

**Business Facilitation Advisory Committee
Food Business and Related Services Task Force**

***Proposed Simplification of Appeal Mechanism for Suspension /
Cancellation of Food Business Licences***

Purpose

This paper briefs Members on the proposal for simplification of the appeal system in respect of food business licences issued by Food and Environmental Hygiene Department (FEHD) under the Food Business Regulation (FBR), Cap. 132X, covering suspension or cancellation of licence under the Demerit Points System¹ (DPS) as a result of convictions under FBR.

Background

2. Some patrons to restaurants prefer outdoor dining, and some restaurants seek to extend their business areas on to public places, sometimes illegally, to provide outside dining areas to meet such preference and accommodate more clients at the same time. Such illegal activities often lead to obstruction of public access, noise and environmental hygiene problems, thereby causing nuisance to residents nearby and other users of the public places. The problem is especially serious in certain built up areas.

3. As the licensing authority of food premises, FEHD has been tackling illegal extension of business area by food premises through the licensing system and enforcement under the Public Health and Municipal Services Ordinance (PHMSO), Cap. 132, the FBR, and the Summary Offences Ordinance, Cap. 228. In addition to prosecution, FEHD may also impose administrative sanctions on licensees of the food premises

¹ Under the Demerit Points System, a pre-determined number of demerit points ranging from five to 15 (depending on the nature and severity of the offence) will be registered against a licensee upon conviction of an offence in relation to food safety and environmental hygiene under the Public Health and Municipal Services Ordinance and its subsidiary legislation. A licence will be suspended for seven days if 15 points are accumulated within a period of 12 months (first suspension) and 14 days if another 15 points are accumulated within 12 months from the date of the last offence that led to the first suspension (second suspension). If another 15 points are accumulated within 12 months from the date of the last offence that led to the second suspension, the licence will be cancelled.

under the DPS for convicted offences under PHMSO and FBR, and under the Warning Letter System² for breaches of licensing requirements or conditions.

4. The Ombudsman had earlier carried out direct investigation on the regulatory measures and enforcement actions against unauthorised extension of business area by restaurants. The report was published in May 2013. In the report, it is mentioned that licensees can defer the effective date of licence suspension or cancellation by taking advantage of the lengthy appeal process and the discretion of FEHD to suspend the implementation of the decision pending results of the appeals. The restaurants could then carry on their business notwithstanding continuing offences, and this can undermine the effectiveness of the system of licence suspension or cancellation.

5. The Ombudsman noted that there was no successful appeal case against suspension and cancellation of food business licences relating to illegal extension of business area under the DPS in 2012 out of a total of 70 and 27 appeal cases to the Licensing Appeals Board (LIAB) and the Municipal Services Appeals Board (MSAB) respectively. The Ombudsman considers that the current three-tier appeal mechanism (including two statutory tiers as detailed in paragraph 7 below) is too cumbersome and that a two-tier appeal mechanism should suffice. The Ombudsman recommends that FEHD should consider amending the relevant legislation to simplify the current appeal mechanism.

Existing legislation with regard to appeal mechanism

6. Under section 125(1)(b) of PHMSO, the Director of Food and Environmental Hygiene (DFEH) has the discretion to suspend or cancel a licence for the purpose of carrying out the objects of the Ordinance if the licensee has contravened the provisions of the legislation, or any requirement or condition to which the licence was subject.

² Under the Warning Letter System, breaches of licensing requirements or conditions will result in issuing of verbal/written warnings to the licensee. Accumulation of three written warnings within a period of six months and detection of subsequent breaches will lead to cancellation of a licence.

Right of appeal

7. At present, a licensee dissatisfied with FEHD's decision to suspend or cancel its licence may –

- (a) make a representation to FEHD, as an administrative procedure, in seven days, or in four days for a serious breach;
- (b) appeal to LIAB against FEHD's decision within 14 days under section 125(9) of PHMSO; and
- (c) in case LIAB upholds or varies FEHD's decision, appeal to MSAB within 14 days under section 125B(4) of PHMSO.

8. Under section 125(10) of PHMSO, if an appeal is made, the licensing authority (i.e. DFEH) may, at its discretion, suspend the operation of the decision of licence suspension or cancellation, pending the determination of the appeal.

Proposal

9. To follow up the Ombudsman's recommendation, FEHD is exploring a proposal under which the scope for simplification of the appeal system will be confined to food business licences issued by FEHD under FBR³, covering suspension or cancellation of licence under DPS as a result of convictions under the regulation. For these cases, the suspension or cancellation of licence will be proceeded with only after the licensees are convicted by the court in the first place, and the right of the licensees should be well protected under a simplified appeal mechanism by removing one layer of statutory appeal.

10. Specifically, FEHD considers it more practical to remove MSAB and retain LIAB as the vast majority of the original decisions of FEHD and decisions of LIAB were upheld by MSAB. FEHD believes the proposal will streamline the process without unduly undermining licensees' right of appeal.

³ Food business licences issued by FEHD under the FBR include those for food factory, restaurant, bakery, factory canteen, siu mei and lo mei shop, fresh provision shop, cold store, and composite food shop.

Way Forward

11. FEHD will further develop the proposal to simplify the appeal mechanism against FEHD's decision to suspend or cancel food business licences from the current two statutory tiers to one tier as proposed above. The initial assessment is that it will involve legislative amendments to the relevant provisions in PHMSO and MSAB Ordinance.

Advice Sought

12. Members are invited to note the contents of this paper and provide their views and comments on the proposal.

Food and Environmental Hygiene Department
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