

立法會

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Paper for the House Committee meeting on 24 January 2003

Report of the Subcommittee on Appeal Board on Closure Orders (Immediate Health Hazard) Rules

Purpose

This paper reports on the deliberations of the Subcommittee on Appeal Board on Closure Orders (Immediate Health Hazard) Rules.

Background

2. The Public Health and Municipal Services (Amendment) Ordinance 2002 was enacted on 23 January 2002, after scrutiny by a Bills Committee.
3. The Amendment Ordinance amends the Public Health and Municipal Services Ordinance to expedite the process for closing unlicensed food establishments and to empower the Director of Food and Environmental Hygiene (DFEH) as the Authority to close unhygienic food establishments the use of which poses immediate health hazard. The Secretary for Health, Welfare and Food has appointed 14 February 2003 as the commencement date of the Amendment Ordinance.
4. Section 128D of the Ordinance provides for the establishment of an appeal board to hear and determine appeals against DFEH's decision to make a closure order or his refusal to rescind a closure order made on grounds of immediate health hazard.
5. Pursuant to sections 128D of the Ordinance, the Chief Executive has appointed a Chairman, two Deputy Chairmen and 22 members of the Appeal Board. The appointments are for a period of three years effective from 15 November 2002. Secretariat support to the Appeal Board is mainly provided by a Principal Assistant Secretary and a Senior Executive Officer of the Health, Welfare and Food Bureau (HWFB).

The Appeal Board on Closure Orders (Immediate Health Hazard) Rules

6. Section 128D(20) of the Ordinance provides that the Chairman of the Appeal Board may, in consultation with the Secretary for Health, Welfare and Food, make rules to -

- (a) regulate the making of appeals to the Appeal Board:
- (b) specify the documents to be lodged or served in relation to appeals:
and
- (c) provide for the hearing and determining of those appeals and the enforcement of the decisions of the Appeal Board.

7. The Rules were gazetted on 6 December 2002 and tabled in Council on 11 December 2002. The Rules will come into operation on 14 February 2003.

The Subcommittee

8. At the House Committee meeting on 13 December 2002, Members agreed to form a subcommittee to study the Appeal Board on Closure Orders (Immediate Health Hazard) Rules. To allow time for the Subcommittee to examine the Rules and report to the House Committee, the scrutiny period of the Rules has been extended to 12 February 2003 by resolution of the Council.

9. Under the chairmanship of Hon Fred LI, the Subcommittee has held two meetings with the Administration and Mrs Lily YEW, Chairman of the Appeal Board. The membership list of the Subcommittee is in **Appendix I**.

Deliberations of the Subcommittee

Composition of the Appeal Board

10. The Administration has informed the Subcommittee that, in line with the recommendation of the Bills Committee on the Public Health and Municipal Services (Amendment) Bill 2001, members of the Appeal Board have been drawn from different sectors of the community, including professionals in legal, medical and accounting fields, businessmen, and representatives from the catering trade. In accordance with section 128D(8) of the Ordinance, for the purposes of hearing an appeal, three persons including the Chairman (or Deputy Chairmen) and two other members who will be selected in rotation will form a board to hear an appeal.

11. Hon Tommy CHEUNG has expressed concern that out of the 22-member Appeal Board, there are only two representatives from the catering trade. He has suggested that the Chairman of the Appeal Board should endeavour to include a representative from the catering trade as far as practicable when appointing members to form a board to hear an appeal. The Administration has noted the suggestion.

Time limits for lodging appeals and fixing hearings, etc.

12. Under section 128C of the Ordinance, a person may, within seven days after a closure order or a refusal to rescind a closure order is issued, appeal against DFEH's decision by serving a notice of appeal on the Chairman of the Appeal Board. The Administration has informed the Subcommittee that to ensure an appeal will be dealt with expeditiously, the Rules have specified the time limits for serving notice of appeal, serving statements, representations and relevant documents by both parties, and fixing the date, time and place of hearings. Under the Rules, the secretary to the Appeal Board will within three clear working days after a notice of appeal is served, fix the date, time and place for hearing the appeal. The Rules also stipulate that the hearing will normally be held within 10 clear working days after the receipt of the notice of appeal.

13. The Subcommittee has asked the Administration to clarify the meaning of "clear working days" and whether its Chinese translation "整個工作天" is clear enough to include Saturday. The Administration has explained that the term "working day" has been clearly defined in section 2 of the Rules, while the meaning of "clear days" is elucidated in Order 3 rule 2(4) of the Rules of the High Court (Cap. 4 sub. leg.). In line with the legislative intention of providing an expeditious appeal process, the Administration has accepted members' view that the word "clear" in the relevant sections of the Rules be repealed.

Serving of notice of appeal

14. The Subcommittee has sought clarification on the procedures for lodging appeals and how the affected parties will be informed of their right to appeal against a closure order or DFEH's refusal to rescind a closure order.

15. The Administration has advised that the affected parties will be aware of the issue of a closure order as a copy of which will be affixed at a conspicuous place on the premises and also sent to the owner of the premises by registered post. Under section 128C (7) and (18) of the Ordinance, any person having an interest in the premises and any person aggrieved by the closure order may, within seven days, or a longer period as the Chairman of the Appeal Board may allow, appeal to the Appeal Board against a closure order or DFEH's decision to rescind a closure order. Procedurally, when issuing a closure order or notice of refusal to rescind a closure order, DFEH will categorically remind the recipient

of his rights to appeal to the Appeal Board. The form for notice of appeal will also be attached to the copy of closure order or refusal letter sent to the owner of premises concerned.

16. The Administration has also proposed that it will issue a press release before the commencement of operation of the Appeal Board. Information on the procedures for lodging appeals with the Appeal Board will also be made available on the website of HWFB.

17. As regards the meaning of "persons who are bound by the Authority's decision or order" in section 4(b) of the Rules, the Administration has explained that these are persons entered by the appellant in paragraph 6 of the notice of appeal together with proper addresses and contact telephone numbers, excluding those entries which the secretary has good reasons to believe have been frivolously or erroneously included. The Administration has clarified that these relevant persons will take part in the proceedings of the appeal as witnesses rather than as parties to the proceedings. To reflect the policy intent more clearly, the Administration has agreed to amend section 4(b) of the Rules by substituting "bound" with "affected" when referring to these persons.

Making representations at hearing

18. The Subcommittee has also sought clarification on section 8(b) of the Rules which provides that the person who is to preside at the hearing of an appeal may, on its own motion, invite any person identified under section 5(a)(iv) of the Rules to make representations at the hearing. Some members have expressed concern whether parties affected by a closure order or refusal to rescind a closure order have the right to make representations at a hearing of an appeal.

19. The Administration has explained that under section 8(a) of the Rules, either party to an appeal may make written request to the Appeal Board to invite any person who may be affected to make representations at the hearing. The Administration has assured the Subcommittee that the Appeal Board will normally invite all persons named by either party to the appeal to make representation at the hearing, unless there is evidence showing that any such persons named are not relevant or cannot be contacted. The Administration has also advised that under section 5(a)(iv) of the Rules, DFEH has to identify all persons who have made representations to the Authority within one month before the making of the decision or closure order which is the subject of an appeal. These persons may be invited by the Appeal Board to make representations at the hearing as well.

20. Regarding the concern that some affected persons may not be invited by the Appeal Board to make representation at a hearing of an appeal, the Administration has responded that any person who has an interest in the premises to which a closure order has been issued or any person aggrieved by such an

order can lodge an appeal to the Appeal Board themselves. The Chairman of the Appeal Board has also pointed out that such persons may not wish to make representation at a hearing as witnesses. If any affected person so wishes, he can lodge an appeal himself to state his case separately to the Appeal Board.

Multiple appeals in respect of a closure order

21. As regards whether there was a need to provide for consolidation of proceedings, the Administration has explained that if there is more than one appeal against a closure order made under section 128C of the Ordinance, the Appeal Board Secretariat will arrange hearings for all appellants successively. All appeals lodged with the Chairman of the Appeal Board will be heard unless the appellants concerned have served a notice of abandonment on the secretary pursuant to section 11 (1) of the Rules. In practice, the Appeal Board may hear more than one appeal before making a decision to confirm, suspend, or disallow a closure order.

Hearing to be held in public except in special circumstances

22. The Subcommittee has requested the Administration to explain the policy intent for making reference to Article 10 of the Hong Kong Bill of Rights (BOR) in section 9(2) of the Rules concerning applications for holding a hearing in private.

23. The Administration has explained that it is the policy intention to ensure that the appeal proceedings comply with Article 10 of BOR which provides that every person shall be entitled to a public hearing in the determination of his rights and obligations in a suit at law subject to certain exceptions. Section 9(2) of the Rules provides for two scenarios where the Appeal Board may deviate from the general rule. The Appeal Board may hear the whole or part of the hearing in private where the parties have mutually agreed to waive their rights under Article 10, irrespective of whether the grounds are provided in Article 10, or where any party applies on any ground provided in Article 10 to hear the appeal in private. The Administration believes that the provision is in compliance with Article 10 of the BOR.

24. The Chairman of the Subcommittee has expressed concern whether it is appropriate to allow the Authority (DFEH) to agree to waive the right to public hearing or to apply for holding a hearing in private. The Chairman of the Appeal Board has explained that DFEH is a party to an appeal and he has the same rights as the other party in a hearing of an appeal. She has advised that an application made by a party to an appeal to hold a hearing in private may be acceded to by the Appeal Board on any of the grounds provided in Article 10 of BOR, if it considers appropriate to do so. In other words, the Appeal Board has the discretion not to accede to such requests having regard to the circumstances of the case.

Language

25. The Subcommittee has suggested that as the appellant may not have a legal representative at a hearing, he should be allowed to indicate his preference for the language used in conducting the hearing. The Administration has agreed to the Subcommittee's suggestion and will make amendments to section 10 of the Rules to provide that an appellant may apply to the person who is to preside at the hearing of the appeal for the hearing to be conducted in Chinese or English or both.

Decision of Appeal Board

26. The Subcommittee considers that the Rules should specify that the Appeal Board must provide its decision on an appeal and the reasons for the decision in writing as soon as possible and within a specified time. This is to facilitate an appellant to appeal to the Court of First Instance the soonest possible if he is dissatisfied with the decision of the Appeal Board. Hon Tommy CHEUNG has also referred to the practice of the Liquor Licensing Board which has been able to announce its decision within the same day on completion of an hearing, although the written decision may be delivered some time later.

27. The Administration was originally of the view that it was not preferable to specify a time limit on the provision of the written decision and reasons in the Rules, in order to provide flexibility to cater for exceptional circumstances such as the need for seeking expert advice. The Administration has also pointed out that there is no provision in the Dutiable Commodities (Liquor) Regulations specifying a time limit for the Liquor Licensing Board to make known its decision on an appeal. The Administration and the Chairman of the Appeal Board have assured members that in line with the spirit of providing a fast and simple appeal mechanism to deal with closure order appeals, the Appeal Board will give written notice of its decision and reasons as soon as possible.

28. To allay members' concern, however, the Administration and the Chairman of the Appeal Board have agreed to provide an express provision in the Rules requiring the Appeal Board to deliver its decision as soon as practicable and within a specified time limit. Members note that delivering a decision is not the same as giving written notice of the decision and its reasons. The Administration has first suggested a time limit of one month although it envisages that in normal circumstances, the Appeal Board can make known its decision in a few days after conclusion of the hearing. The Administration has explained that the one-month time limit is proposed in order to cater for complicated cases, for example, where there are multiple appeals in respect of a closure order.

29. The Subcommittee has opposed to the one-month time limit proposed by the Administration as members do not consider that the Appeal Board should need as long as one month to deliver its decision. Hon Tommy CHEUNG has indicated that the Appeal Board should be able to deliver its decision within one or two days after completion of the hearing of an appeal. After further discussion with the Subcommittee, the Administration and the Chairman of the Appeal Board have agreed that the Appeal Board will deliver its decision as soon as practicable and in any event not later than "10 working days" after the hearing of an appeal. The proposed amendment is supported by the Subcommittee.

Amendments to the Rules

30. The Administration's proposed amendments to the Rules to address the Subcommittee's concerns are in **Appendix II**. The Subcommittee has not proposed any amendments.

Recommendation

31. The Subcommittee supports the Rules subject to the amendments proposed by the Administration.

Advice sought

32. Members are invited to note the recommendation of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
22 January 2003

**Subcommittee on
Appeal Board on Closure Orders (Immediate Health Hazard) Rules**

Membership list

Chairman	Hon Fred LI Wah-ming, JP
Members	Hon WONG Yung-kan Dr Hon TANG Siu-tong, JP Hon Tommy CHEUNG Yu-yan, JP Hon Michael MAK Kwok-fung Dr Hon LO Wing-lok (Total : 6 members)
Clerk	Mrs Constance LI
Legal Adviser	Ms Bernice WONG
Date	3 January 2003

Appendix II

INTERPRETATION AND GENERAL CLAUSES ORDINANCE

RESOLUTION

(Under section 34(2) of the Interpretation and
General Clauses Ordinance (Cap. 1))

APPEAL BOARD ON CLOSURE ORDERS (IMMEDIATE HEALTH HAZARD) RULES

RESOLVED that the Appeal Board on Closure Orders
(Immediate Health Hazard) Rules, published in the
Gazette as Legal Notice No. 200 of 2002 and laid on
the table of the Legislative Council on 11 December
2002, be amended -

(a) in section 2, in the definition of "working day",
by repealing "日" and substituting "天";

(b) in section 4 -

(i) by repealing "clear";

(ii) in paragraph (b), by repealing
"bound" and substituting
"affected";

- (c) in section 5, by repealing "clear";
- (d) in section 6(1), by repealing "clear";
- (e) in section 7 -
 - (i) in subsection (1), by repealing "clear";
 - (ii) in subsection (2)(a), by repealing "clear";
- (f) in section 8(a), by repealing "clear";
- (g) in section 10, by adding -
 - "(3) An appellant may apply to the person who is to preside at the hearing of the appeal to conduct the hearing in Chinese or English or both.";
- (h) in section 12(2), by repealing "clear";
- (i) in section 13 -
 - (i) by renumbering it as section 13(2);
 - (ii) by adding -
 - "(1) The Appeal Board shall, as soon as practicable and in any event not later than 10 working days after the completion of the hearing of an appeal, deliver its decision on the appeal.";
- (j) in section 15(3), by repealing "clear".

