

Waste Disposal (Amendment) Bill 2013

This note sets out (i) the information requested by the Bills Committee at its meeting of 12 July 2013 and (ii) our reply to the matters raised by the Assistant Legal Advisor in the letter of 8 July 2013.

PART ONE FOLLOW-UPS OF THE FIRST MEETING

(a) A list of other legislation that was relevant to fly-tipping of waste (such as the change of land use or deposit of waste giving rise to health hazard as a result of dumping activities);

2. Apart from the Waste Disposal Ordinance (Cap. 354; “WDO”), other legislation may also contain provisions that have an effect of regulating the various aspects relating to the depositing of construction waste on a private lot. Some key examples are set out below –

- (i) Air Pollution Control Ordinance (Cap. 311), Water Pollution Control Ordinance (Cap. 358) and Noise Control Ordinance (Cap. 400), enforced by Environmental Protection Department, for the control of dust emission, noise and wastewater discharges arising from land filling activities;
- (ii) Town Planning Ordinance (Cap. 131; “TPO”), enforced by Planning Department, for the control against unauthorized development including illegal land filling falling within the Development Permission Areas (“DPAs”) in the rural area when provisions of statutory plans are not complied with;
- (iii) Public Health and Municipal Services Ordinance (Cap. 132), enforced by Food and Environmental Hygiene Department (“FEHD”), for the control against land filling or depositing of construction waste on a private lot that have given rise to sanitary nuisances; and against deposition that leads to an accumulation of water resulting in breeding of mosquitoes;
- (iv) Public Cleansing and Prevention of Nuisances Regulation (Cap. 132BK), enforced by FEHD, for the control against the depositing of litter or waste from any specified vehicles stipulated under the Regulation;

- (v) Buildings Ordinance (Cap. 123), enforced by Buildings Department for the control of building works including those associated with land filling on a private lot;
- (vi) Country Park Ordinance (Cap. 208), enforced by Agriculture, Fisheries and Conservation Department, for the control against illegal dumping on a private lot that is located within country park; and
- (vii) Land Drainage Ordinance (Cap.446), enforced by Drainage Services Department, for the control against any filling in any designated main watercourse that would impede its flow.

(b) Any restriction on the height of the waste deposited on the lot or on the depth of the permitted area of 20 m² below ground level; and

3. The proposed new section 16B does not apply to a depositing activity where the total area on which construction waste has been deposited within the lot is less than 20 m². There is no restriction on the height or depth of the waste deposited on or below the said area of 20 m².

(c) Any responsibility on the part of the owner of the lot to reinstate the lot used as the depositing area.

4. The WDO provides for reinstatement of land lot used as depositing area if the deposited waste contains chemical waste. More specifically, the Director of Environmental Protection (“DEP”) may, by notice in writing under Section 31 of the Waste Disposal (Chemical Waste) (General) Regulation (Cap. 354C), require the owner or occupier of the premises in which the waste is stored to remove the chemical waste to a particular facility and to establish to his satisfaction that such requirement is complied with.

5. Other control regime may also be relevant. Under TPO, for instance, depending on the provisions of the relevant statutory plans, filling of land resulting in an elevation of ground level in some zones is an unauthorized development (“UD”) unless with the permission from the Town Planning Board¹. In accordance with section 23(1) of TPO, the

¹ Unlike other zones, the Notes for the “Agriculture” zone provide that land filling for laying of soil not exceeding 1.2m in thickness for cultivation would be exempted from the land filling restriction.

Planning Authority may serve Enforcement Notice on one or more of a land owner, an occupier or a person who is responsible for the UD requiring the UD to be discontinued. The Planning Authority is also empowered under section 23(3) of TPO to serve Reinstatement Notice requiring the reinstatement of concerned land to a condition it was in immediately before the Interim DPA Plan or DPA Plan became effective or to such other condition, more favourable to the person served, as the Authority considers satisfactory.

PART TWO ISSUES RAISED BY ASSISTANT LEGAL ADVISER

Commencement of the Bill

Q1 Clause 1(2) of the Bill provides that the Bill, if enacted, will come into operation on a day to be appointed by the Secretary for the Environment by notice published in the Gazette. Please advise if there is any intended commencement date of the Bill.

6. The exact commencement date will depend on the progress of the Bills Committee's scrutiny. Once the bill is enacted, we aim to bring the enacted ordinance into operation as soon as possible. Before we do so, there should be sufficient lead time, say three months, for informing the affected stakeholders, including the dump truck trade, the construction trade as well as the rural committees, and other preparatory work.

Definition of private lot and proposed new section 16B(1)(a)

Q2 Please confirm whether there is any piece or parcel of ground in Hong Kong which is –

- (i) held under a Government lease without identified by a lot number;***
- (ii) identified by a lot number but not held under a Government lease; and***
- (iii) neither held under a Government lease nor identified by a lot number.***

If so, please provide examples of such piece or parcel of ground.

7. Subject to relevant exclusions, the enhanced regulatory control

proposed under the Bill will apply to the depositing of construction waste on a private lot which is defined as “a piece or parcel of ground held under a Government lease and identified by a lot number as defined by regulation 2 of the Land Registration Regulations”. Please note that –

- (i) With reference to its definition under section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), the term “Government lease” includes short term tenancy (“STT”) granted by the Government which may not bear a lot number. These STT cases do not suffer from the same enforcement problem that the Bill aims to tackle and hence have not been covered under the Bill. Otherwise, according to the Land Registry’s record, lands held under a Government lease have a lot number.
- (ii) There is no case of land that is identified by a lot number but not held under a Government lease.
- (iii) There are lands not held under a Government lease and do not have a lot number. Examples include (i) government land and (ii) “land vested in a person by an Ordinance”, such as land vested in the Kowloon-Canton Railway Corporation under the Kowloon-Canton Railway Corporation Ordinance (Cap. 372) as well as Saint John’s Cathedral Church in Central which was vested in the trustees of the Church of England by the Church of England Trust Ordinance (Cap. 1014). Again, these cases do not suffer from the same enforcement problem that the Bill aims to tackle and hence have not been covered under the Bill.

Q3 Please explain the meaning of “a piece or parcel of ground held under a Government lease and identified by a lot number”. Does “a piece or parcel of ground” only refer to a piece or parcel of ground without any house, building or other structure built upon it? Does the ground floor of a house or building on a piece or parcel of ground fall within the meaning of “a piece or parcel of ground”? Does it require that the ground must be subject to one Government lease and identified by one lot number? If a house or building occupies a piece of ground held under a Government lease which is identified by more than one lot number, will it be considered as one private lot?

8. According to the definition, a private lot is a piece or parcel of

ground (i) held under a Government lease and (ii) identified by a lot number. The boundary of each such piece or parcel of ground is specified in the relevant Government lease. Whether any house, building or other structure is built upon the piece or parcel of ground is irrelevant to whether it is a private lot.

9. The Bill aims to regulate the depositing of construction waste on the ground without any house, building or structure of a private lot. If construction waste is to be deposited inside a building, house or structure that is built on a private lot, the construction waste will not be regarded as having been deposited on a piece or parcel of ground and thus such depositing activity will not be subject to the proposed new section 16B. Nevertheless, section 16A will still be applicable and the intended depositor has to seek permission from any owner or legal occupier of the place.

Q4 Please clarify how the boundary of a private lot be determined for the purpose of assessing the total area on which construction waste has been deposited within the lot under proposed new section 16B(1)(a) of the Ordinance.

10. As explained, each Government lease is identifiable by a distinct lot number and specifies the boundary of the subject lot which can be determined by standing surveying methods which will also be deployed in assessing the boundary of a private lot for the purpose of section 16B.

Q5 Proposed new section 16B(1)(a) of the Ordinance states that the proposed new section 16B does not apply in relation to the depositing of construction waste on a private lot if the total area on which construction waste has been deposited within the lot, regardless of who deposited the waste, does not exceed 20 m². Please clarify whether the total area means, in case of a multi-storey building within the private lot, the total areas of all the floors of the building.

11. Where there is any structure built on a private lot, the boundary of the lot will not be affected and will remain as what is specified in the Government lease. In calculating the total area on which construction waste has been deposited within the lot under section 16B(1)(a), we will not count construction waste that has been deposited inside any structure built on the lot.

Proposed new sections 16B(3) and (5)

Q6 If there is a multi-storey building on a piece of ground which is held under a Government lease and identified by a lot number, should the permission be given by all the owners of every unit of the building for depositing construction waste in that building/piece of ground?

12. As explained under paragraph 9, if construction waste is to be deposited inside the multi-storey building, the depositing activity will only be subject to section 16A. If construction waste is to be deposited on the ground outside the building, the proposed new section 16B will apply subject to relevant exclusions and the person will need to obtain permission from all owners of the lot in writing vide a specified form following the requirements under section 16B.

Q7 If a private lot is owned by three persons and one of them intends to deposit construction waste on such private lot, does such owner require to obtain the valid permission of the other two owners? Does such owner also require to give self-permission as required under proposed new section 16B(3) of the Ordinance because of the inapplicability of proposed new section 16B(5) of the Ordinance? What if the private lot is owned by two persons who are married couple?

13. Our policy intent is that an intended depositor and the person who causes the construction waste to be deposited on a private lot have to obtain permission from all owners of the lot in writing vide a specified form following the requirements under the proposed new section 16B. Accordingly, in the case of a private lot which is owned by three persons and one of them intends to deposit construction waste on such private lot, permission has to be obtained from all three owners. Whether or not these owners involves married couple is not relevant.

Q8 It appears that there will be occasions where a person may commit both the offences under proposed new section 16B(3) and section 16A(1) of the Ordinance by doing a single act. Please advise which of the offences will be charged by the prosecution.

14. The current legislative exercise seeks to enhance the enforcement effectiveness of the existing regulatory regime under section 16A. The Prosecution will decide which of the offences is to be charged after considering the available evidence of individual cases.

Proposed new section 16C(4)

Q9 It appears that the duty to display the acknowledged form under proposed new section 16C(4) of the Ordinance is only imposed upon a person who deposits construction waste on a private lot, but not on one who causes to be deposited construction waste on a private lot. Please state the policy reason(s) for making such arrangement.

15. The purpose of displaying the acknowledged form is to inform the public, thus facilitating effective enforcement. Where a depositing activity is being carried out and an acknowledged form is displayed, the public will have knowledge that valid permission has been obtained in accordance with the requirements under the WDO. To achieve this purpose, it will suffice to impose the liability to display the acknowledged form upon the depositor.

Proposed new section 16C(7)

Q10 In view of the amendment proposed to be made to section 31 of the Ordinance under clause 8 of the Bill, please confirm whether it is not intended to make the offence under proposed new section 16C(7) of the Ordinance an offence of strict liability. If so, please provide the policy reason(s).

16. In general, an offence of a regulatory nature will be an offence of strict liability and the offence under proposed new Section 16C(7) is of a regulatory nature. Therefore it is our policy intent that the offence under that section is a strict liability offence even though it has not been explicitly declared as such under Section 31. We are happy to further review this provision with the Bills Committee at the clause-by-clause stage.

Penalties for the offences under proposed new section 16C(6) and (7)

Q11 Please explain the policy reason(s) for setting a fine at level 6 as the penalty for the offences under proposed new section 16C(6) and (7) of the Ordinance. Are these two offences of the same nature and seriousness?

17. The two offences under Section 16C(6) and (7) are not of the same nature. But when compared with the other offences referred to in Section 18, we consider both offences under Section 16C are less serious

and therefore have proposed a penalty at level 6².

Q12 Could the offence under proposed section 16C(7) of the Ordinance be committed continuously? If so, please clarify the policy reason(s) for not including daily default fine as the penalty for this offence in the case of a continuing offence.

18. The offence under the proposed new section 16C(7) is related to the failure to display a copy of the acknowledged form at a conspicuous place on the lot during the depositing activity. Since an unauthorized depositing activity is a continuous offence under Section 18(1), non-compliance with Section 16(7) may also be committed continuously. But continuous non-compliance with the display requirement will not result in aggravation of the adverse environmental impact in the lot concerned. Thus, we have not proposed daily default fine for such offence.

**Environmental Protection Department
September 2013**

² By way of clause 5, the maximum penalty terms under Section 18(1) apply to an offence under Section 16B, i.e. a fine of \$200,000 and to imprisonment for 6 months for the first offence; a fine of \$500,000 and to imprisonment for 6 months for a second or subsequent offence; and a daily fine of \$10,000 for a continuing offence.