

LEGISLATIVE COUNCIL BRIEF

Land (Miscellaneous Provisions) (Amendment) Bill 2014 - Proposed Increase in Penalties Relating to Unlawful Occupation of Unleased Government Land

INTRODUCTION

A At the meeting of the Executive Council on 24 June 2014, the Council ADVISED and the Chief Executive ORDERED that the Land (Miscellaneous Provisions) (Amendment) Bill 2014 (at **Annex A**) should be introduced into the Legislative Council (“LegCo”) to increase the penalties for offences relating to unlawful occupation of unleased Government land for the purpose of enhancing the deterrent effect against the relevant offences.

JUSTIFICATIONS

Enforcement Against Unlawful Occupation of Unleased Land

2. Land is a scarce and valuable resource in Hong Kong. It is important for the Government to ensure that the use of land is properly controlled and managed. The objective and premise of the Land (Miscellaneous Provisions) Ordinance (Cap. 28) (“the Ordinance”) are to provide for matters relating to Government land. Lands Department (“LandsD”) is responsible for the management and administration of land, and the Director of Lands (“D of Lands”) resorts to the various provisions thereunder for such purpose. Part II of the Ordinance, entitled “Occupation of Unleased Land” (sections 4 to 7), relates to the powers to issue licence for occupation of unleased land and to take enforcement action against unlawful occupation of unleased land, unlawful erection of structure on unleased land as well as unlawful removal of earth, turf or stone from unleased land. The relevant offences and penalties are stipulated under sections 6(4), 6(4A) and 7(4) of the Ordinance. In addition, section 6(5) provides for the recovery from the person convicted of an offence under sections 6(4) or 6(4A) any cost incurred in or arising out of the demolition of any property or structure, and the exercise of the powers conferred by section 6 of the Ordinance.

3. Given the vast tract of unleased and unallocated Government land over the territory and the practical difficulties in effectively monitoring and patrolling such land, unleased land is occupied illegally and related offences are committed from time to time. Between 2008 and 2013, LandsD had handled about 45 000 cases of unlawful occupation of unleased land. Given the perceived scarcity and value of land in Hong Kong, individual cases of unlawful occupation of unleased land have also prompted high-profile media reports and attracted wide interest in the community. There is a general consensus in the community that such acts should not be tolerated and any such cases should be tackled expeditiously with punitive and deterrent effect.

Diminishing Deterrent Effects of Penalties

4. In general, LandsD takes action to deal with cases of unlawful occupation of unleased land depending on the nature and circumstance of each individual case. Such actions include issuing cessation notice, carrying out clearance operation, participating in joint enforcement action involving other relevant departments, and making referral to other relevant departments for action. Based on legal advice, LandsD also instigates prosecution action in respect of cases with sufficient evidence under the relevant provisions of the Ordinance. Between 2008 and 2013, prosecution actions against unlawful occupation of unleased land under section 6(4) of the Ordinance had been taken in 67 cases. However, the level of penalty for the offence under section 6(4), i.e. a maximum fine of \$10,000 and imprisonment for six months, has not been revised since the enactment of the Ordinance in 1972. Among the 58 convicted cases for the offence under section 6(4) of the Ordinance between 2008 and 2013, the offenders were fined between \$500 and \$10,000 (except for one case with a suspended imprisonment term imposed and one case with an absolute discharge given), at an arithmetic average of around \$4,700 per case and six cases were fined to the maximum fine level. The area of unleased land occupied varied, ranging from less than a square metre up to about 4 600 square metres.

5. The provisions for the relevant offences and the corresponding penalties in Part II of the Ordinance are among the essential elements in the enforcement regime for unlawful occupation of unleased land. It is of vital importance to keep the level of penalties abreast with societal development and to maintain an adequate deterrent effect against the relevant offences. It is evident that the current level of fine is not commensurate with the severity of the offence and could not achieve the

necessary punitive and deterrent effects to both first-time and repeated offenders. The situation is similar for the level of penalty for the other two offences under sections 6(4A) and 7(4), i.e. unlawful erection of structures on unleased land and unlawful removal of earth, turf or stone from unleased land.

Previous Audit Review

6. In March 2012, the Audit Commission completed a review of the management of Government land, covering the action of LandsD to prevent, detect and rectify unlawful occupation of Government land, and suggested that the level of penalty for the offence under section 6(4) of the Ordinance should be reviewed with a view to providing an effective deterrence. The Audit Commission also recommended that the Government should consider introducing legislative provisions to the effect that a daily fine would be imposed for the period over which the relevant contravention continued, with reference to similar provisions in other ordinances.

7. The findings of the Audit Commission were subsequently deliberated by the Public Accounts Committee (“PAC”) of the LegCo in May 2012. The PAC opined that the fines for convicted cases of the offence under section 6(4) of the Ordinance were too lenient to have an adequate deterrent effect. The PAC strongly urged the Government to promptly initiate legislative amendments to increase the relevant level of penalties and consider introducing a system of daily fine to reinforce the deterrent effect.

Proposed Increased Penalty Provisions

8. Taking into account the above and making reference to the penalty provisions for offences of similar nature in other ordinances, viz. the Buildings Ordinance (Cap. 123), the Town Planning Ordinance (Cap. 131) and the Waste Disposal Ordinance (Cap. 354), we consider it justified to increase the penalty level and introduce a system of daily fine for the offence of unlawful occupation of unleased land under section 6(4) of the Ordinance, with a view to better reflecting the severity of such an offence and increasing the deterrent effect against it. Similarly, it would also be necessary to increase the penalty level of the two related offences under sections 6(4A) and 7(4) of the Ordinance so as to bring them in line with those under section 6(4) of the Ordinance. Given that the planning regime and the land administration regime are closely related in terms of

controlling and managing the use of land, we consider that the gravity of the offence of unlawful occupation of unleased land under the land administration regime would be similar to that of unauthorized development under the planning regime. We have thus taken the relevant penalty provisions of the Cap. 131 as the benchmark in proposing changes to the Ordinance.

9. On the other hand, no express provision in the Ordinance empowers the court to order payment of cost of demolition works incurred by the Authority from a person convicted of an offence under sections 6(4) or 6(4A) of the Ordinance, although section 6(5) of the Ordinance provides that the Authority may recover such cost from a convicted person. Past experience has shown that there might be some uncertainty over the court's authority under section 6(5) to make the order. We consider it advisable to amend the Ordinance to put beyond doubt that the court has the power, either on application by the Authority or on the court's own initiative, to make an order against the convicted person requiring the payment of the cost to the Authority.

10. The proposal to increase the level of penalties through legislative amendments will send a clear message to the public about Government's determination to effectively enforce against unlawful occupation of Government land. On the other hand, apart from this proposal to increase the relevant penalties through legislative amendments to the Ordinance, LandsD is examining measures to enhance its enforcement actions with a view to stepping up prosecution.

Other Provisions

11. We will continue to keep in view the operation of the other provisions of the Ordinance and the need for their review as necessary and appropriate, with a view to further enhancing Government's proper control and management of both leased and unleased land. If warranted, further legislative amendments to the Ordinance will be considered and proposed as appropriate at a later stage.

THE BILL

12. The Bill aims at increasing the penalties for the existing offences under Part II – "Occupation of Unleased Land" of the Ordinance and providing for the related matters. The main provisions are -

Section 6(4) – Unlawful occupation of unleased land

- (a) to introduce an escalating scale of maximum fines at \$500,000 for the first conviction and at \$1,000,000 for each subsequent conviction, with the existing maximum imprisonment term of six months unchanged for both circumstances;
- (b) to introduce an additional fine of \$50,000 (for the first conviction) and of \$100,000 (for each subsequent conviction) for each day during which the offence continues;

Section 6(4A) – Unlawful structure being erected on unleased land

- (c) corresponding to the proposed amendment in (a) above, to increase the maximum fines for offences under section 6(4A)(a) and (b) of the Ordinance concerning erection of structure on unleased land by 50 times, i.e. from \$50,000 to \$2,500,000 [for sub-paragraph (i) below] and from \$10,000 to \$500,000 [for sub-paragraph (ii) below] and introduce an escalating scale of maximum fines, i.e.
 - (i) where the offender has been engaged in any way in, or has arranged or directed the erection of the structure for the purpose of disposing of the structure for gain for the offender or another, the maximum fines shall be \$2,500,000 for the first conviction and \$5,000,000 for each subsequent conviction, with the existing maximum imprisonment term of one year unchanged for both circumstances; and
 - (ii) in any other cases, the maximum fines shall be \$500,000 for the first conviction and \$1,000,000 for each subsequent conviction, with the existing maximum imprisonment term of six months unchanged for both circumstances;

Section 7(4) – Removal of earth, turf or stone from unleased land without a removal permit

- (d) corresponding to the proposed amendment in (a) above, to increase the maximum fine for extraction or removal of earth, turf or stone from unleased land without a removal permit by 50 times, i.e. from \$5,000 to \$250,000, with the existing maximum imprisonment term of six months unchanged; and

The new section 6(6) and section 6(7) – Recovery of cost of demolition, etc.

- (e) to state clearly that, if a person is convicted of an offence under section 6(4) or section 6(4A), the court may, either on application by the Authority or on the court's own initiative, order the convicted person to pay the Authority any cost incurred in or arising out of the demolition of any property or structure under section 6(2A) or section 6(3) of the Ordinance and the exercise of the powers conferred on the Authority by section 6 of the Ordinance. Such order should be in addition to any penalty imposed for the offences under sections 6(4) or section 6(4A) of the Ordinance.

B

A comparison table showing existing and proposed penalty levels is at **Annex B**.

LEGISLATIVE TIMETABLE

13. The legislative timetable will be –

Publication in the Gazette	4 July 2014
First Reading and commencement of Second Reading debate	9 July 2014
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

IMPLICATIONS OF THE PROPOSAL

14. The proposal has no direct financial and civil service implications. It is unlikely to have any significant economic implications. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no productivity, environmental, family or sustainability implications. It does not affect the binding effect of the Ordinance.

PUBLIC CONSULTATION

15. The LegCo Panel on Development was consulted on the proposal on 22 April 2014. Panel Members generally agreed with increasing the level of penalties against offences of unlawful occupation of Government land to enhance the deterrent effect and did not have adverse comment on the framework of our legislative amendment proposals.

16. The Land and Development Advisory Committee¹ was consulted on the proposal on 23 April 2014. Committee Members supported the proposal to increase the penalties against the relevant offences with a view to enhancing the deterrent effect.

PUBLICITY

17. A press release will be issued today (26 June 2014). A spokesman will be made available to address media enquiries.

BACKGROUND

18. The Government is responsible for ensuring that the use of land is properly controlled and managed. Part II of the Ordinance contains provisions governing the occupation of unleased land, erection of structure on unleased land, and removal of earth, turf or stone from unleased land, including enforcement powers, offences and penalties relating to such.

19. Specifically, the Ordinance provides for the statutory authority to take summary action to clear any unlawful occupation of unleased land or unlawful erection of structures on unleased land, instigate prosecution of any person held liable for the contravention, and recover from the person convicted of such an offence any cost incurred in or arising out of the demolition of any property or structure under these provisions.

¹ The Land and Development Advisory Committee is an advisory body advising the Government, through the Secretary for Development, on policies and procedures relating to planning, land and buildings matters.

20. LandsD is responsible for the management and administration of land, and D of Lands is the major party vested with the authority² under various provisions of the Ordinance for such purpose.

ENQUIRIES

21. Any enquires on this brief may be addressed to Mr LAW Kin-wai, Principal Assistant Secretary (Planning and Lands) on 3509 8830.

Development Bureau
26 June 2014

² According to section 3 and the Schedule to the Ordinance, D of Lands, the Director of Food and Environmental Hygiene and the Housing Authority are the designated authorities of unleased land under their respective purview for the purposes of sections 5 and 6 of the Ordinance. For the purpose of sections 7(2) and 7(3) of the Ordinance, the Director of Highways is the designated authority for unleased land in the New Territories (except New Kowloon) which is a street while D of Lands is the designated authority for the rest of unleased land in urban area and the New Territories.

A BILL

To

Amend the Land (Miscellaneous Provisions) Ordinance to increase the penalties for offences relating to the occupation of unleased land; and to provide for related matters.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Land (Miscellaneous Provisions) (Amendment) Ordinance 2014.

2. Land (Miscellaneous Provisions) Ordinance amended

The Land (Miscellaneous Provisions) Ordinance (Cap. 28) is amended as set out in sections 3, 4 and 5.

3. Section 6 amended (unlawful occupation of unleased land)

(1) Section 6(4)—

Repeal

everything after “offence”

Substitute a full stop.

(2) After section 6(4)—

Add

“(4AA) A person who is guilty of an offence under subsection (4) is liable—

- (a) on the first occasion on which the person is convicted of the offence, to a fine of \$500,000 and

to imprisonment for 6 months and, in the case of a continuing offence, to a further fine of \$50,000 for each day during which the offence continues; and

- (b) on each subsequent occasion on which the person is convicted of the offence, to a fine of \$1,000,000 and to imprisonment for 6 months and, in the case of a continuing offence, to a further fine of \$100,000 for each day during which the offence continues.”.

(3) Section 6(4A)—

Repeal

everything after “offence”

Substitute a full stop.

(4) After section 6(4A)—

Add

“(4B) A person who is guilty of an offence under subsection (4A) is liable—

- (a) on the first occasion on which the person is convicted of the offence—
 - (i) if the contravening act is done for the purpose of disposing of the structure for the gain of the person or another (*gainful purpose*)—to a fine of \$2,500,000 and to imprisonment for 1 year; or
 - (ii) if the contravening act is done for any other purpose—to a fine of \$500,000 and to imprisonment for 6 months; and
- (b) on each subsequent occasion on which the person is convicted of the offence—

- (i) if the contravening act is done for a gainful purpose—to a fine of \$5,000,000 and to imprisonment for 1 year; or
- (ii) if the contravening act is done for any other purpose—to a fine of \$1,000,000 and to imprisonment for 6 months.”.

(5) After section 6(5)—

Add

- “(6) In any court proceedings for an offence under subsection (4) or (4A), the court may, on application by the Authority or on the court’s own initiative, order the person convicted of the offence to pay the cost mentioned in subsection (5).
- (7) The cost mentioned in subsection (5) may be recovered from or ordered against a person in addition to any penalty imposed on the person under subsections (4AA) and (4B) for the offence.”.

4. Section 7 amended (prohibition of removal of earth, turf or stone from unleased land)

Section 7(4)—

Repeal

“\$5,000”

Substitute

“\$250,000”.

5. Schedule amended (designated Authorities)

The Schedule, column headed “Section”—

Repeal

“6(4A) and

6(5)”

Substitute

“6(4A)

6(5) and

6(6)”.

Explanatory Memorandum

This Bill amends the Land (Miscellaneous Provisions) Ordinance (Cap. 28) (*Ordinance*).

2. Sections 6 and 7 of the Ordinance respectively prohibit—
 - (a) the unlawful occupation of, and erection of structures on, unleased land; and
 - (b) the extraction or removal of earth, turf or stone from unleased land without authorization.
3. The object of the Bill is to amend those provisions—
 - (a) to increase the penalties for the offences under sections 6 and 7;
 - (b) to introduce an escalating scale of fines and a daily fine for the offences under section 6; and
 - (c) to enable the Authority to recover the cost of enforcement actions in proceedings under section 6.

**Existing penalty and proposed penalty levels
under sections 6(4), 6(4A) and 7(4) of Land (Miscellaneous Provisions) Ordinance (Cap. 28)**

Section	Existing Provision	Existing Penalty	Proposed Penalty
6(4)	<u>Unlawful occupation of unleased land</u> (4) Any person occupying unleased land, otherwise than under a licence or a deed or memorandum of appropriation, who without reasonable excuse does not cease to occupy the same as required by a notice under subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine of \$10,000 and to imprisonment for 6 months.	<u>Fine</u> \$10,000	<u>Fine</u> 1st conviction \$500,000 + \$50,000/day Subsequent conviction \$1,000,000 + \$100,000/day
		<u>Imprisonment</u> 6 months	

Section	Existing Provision	Existing Penalty	Proposed Penalty
6(4A)	<p><u>Unlawful structure being erected on unleased land</u></p> <p>(4A) Any person who-</p> <p>(a) is engaged in any way in the erection of a structure on unleased land; or</p> <p>(b) arranges or directs the erection of a structure on unleased land, being a structure being erected otherwise than under a licence or a deed or memorandum of appropriation, shall be guilty of an offence and shall be liable on conviction -</p> <p>(i) where the offender has been engaged in any way in, or has arranged or directed, the erection of the structure for the purpose of disposing of the structure for gain for himself or another, to a fine of \$50,000 and to imprisonment for 1 year; and</p> <p>(ii) in any other case, to a fine of \$10,000 and to imprisonment for 6 months.</p>	<p><u>Fine</u></p> <p><i>For disposing of the structure for gain</i></p> <p>\$50,000</p> <p><i>In any other case</i></p> <p>\$10,000</p>	<p><u>Fine</u></p> <p><i>For disposing of the structure for gain</i></p> <p>1st conviction</p> <p>\$2,500,000</p> <p>Subsequent conviction</p> <p>\$5,000,000</p> <p><i>In any other case</i></p> <p>1st conviction</p> <p>\$500,000</p> <p>Subsequent conviction</p> <p>\$1,000,000</p>
		<p><u>Imprisonment</u></p> <p><i>For disposing of the structure for gain</i></p> <p>1 year</p> <p><i>In any other case</i></p> <p>6 months</p>	
7(4)	<p><u>Removal of earth, turf or stone from unleased land without a removal permit</u></p> <p>(1) No person shall extract or remove earth, turf or stone from unleased land except under and in accordance with a removal permit issued under this section.</p> <p>(4) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine of \$5,000 and to imprisonment for 6 months.</p>	<p><u>Fine</u></p> <p>\$5,000</p>	<p><u>Fine</u></p> <p>\$250,000</p>
		<p><u>Imprisonment</u></p> <p>6 months</p>	