

Waste Disposal (Amendment) Bill 2013

This note sets out our response to the follow-up actions requested by the Bills Committee at its second and third meetings held on 15 and 29 October 2013.

A. Follow-ups from the Second Meeting

The Town Planning Ordinance

Q1 Information on the enforcement of the Town Planning Ordinance (Cap. 131) in combating fly-tipping activities by the Planning Department, including the number of prosecutions taken against fly-tippers in recent years.

2. We consulted Planning Department (“PlanD”) and their response is as follows –

- (a) 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 Board. In accordance with section 23(1) of the Town Planning Ordinance (“TPO”), the 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 the TPO to serve Reinstatement Notice requiring the reinstatement of concerned land to a condition it was in immediately before the Interim Development Permission Area Plan or Development Permission Area Plan became effective or to such other condition, more favourable to the person served, as the Authority considers satisfactory.
- (b) Relevant statistics of enforcement against unauthorized land filling activities (involving construction and demolition materials) under the TPO are set out at Annex A.

Buildings etc. on a Private Lot

Q2(a) Whether the proposed new section 16B will apply to the circumstance that an abandoned site was fly-tipped by persons carrying out works in a construction site nearby;

3. As explained at the second Bills Committee meeting, the Waste Disposal (Amendment) Bill 2013 (“Amendment 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.

Q2(b) Definitions of a building, house and structure that are built on a private lot, in particular for those which are partially collapsed; and

4. Several provisions of the Waste Disposal Ordinance (Cap 354; “WDO”) contain references to “building” (cf. sections 12(1) and 13(1)) which however have not been specifically defined. The WDO does not contain any references to “house” nor “structure”, but has referred to “premises” which also has not been defined.

5. Several Members expressed concerns that the conditions of some abandoned buildings may have deteriorated substantially and may be more prone to unauthorized depositing of construction waste than other properly maintained buildings. In actual practice, there may not be any simple yardstick¹ to determine whether a building has been deteriorated sufficiently to become a potential site for fly-tipping. Whether the proposed new section 16B applies will depend on actual circumstances as to whether such a building has been so deteriorated that it can no longer be regarded as a building and thus the depositing of construction waste will accordingly be regarded as being undertaken on the ground inside a building that is built on a private lot. As our policy intent is NOT to regulate the depositing of construction waste inside a building, house or structure that is built on a private lot, we do not see any need at this stage

¹ One possibility is to refer to the “dangerous buildings” as may be identified under the building safety regime. But it is questionable whether such dangerous places will be popular for unauthorized depositing of construction waste vis-à-vis other private land in the territory. The process of ascertaining the status of a “dangerous building” will also complicate the compliance system under the Amendment Bill.

to include references to such words in the Amendment Bill and there is therefore no need to suggest any definitions.

Q2(c) Justifications for the Administration's definition of a private lot.

6. The proposed definition of “private lot” sets out two conditions for determining whether a piece or parcel of ground is a “private lot”. On the other hand, for the new section 16B to apply, the construction waste has to be deposited on “a piece or parcel of ground” first. While the definition does not seek to further elaborate on the meaning of “a piece or parcel of ground”, it is noted that in some other existing provisions in the WDO, e.g. sections 13(1), 16(1) and 21A², there are express references to wording such as “premises” or “building” when the intention is that the relevant provision is to apply to “premises” or “building” in addition to land. Since the policy intent is that the proposed new section 16B is not to apply to the depositing of construction waste inside any building or premises, there is no need to expressly refer to such wording in the definition of “private lot”.

Section 16A(1) and Section 16B(3)

Q3 An explanation of the elements that the prosecution would consider when deciding to charge a person with the existing section 16A(1) or the proposed new section 16B(3) who has

² The relevant provisions under the WDO are set out below –

- (a) **Section 13(1)**: If the collection authority is requested by the owner or occupier or person responsible for the management of **any building or land** to remove any trade waste, livestock waste or animal waste, the collection authority may remove it, and may recover from the person requesting the removal a fee not exceeding the cost of removal and disposal;
- (b) **Section 16(1)**: Subject to subsection (2), a person shall not use, or permit to be used, any land or premises for the disposal of waste unless he has a licence from the Director to use **the land or premises** for that purpose; and
- (c) **Section 21A**: Without prejudice to the generality of section 21(4), the licensing authority shall not grant a waste disposal licence in respect of chemical waste or clinical waste (as the case may be) under that section unless he is satisfied that **the land or premises** in respect of which the licence is sought has a waste disposal facility which (a) has the capacity to dispose of such minimum quantity of chemical waste or clinical waste (as the case may be) and within such period; or (b) is capable of disposing of chemical waste or clinical waste (as the case may be) in such other manner, as may be prescribed.

done a single act possibly in breach of the Waste Disposal Ordinance, and to provide an illustration.

7. The offences under section 16A(1) and the proposed new section 16B(3) comprise different ingredients –

- (a) under section 16A(1), the depositing of *any kind of waste* in *any place* without the permission of *any owner or lawful occupier* of the place (or without lawful authority or excuse) is prohibited. There is no statutory requirement on how the permission should be required;
- (b) under the proposed new section 16B(3), only the depositing of *construction waste* on a *private lot* without the permission of *all owners* of the lot is prohibited. There are statutory requirements on how to obtain a valid permission.

8. In the event that a person is found to have deposited construction waste on a private lot, the enforcement authority will investigate and determine whether or not to initiate prosecution taking into account the collected evidence of the case. Where prosecution is initiated for a single act of contravention, the depositor will only be prosecuted for having committed an offence under section 16A(1) or the proposed new section 16B(3) but not both. For Members' reference, under section 18(1), the penalty for an offence under the proposed new section 16B(3) is a fine at Level 6 (i.e. \$100,000) which is the same as the penalty level for section 16A(1).

Display of the Acknowledged Form in a Conspicuous Place

Q4 A person who deposits construction waste must display in a conspicuous place on the lot a copy of the acknowledged form for the depositing activity, the Administration to define "conspicuous place" in a lot, in particular that in a rural open ground.

9. As explained at the second Bills Committee meeting, it is not uncommon under the existing legislation to provide for the display of certain documents in a "conspicuous place". For instance, an attempt of keyword search through the Bilingual Laws Information System ("BLIS") search reveals that over 100 provisions in the existing

legislation contain the reference to “conspicuous place” (and over 400 provisions contain the reference to “conspicuous”). Some examples are set out at Annex B. On the other hand, no existing legislative provision seeks to define “conspicuous place”. We are not aware of any specific circumstantial considerations in the context of the Amendment Bill that may require “conspicuous place” to be defined. In actual practice, we do not see major problem for a depositor to comply as the copy of the acknowledgment form being displayed will normally be quite visible in a depositing site that is subject to the Amendment Bill.

Other Enforcement Issues

Q5 Procedures for enforcing the Waste Disposal Ordinance against fly-tipping activities in real situation (including the roles of the front-line staff of Environmental Protection Department and Police Force) and an explanation of the ordinances, apart from the Waste Disposal Ordinance, empowering the public officers to stop persons from obstructing them to carry out duties against fly-tipping activities.

10. As explained at the second Bills Committee meeting, the WDO including the Amendment Bill (when enacted and implemented) is enforced by the Environmental Protection Department. Where a person is found to be depositing construction waste, presence of a public officer who has been authorized as an “authorized officer” under section 23A of the WDO is necessary for taking any appropriate enforcement action under section 16A of the WDO or the proposed section 16B of the Amendment Bill (when enacted and implemented). This holds true even though a police officer is on the spot to attend to the case.

11. As far as enforcement under section 16A of the WDO is concerned, in a typical case, authorized officers will attend the scene and make investigation to check whether any illegal depositing activities occur. If illegal activities are suspected, the officers would record the particulars of the suspects (such as drivers or contractors) and warn them on their legal liabilities and possible penalties. If there is sufficient evidence, we may initiate prosecution actions against them under the WDO. In general, under the WDO, such an authorized officer has been empowered to enter relevant places or premises to undertake enforcement work. He may also take samples and collect relevant pieces of evidence. For details, please refer to sections 23C and 23D of the WDO.

Furthermore, wilful obstruction to authorized officers in exercising their powers is an offence under section 23F of the WDO. In exercising their powers, authorized officers may, as the cases so require, seek police's assistance. In general, under section 10 of the Police Force Ordinance (Cap. 232), police officers have duties to take lawful measures for preventing and detecting crimes and offences, including those under the WDO.

12. At present, as we may only consider taking enforcement action under section 16A, there are practical problems for us to ascertain whether an offence has already been committed. As already explained in the Legislative Council Brief, the current enforcement against fly-tipping on private land is not effective under section 16A as it is sometimes difficult to prove the lack of permission of a landowner or lawful occupier. It is not unusual to receive incomplete or conflicting information from the depositor and the landowner or lawful occupier as to whether there was indeed proper permission partly owing to no statutory requirement on the format of the permission to be given. Some cases involve uncertainty in ownership due to outdated records (e.g. when the owner on record has deceased). We envisage that the enhanced control proposed under the Amendment Bill will improve the situation because the prior notification mechanism will help identify the depositing activities that have indeed been properly authorized and thus single out those that have not.

B. Follow-ups from the Third Meeting

- (a) Circumstances under which the Department of Justice would apply for a review of the sentence handed down by the court;*
- (b) The number of prosecution cases against persons who cause or permit to be deposited construction waste without lawful authority on a piece of land in the past; and*
- (c) Information on the maximum penalty imposed by the court for unauthorized dumping vis-à-vis the maximum penalty specified in the Waste Disposal Ordinance in the past.*

13. At present, under section 16A(1) of the WDO, a person commits an offence if he deposits or causes or permits to be deposited waste in any place except with lawful authority or excuse, or except with the permission of any owner or lawful occupier of the place. Section 16A(2)

of the WDO further provides that for the purpose of section 16A(1), if waste is deposited from a vehicle that is not being used as a public transport carrier, the following persons are regarded as causing the waste to be deposited –

- (a) the driver of the vehicle at the time when the waste is deposited from it; and
- (b) any person employing that driver to drive the vehicle at that time.

14. As explained at the third meeting of the Bills Committee, no minimum penalty level is set out under section 18(1): any person who commits an offence under section 16A is liable (i) for the first offence, to a fine of \$200,000 and to imprisonment for 6 months; (ii) for a second or subsequent offence, to a fine of \$500,000 and to imprisonment for 6 months; and (iii) in addition, if the offence is a continuing offence to a fine of \$10,000 for each day during which it is proved to the satisfaction of the court that the offence has continued.

15. In general, the court will take into account various factors, such as the nature or seriousness of the offence, environmental impacts and mitigation, before sentencing in each case. In the past three and a half years, the prosecution statistics for section 16A are set out at Annex C. Among the convicted cases in 2013 (up to June), the maximum fine handed down by the court was \$20,000 while the minimum fine was \$1,500. The average fine was about \$8,611. According to the *Prosecution Code* published by the Department of Justice, the Secretary for Justice may apply to the court in exceptional cases for the review of a sentence on the basis that it has proceeded on an error of law or of principle or that it is manifestly inadequate or excessive.

16. In general, the following persons may be prosecuted in an illegal depositing activity under section 16A: (i) the person who directly performs the depositing activity; (ii) the driver of the vehicle from which waste is deposited (if applicable); and (iii) any person who employs the driver to drive the vehicle at that time. It is also feasible that an individual may fit into more than one of the preceding descriptions such that he has different roles in the illegal depositing activity, and prosecution against which individual or company has to be considered on a case-by-case basis in light of available evidence. Accordingly we are unable to provide breakdown figures on the convicted cases which involve “persons who cause or permit to be deposited construction waste

without lawful authority on a piece of land”. That said, we are able to confirm that there were cases where an employer of the driver or a person giving instructions to the driver for the waste deposition was successfully prosecuted.

Environmental Protection Department
November 2013

Annex A

**Enforcement Statistics on Unauthorized Land Filling Activities
under the Town Planning Ordinance**

| | 2010 | 2011 | 2012 | 2013* |
|--|-------------|-------------|-------------|--------------|
| <u>Complaints</u> | | | | |
| Public complaints received | 195 | 207 | 233 | 111 |
| <u>Actions taken</u> | | | | |
| Warning letter issued | 183 | 485 | 436 | 190 |
| Enforcement/ stop notice issued | 274 | 662 | 462 | 265 |
| Reinstatement/compliance notice issued | 185 | 296 | 419 | 140 |
| <u>Prosecution</u> | | | | |
| No. of prosecutions by summonses | 32 | 11 | 25 | 17 |

* Up to June 2013

**Examples of Existing Legislation that also Contain the Reference to
“Conspicuous Place”**

- (a) Regulation 26A of the Dutiable Commodities (Liquor) Regulations (Cap. 109B) requires a licensee to display the relevant licence in a *conspicuous place* on the licensed premises.
- (b) Section 34B of the Food Business Regulation (Cap. 132X) requires that a licensee shall exhibit and keep exhibited the relevant licence at a *conspicuous place* near the entrance of the premises to which such licence relates.
- (c) Section 22 of the Places of Amusement Regulation (Cap. 132BA) requires the licensee of a billiard establishment to exhibit a notice as prescribed in some *conspicuous place* at the entrance of the licensed premises.
- (d) Section 11 of the Pharmacy and Poisons Ordinance (Cap. 138) requires each registered pharmacist to display the name, the certificate of registration and a notice in a *conspicuous place* in the premises where he is engaged or employed by an authorized seller of poisons.
- (e) Section 14 of the Dentist Registration Ordinance (Cap. 156) states that every registered dentist shall exhibit the certificate of registration or a certified copy of the certificate issued under the Ordinance in a *conspicuous place* in any premises in which he practises dentistry.
- (f) Section 18 of the Education Ordinance (Cap. 279) requires the management authority of a school to cause the certificate of the registration or a certificate of provisional registration in the specified form to be exhibited at all times in a *conspicuous place* in each of the premises specified in the certificate unless exception applies.
- (g) Section 41 of the Employees’ Compensation Ordinance (Cap. 282) is concerning display of notice of insurance in a *conspicuous place* on each of the employer’s premises.

**Prosecution Statistics:
Section 16A of the Waste Disposal Ordinance**

| | 2010 | 2011 | 2012 | 2013* |
|----------------------------------|-------------|-------------|-------------|--------------|
| No. of prosecutions by summonses | 55 | 36 | 47 | 27 |
| Convicted summonses | 51 | 35 | 45 | 27 |
| Average Fine (HK\$) | 2,631 | 3,086 | 5,107 | 8,611 |
| Maximum Fine (HK\$) | 6,000 | 5,000 | 20,000 | 20,000 |
| Minimum Fine (HK\$) | 500 | 1,000 | 1,500 | 1,500 |

*up to June 2013