

Contractual and legislative rules

The most important factors affecting the obligation of the owners and the duty and power of the property manager in respect of unauthorised structures are:

- (1) the terms of the Crown/Government lease;
- (2) the terms of the DMC;
- (3) the Buildings Ordinance; and
- (4) policies of the Building Authority regarding unauthorised structures.

The first three factors are briefly explained below.

Crown/Government lease

The land lease is a civil contract (Roberts, 1975; Lai, 1998a) between the Government, as represented by the Lands Authority, and the lessee, the developer initially and assignees (individual owners of units) subsequently, that regulates land uses and build forms. Its terms are always subject to legislative controls.

Where such a land contract, as of the case in the so-called “999 years unrestricted lease”, does not specify that building works need to be approved by the relevant authority, enforcement against unauthorised structures can come only under orders of the Building Authority exercising its authority under the Buildings Ordinance.

Where such a contract, as in most modern grants, specifies that building works need to be approved, action against unauthorised structures can be enforced statutorily by the Building Authority as well as contractually by the Lands Authority. Extreme cases may trigger actions for re-entry of land by the Lands Authority (Nield, 1989; Chan and Wong, 1998).

As explained below, government has a policy priority to take action against unauthorised structures which are in breach of lease conditions as well as the Buildings Ordinance. An example is where a structure for industrial activities, not approved by the Building Authority, is constructed contrary to the user restriction for a piece of residential land.

DMC

The erection of unauthorised structures, including very minor Type 2 structures, are generally breaches of the DMC in terms of being an alteration of

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the “external appearance” of the relevant building block or estate (Merry, 1989, 1990). The external appearance clause is commonly found in a modern DMC.

Buildings Ordinance

Statutory enforcement against illegal structures on private property in the urban areas, including new towns in the New Territories, is solely governed by the Buildings Ordinance.

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According to S. 24 of the Buildings Ordinance, any building works which have been or are being carried out in contravention of any of the provisions of the Ordinance are classified illegal structures or UBW. The Building Authority may initiate enforcement action for these structures or works by serving an order in writing on the owner requiring the owner to put an end to the contravention. This would include demolition of the unauthorised structure and/or reinstatement works to comply with the latest approved plans. A person issued with such an order may make an appeal against the order before the Building Appeal Tribunal, which will decide whether to allow or dismiss the appeal, or remit the case to the Building Authority for reconsideration. Orders made under S. 24 of the Buildings Ordinance are registered in the Land Registry against the owner as an encumbrance. Where the order is made on an unauthorised structure erected in the common area of a building, the title of all units within the building are affected, until the order has been complied with.

Policies of the Building Authority

The extent of the problem of the erection of unauthorised structures (refer Table II) prevents the Building Authority from taking action against all of them at the same time (refer Table III). There is no policy to systematically demolish them either, unlike the case of the clearance of squatter villagers on Government land, which was tied in with a rehousing and redevelopment programme. Sporadic attempts by individual staff of the Building Authority to clear illegal structures from roof tops may end in confrontation between angry

Year	Dangerous buildings	Dangerous advertising signs	Unauthorised building works
1990	838	242	7,009
1991	1,022	300	7,420
1992	1,323	327	6,992
1993	1,344	285	8,437
1994	1,428	234	7,596
1995	1,974	230	8,203
1996	2,567	165	9,913
1997	3,658	350	12,427
1998	3,851	250	12,577

Table II.
Reports received about dangerous buildings, advertising signs and unauthorised building works

Source: Buildings Department (1998) *Monthly Digest*, December, 1998, HKSAR

Year	Building repairs	Removal of dangerous advertising signs	Removal of unauthorised building works
1990	1,209	232	2,269
1991	1,293	212	6,857
1992	852	158	6,969
1993	1,042	67	8,759
1994	299	192	4,890
1995	188	195	3,883
1996	290	202	3,479
1997	525	160	3,103
1998	329	310	3,455

Table III.
Statutory orders issued on dangerous buildings, advertising signs and unauthorised building works

Source: Buildings Department (1998) *Monthly Digest*, December, 1998, HKSAR

crowds, typically comprising recent migrants from Mainland China, and the law enforcer.

The Building Authority faces a real dilemma. On the one hand, the political consequences can be serious if such confrontation arising from the dislocation of a large number of people escalates. On the other hand, there is a need to ensure that public safety is not jeopardised. Besides, an enforcement order may be issued as a result of the complaints of informers aggrieved by the presence of the structures. The person responsible, on receiving such an order, will naturally try to establish that the structures involved are indeed authorised, or to delay the execution of the order as long as possible.

Thus, a pragmatic approach has been adopted by the Building Authority in its action against unauthorised structures in the form of a policy of “toleration” in respect of the priority of clearing illegal structures. This policy, announced in 1988, after public consultation (Buildings and Lands Department, 1988), is known as the “The Control of Unauthorised Building Works” or “Unauthorised Building Works Policy” (“the 1988 Policy”). This policy replaced the so-called “1975 Policy” which gave priority to action against unauthorised structures where they “pose a hazard to life and limb” and are “in progress” when a complaint was received.

Under the 1988 policy, unauthorised building works were classified into a high priority group for which enforcement action shall be taken as a matter of urgency and a low priority group for which enforcement action may be deferred. The high priority group has four sub-categories. These are unauthorised building works:

- (1) which constitute “an imminently dangerous situation where there is an obvious danger to life or property”;
- (2) “significant new” ones, irrespective of the date of completion;
- (3) those which are required for demolition by public bodies or government agencies; and

- (4) “major” ones which contravene both the Buildings Ordinance and lease conditions at the same time.

Works not covered by the high priority group would fall into the low priority group for which no enforcement action will be taken for the time being. Cases in this group would, however, be upgraded when it is considered appropriate to do so. Naturally, one of the practical concerns for proprietors and property managers is the risk of enforcement. There are two lessons from our analysis (Lai and Ho, 2000) of the relevant building appeal cases decided by the Appeal Tribunal under the Buildings Ordinance:

- (1) As for the 1988 policy, there appears to be a distinction between those which may involve “social unrest”, which occurs normally with squatter structures on the roof tops of old buildings, as represented by the *Ying Hing Building* case[4], and those which may not. In the former, the Appeal Tribunal was rather lenient with the occupant. In the latter category, the leading case is the *Discovery Bay* case[4], as followed in the *Marina Cove* case[4], and further developed in the *Sam Pei Square* case[4], in respect of the proof of “an immediate danger to life or property”. In comprehensively-planned estates of this category, the Tribunal can be very strict with even minor unauthorised structures, as exemplified in the *Laguna City* case[4], in which a 3.3m × 2.6m × 2.5m barbecue cabinet on the rooftop was considered illegal.
- (2) As for rule of evidence, the *Discovery Bay* case[4], *Marina Cove* case[4], *Shek O Village* case[4], and *Sam Pei Square* case[4] show that strict criminal standards are adopted in respect of the reliability of expert evidence.

Unauthorised structures, however minor, in large comprehensively-planned private residential estates are most susceptible to enforcement action by either the property management or Building Authority. The reasons are threefold. First, the owners have less incentive to create title defects for their units, which have a high re-sale rate. Illegal structures that are erected in a private unit may affect the overall image of the property. Other owners would put pressure on the property management and/or the Building Authority to take action. Illegal structures that are erected by an owner in the common area of a building, such as a commonly-owned flat roof or passage, will affect the titles of all units within the estate when a S. 24 order is served against the common area by the Building Authority. Other owners will press the manager to take action according to the provisions of the DMC.

Second, any illegal structure in these up-market units is unlikely to be works that accommodate squatters. Hence, the chance that enforcement by the manager or the Government would trigger “social unrest” is minimal.

Third, both the proprietors and property manager in these estates are also financially more resourceful to take legal action against the owner who erects

unauthorised structures. Large estates generate huge financial reserves from management fees. Also, as large estates are normally managed by companies connected with developers, their property managers would have better expertise to use the legal machinery. Thus, enforcement actions against unauthorised works taken by these managers are often more efficient than those taken by incorporated owners. In addition, as the larger estates also have commercial elements that are rental property of the developer, the property manager appointed by the developer would have great incentive to maintain a tidy appearance of the entire development. Thus, prompt actions would be taken where an incidence of illegal structure being erected is reported.

Conclusion

Government has contemplated tightening up measures against unauthorised structures. However, resources could be saved if property owners have a better understanding of the DMC, the relevant procedures for carrying out alteration and addition works and the consequences of erecting unauthorised structures. Property managers, as the paid custodian of the buildings they look after, should take the lead in this regard by better communication with the owners. The Building Authority may also wish to consider the possibility of making use of private resources in certification of minor alteration works by practising building surveyors or structural engineers, as they would reduce the cost of compiling with statutory requirements.

Notes

1. For factual details and analysis of the property market of Hong Kong, see Walker *et al.* (1995), introductory sections to Walters and Hastings (1998a, 1998b), Renaud (1997). For a general exposition of the development process in Hong Kong, see Poon and Chan (1998).
2. Building works which are not exempted from the Buildings Ordinance and carried out without approval or are being carried out in contravention of any of the provisions of the Building Ordinance are classified illegal structures or UBW.
3. The Government contemplated in 1966 the construction of 50-storey public housing blocks at Ping Shek (Lai, 1993).
4. For detailed descriptions and rulings of the building appeal cases, see Lai and Ho (2000).

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