

Regulating cages of carton recycler occupying public places by Food and Environmental Hygiene Department and Lands Department

Investigation Report

On 28 February 2020, the complainant lodged a complaint with us against the Food and Environmental Hygiene Department (“FEHD”). On 10 June, the complainant agreed to include the Lands Department (“LandsD”) as the other complainee department.

The Complaint

2. The complainant alleged that a recycler had been placing several cages filled with paper cartons and refuse on a street (at both the roadside and the periphery of a sitting-out area nearby) (“the Location”). The cages not only occupied public places and caused obstruction to pedestrians, but also became breeding grounds for mosquitoes, insects and rodents (“the Cage Problem”). Despite his repeated complaints to FEHD, the Cage Problem remained.

Our Follow-up Actions

3. Subsequent to our preliminary inquiry of FEHD on 1 April 2020 and site visits on 26 May and 5 June 2020, we found that the Cage Problem might also involve LandsD’s jurisdiction. Having considered the details of the complaint, the complainant agreed to include LandsD as a complainee department. On 15 June 2020, we launched a full investigation against FEHD and LandsD. Upon completion of investigation, we have the following findings.

Our Findings

Jurisdiction of Relevant Departments

4. For cases involving miscellaneous articles placed on streets causing obstruction to scavenging operations, **FEHD** may prosecute the offender under the Public Health and Municipal Services Ordinance (“PHMSO”). Should such obstruction persist and be of a serious nature, FEHD’s law enforcement officers would institute prosecution at once without prior warning.

5. For littering cases, FEHD may issue fixed penalty notices to offenders pursuant to the Fixed Penalty (Public Cleanliness and Obstruction) Ordinance, or prosecute them under the Public Cleansing and Prevention of Nuisances Regulation.

6. Illegal hawking activities in public places are subject to prosecution by FEHD pursuant to the PHMSO. Equipment and merchandise involved in the activities would also be seized in accordance with the Ordinance.

7. Regarding cases of unlawful occupation of unleased government land, **LandsD** may take action to post a statutory notice pursuant to the Land (Miscellaneous Provisions) Ordinance (“L(MP)O”), requiring the occupier to cease occupation of the land by the date specified. In case of non-compliance, law enforcement officers may remove from the land the persons thereon, or take possession of any property or structure on the land, and institute prosecution against the occupier who occupies the land without reasonable excuse.

FEHD’s Response

8. FEHD provided the following explanations.

9. Acquisition or recovery of old articles or recyclable materials on streets by recycler stalls are business, but not selling, activities. Furthermore, when owners of old articles or recyclable materials sell the articles or materials, they are not in a state of “business operation”. They should not be treated as hawkers either, as they just engage in one-off transactions. Consequently, FEHD cannot invoke the PHMSO and take enforcement actions against them for “illegal hawking”.

10. Unlawful occupation of public places by recyclers is a street management issue involving the jurisdiction of a number of Government departments. Different departments would take enforcement actions in accordance with their powers and purview. As far as this case is concerned, FEHD’s prime duty is to maintain environmental hygiene.

11. On 30 January 2020, the local District Environmental Hygiene Office (“DEHO”) received for the first time complaint about the Cage Problem. On 31 January and 1 February, DEHO received the complaint again.

12. On 5, 6, 11 and 17 February, FEHD officers conducted inspections at the Location and found an itinerant recycler stall (“the Stall”) in a back alley nearby (“the Alley”) and a little rubbish on the road. DEHO arranged removal of the rubbish by the street cleansing contractor at once, and instructed the contractor to step up cleansing services at the Alley.

13. Between February and March 2020, DEHO discovered that the articles belonging to the Stall were obstructing scavenging operations on the street. Consequently, it issued a total of four verbal warnings and four Notices to Remove Obstruction to the operator of the Stall (“the Operator”).

14. Upon DEHO’s warning, the Operator immediately removed the articles to make way for scavenging operations by the contractor.

15. In March 2020, DEHO issued three fixed penalty notices to littering offenders at the Location.

16. On receipt of our referral of the case, DEHO staff conducted inspections at different times at the Location between 7 and 21 April 2020. They found cages for collecting recyclables and miscellaneous articles awaiting truck transportation being placed temporarily on the carriageway.

17. On 7 April 2020, in view of the street obstruction and traffic safety concerns caused by the articles being placed on the street by the Stall, DEHO referred the case to the Hong Kong Police Force (“HKPF”), which subsequently informed DEHO on 4 June that it had taken follow-up action and the situation at the Location had improved.

18. Between April and June 2020, DEHO stepped up inspections at the Location and took enforcement action against the Stall for causing obstruction to scavenging operations. It issued a total of 16 verbal warnings, 24 Notices to Remove Obstruction and instituted two prosecutions against the Operator.

19. On 22 June, DEHO suspected that someone had been occupying the Alley, which was Government land, without authorisation for a protracted period. It therefore referred the case to LandsD.

20. In respect of the environmental hygiene problem at the Location, DEHO also strengthened its pest control efforts to prevent the breeding of pests and rodents.

Between April and June 2020, it issued a total of 15 fixed penalty notices to littering offenders in the vicinity.

LandsD's Response

21. LandsD provided the following explanations.

22. The carriageway at the Location, the Alley and the periphery of the sitting-out area nearby are Government land.

23. To invoke the L(MP)O for removing articles on Government land, LandsD must give the person concerned at least 24 hours' statutory notice. For easily movable articles, such as the wheeled recycling cages in this case, the L(MP)O is not an effective enforcement tool.

24. The problem of occupation of public places by recycling cages or non-fixed articles involves the jurisdiction of several Government departments and the authorities concerned have worked out the division of responsibilities in this respect. According to the established policy, the problem of street obstruction caused by recyclers engaging in mobile business activities in public places should be followed up by FEHD and HKPF. If street obstruction is caused by stand-alone and fixed structures erected on government land, then LandsD should take land control action pursuant to the L(MP)O.

25. The local District Lands Office ("DLO") received a complaint from a District Council member in January 2017 about recycling cages and articles causing street obstruction. DLO officers conducted a site inspection and found those articles were movables. They then followed the established policy to refer the case to FEHD, HKPF, the Environmental Protection Department ("EPD") and the local District Office ("DO") of the Home Affairs Department for follow-up actions.

26. Upon our referral of the case, DLO officers conducted a number of site investigations at the Location in June and July 2020. Five to six wheeled cages either empty or filled with miscellaneous articles were found on the street. No illegal structure was found, but an itinerant recycler (i.e. the Operator) had put a chair on the street and was conducting recycling business activities with a weighing scale placed there.

27. On 31 July 2020, DLO referred the case to FEHD, HKPF, EPD and DO because the Stall was conducting mobile business activities in a public place.

Our Site Visits

28. Our officers conducted site visits on 26 May, 5 June and 29 August and found the following:

- (1) the Location was a carriageway flanked by narrow pavements on both sides and illegal parking was occasionally spotted;
- (2) the Stall would place empty recycling cages and tables/chairs in the Alley during non-business hours, and a canopy was used to cover those articles such that pedestrians could not pass through the Alley. A number of empty recycling cages were placed outside the sitting-out area nearby; and
- (3) when the Stall was in business, it would place some tables/chairs, a parasol and several cages for collecting old paper cartons on a section of the carriageway just off the Alley, causing obstruction to traffic.

Our Comments

Complaint against FEHD

29. Information submitted by FEHD indicated that DEHO had followed up on the Cage Problem and maintained environmental hygiene at the Location in accordance with its duties and powers.

30. Nevertheless, between February and March 2020, (i.e. prior to our referral of the case), DEHO had only issued verbal warnings and several Notices to Remove Obstruction to the Stall for causing obstruction to scavenging operations in the Alley with its articles, instead of taking more deterrent enforcement actions.

31. Our site visits revealed that the massive heap of furniture, tools and miscellaneous articles in the Alley constituted obstruction to pedestrians and scavenging operations. According to FEHD's internal guidelines, if such situation persists or is of a serious nature, FEHD can instigate prosecution without warning. However, the

Department had only instigated two prosecutions against the Stall over the past several months. Such actions did not match the seriousness of the problem. The problem of obstruction to scavenging operations, therefore, had remained.

32. As regards the cages placed on the carriageway just off the Alley, we concurred with FEHD's decision to refer the problem to HKPF.

33. In light of the above analysis, The Ombudsman considered the complaint against FEHD **partially substantiated**.

Complaint against LandsD

34. LandsD explained that the L(MP)O is not an effective enforcement tool with respect to movable articles, including wheeled recycling cages. During site inspections, DLO staff saw several wheeled recycling cages, chairs as well as recycling business activities there. They subsequently followed the agreement on division of responsibilities and referred the case to the relevant departments. We considered the referrals appropriate. On the other hand, LandsD as the land administrator in Hong Kong actually has the power and duty to follow up on the case further.

35. Our site visits revealed that the Stall had been putting a large amount of furniture and miscellaneous items, together with articles for conducting business activities, in the Alley for a prolonged period. A canopy was even erected to cover those articles. This is virtually occupying Government land for self-use, making it impossible for pedestrians to pass through the Alley. Such behaviour is in fact no different from erecting illegal structures to occupy Government land. Yet, LandsD just concluded the case by referring it to other Government departments and stopped short of using its powers to resolve the problem. Such handling method could hardly be convincing to the public.

36. We consider that LandsD has the power and duty to resolve the long-standing problem of the Stall occupying the Alley, for instance, by installing metal bollards such that the Operator can no longer push the cages into or out of the Alley. Statutory notices can also be posted at the Alley to warn the Operator that occupation of Government land is prohibited.

37. In light of the above analysis, The Ombudsman considered that while LandsD was not the complainant's initial complaint target and the Department had followed up

on the case in accordance with established procedures, this case did reveal possible inadequacies in the current division of responsibilities among Government departments and their way of following up on cases. LandsD should conduct a review and examine how to better handle the case with its powers and functions.

Recommendations

38. The Ombudsman recommended that:

- (1) **FEHD** increase the frequency of inspection at the Location and take decisive enforcement actions (including instituting prosecutions) if the cages of the Operator cause obstruction to scavenging operations, such that the problem can be curbed. It should also take joint actions with other Government departments when warranted.
- (2) **LandsD** proactively explore ways to resolve once and for all the prolonged problem of the Stall occupying the Alley. For instance, it can install metal bollards at the entrance/exit of the Alley and take joint actions with other Government departments when warranted.

Office of The Ombudsman
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