

## **Executive Summary**

### **Direct Investigation into Government's Control over Fly-tipping of Construction Waste and Landfilling Activities on Private Land**

#### **Foreword**

In recent years, there have been frequent occurrences of fly-tipping of construction waste (i.e. dumping of any substance, matter or thing generated as a result of construction work) or landfilling activities on private land in the rural areas of the New Territories. These activities have aroused public concerns about issues such as environmental hygiene, land use and conservation. Some critics suspect that these activities are illegal and the landfilling might be a “destroy first, build later” tactic to create a *fait accompli* and change the land use. In view of the growing public concern over these matters, The Ombudsman conducted this direct investigation.

#### **Our Findings**

2. While disposal of construction waste and landfilling activities are inevitable in urban development, they should meet the requirements in the relevant legislation and must not have an adverse impact on the environment. Strict control by the Government departments concerned over these activities is, therefore, of paramount importance.

3. Fly-tipping of construction waste and landfilling activities on private land are subject mainly to regulation and enforcement actions by the Environmental Protection Department (“EPD”) and the Planning Department (“Plan D”) in accordance with the relevant legislation.

#### ***EPD Should Have Conducted More Comprehensive and Proactive Inspections***

4. The Waste Disposal Ordinance (“WDO”) empowers EPD to take enforcement actions against fly-tipping of construction waste on private land. WDO requires all owners of the land concerned to sign a Specified Form to indicate their consent and then submit it to the Director of Environmental Protection for acknowledgement at least 21 days prior to any intended depositing of construction waste. Failure to do so will

render such depositing illegal. Where fly-tipping of construction waste or landfilling is found to have caused environmental pollution, EPD may take enforcement action in accordance with other legislation on environmental protection.

5. The figures provided by EPD show that between January 2016 and October 2017, most EPD's inspections (93.8%) were conducted during office hours on weekdays, while inspections conducted during weekends, holidays and non-office hours accounted for only about 6% (or 6.2% to be exact) of the total number of inspections. Furthermore, during those 22 months, EPD instituted prosecution in 18 cases only, which means less than one case per month on average. EPD has explained to us that fly-tipping of construction waste occurs in remote areas all over the place, at any time and without any fixed peak periods or pattern. According to EPD's experience over the years, most fly-tipping activities would stop when EPD conducted its first and subsequent follow-up inspections, thus evading EPD's enforcement actions. Hence, EPD considers that there is not much point in conducting inspections during weekends, holidays and non-office hours. The department has, nevertheless, carried out some inspections during weekends, holidays and evenings based on the information supplied by members of the public. Moreover, in 2017, EPD conducted two proactive inspections during weekends.

6. EPD attributes the low prosecution figures to difficulty in catching offenders red-handed and confirming their identity since by the time the Department conducted its inspections, fly-tipping activities had stopped.

7. Some members of the public have indicated that as EPD usually conducts its inspections during office hours on weekdays (i.e. Monday to Friday), those engaged in fly-tipping of construction waste can easily evade EPD's inspections by simply doing their fly-tripping all during weekends, holidays or non-office hours. Naturally, it would then not be easy for EPD to catch the offenders, not to mention collecting sufficient evidence to institute prosecutions. EPD notes that according to its experience, most fly-tipping activities would stop by the time of its first and subsequent follow-up inspections and, therefore, it could not catch offenders on the spot and identify them. We think that is all the more reason why EPD should consider the public's view point and conduct more inspections during weekends, holidays and non-office hours to increase its chance of successful enforcement action. Indeed, EPD should have conducted more comprehensive inspections so that there would be no loopholes for offenders to evade its enforcement action.

8. In its Circular Memorandum of 2009, the Environment Bureau (“ENB”) asked Government departments to proactively conduct regular inspections in the rural areas of the New Territories and on various black spots so as to detect illegal or unauthorised dumping of construction waste or landfilling. Though being one of the major enforcement authorities, EPD has yet to work out an action plan for such proactive inspections. EPD usually acts only on reports from the public, referrals from other departments or media reports. In 2017, EPD carried out two inspections proactively. We hope to see more of such proactive inspections in future.

### ***EPD Has Yet to Implement the Use of Global Positioning System Despite Years of Study***

9. EPD has been studying the feasibility of using Global Positioning System (“GPS”) to more effectively deter fly-tipping of construction waste. In October 2015, the Government launched a trial scheme of mandatory use of GPS technology on vehicles collecting construction waste. It showed that GPS technology was already well developed. EPD points out that there might be still concerns from the industry about privacy, compliance cost and other operational issues besides the technological aspect. To effect mandatory use of GPS on construction waste collection vehicles, amendments to WDO will be necessary. EPD will draw up operational details of the regulatory framework, further consult the industry and follow up on the relevant legal issues.

10. As GPS is already a well-developed and popular technology, and the Government has already spent years studying its application on control over fly-tipping of construction waste on private land, we consider that EPD, as the department enforcing WDO should make more efforts to push forward with the aforesaid legislative amendments.

### ***EPD’s Response to Environmental Problems of Public Concern***

11. Quite a few people have expressed concern about the environmental problems that might be caused by fly-tipping of construction waste. Some think that EPD should assess the environmental impact of such activity before acknowledging receipt of the Specified Form, and where its assessment results indicate that the depositing of construction waste would adversely affect the environment, EPD should refuse to acknowledge receipt of the Specified Form.

12. In response, EPD points out that WDO does not empower the Department to consider factors other than those in the Ordinance when deciding whether to acknowledge receipt of a Specified Form. Besides, the Government has to respect the legitimate right of landowners or lawful occupiers to use their private land. Unless dumping of construction waste by the landowner or lawful occupier concerned is in breach of any law or found to have affected the environment or people in that locality, the Government has no legal grounds to intervene in his/her legitimate activities. EPD's view is that being the enforcement authority, it should not and cannot conduct environmental assessment for landowners on their fly-tipping activities when processing their Specified Forms. Notwithstanding that, it is EPD's usual practice, upon receipt of a Specified Form, to conduct site inspections to check and record the existing condition of the land for its future monitoring; if EPD finds any potential environmental pollution (e.g. river pollution), it will recommend preventive measures to the applicant.

***Plan D Takes Too Long to Enforce Reinstatement Notices***

13. Plan D can exercise its power under the Town Planning Ordinance ("TPO") to investigate landfilling activities on private land. If unauthorised development is involved, Plan D can take control and prosecution actions. Pursuant to TPO, the Director of Planning may issue a Reinstatement Notice ("RN") requiring the recipient of the RN to reinstate the land, by the date specified, to the condition it was in immediately before the relevant Development Permission Area Plan or Interim Development Permission Area Plan (if any) came into effect, or to such other condition more favourable to the RN recipient, as the Director considers satisfactory.

14. Between January 2006 and October 2017, Plan D issued RNs in 851 cases. Of those cases, only 66 (8%) complied with the RNs within three months as required, while 588 (69%) were issued the Compliance Notices ("CNs") by Plan D within three years after expiry of the three-month period specified in the RNs. Plan D has explained that among the total of 851 cases, around 50% (413 cases) were issued CNs within 12 months after the Department's issuance of RNs. Plan D considers it generally reasonable to take 9 months after the expiry of the three-month period specified in the RNs to conduct investigations and handle the relevant procedures leading to the issuance of CNs.

15. We note that RNs issued by Plan D generally just require the RN recipients to reinstate the land by removing leftover and filling materials, and/or grassing the land. Though it may be said that some cases cover large site area or uneven ground surface,

overall it is not that difficult to meet the requirements of RNs. However, information shows that only 8% of the cases were able to complete reinstatement of the land within the three-month period. For the remaining cases, Plan D had to use substantial resources to conduct repeat inspections and take follow-up actions over a prolonged period.

16. RNs actually require recipients to reinstate the land within three months, and yet Plan D often does not manage to issue CNs until 9 months or longer after the three-month period. In some cases, the RN recipients even still fail to fully comply with the requirements of the RNs after three years or longer. Clearly, Plan D is taking too long to enforce RNs, resulting in serious delays in reinstatement of the damaged sites. Plan D's slow enforcement actions give offenders a strong incentive to ignore the laws for their own gains. With more and more offenders delaying rectification, Plan D will only accumulate a larger backlog of cases, which in turn will further lengthen its enforcement process and make the problem even more unwieldy.

#### ***Plan D's Prosecution Actions Have Little Deterrent Effect***

17. Plan D has informed this Office that between January 2016 and October 2017, it recruited a total of 10 more officers for its Central Enforcement and Prosecution Section, so as to strengthen its enforcement operations and improve their effectiveness. Regarding cases of non-compliance with RNs, during the roughly twelve-year period from January 2006 to October 2017, Plan D prosecuted the offenders in 155 cases, with success in 136 of them. The fines ranged from \$4,000 to \$370,000, averaging \$45,000. Plan D has provided the court with relevant information for sentencing reference, including the fines imposed on similar cases in the past and the offenders' conviction records. After strengthening its enforcement operations, Plan D successfully prosecuted the offenders in 47 cases during the period from January 2016 to October 2017, with the average fine per case increased to \$63,000.

18. The figures provided by Plan D show that during the roughly twelve-year from January 2006 to October 2017, the average number of cases of successful prosecution was only 11 per year, with the average fine per case being \$45,000. Although both figures were on the rise during the period from January 2016 to October 2017, the deterrent effect of Plan D's prosecution actions remains questionable.

### ***Plan D Requires Pond Filling Offenders to Merely Grass the Land***

19. Some critics are concerned about the ecological impact caused by pond filling cases, and consider that Plan D should have required the offenders to reinstate the fish ponds. Plan D has explained to us that when stipulating the requirements in RNs, it would take into account the actual circumstances of each case and various factors, including the planning intention behind the land use zoning, the site condition before the unauthorised development and the latest situation, the impact on the overall environment, and the issue of public safety, such as any flooding or landslide risks. Therefore, when drawing up RNs, Plan D might not always require a site to be restored to fish pond.

20. Between January 2013 and October 2017, Plan D issued RNs in 46 pond filling cases. In 43 of them, Plan D stipulated in the RNs that the recipients were required to remove the filling materials, thereby reinstating the fish ponds. In the remaining three cases, Plan D did not stipulate in the RNs that the fish ponds should be reinstated. It required the RN recipients merely to remove the leftover materials on the site and grass the land for beautification. Plan D stated that it had indeed taken into account the surrounding landscape before the unauthorised development and the planning intention behind the land use zoning. Plan D had also examined the factors relating to individual cases in accordance with TPO in formulating the requirements of the RNs, which were more favourable to the RN recipients, as the Director considered satisfactory.

21. We note that pursuant to TPO, planning permission from the Town Planning Board (“TPB”) must be obtained for land filling/pond filling works within any zone of ecological/conservation value. Otherwise, Plan D can take enforcement action. In pond filling cases, grassing the land is, of course, more favourable to the RN recipient than reinstating the fish ponds, and is easier to comply with. However, grassing the land is obviously not the same as reinstating the fish ponds. Given the distinctive ecological value of fish ponds, merely grassing the land will lead to gradual diminution in the number of fish ponds, and thus the associated ecological habitats will gradually vanish. We consider that protecting zones of ecological/conservation value from damage by landfilling activities should be a paramount factor for consideration. When drawing up RNs, Plan D should assess in a more prudent manner whether the requirements of the RNs can genuinely serve the purposes of conserving ecological habitats and reinstating the site to its satisfaction, with more weight placed on conservation of natural habitats and not slanting in favour of the RN recipients. For fish pond cases, unless the RN recipient can give a reasonable justification for not being

able to reinstate the fish pond, Plan D should not relax its requirements and accept grassing the land as reinstatement on the grounds that grassing is more favourable to the RN recipient.

### ***Plan D's Response to the "Destroy First, Build Later" Query***

22. In response to the query concerning "destroy first, build later", Plan D has indicated to us that in order to protect the rural areas and natural environment, TPB had decided in as early as 2011 to take appropriate measures to deter such tactic. All applications for planning permission for sites involved in unauthorised development would be subject to investigation first. Should an unauthorised development be confirmed, TPB would vet the application concerned based on the land condition of the site before damage. If Plan D has already taken enforcement action on the site under application and served an RN in accordance with TPO, then TPB would only consider the application with reference to the reinstated condition of the site as required by the RN. The above measures serve to deter the use of "destroy first, build later" tactic.

### ***Inter-departmental Coordination Should be More Proactive***

23. According to ENB's 2009 Circular Memorandum, EPD will convene inter-departmental meetings with the relevant Government department(s) as and when necessary to monitor illegal or unauthorised dumping of construction waste and landfilling activities anywhere in Hong Kong. Special urgent meetings will also be called to discuss special cases that have aroused wide public concern, with a view to arranging the necessary joint operations. Between 2009 and 2016, inter-departmental meetings were convened about once every year. In view of the public's concern in recent years about fly-tipping of construction waste and landfilling activities, such inter-departmental meetings coordinated by EPD have been increased to twice a year since 2017.

24. We notice that up till 2016, inter-departmental meetings were convened only once a year. The saving grace is that, in response to mounting public concern about illegal dumping/landfilling activities, EPD has started to convene two such meetings a year since 2017. We hope that EPD would continue to strengthen inter-departmental communication and arrange joint operations wherever necessary to boost the success rate of enforcement actions.

### *The “Kingswood Soil Fill” Case*

25. We took the opportunity of this direct investigation to study a case of suspected unauthorised development and illegal dumping of soil that had attracted very wide public attention.

26. In early 2016, there was extensive media coverage on some suspected unauthorised development and illegal dumping of soil on a piece of private land (“Site A”) east of Kingswood Villas in Tin Shui Wai, leading to the formation of a soil fill (some called it “the Kingswood Soil Fill”). The media also queried whether the Government had taken any enforcement action on the situation.

27. **Plan D** has explained to us that Site A is within Ping Shan Development Permission Area. The draft Ping Shan Development Permission Area Plan was gazetted in June 1993 and aerial photographs taken by Lands D on the day following the gazettal showed that Site A was already being used as an open storage for sand at that time. Plan D also pointed out that the sand pile on the Site, as observed in March 2016, showed no discernible increase beyond its maximum size and height as at June 1993. The use of Site A as a storage for sand is regarded as an “existing use” under TPO and does not constitute an unauthorised development. Nonetheless, having noticed illegal landfilling activities on the private land just outside the “Kingswood Soil Fill” (“the adjacent private land”), Plan D had invoked TPO to take enforcement action against the offences, including issuance of RNs to the persons concerned requiring removal of the filling materials and growth of vegetation on the land in question. In addition, Plan D had instituted prosecution in two cases where the recipients of the Enforcement Notice had not ceased the illegal landfilling activity as required. The offenders in both cases were convicted and fined \$120,000 in total.

28. **EPD** has pointed out that it had followed the instructions in ENB’s Circular Memorandum to coordinate the work of relevant Government departments and convene several inter-departmental meetings to follow up on the “Kingswood Soil Fill” case. During an inspection conducted in early 2016, EPD found excavation works in progress at Site A and a huge volume of spoil was left exposed. Since the person responsible for the works had failed to implement measures to prevent dispersion of dust as stipulated in the Air Pollution Control (Construction Dust) Regulations, EPD had instituted 9 prosecutions against that person, who was convicted and fined \$37,000 in total. However, the Department found that Site A could be used as a storage for sand and such activity had the consent of all the landowners concerned, so the activity of

dumping soil and sand *per se* on the Site did not contravene WDO. Regarding the depositing of construction waste on the adjacent private land, EPD discovered that the activity did not have the consent of the landowners. The Department had, therefore, taken enforcement action pursuant to WDO and instituted 6 prosecutions. The people prosecuted were all convicted and were each fined \$10,000 to \$50,000.

29. In sum, the outcomes of the actions taken by Plan D and EPD on the suspected irregularities at the “Kingswood Soil Fill” were as follows:

<b>Suspected Irregularity</b>	<b>Enforcement Department</b>	<b>Outcome</b>
Fly-tipping and illegal landfilling at Site A	Plan D	The use of Site A as a storage for sand is regarded as an “existing use” under TPO and does not constitute an unauthorised development
	EPD	Site A can be used as a storage for sand. Since the activity had the consent of all the landowners concerned, it did not contravene WDO
Illegal landfilling works on the adjacent private land, contravening TPO	Plan D	2 prosecutions instituted; fines totalling \$120,000 imposed
No measures taken to prevent dispersion of dust during excavation works at Site A, thus violating the Air Pollution Control (Construction Dust) Regulations	EPD	9 prosecutions instituted; fines totalling \$37,000 imposed
Depositing of construction waste on the adjacent private land without the consent of the landowners concerned, violating WDO	EPD	6 prosecutions instituted; fines ranging from \$10,000 to \$50,000 imposed

30. It can thus be seen that regarding the irregularities found in the case, Plan D and EPD had considered the circumstances and taken follow-up actions within their remit.

31. Nevertheless, according to media reports, the development situation at Site A and the adjacent private land keeps changing and the case continues to capture the public's attention. In handling a complaint case involving the "Kingswood Soil Fill" in September 2016, this Office urged Plan D and EPD to closely follow up on the matter. Should there be sufficient evidence, they must take decisive enforcement action against the offenders to uphold the law.

### **Recommendations**

32. Based on the above findings, The Ombudsman makes the following recommendations to EPD and Plan D:

#### ***EPD***

- (1) to reallocate or augment resources to step up inspections and enforcement action outside office hours and on weekends and holidays as necessary;
- (2) to draw up proactive inspection plans for stronger actions against fly-tipping activities;
- (3) to take greater initiative to coordinate with other Government departments, enhance communication through inter-departmental meetings and arrange joint enforcement operations as and when necessary;
- (4) to expedite the study on the operational details of the mandatory use of GPS technology on construction waste collection vehicles, and push forward with the necessary amendments to the relevant legislation without delay;

*Plan D*

- (5) to review the enforcement procedures to avoid unnecessary repeat inspections, and to take resolute further enforcement actions against offenders who delay their compliance with RNs;
- (6) to alert the court to the seriousness of the problem in cases of a serious nature, and seek more severe penalties in terms of heavier fines for stronger deterrent effect; and
- (7) to review the factors to be considered in drawing up RNs; where sites of ecological/conservation value are involved, to require the RN recipients as far as possible to fully reinstate the sites to their original state in order to achieve the purpose of conservation.

**Office of The Ombudsman  
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