**Administration's Response to Inquiries of the Subcommittee on Places of Public Entertainment Ordinance (Amendment of Schedule 1) Regulation 2002 and Places of Public Entertainment (Exemption) Order (Meeting of 11 October 2002)**

The following responses are made with reference to the minutes of meeting of the captioned subject:

Paragraph 3

2. The requested legal advice on the interpretation of admission of "general public" is enclosed in **Annex A**. A flow chart to illustrate the application and approving process for issuing a Place of Public Entertainment (PPE) licence is enclosed in **Annex B**.

Paragraph 4(a)

3. Those parties, which are open only to members of a club, society, association, union etc or to students of a tertiary institution, are not public entertainment for the purpose of Places of Public Entertainment Ordinance (PPEO) and hence PPE licences would not be required. Please refer to paragraph 5 of **Annex A**.

4. It should be noted that whether organizers of activities sell tickets or receive other monetary considerations is irrelevant in deciding if the activities are public or private for the purpose of PPEO.

Paragraph 4(b)

5. We have reservation on the suggestion to grant exemption to those places such as halls, theatres, multi-purpose sports centres or playground, auditorium, etc, of tertiary institutions from the operation of the PPEO.

6. Although some of the aforesaid places in tertiary institution are designed for the congregation of public, most of them are not purposely designed/built for all kinds of entertainment activities, e.g. dance party in sports centre; circus inside a school hall; stage performance inside a playground, etc.. Those entertainment activities, which may involve use of stage, combustible materials for sets and props as well as the provision of additional seating accommodation for attendees, will either increase the fire load in the premises or require additional consideration on the available means of escape. Original provisions for fire and building safety may not be adequate after the change in use of the premises.

7. On the other hand, premises under the management of LCSD or HAD could be exempted because as an administrative arrangement, these departments

would refer entertainment applications received to FSD for comments. A set of fire safety recommendations will be formulated accordingly for the department concerned to impose as part of the conditions for hiring the venue.

Paragraph 4(c)

8. Departments concerned always do their best to expedite the speed of processing PPE licence applications for dance parties. In fact, we only requires at most 17 working days in total for administrative proceedings as shown in the flowchart at **Annex B**. The actual amount of days required for the issue of the licences is greater than 17 working days because the applicants may require some time to comply with the requirements laid out by the licensing authority. Taking into account of the present workload and resources of departments concerned, we are afraid that we are unable to reduce the maximum processing time any further.

Paragraph 4(d)

8. As discussed in paragraphs 6 to 10 of **Annex A**, the club membership in this scenario is a mere fiction and the club is a sham. The dance party is therefore a public entertainment for the purpose of PPEO.

Paragraph 4(e)

9. Yes, under such circumstances the dance party would be caught by PPEO since it would become a public entertainment.

Paragraph 4(f)

10. The answer is no. It is because those premises are exempted from the licensing requirements under PPEO by section 2 of the Places of Public Entertainment (Exemption) Order.

Paragraph 4(g)

11. The single act of selling tickets is not "keeping" or "using" for the purpose of s. 4(1) of PPEO. A person does not need a licence until he keeps or uses the place of public entertainment. If a person sells tickets in advance but the place of public entertainment has not opened yet, he will not be guilty under s.4 of PPEO. If the place is open and he sells tickets, he will be guilty, not for selling tickets, but for keeping or using the place of public entertainment without a licence.

Home Affairs Bureau
October 2002

**Annex A**

**Legal Advice for Discussion in the Subcommittee on Places of Public Entertainment Ordinance (Amendment of Schedule 1) Regulation 2002 and Places of Public Entertainment (Exemption) Order**

Interpretation of "general public"

1. Section 2 of the Places of Public Entertainment Ordinance (Cap.172) defines "public entertainment" as –

> "any entertainment within the meaning of this Ordinance to which the general public is admitted with or without payment".

The term "general public" in the context of Cap.172 has so far not been discussed in any courts in Hong Kong. However, the following cases in which the meaning of the term "public" or "member of the public" in other contexts was discussed may shed some light on the meaning of "public entertainment" and "general public" in the context of Cap.172.

2. In the English case of *Beynon and another v Caerphilly Lower Licensing Justices* [1970] 1 All ER 618, on an application for a music and dancing licence under s.51 of the Public Health Acts Amendment Act 1890, the Court, when considered whether the premises are being used for public music and dancing, applying the principles laid down in *Gardner v Morris* (1968) 132 JP 513[1] and held that the test is whether the entertainment is open to the public in the sense that **any reputable member of the public on paying the necessary admission fee can come in and take part in the entertainment.**

3. In *Wong Yiu Wah & Others* [2001] 1 HKC 527, the second to fourth appellants were convicted of soliciting for an immoral purpose in a public place, contrary to s.147 of the Crimes Ordinance (Cap.200). In an appeal to the Court of First Instance, the issue whether the club premises was a "public place" was discussed. The Court of First Instance was of the view that whether the club premises is a public place depends on the **factual finding** whether entry was by licence or invitation or whether entry was open to members of the public. The Court held that so long as the

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[1] Lord Parker CJ in *Gardner* observed that "the condition already referred to is dealing with the opening of the premises on Sunday for entertainment of public dancing. In my judgment, the test of that matter is not whether one, two or three or any particular members of the public were present, but whether on the evidence, the proper inference is that the entertainment was open to the public in the sense that any reputable member of the public on paying the necessary admission fee could come into and take part in the entertainment".

club was open for business, inviting the public to enter, it was a place to which the public was permitted to have access and therefore a public place within the meaning of s.117 of the Crimes Ordinance (Cap.200). It did not matter whether they were there as licensees or invitees of the occupier.

4. In the case of *R v Lam Shing Chow* (1985) 1 HKC 162, the question for the court was whether the common corridor of a private building was a "public place" for the purpose of Public Order Ordinance (Cap.245). The Court held that persons other than the occupiers who may lawfully enter the premises are neither members of the public nor any section of the public. Their legal right to access does not arise from **being members of the public** but solely by virtue of their **status** as licensees or invitees of the occupiers. In the circumstances, the Court is satisfied that the common corridor of the private building in question was not a public place within the meaning of s.2 of the Public Order Ordinance[2].

5. In the light of the above case, it appears that whether an entertainment is a "public entertainment to which the general public is admitted" would depend on the facts and circumstances of each case. It is likely that the Court would look at the question of whether in fact any members of the public can come in and take part in the entertainment and whether they are admitted as being members of the public or in other status. Applying the above test, if an entertainment is open to students of a tertiary institution and their guests only, the entertainment would not be a "public entertainment" for the purpose of Cap.172. On the other hand, if the admission to the entertainment is by way of on-the-spot registration of a club membership, it is very likely that the Court would find that the club is a mere sham and in fact members of the public are being admitted. The following cases may illustrate this.

<u>Sham club or association</u>

6. In *R v Leung Kwan Fu & others* [1977-1979] HKC 494, the appellant were convicted of keeping a disorderly house contrary to common law. The premises in question were registered under the Societies Ordinance (Cap.151) as a private club known as "Hong Kong Artists' club". Police observations showed that it was a sham club. Instantaneous memberships were given and indecent shows were nightly staged. The Magistrate was satisfied that it was not a true club but a place **to all intents and purposes open to all comers**. It was a sham club and any member of the public who was prepared to pay could go in. **Membership was a mere fiction**.

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[2] s.2(a) of Public Order Ordinance and s.117 of Crimes Ordinance defines "public place" as "any place to which for the time being the public or any section of the public are entitled or permitted to have access, whether on payment or otherwise, and, in relation to any meeting, includes any place which is or will be on the occasion and for the purposes of such meeting, a public place".

On appeal, the High Court reaffirmed the Magistrate's finding that the place was a sham club.

7. Similarly, in *R v Ng Lok Ngai & others* [1987] 2 HKC 463, the premises in question was operated as a private club by a limited company and registered under the Societies Ordinance. The Court was of the view (obiter) that the manner in which the various police officers were granted so-called membership at the association does not alter their status as members of the public and the admission of so-called members into the association was a mere sham and the association was operating under the guise of a company limited by guarantee.

8. On the contrary, in *AG v Lam Yick Kwan* [1985] 1 HKC 208, the respondents were charged with managing or assisting in the management of a gambling establishment. The premises in question was registered as a social club designed primarily for person involved in paging services in Hong Kong. On the facts, the Magistrate was satisfied that the club was a **genuine** social club, was private and the playing of mahjong was not promoted or conducted by way of trade or business or for the private gain of any person. On appeal by the Attorney General, the Court upheld the Magistrate's finding and dismissed the appeal.

9. In another English case *Director of Public Prosecutions v Milbanke Tours Ltd.* [1960] 2 ALL ER, an organisation called the International English Language Association, which any members of the public could join on payment of a subscription and one of whose objects was the advancement throughout the world of a greater knowledge of the English language, ran tours through a travel agency. The question in that case was whether the journey was "available to members of the public from time to time seeking to take advantage of it" and contravened the Air Corporations Act 1949[3]. The Court found that the association was a **perfectly genuine, reputable association**. The Court said (at p.471F) that –

> "One can imagine cases where it could be said that the whole thing was a sham, where in effect there was no proper organisation, but where the price of the tour was split up…in an attempt to get round the section. As I have said, there is no suggestion of that here, and I cannot see that the magistrates could have held otherwise than they did, namely, that those who travelled were bona fide members of I.E.I.A."

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[3] S.24(1)(5) of the Air Corporations Act 1949 provided an offence for a person, other than the air corporations and their associates, to carry passengers by air for reward on a "scheduled journey" and by s.24(2) a scheduled journey was one of a series amounting to a service the benefits whereof were "available to members of the public from time to time seeking to take advantage of it.

The Court further said that (at p.472A) that –

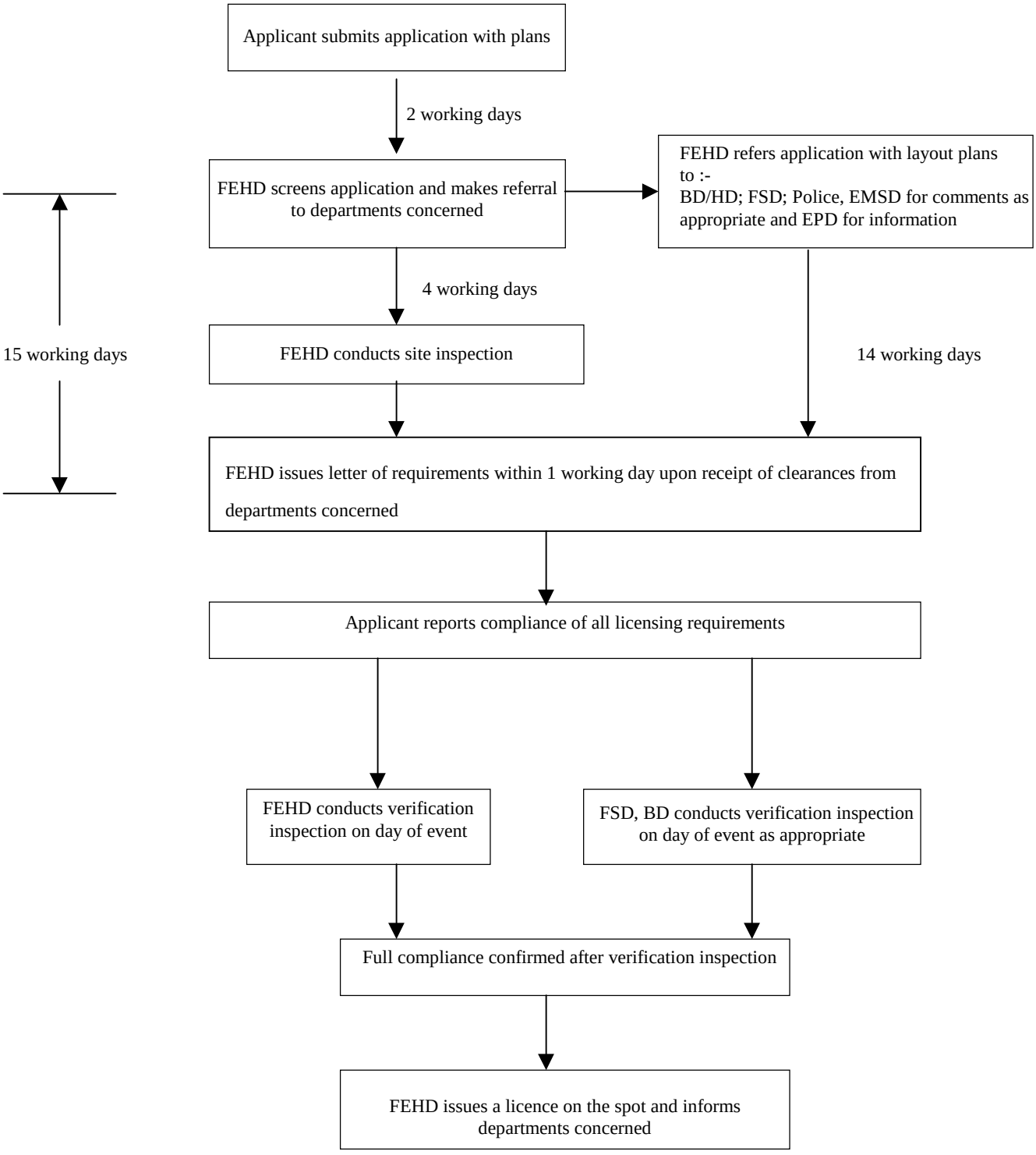
> "The fact that anyone can join an association and he does so not because he wants to further the association's objects but for purely selfish reasons of his own, does not prevent him from being a member [of the association] once he has joined. The case here finds that the passengers in question travelled as bona fide members of the association."

10. In the light of the above principles, it appears that the Court when deciding whether an entertainment which is open to members of a club/association is a public entertainment would look at whether the association/club is a **bona fide, genuine** association/club, and all the members are bona fide members or in fact it is a place to all intents and purposes **open to all comers** and the club is a mere **sham** and the membership is a mere **fiction**. Therefore, if any person organises any dance party the admission to which is by way of on-the-spot registration of a club membership, it is very likely that the membership is a mere fiction and the club is a sham to cover the facts that members of the general public are admitted. In this case, the persons holding the entertainment are subject to the licensing control under Cap.172.

Department of Justice
17 October 2002

**Annex B**

**Flow Chart for Processing of Application for**
**<u>Places of Public Entertainment Licence (PPEL)</u>**
**(Dance Party)**




<u>Legend</u>

FEHD : Food and Environmental Hygiene Department
BD : Buildings Department
HD : Housing Department
FSD : Fire Services Department
EMSD : Electrical & Mechanical Services Department
EPD : Environmental Protection Department