

Land Filling Activities at She Shan Tsuen, Tai Po

Purpose

This paper examines the existing regulatory regime, involving various bureaux and departments, in dealing with the land filling activities at She Shan Tsuen, Tai Po.

Land Use Planning and Lease Enforcement

Land use planning control

2. Land is a scarce resource in Hong Kong. The main objectives of the Administration's land use planning are to ensure optimal land use and to promote sustainable development for a vibrant economy and social progress. These objectives are achieved through the operation of a town planning system. The Town Planning Ordinance (TPO), Cap. 131, provides the statutory mechanism for preparing, publishing and approving zoning plans.

3. Planning control is effected through the preparation of statutory plans. The statutory plans list out those uses/developments permitted under the plan and those requiring planning approval from the Town Planning Board (TPB).

4. In deciding the land use zoning, the Administration takes into account relevant factors such as government policies, planning principles, infrastructure and environmental consideration, site conditions and public aspiration etc. The designation of conservation zonings such as "Site of Special Scientific Interest (SSSI)", "Conservation Area (CA)" and "Coastal Protection Area (CPA)", requires justifications from the relevant departments for the required stringent planning control in such areas. In most of these conservation zonings, pond filling and/or excavation, even for a permitted use, require planning approval from the TPB.

5. For other zonings such as "Agriculture", "Village Type Development", "Recreation" etc, uses which are compatible with the planning intention of the zoning are always permitted and do not require planning approval. For instance, agricultural use (including market garden, keeping of livestock) and plant nursery are permitted as of right in "Agriculture" zone. Besides, developments incidental to the permitted developments, and uses directly and ancillary to the permitted developments and uses are always allowed and no separate permission is required.

Lease enforcement

6. While the land use planning system guides the development and use of land at a macro level, the use of a particular piece of private land is governed by the terms of the relevant land lease. The Lands Department (Lands D) is responsible for the disposal of land by leases and for ensuring that the lease conditions are complied with by land owners.

7. All land leases contain a user clause specifying the permitted use of the land concerned. The leases also include a number of general and special conditions that the lessees need to comply with. Failure to comply with these conditions will lead to lease enforcement action by Lands D. Where breach of land lease condition persists, re-entry of the land concerned may be initiated by Lands D.

8. The land lease conditions have evolved over time with the development of the society. Modern land leases are more elaborate than the old leases. Land lease is a form of contract. Once entered into, it cannot be altered unilaterally by either of the contractual party i.e. the lessor (the Government as the landlord) and the lessee. Hence, Government cannot impose additional terms on an existing lease to tighten the control over the use of the land concerned.

The land use planning and lease enforcement systems as vehicles to protect the environmentally sensitive areas

9. The primary function of the land use planning system is to ensure the optimal use of land as planned. The lease enforcement system aims to ensure that the lessee will observe the contractual obligations as provided in the lease conditions. These systems are mainly land use oriented and are not designed to deal with environmental protection issues. However, the formulation of town plans (as mentioned in paragraph 4 above) also takes relevant government policies and environmental considerations into account. Therefore, the statutory town plan control helps to reflect the relevant environmental protection aspects through the imposition of certain planning conditions, e.g. in most of the conservation zonings, pond filling requires planning approval.

10. Specific environmental protection laws have only been enacted since 1980s. Before that, environmental protection measures were implemented through the imposition of relevant conditions in the new leases. After the environmental protection laws are in place, the environmental protection clauses (except for a few industrial leases) are gradually removed from the new leases. This is because enforcement of environmental protection measures will be much more effective by the dedicated law enforcement agency through the relevant legislation.

11. Land lease conditions evolve with time. Hence, they vary greatly among different types of leases, and among leases of similar category but issued at

different times. Whether environmental nuisances can be tackled through lease enforcement action depends very much on the actual conditions in the specific leases. Where the use of land breaches the lease conditions and creates nuisances, Lands D will take enforcement action in accordance with its departmental priorities and in consultation with relevant departments. In the absence of the relevant land lease conditions against environmental nuisances, Lands D cannot take enforcement action against the land owner.

Pollution Control and Prevention of Environmental Nuisances through Legislation

12. In order to protect the environment more effectively, the Administration has enacted specific laws targeting particular activities or to achieve specific policy objectives. These include, inter alia, the Waste Disposal Ordinance (Cap. 354), the Air Pollution Control Ordinance (Cap. 311), Water Pollution Control Ordinance (Cap. 358) and Noise Control Ordinance (Cap. 400). These Ordinances apply to the whole territory, irrespective of their land status. Therefore the land owners of leased land also abide by these laws.

13. Apart from the above specific pollution control ordinances, the Public Health and Municipal Services Ordinance (Cap. 132) also has provisions to deal with nuisances and require removal of litter or waste from any place.

Land Filling Activities and Dumping of Waste on Private Land

14. We share the concern of Members and the public about recent incidents of land filling activities and dumping of waste on private land in the New Territories (NT). With the assistance of the Department of Justice, we have examined the lease control and regulatory regimes under the relevant Ordinances with a view to identifying a valid basis for action. The ensuing paragraphs set out the Administration's considerations.

Lease control

15. Whether land filling activity is allowed on private land depends on the land lease conditions. Most private land in the NT is covered by Block Government Leases (BGLs) granted in the early 20th Century. The main restriction in BGLs is that no buildings are permitted on agricultural lots without the prior consent of the Director of Lands. BGLs do not contain conditions prohibiting land filling on agricultural land. As such, lease enforcement action cannot be taken by Lands D against land filling activity on lots covered by BGL.

Town Planning Ordinance

16. All land uses and developments must conform with the relevant

statutory plans. Developments that are not permitted under the plan, or not covered by the planning approval, or not in existence before the gazette of the Development Permission Area (DPA) plan are unauthorized developments (UDs) under the TPO. They are subject to enforcement action by the Planning Authority. Land filling activities that have led to complaints from residents in the vicinity of the sites concerned often take place on “Agriculture” zone. Land filling in “Agriculture” zone does not breach the relevant statutory plan. Unless there is clear evidence that the land filling activity will lead to UD, no legal action can be taken under the TPO.

Buildings Ordinance (BO)

17. All buildings and development works will need to comply with the relevant provisions of the BO. If land filling or other activities on agricultural land are undertaken for the purpose of building or related works, they would be building works and should first obtain the approval from the Building Authority (BA) such that the BA can consider whether they comply with the safety standards stipulated under the BO. On the other hand, if these activities are not undertaken for the purpose of building and related works, these activities per se will not come under the control of the BO. However, should they affect the safety of adjacent buildings or land, the BA may consider appropriate enforcement action under the BO.

Waste Disposal Ordinance

18. The existing Waste Disposal Ordinance provides for sanctions against illegal disposal of waste. It is an offence if any person deposits or causes or permits to be deposited any waste on private land *without the consent of the owner or occupier*. However, where such activities are undertaken by the owner or occupier or with their consent, no sanctions could be applied.

19. The Administration is aware that the introduction of the construction waste disposal charging scheme may aggravate the problem of illegal disposal of waste. The Administration has therefore strengthened legal provisions under the Waste Disposal (Amendment) (No.2) Bill (which aims to introduce the charging scheme) against such acts to minimize adverse impact on the environment. With regard to private land, we propose to empower the Director of Environmental Protection (DEP) to enter without warrant any places (other than domestic premises and private land for dwelling purpose), or with warrant issued by the magistrate to enter domestic premises and dwelling place to remove waste if DEP/the magistrate has reasonable grounds to believe that an offence of illegal disposal of waste has been committed, that the deposited waste is likely to give rise to an imminent risk of adverse environmental impact, and that immediate remedial actions are required. DEP would be entitled to apply to the court to recover from the convicted person the cost of removing the waste.

20. We are considering the suggestion of extending DEP’s power to enter

private land to remove waste even if there is consent from the land owner concerned.

Public Health and Municipal Services Ordinance

21. If land filling or dumping of waste on a particular piece of land gives rise to a nuisance or litter, action may be taken against the land owner under this Ordinance. The Food and Environmental Hygiene Department (FEHD) can issue abatement notice or notice of removal of litter or waste to the responsible person, requiring the person to abate the nuisance within a specified period of time. Failure to comply with the relevant notice will be subject to prosecution.

Land Drainage Ordinance

22. The Land Drainage Ordinance empowers the Drainage Authority (DA) to carry out drainage works and other related matters within the specific areas (the Drainage Authority Area) as defined in the Ordinance. If private lot owners, without the DA's consent, carry out filling or other like obstruction in any main watercourse (in the specified areas) impeding the flow, action can then be taken. Where in the opinion of the DA, obstructions block any main watercourse or impede its free flow in a Drainage Authority Area, the DA may require the owner of the land on which the obstructions are situated; or requiring any person causing the obstruction to remove such obstructions.

Waterworks Ordinance

23. The Waterworks Ordinance empowers the Water Authority (i.e. Director of Water Supplies) to take actions for the prevention of pollution to raw water in the water gathering ground. If there is objective evidence demonstrating that a land filling activity has caused or will likely cause contamination to the water in the water gathering ground, prosecution actions can be initiated. On the other hand, if the filling is placed properly and will unlikely cause contamination, prosecution action cannot be taken under the Waterworks Ordinance.

Land Filling Activity on Private Agricultural Land – the Case at She Shan Tsuen, Tai Po

24. The site concerned at She Shan Tsuen, Tai Po is under “Agriculture” zone. This case has aroused public concern because the land filling activity could adversely affect the rural environment of the area and cause environmental nuisances, and increase the risk of flooding. The Administration has been requested to take legal action against the land filling activity so as to prevent the situation from deteriorating and to deter similar cases in future. Some have suggested a “test case” prosecution. Indeed, relevant Government departments have sought legal advice to ascertain whether the case is actionable under their respective regimes. Meanwhile,

the departments are monitoring the situation at the site regarding aspects under their purview. Details of the departments' follow up actions are at the **Annex**.

Prosecution Considerations

25. The Administration has considered taking enforcement action under relevant Ordinances. However, up to this juncture, no prosecution action can be taken. When considering the institution or continuation of criminal proceedings, the first question to be determined is the sufficiency of evidence. A prosecution should not be started or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by an identifiable person. A bare prima facie case is not enough to justify a decision to prosecute. The proper test is whether there is a reasonable prospect of a conviction. This decision requires an evaluation of how strong the case is likely to be when presented at trial. In this connection, the Secretary for Justice has also to consider any defences which are plainly open to or have been indicated by the accused, and any other factors which could affect the prospect of a conviction.

26. Taking account of the existing legislative provisions as outlined above, there is so far no sufficient evidence under relevant ordinances to instigate prosecution. There is particular concern about why no action can be taken under the TPO against the land filling activity. As mentioned in paragraph 16 above, land filling in itself does not contravene the permitted use in "Agriculture" zone. The land owner claimed that the land filling on site is for future agricultural use. There is no sufficient evidence to rebut the claim of the land owner and to take prosecution action. Nevertheless, the Administration will closely monitor the situation. The prosecution position will be reviewed if sufficient evidence comes to light.

Way Forward

27. The Administration fully recognises the need to make the best use of our scarce land resources and to protect our environment. We have adopted multiple-prong approach to achieve the objectives. However, as demonstrated in the She Shan Tsuen case mentioned above, there may be situations where, despite the existence of relevant ordinances, no immediate enforcement action can be taken due to the limitations in the regulatory regime or lack of sufficient evidence. The Administration will review its policies and legislation in the light of this case to see whether it is necessary, and if so, how to strengthen our control over certain activities on private land with a view to enhancing the protection of the environment.

**Housing, Planning and Lands Bureau
Environment, Transport and Works Bureau
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**Land filling at She Shan Tsuen, Tai Po :
Responsibilities and follow up actions by relevant departments**

A. Land use planning

- Plan D is to ensure that the land use is permitted under the relevant Outline Zoning Plan (OZP).
- Plan D has conducted a number of inspections to the subject site. So far there is no sufficient evidence of a breach of the statutory town plan. Hence, no prosecution action can be taken under the relevant provisions of the Town Planning Ordinance (Cap. 131).
- Plan D will continue to monitor the activity on site and take appropriate action if there is sufficient evidence to show that there is a breach of the statutory provisions.

B. Land lease conditions

- Lands D's responsibility is to ensure that the land lease conditions are complied with.
- The land filling activity at She Shan Tsuen involves private agricultural lots held under a Block Government Lease (BGL). Land filling activity on the lots does not breach the lease conditions.
- Notwithstanding the above, the District Lands Office/Tai Po of Lands D has requested the concerned land owner to improve the site situation and to keep the area in a hygienic condition.

C. Building control

- Buildings Department (BD) is to ensure that any development works taking place on site will comply with the relevant provisions of the Buildings Ordinance (BO).
- Formation of a dangerous slope is a breach of the BO. Since a slope has been formed on the site which may pose danger, BD has advised the land owner to trim the slope to the safety level in accordance with the advice given by the Civil Engineering Department. The contractor of the land owner has trimmed the slope.

- So far there is no evidence that the land filling activity is associated with building construction. BD will continue to monitor if there is unauthorized site formation work at the site.

D. Waste Management

- As the land filling activity at She Shan Tsuen is carried out on a private land with the consent of the landowner, it is not an offence under the Waste Disposal Ordinance. Hence, the Environmental Protection Department (EPD) cannot take any action against the concerned activity under the Ordinance.
- EPD will take necessary enforcement action if there is evidence that the concerned activity violates the environmental laws.

E. Environmental hygiene

- Food and Environmental Hygiene Department (FEHD) has conducted inspection at the site. However, no rubbish could be observed on site, and emission of dust from the site was not in such a manner as to be a nuisance to the vicinity. Therefore no prosecution action under the Public Health and Municipal Services Ordinance can be taken at this stage. FEHD will continue to monitor the situation.

F. Drainage concerns

- With respect to the Land Drainage Ordinance, as the land filling site and the affected watercourses are physically located outside the Drainage Authority Area, the Land Drainage Ordinance cannot be invoked to deal with the situation in the present case.
- Drainage Services Department (DSD) has assessed the impact of the land filling activities at She Shan Tsuen on the drainage system in the area and the risk of flooding. It is likely that the land filling activities may cause flooding to the nearby low-lying areas in the rainy season.
- DSD will continue to closely monitor the land filling site. It will remove any silt/debris accumulated in channels/drains within Government land.

G. Quality of Raw Water

- Water Supplies Department (WSD) has been monitoring the

subject site and the nearby stream courses on a biweekly basis as part of the water quality monitoring exercise. The regular test results do not indicate that the quality of raw water in the vicinity has been adversely affected. Under such circumstance, it will not be appropriate to take actions under the Waterworks Ordinance.

- WSD will continue to monitor the situation and will take necessary action, if appropriate.

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