

**Bills Committee on
Smoking (Public Health) (Amendment) Bill 2005 (the Bill)
Powers and Scope of a “manager” within a building**

PURPOSE

This paper seeks to address questions in relation to the meaning of “managers” within a building under the Smoking (Public Health) Ordinance (the Ordinance) raised by the Bills Committee at its meetings on 14 February and 31 March 2006.

BACKGROUND

2. At the above meetings, the Legislative Council Legal Advisor raised the following issue and requested the Administration to provide a response in writing -

(a) Whether the removal of the owner, occupier or lessee who smokes in the common area of his/her building from that common area by the manager of the building provided under section 3(3)(c) would be in breach of the Bills of Rights, the Basic Law and other legislation, as the private property rights of the owner, occupier or lessee in enjoying the common parts of his/her building would be affected; and

ADMINISTRATION’S RESPONSE

3. Under section 3(3) of the Ordinance, “manager” of a no smoking area may require a person who smokes in the no smoking area to extinguish the lighted cigarette, cigar or pipe. Where the latter person fails to extinguish the lighted cigarette etc., the manager may require him to give his name and address and to produce proof of identity and may require him to leave the no smoking area. If the latter person fails, upon request, to provide his personal details or to leave the no smoking area, the manager may remove that person from the no smoking area by the use of reasonable force if necessary and detain him and call for the assistance of a police officer to assist in the enforcement.

4. The Bill now proposes to designate all indoor areas of workplaces and of public places to become no smoking areas. With regard to a building, this would in effect mean that all common parts of a building would have to go smokefree.

5. Legal advice obtained in relation to the legal position of an owner of a building unit is as follow:

(a) an owner holds a number of undivided shares in the building, which relates to the exclusive use of his own flat and the right to use over the common area. He is entitled to use the common area subject to the terms

of the Deed of Mutual Covenant (DMC). When the owner transfers his title in his flat, his interest in the common area is also transferred to the transferee;

(b) the owner holds proprietary interest in the common area of the building represented by his undivided shares and enjoys the right to use over the common area, subject to the terms of the DMC; and

(c) an occupier or a lessee of domestic premises enjoys the right to use (derived from the owner) over the common area, subject to the terms of the DMC.

6. Taking the interest/right of the owner and the right of the occupier or lessee in the common area of the building as a property right for the purpose of Article 105 of the Basic Law, it is necessary to consider whether there is any deprivation (or de facto deprivation) of the property right of the owner, occupier or lessee who smokes in the common area of his/her building if the latter is removed from that common area by the manager in accordance with section 3(3)(c) of the Ordinance. It is clear that the exercise of the power of removal by the manager against the owner, occupier or lessee would not cause a formal deprivation of the latter's property right in the common area.

7. According to the review of Hong Kong, European and American jurisprudence, a de facto deprivation exists if the property affected is left without any meaningful alternative use or if the restrictions have denied the owner of all economically viable use of the property. Under this test, the removal of the owner, occupier or lessee from the common area of the building is unlikely to amount to a de facto deprivation because it is unlikely that the interest of the owner in the common area would be left without any meaningful alternative use. Furthermore, the right of use of the owner, occupier, lessee over the common area would only be affected in limited circumstances, i.e. when the owner, occupier or lessee is smoking in the common area, has failed to extinguish the lighted cigarette, etc. and has also refused to provide personal details or leave that common area, upon request by the manager. It would be difficult to argue that the right of use of the owner, occupier or lessee over the common area is left without any meaningful alternative use, when he may use the common area anytime he is not smoking or carrying a lighted cigarette.

8. The question of deprivation aside, we have also considered whether a fair balance is struck between the overriding interest in protecting public health and the property right of the owner, occupier or lessee, should Hong Kong courts adopt the fair balance test developed under European jurisprudence. Under this test, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

9. In order to protect the health of occupants of the building as a whole, and that the common parts of a building should not be treated any differently from other statutory no smoking areas, we consider it reasonable and necessary for the manager to be empowered to remove a person smoking or carrying a lighted cigarette in the circumstances mentioned above. There is no other alternative to remove the second hand smoke that is generated by the lighted cigarette. We consider that there is sufficient justification for having the power of removal exercisable by the manager in accordance with section 3(3)(c) of the Ordinance and that the fair balance test would also be met.

10. We have also looked into the issue from the human rights perspective. There is a potential argument that the exercise of a manager's power under section 3(3) of the Ordinance in the common areas of a domestic building would interfere with the privacy of the owners, occupiers and lessees as protected under Article 28 of the Basic Law and Article 17 of the International Covenant on Civil and Political Rights. However, having considered the objective to be pursued (i.e. protection of public health) and the less intrusive steps which the manager has to take before exercising the power of removal under section 3(3) of the Ordinance, even if there is an interference with the privacy of the owners, occupiers and lessees as a result of the exercise of the manager's statutory power under section 3(3), we are of the view that the interference would not be 'arbitrary'. In other words, it would not be inconsistent with the protection under Article 28 of the Basic Law and Article 17 of the International Covenant on Civil and Political Rights.

11. The Bills Committee also raised the following query:

(a) who in a building would become the “manager” if there is no owners’ corporation (OC), management company or other form of management?

12. Under the Smoking (Public Health) Ordinance (the Ordinance), the manager of a statutory no smoking area has the following powers and statutory responsibilities:

Powers

13. After indicating that the person is smoking or carrying a lighted cigarette, cigar or pipe, as the case may be, in a no smoking area, the manager of a no smoking area could require the person to extinguish the lighted cigarette, cigar or pipe. Where the person fails to extinguish the lighted cigarette, cigar or pipe, the manager could require him-

- (i) to give his name and address and to produce proof of identity; and
- (ii) to leave the no smoking area.

14. If the person failed to do so, the manager could remove him from the no smoking area by the use of reasonable force if necessary and detain him and call for the assistance of a police officer to assist in the enforcement of this section.

Responsibilities

15. The manager shall place in a prominent position in each no smoking area or public transport carrier, as the case may be, a sufficient number of signs in English and Chinese to indicate that smoking is prohibited in the no smoking area or the public transport carrier and such signs shall be of the prescribed description and shall be maintained by the manager in legible condition and good order.

Proposal

16. Indoor public place and indoor workplace are proposed by the Smoking (Public Health) (Amendment) Bill 2005 to be statutory no smoking areas. Indoor common areas of a building are indoor public places and in most cases, also indoor workplaces. For the purposes of the Smoking (Public Health) Ordinance, in buildings without OC and without management company but with one / a few staff undertaking security, cleansing etc. duties, we propose that the manager should be the party that is stated in the DMC or other legal documents to have the management responsibilities for common parts (in most cases it is all co-owners). The same would apply to buildings without OC, without management company and without any employed staff performing any house-keeping function.

17. We do not propose to pinpoint any other person(s) / party to be the “manager” for the purpose of the Smoking (Public Health) Ordinance regardless of the provisions of the DMC or other legal document dealing with management of common part matters, although this would mean that enforcement officers may have to research into the DMC to identify the “manager” in respect of some buildings.

18. We would also not propose the Government to take up the role of manager for buildings without an OC or any regularized form of management. In line with other building management and maintenance duties, the Government should not be subsidizing owners / the person(s) or party responsible for the management to comply with this relatively straightforward legal requirement. Any government involvement would render it unfair for other private property owners and serves as a disincentive for the formation of OC, employment of property manager or any proactive taking up of building management matters on the part of owners or of the responsible person(s) or party.

Enforcement

19. In buildings where there is no OC or any regularized form of management,

we understand that most DMCs stipulate owners collectively to be responsible for the management of common parts. In these cases, all co-owners would be held liable for not displaying no-smoking signs in the common parts of their buildings. The majority of those buildings are old buildings populated by elders or low-income families who may have difficulties in arranging for the discharge of their statutory responsibilities. In considering how best to enforce the law, in particular whether to initiate prosecution of the owners of such buildings, we will take into consideration the unique circumstances of the building concerned. We will consider, in particular, whether prosecution, even if successful, would help rectify the situation.

20. We would, however, not propose exempting those buildings from complying with the statutory responsibilities. The circumstance of each case is unique and should be separately considered. The statutory responsibilities are relatively straightforward. It is not necessarily the case that the owners / person(s) or party responsible for management of common parts of those buildings would not be able to comply with the law's requirements. The owners / the person(s) or party responsible for the management should be required to comply as far as possible, and whether enforcement action would be taken should be a matter for consideration on a case-by-case basis, taking into account all circumstances of each case.

Follow-up Actions

21. We consider that the proposed CSA in respect of the definition of manager as detailed in LC Paper No. CB(2)1567/05-06(02) and examined by the Bills Committee on 31 March 2006 is sufficient to serve our present purpose. For ease of reference, we reproduce the proposed definition in the following:

“manager” (管理人), in relation to a no smoking area or a public transport carrier, means any person who is responsible for the management or is in charge or control of the no smoking area or public transport carrier, and includes an assistant manager and any person holding an appointment analogous to that of a manager or assistant manager.

ADVICE SOUGHT

22. Members are requested to note the content of this paper.