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Panel on Food Safety and Environmental Hygiene

**Information note prepared by the Legislative Council Secretariat
for the meeting on 13 May 2014**

Regulatory control on outside seating accommodation of and unauthorized extension of business area by restaurants

Purpose

This paper provides background information on the regulatory control on outside seating accommodation ("OSA") of and unauthorized extension of business areas by restaurants.

Background

Outside seating accommodation of restaurants

2. According to the Administration, OSA refers to any open area used for alfresco dining business, whether it is situated on Government land or within private property. In light of the increasing popularity of outdoor dining, the Administration reviewed the arrangements for approving OSA for restaurants and consulted the Panel on Food Safety and Environmental Hygiene ("the Panel") in 2001. Since 2002, the Food and Environmental Hygiene Department ("FEHD") has provided a "one-stop-shop" licensing service for OSA applications from restaurants so as to facilitate the trade. Following a further review of the regulatory regime for OSA in 2007, the Administration initiated a number of measures to streamline the application process.

3. At present, FEHD serves as the focal point to receive and process OSA applications, and is responsible for arranging the necessary referrals to the departments concerned and following through the whole process. As stated in FEHD's "Guide to Apply License for Outside Seating Accommodation", main

licensing criteria cover matters such as legal right to use the land concerned and a number of requirements relating to planning, building safety, fire safety and transport. The standard timeframe for processing a simple normal application for inclusion of OSA into existing licensed food premises is 53 working days.

Unauthorized extension of business area by restaurants

4. Under section 34C of the Food Business Regulation (Cap. 132X), FEHD may institute prosecution against licensed food premises that carry on business illegally beyond the confines of their premises. In addition to a fine upon conviction, a licensee would also be subject to demerit points registered against his/her food premises under the Demerit Point System administered by FEHD. Repeated conviction and accumulation of demerit points up to a certain level will lead to suspension or cancellation of the licence.

5. FEHD may also institute prosecution against shops which extend its business without authorization and cause obstruction of public places by invoking section 4A of the Summary Offences Ordinance (Cap. 228). In addition, the Lands Department ("LandsD") and the Buildings Department can curb illegal extension of business areas by shops on private or government land by invoking the Lands (Miscellaneous Provisions) Ordinance (Cap. 28) and the Buildings Ordinance (Cap. 123) respectively.

6. When the Administration consulted the Panel in 2006 on the proposal to amend the Food Business Regulation so as to empower FEHD to take prosecution action against any person (in addition to the licensee) that engaged in food business operating beyond the confines of the licensed premises, members generally supported strengthening the regulation on unauthorized food business activities which posed public health risks and caused nuisance to the neighbourhood. However, some members expressed concern that employees of the food business would be held liable for the offence if the proposed amendments were passed, and urged the Administration to explore other ways to regulate extension of food business before proposing to amend the Food Business Regulation.

7. Subsequently, the Administration issued an information note to the Panel in 2010 (LC Paper No. CB(2)684/10-11(01)) advising members that even without making any amendments, FEHD could enforce the relevant legal provision as long as prior warning to licensees was given. As regards the evidence required, FEHD would only have to prove either the licensee did conduct illegal extension of business at the scene, or if the licensee was not at the scene, he/she had given instructions or implied permission to his/her employees to conduct business outside the licensed area.

Latest development

8. In May 2013, The Ombudsman released a direct investigation report entitled "Regulatory Measures and Enforcement Actions against Illegal Extension of Business Area by Restaurants" ("the Ombudsman Report"). In the Ombudsman Report, FEHD was criticized for failing to effectively curb or contain illegal extension of business area by restaurants and LandsD for its failure to make adequate efforts to take enforcement actions against illegal occupation of Government land by restaurants. In The Ombudsman's view, FEHD had not set objectives and formulated strategies for enforcement actions and as a result, its enforcement actions had been superficial and produced little results to curb the problem. The recommendations made by The Ombudsman to the Administration are set out in **Appendix I**.

9. The Administration will brief members on the regulatory control on OSA of and unauthorized extension of business area by restaurants at the Panel meeting on 13 May 2014.

Relevant papers

10. A list of relevant papers on the Legislative Council website is in **Appendix II**.

Council Business Division 2
Legislative Council Secretariat
9 May 2014

**Extract from the Executive Summary of Direct Investigation on
Regulatory Measures and Enforcement Actions against
Illegal Extension of Business Area by Restaurants**

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Recommendations

26. The Ombudsman makes the following recommendations to FEHD and Lands D:

FEHD

- (1) to actively explore the best use of existing resources and relevant legislation, consider setting up a taskforce comprising HIs and HCOs, deploying more manpower and using diverse strategies to deal with unauthorised food operations in public places; before these could be implemented, to allow HCOs more participation in dealing with the problem so as to increase the Department's enforcement strength;
- (2) based on the situation of each district, to set objectives and formulate strategies for tackling illegal extension of business area by restaurants;
- (3) to conduct targeted raids on recalcitrant offenders, taking more frequent enforcement actions against them, making arrests and seizure of articles;
- (4) to exercise more stringent control on those unlicensed restaurants which persistently extend their business area outside their premises, conducting more frequent inspections and bringing more prosecutions, applying for closure orders from the Court, as well as publicizing information about those restaurants through the media and uploading such information on FEHD's website for easy public access;
- (5) to continue to submit charge records of offenders to the Court in the hope that it would impose heavier penalties on them;

- (6) to consult the District Councils, which represent the local communities, on its enforcement plans, seek their views and support for the purpose of gaining public recognition and reducing resistance from those who are benefiting from illegal operations;
- (7) to consider amending the relevant legislation to simplify the mechanism for appeal against suspension or cancellation of licences from three-tier to two-tier;
- (8) except under very special circumstances, to refrain from withholding the suspension or cancellation of licences pending appeals by restaurant licensees; to draw up relevant assessment criteria and procedures;
- (9) to consider extending the applicability of the non-standard licensing requirements of prohibiting encroachment on Government land or common passageways to all premises under application for restaurant licences;
- (10) to lengthen the “observation period” before the issuance of provisional licence;
- (11) in respect of an applicant whose restaurant licence has previously been cancelled due to repeated offences, to refuse to process, for a specified period of time, his/her application, or an application made by his/her representative, for any restaurant or related licence in relation to the same premises;
- (12) to consider, in the long term, how to restrict applications from recalcitrant offenders for restaurant or related licences in relation to any premises;
- (13) to suggest to District Councils the designation of spots for alfresco dining in suitable areas, and to facilitate applications from restaurant operators for setting up outside seating accommodation at those spots;
- (14) to deliberate with Home Affairs Department on how to balance stakeholders’ interests with regard to public consultation on applications for setting up outside seating accommodation;

Lands D

- (15) to study with the Department of Justice how to more effectively exercise statutory powers to deal with illegal occupation of

Government land by restaurants, in fulfilment of its responsibility as land administrator;

- (16) subject to the outcome of their study, to actively support FEHD in rigorous actions against recalcitrant offenders; and
- (17) subject to the outcome of their study, to review with SCDA the arrangement whereby Lands D only deals with illegal occupation of Government land involving structures of a “more permanent nature”.

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Appendix II

Relevant paper on Outside Seating Accommodation of and Unauthorized Extension of Business Area by Restaurants

Committee	Date of meeting	Paper
Panel on Food Safety and Environmental Hygiene	13.6.2006 (Item IV)	Agenda Minutes

Council Business Division 2
Legislative Council Secretariat
9 May 2014