

LEGISLATIVE COUNCIL BRIEF

Land (Miscellaneous Provisions) Ordinance
(Chapter 28)

LAND (MISCELLANEOUS PROVISIONS) (AMENDMENT) BILL 2002

INTRODUCTION

At the meeting of the Executive Council on 9 April 2002, the Council ADVISED and the Chief Executive ORDERED that the Land (Miscellaneous Provisions) (Amendment) Bill 2002 should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

2. Excavation work may be required on streets maintained by Highways Department (HyD) as well as other unleased government lands and currently the excavation permits (EPs) are issued free of charge. Neither is this in line with the user-pays principle, nor does this have an incentive on permittees to complete their work as soon as possible. The Bill's objective is to improve this situation. In fact, it is excavations in HyD maintained streets which are causing traffic delays and is the concern of the public. Specific control measures, which require resources, should only be directed at those excavations causing problems. Some of our proposals below, such as those for the recovery of administrative cost of issuing and extending EPs and widening the scope of enforcement of EP conditions are applicable to both. Those relating to curbing delays etc. are directed only to streets maintained by HyD.

Proposals applicable to streets maintained by HyD and lands maintained by Lands Department

3. We propose that if a permittee employs a contractor for the excavation work, the same permit shall be deemed to have been issued to the contractor and subcontractors of any tier below so that we can have an effective control.

4. We also propose that a permittee may nominate his contractor as a nominated permittee by sending a notice of nomination to the Authority. If the contractor consents to such nomination and the Authority approves the nomination, then the contractor becomes a nominated permittee. The permittee and the nominated permittee shall be liable for breach of their respective conditions as stated in the EP, but if no contractor consents to nomination, the permittee himself will remain liable for all breaches.

5. We also propose to recover administrative costs on a full cost recovery basis. Together with economic charge based on the principles stated below, we propose the fee structure at Annex A with cost computation at Annex B.

A
B

6. We also propose to change the maximum fine on conviction of making or maintaining an excavation without an EP or not in accordance with an EP from \$5,000 to \$50,000 to reflect the inflation over the past 30 years. We have not changed the 6 months of jail sentence for making or maintaining an excavation without an EP.

7. For administrative convenience, we propose to designate the Director of Highways as the Authority for the control of excavations in streets maintained by the HyD, and the Director of Lands as the Authority for other unleased government lands.

8. We propose statutory provisions to provide for the use of computer records of the Authority as evidence in court proceedings.

9. To preserve the rights of the existing permit holders, the proposed amendments do not apply to applications for EPs which are received before the commencement date of the new legislation, or excavations made pursuant to EPs which are in force immediately before, and will continue to be in force after, the commencement date of the new legislation, or EPs the application of which is made before the commencement date of the new legislation.

Proposals specifically applicable to streets maintained by HyD

10. We propose a scheme for charging economic costs in excavations in streets maintained by HyD based on the following principles:

- (a) All streets maintained by HyD in Hong Kong are to be divided into 3 categories, namely, “strategic streets”, “sensitive streets” and “remaining streets”. The classification is based on the likely traffic impact an excavation can cause in that category of street. The methodology of classification is set out on page 3 of Annex B.
- (b) The economic costs of each category is based on a weighted average of traffic delay costs from sampled road section within that particular category.
- (c) For excavation affecting carriageways which will cause traffic delays, EP holders will be charged for economic costs according to the category of streets for any extension beyond an ‘initial period’ decided by the Director of Highways. The economic costs will only be charged on an extension of an excavation permit and costs paid may be refunded if (i) the extension is caused by reasons other than the fault of a permittee, its contractors or employees, or (ii) a permittee completes the excavation before the extended expiry date.
- (d) Disagreement on the permit period and decisions on refund of economic costs are subject to a multi-tier statutory review mechanism within HyD. But only cases on refund of economic costs can be further appealed to the Administrative Appeals Board. This arrangement can ensure a reasonable number of cases is handled by each tier of the mechanism.
- (e) Economic costs is not charged for excavations in unleased land maintained by Director of Lands.

11. We also propose that the requirement to obtain EP for excavation in streets maintained by the HyD is to be made binding on Government, and when EP is obtained by a Government department, the department shall pay the prescribed fees and economic charges, and be bound by the permittee's conditions of EP.

12. We also propose where Government departments excavate without an EP or breach its conditions, it is subject to a reporting mechanism similar to that under the Section 3 of the Environmental Impact Assessment Ordinance, except the report is to be made to the Secretary for Works, instead of the Chief Secretary. The Secretary for Works will investigate the case, and if found true, will ensure the best practicable steps are taken to prevent recurrence.

13. We also propose to make statutory provisions to allow for emergency excavations.

THE BILL

14. The main provisions of the Bill, which is to be gazetted soon, are as follows:

- (a) **Clause 3** adds new section 2A to the Land (Miscellaneous Provisions) Ordinance (“Ordinance”) to define the scope of application of the Ordinance to the Government.
- (b) **Clause 4** substitutes Part III of the existing Ordinance by replacing it with 22 provisions (sections 8 to 10, 10A to 10S). The main provisions are as follows:
 - (i) The new section 9 restricts the scope of application of certain clauses to excavations on street maintained by the HyD.
 - (ii) The new section 10 consolidates the existing regime on the control of excavations in unleased land. It revises the penalty for breach of permit conditions and defines the respective liabilities of a permittee and a nominated permittee for breach of EP conditions.
 - (iii) The new section 10A provides for the issue of principal excavation permits and charging of prescribed fees, which include economic costs.
 - (iv) The new sections 10B and 10C establish a new regime for the control of emergency excavation and charging of prescribed fee.
 - (v) The new section 10D provides for refusal of issue of excavation permits.
 - (vi) The new section 10E provides for the deemed issue of excavation permits to the contractors or subcontractors of a permittee.

- (vii) The new section 10K provides for refund of daily fee and economic charges in certain circumstances.
 - (viii) The new sections 10L to 10N provides for setting up a review mechanism within HyD and details of the Review Board and Review Panel.
 - (ix) The new sections 10O and 10P transfer the existing duty to reinstate land and reimburse the Authority the cost of provision of safety facilities to a permittee.
 - (x) The new section 10Q imposes a new statutory duty on both the permittee and nominated permittee to provide safety precautions and specifies the penalty for failing to do so.
- (c) **Clause 5** adds new section 16C to provide for the use of computer records as evidence in court proceedings.
 - (d) **Clause 7** adds new section 18B to provide for appeals to the Administration Appeals Board against a decision made by the Director of Highways in relation to the refund of economic costs.
 - (e) **Clause 8** adds new subsection to section 19 of the principal Ordinance to empower the Chief Executive in Council to fix prescribed fee at certain level to provide for the recovery of administrative costs, and economic costs of traffic delays in carriageways caused by excavations in streets.
 - (f) **Clause 10** sets out the transitional arrangements for existing excavations and applications for EPs that are made before the commencement of this Ordinance.
 - (g) **Clauses 11 and 14** amend the Land (Miscellaneous Provisions) Regulations to specify the fees payable for the issue and extension of a principal EP, and the fee payable for the initial period of a principal emergency EP.

PUBLIC CONSULTATION

15. In respect of excavation in streets maintained by HyD, we have consulted the utilities and the construction industry. They are reluctant to pay fees in the current economic climate. In addition, they have concern on the setting of the initial period, excessive penalty for breach of some of the EP conditions, and delays beyond their control. They doubt if HyD is able to enforce the EP conditions without bias. We will set up a statutory multi-tier review mechanism to deal with dissatisfaction with permit period; we will modify the EP conditions so that they cover only technical matters and with penalty of fine only for their breach, moving those matters affecting safety which should carry prison sentence as well to the legislation itself; we have empowered the Authority to refund economic costs for extensions which are beyond the permittee's control, a statutory multi-tier mechanism is provided to review decision on refund of economic costs, plus a channel for final appeal to the Administrative Appeals Board. We do not see the argument strong enough to warrant a separate enforcement agent of the EP conditions, as that will incur additional resources.

16. We have also consulted the LegCo Panel on Planning, Lands and Works. Generally, some members have shown support to the bill as it may shorten the delays in excavations in streets maintained by HyD, some of them have echoed the concern of the utility undertakings and construction industry, and demand for incriminating Government or its officials on criminal offences related to excavations in streets maintained by HyD. We do not recommend imposing criminal liability on government departments as it is unlikely that government departments or government officials in the process of discharging their public duties would contravene the Ordinance or breach the EP conditions, given that there is no commercial incentive for them to do so. D of J has also advised against imposing criminal liability on government departments as it would depart from our usual practice of not placing criminal liability on the government or government departments (through the machinery of prosecution in SAR courts). Moreover, D of J considers that such an approach would raise complex questions of procedure and efficacy (e.g. a government department cannot be imprisoned). Coupled with the proposed reporting mechanism, there are effective means to ensure the government's compliance with applicable statutory requirements, such as accountability to LegCo and monitoring by the Ombudsman.

BASIC LAW IMPLICATIONS

17. The Department of Justice (D of J) advises that the Bill does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

18. The D of J advises that the Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

19. Part III of the Land (Miscellaneous Provisions) Ordinance (as amended) binds Government in so far as it relates to excavations in unleased land which is a street maintained by the Highways Department. In effect, Government departments who intend to carry out excavation on those streets have to apply for an EP, pay the prescribed fees and bound by the conditions of an EP. However, the departments will not be subject to criminal proceedings but instead they will be subject to a reporting mechanism to the Secretary for Works.

FINANCIAL AND STAFFING IMPLICATIONS

20. It is difficult to forecast the amount of extensions when the scheme is implemented. Assuming the amount of extensions is reduced by 90%, the annual revenue generated is about \$269 million with \$159 million from charging for administrative cost and \$ 110 million from economic costs.

21. Some \$9.4 million has been earmarked for 11 additional civil service staff and 12 non-civil service staff in Highways Department for collection of EP fees, performing regulatory control and prosecution, and stepping up the frequency of inspection. Of this, \$8.4 million for 8 civil service staff and 12 non-civil service staff is time limited to fiscal year of 2004-05.

ECONOMIC IMPLICATIONS

22. The economic cost charging scheme is expected to discourage delays in completions of street excavations. This should generate benefits to the community in terms of smooth traffic flow. As the proposed fees represent only a minute portion of the operating costs of the industry, there will be no significant cost burden on the parties concerned.

SUSTAINABILITY IMPLICATIONS

23. The proposal would not have significant sustainability implications. It would help reduce road congestion and bring about some improvement to the environment and traffic mobility at street level.

ENVIRONMENTAL IMPLICATIONS

24. The proposal would not have significant environmental implications. Standard pollution control measures will be incorporated into excavation works to minimize environmental impacts.

LEGISLATIVE TIMETABLE

25. The legislative timetable will be-

Publication in the Gazette	12 April 2002
First Reading and commencement of Second Reading debate	24 April 2002
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

PUBLICITY

26. Besides this LegCo Brief, there will be a press release, and a spokesman available to handle press enquiries.

ENQUIRIES

27. Enquiries on this subject can be made to Mr C S Wai, Principal Assistant Secretary, Works Bureau on telephone number 2848 2704.

Works Bureau

10 April 2002

Annex A

Revised Proposed Fees for Excavation (Recovery of Administrative Costs)		
Description	In streets maintained by Highways Department	In other unleased lands maintained by Lands Department
For issue of an EP	\$1,860	\$3,060
For an extension of an EP, if required	\$590	\$400
Daily charge for the duration of the EP, including any extension, if required	\$32 per day	not applicable

Proposed Fees for Excavation (Recovery of Economic Costs)	
Type of Street	Charge
Category 1 (strategic streets)	\$18,000/day
Category 2 (sensitive streets)	\$7,000/day
Category 3 (remaining streets)	\$1,500/day

Proposed Fees for Highways Department's Excavation Permits (EPs)
(Cost at 2001-02 Prices)

	Issue of EP \$	Issue of extension EP \$	Daily Fee in respect of EP/extension EP \$
Staff Costs	59,383,346	4,628,734	43,037,290
Departmental Expenses	2,352,232	302,143	2,413,409
Accommodation Cost	1,704,949	152,878	1,354,845
Depreciation of the computerised UMS	4,625,073	746,584	5,655,072
Cost of Services provided by other departments	31,040,364	2,575,776	5,928,511
Central Administration Overheads	1,559,846	121,585	1,130,478
Total Cost	<u>100,665,810</u>	<u>8,527,699</u>	<u>59,519,605</u>
Total no of permit/permit-day	54,295	14,427	1,846,590
Unit cost	1,854	591.1	32.2
Approved fees	1,860	590	32

Note :

- 1) The above costs include those of HyD, TD and HKPF.
- 2) The staff cost is calculated based on the time spent by HyD in executing their duties in relation to excavation works on streets maintained by HyD.
- 3) The costs for issue of EP and extension EP are for processing EP and extension EP applications, and the costs for daily fee are for audit site inspections. They do not include the costs for prosecution.
- 4) The total no. of permit/permit-day include those for HyD works orders and excavation permits.

Proposed Fees for Lands Department's Excavation Permits (EPs)
(Cost at 2001-02 Prices)

	Issue of EPs for excavation in unleased land other than streets maintained by Highways Department	Extension of EPs for excavation in unleased land other than streets maintained by Highways Department
	\$	\$
Staff Cost	8,964,166	660,396
Departmental Expenses	260,726	17,773
Accommodation Costs	444,869	27,982
Services by Other Departments	-	-
Central Administrative Overheads	323,706	23,848
Total of above costs	<hr/> 9,993,467	<hr/> 729,999
Number of Permits Issued#	4,506	1,817
Unit Cost	2,218	402
Plus Unit Cost for Copying of Land Records	840	-
Total cost	<hr/> 3,058	<hr/> 402
Proposed Fees	3,060	400

Remarks:

- # The numbers of permits issued in 2001-02 assumed to be the same as that in 1997-98 as the number of EPs issued by Lands Department does not vary greatly from year to year.

Methodology in assessing the Additional EP Daily Charge based on Economic Cost due to Traffic Delay

1. To devise a charging scheme for economic cost, it is essential that we have a classification system of all roads over Hong Kong based on some existing criteria. We identified 3 categories:

Category 1 - Strategic Streets

This category comprises all strategic streets which basically include all red and pink routes.¹ Since expressways are either red or pink routes, they are automatically included in this category.

Category 2 - Sensitive Streets

This category includes all traffic sensitive streets other than those specified in Category 1 above. It includes streets where any excavation would normally require a Traffic Impact Assessment (TIA) and/or Day-time Ban would be imposed, and other streets where the closure of a traffic lane will result in major traffic problems².

Category 3 - Remaining Streets

This category comprises all other streets not included in Category 1 and 2.

2. From each category of streets, Transport Department selected representative road sections and junctions to conduct a computer study to assess the delay to motorists by street excavations.

3. The computer study was done utilizing a transport-modeling package capable of reporting the total travel time for all vehicles passing through a defined road section under different network conditions. For each sample selected, a model run was conducted for the normal road network and a second run was carried out with a road network suitably modified to reflect the loss of road capacity, resulting from the excavation works. By comparing the total travel time experienced by all vehicles through the road section for the scenarios with and without the excavation works, a delay value was derived. This delay was converted to an economic loss in dollars per day by application of a “value of time” factor (\$197.6 /car/ hour) used in the Comprehensive Transport Study.

¹ The existing red routes and pink routes are listed in the Annexes to Highways Department Technical Circular No. 5/2001.

² This list of roads where TIA and/or Day-time Ban requirements shall apply is also given in the Appendix to the “Guidance Notes No. RD/GN/021” issued by Highways Department.

4. Based on the above, the cost of each category of streets is then derived from the weighted average of the sample costs within that particular category, as shown below:

Type of Streets	Charge
Category 1 (strategic streets)	\$18,000/day
Category 2 (sensitive streets)	\$7,000/day
Category 3 (remaining streets)	\$1,500/day