

LEGISLATIVE COUNCIL BRIEF

MEASURES TO REGULARISE AND FACILITATE THE OPERATION OF TESTING LABORATORIES IN INDUSTRIAL BUILDINGS

INTRODUCTION

At the meeting of the Executive Council on 14 April 2015, the Council ADVISED and the Chief Executive ORDERED that the Government should facilitate the continued operation of testing and calibration laboratories (hereunder referred as “testing laboratories”) situated in those industrial buildings in violation of the land leases by forgoing the waiver fees that would otherwise be chargeable for issuing waivers under lease to accommodate the use; the waivers would allow the use of the entire industrial building, or part or parts of an industrial building¹ (irrespective of their age) as testing laboratories for the lifetime of the existing buildings concerned, or until expiry or termination of the current land leases, whichever is earlier, if such use is permitted by the current land use zoning of the site on the statutory plans, or granted planning permission by the Town Planning Board (TPB), or is considered as an existing use in terms of planning control.

JUSTIFICATIONS

Long term development of the testing and certification industry in Hong Kong

2. The testing and certification industry is recognised by

¹ For simplicity, in the context of this brief an “industrial building” refers to a building lawfully erected on a lot which, under the lease conditions, shall not be used for any purpose other than for industrial and/or godown purposes. Such lots, for the purpose of this brief, are referred to as “industrial lots”. Industrial buildings do not include special factories such as those located in storage premises in container terminals and flatted factories built by the Hong Kong Housing Authority, or lots for special industries such as cargo handling uses, ship building and repairing, oil storage and refining and production of associated chemical by-product, manufacture of polystyrene plastics, manufacture and storage of chlorine, hydrogen and textile chemicals, etc.

Government as an economic sector where Hong Kong enjoys clear advantages. Since 2009, Government has implemented various measures to develop and promote the industry, including the establishment of the Hong Kong Council for Testing and Certification (HKCTC). In its reports published in 2010 and 2013, HKCTC advised that in view of the size of vacant building stock (roughly 6.7% in 2011) in comparison to the number of testing and certification establishments (about 600 private independent establishments), the supply of premises should generally cope with demand. Nonetheless, HKCTC had also noted that some large testing establishments might face the challenge of finding suitable premises, hence recommended Government to assist where appropriate.

Unique requirements for testing laboratories

3. Testing laboratories have been operating in industrial buildings in Hong Kong for decades, and they used to work together with manufacturers in the same location and this facilitated production and operating efficiency. When many of our manufacturers and conventional industries relocated their factories to the Mainland, the testing laboratories stayed and continued to serve the local community such as providing food testing services. The laboratories are also providing essential support to Hong Kong manufacturers in the Pan-Pearl River Delta area, especially in serving the demands of overseas markets where Hong Kong testing laboratories are recognised as trustworthy and credible. At present, there are about 600 independent third-party testing and certification establishments in Hong Kong and 50 in-house laboratories in manufacturers and exporters.

4. There are needs and merits for testing laboratories to be located in industrial buildings for reasons as set out below –

- (a) **Operational needs:** Industrial buildings often provide high headroom, high floor loading capacity, wide corridors, etc. which are essential to the operation of testing laboratories. For example, some laboratory instruments/ equipment could not be transported by normal elevators in office buildings. Some testing laboratories also need to store dangerous goods and install safety hoods and dedicated ventilation equipment for their operation. It is extremely difficult for testing laboratories, especially the large ones which provide specialist testing services, for example using organic solvents to extract pesticide residues, gas and liquid chromatographs to determine organic compounds, or requiring an electromagnetic compatibility test chamber for testing electronic products, to

find suitable units in non-industrial buildings that can fulfil their operational requirements.

- (b) **Proximity to clients and supporting facilities:** Clients of testing laboratories are mostly manufacturers, traders, and sourcing agents. Manufacturers who remain in Hong Kong are located in industrial buildings. Other related businesses are usually located in industrial buildings or their close vicinity. The co-location of testing laboratories and their clients in industrial buildings are conducive to the smooth operation of testing laboratories, especially when it is commonplace to deal with a large quantity of test samples.
- (c) **Compatibility with other occupants:** Testing laboratories are “industrial” by the nature of their operation and processes and are also compatible with godown use. For example, testing of clothes and garments will involve destruction of fibres, burning of cloths and washing for colour fastness. Such activities are usually incompatible with other non-industrial occupants.
- (d) **Affordable rent:** Rents in industrial buildings are usually lower than in commercial buildings in Hong Kong. Testing laboratories require a relatively large floor space, so they are more inclined to operate from industrial buildings.

5. The alternative would be for the testing laboratories to operate from non-industrial buildings. Most testing laboratories (except medical testing laboratories), however, are unable to operate from commercial buildings, which are the next most likely alternative. While individual land leases for commercial buildings may permit testing laboratories (e.g. where the leases are old unrestricted leases without specifying user or where the user is “non-residential” or “non-industrial”), there are practical constraints hindering the operation of testing laboratories from commercial buildings. For example, it would unlikely be possible to conduct various chemical tests and flammability tests on a toy product in a commercial building on a mass scale. Colour fastness tests on garments with industrial washing machines and dryers will create noise, heat, and sewage that are incompatible with other uses in ordinary commercial buildings. In particular, some types of testing laboratories like those dealing with construction material tests will cause nuisances to others, e.g. transfer of samples (steel reinforcement bars, concrete cubes, etc.) is incompatible with the normal activities in commercial or office buildings. These non-industrial buildings usually do not have suitable loading and unloading areas that facilitate delivery around the clock. Furthermore, the relatively higher rent/sale price charged for a

unit in a commercial building is a prohibiting factor.

Changing economy and non-compliance of testing laboratories under lease conditions for old industrial lots

6. Whether a particular use in an industrial building complies with or violates the Government land lease has to be examined with reference to the lease conditions for the site concerned. Leases executed at different times have the users defined by reference to the planning and land policies or practices prevailing at the time of preparing the land lease and having regard to the site in question, and so the user control varies from lease to lease². However, the user restriction in the land lease is a term in a contract that would not be changed unless both sides agree to a change, i.e. by means of a waiver (for change in use on a temporary basis) or lease modification (for change in use on a permanent basis), despite subsequent changes in circumstances (including planning changes).

7. In the case of testing laboratories, they are mostly situated in industrial buildings where the leases concerned were executed many years ago, at a time when conventional manufacturing (such as garment manufacturing) was the main stream and so the uses permitted under the leases concerned is typically specified “industrial and/or godown” purposes. It reflects the state of the economy of the time. Testing laboratories supporting manufacturing operations co-located on site could also be permitted as ancillary facilities. Given the economic transformation over the years, and the advancement in technology, industrial activities that are not necessarily equivalent to manufacturing in the traditional sense now operate in industrial buildings. Testing is one of them. Furthermore, such testing operations no longer support manufacturing activities on site only. In the context of land lease as a contractual document, however, testing laboratories not involving a primary manufacturing use cannot be legally considered as industrial use following some decided court cases.

8. An industrial lease prepared nowadays would not have such a problem as the user under lease would not be confined to “industrial and/or godown”. It would instead allow many modern “industrial” uses that do not involve a manufacturing process but are permissible under planning terms. For instance, Lands Department (LandsD) has allowed “laboratory, inspection and testing centre” as a permissible use under a

² For example, land leases of the existing industrial estates granted to the Hong Kong Science and Technology Parks Corporation permit the operation of testing laboratories.

modern industrial lease for a site in Kwai Chung sold in February 2015. However, in older industrial leases, testing laboratories will not be permissible unless the industrial user clause is modified by a lease modification or a waiver.

9. Under normal circumstances, the owner of industrial premises housing those testing laboratories may apply to LandsD for a waiver to permit the non-compliant testing use on a temporary basis (which may be for a specified period or for the lifetime of the building). In handling waiver applications, LandsD usually seeks comments from relevant departments. If the departments do not raise any objection (e.g. from building or fire safety angle) and an application fulfils all requirements, LandsD may approve the application. A waiver fee based on the assessed enhancement in rental value of the premises by virtue of the waiver will be charged, together with an administrative fee to recover the cost for processing the application. Depending on the application and the approval given, the waiver fee may be payable periodically (annually, quarterly, etc.) during the term of the temporary waiver granted or in one lump sum upfront for waiver granted for the lifetime of the building. Given the expenses and time involved, property owners may not have an incentive to accommodate testing laboratories. This is notwithstanding the fact that, since 2003, LandsD has streamlined the processing of waivers allowing modern industrial uses that are permissible under planning terms but are non-compliant under the old industrial leases (including testing laboratory under the category of “research, design and development centres”). It now applies standard rates in the assessment of the waiver fees for premises located not on basement, ground or podium floors and with building plans approved not later than 2007. The amount of waiver fee payable would depend on the floor area, location and the proposed use of the premises in question.

10. Most, if not all, of the largest testing and certification employers in Hong Kong are operating from industrial buildings. Such use may lead to enforcement action by LandsD for breach of the industrial user restriction under the lease as explained in paragraphs 6 and 7 above. The testing and certification sector has raised concerns about such enforcement action. The sector indicated that the lease restriction, and the extra cost and uncertainty involved in obtaining a waiver and payment of the concerned waiver fee are likely to affect negatively their decision to continue their operation in Hong Kong.

11. Meanwhile, some testing laboratories have indicated that they are reviewing their operation in Hong Kong. If there is any major downsizing as a result, this would be a setback to the long-term

development of the testing and certification industry and the diversification of Hong Kong's economy. The extra cost involved in obtaining a waiver for relaxation of the lease restrictions would create a burden to the testing laboratories and will be considered as a negative factor when comparing with the business environment elsewhere.

The proposed nil waiver fee as a measure to address the issue

12. In line with our policy to develop and promote the testing and certification industry in Hong Kong, we propose to waive the fees chargeable for the issue of waiver as described in paragraph 1 above so as to allow the operation of testing laboratories in industrial buildings where the relevant leases do not allow such use. The proposed waiver should apply to industrial buildings of all ages. This will enable existing testing laboratories to regularise their current operations and facilitate their expansion or the establishment of new testing laboratories in future. It will also optimise the use of existing industrial buildings in Hong Kong. The measure would remove an unsettling factor in the industry.

13. If an industrial building is under multiple ownership, owners of the units of the building may apply individually for change of use into testing laboratories for their respective units. There is no need for all owners of the same building to submit a joint application. The proposed nil waiver fee for this specific change in use may be valid for the lifetime of the existing building, or until expiry or termination of the current land lease, whichever is earlier. By nature, such waivers focus on the "use" (and not the identity of specific testing laboratory operators) and will therefore allow different testing laboratories to operate in the same building as long as the waivers remain valid. Under normal practice where waiver fee is chargeable, Government would allow the premises to be used as testing laboratory in addition to its original uses under the lease. In a case where life-time waiver has been granted, the owner can use the premises for either testing laboratory or the original uses under lease (or both) anytime during the lifetime of the existing building. Where the waiver fee is payable periodically, the owner may continue to pay the waiver fee if the premises revert to the original uses under the lease. But more likely, he would terminate the waiver to avoid payment of the waiver fee, although a new waiver application chargeable to an administrative fee has to be made if the premises would be used as a testing laboratory in future. Under the proposed measure, it is proposed to allow testing laboratory use in addition to the original uses under lease. If the property owner wishes to revert to the original uses, there would be no need to terminate the waiver. The waiver would remain valid in this case, and there is no need to apply for another waiver if the premises concerned are to be used as testing laboratories again in future.

14. From the policy of promoting the testing and certification industry, the inclusion of industrial buildings of all ages would increase the availability of space for testing laboratories in Hong Kong and there is no cogent reason to distinguish old and new buildings under this proposed measure. We welcome the continual operation of testing laboratories in industrial buildings as long as they comply with all the statutory and other requirements imposed by Government from time to time.

15. Applications for the use of industrial buildings (or part(s)) thereof for testing laboratories shall be processed where such use is –

- (a) permitted by the current zoning in the Outline Zoning Plans ; or
- (b) granted planning permission by the TPB; or
- (c) considered as existing use under TPB Guidelines.

Existing use covers the situation where there is a re-zoning and the Planning Department allows the use of a building not only for the actual use in existence at the time when the new land use zoning is imposed, but also for the use(s) designated on the building plans / Occupation Permit of the existing building approved/issued under the Buildings Ordinance before the new land use zoning is imposed. This is in line with existing practice. For example, if a testing laboratory is in operation when the land use zoning of the concerned industrial building is re-zoned from “Industrial” to “Residential”, the laboratory would remain eligible to the proposed measure as existing use would be tolerated by Planning Department under the new zoning until there is a material change of use or the building is redeveloped. If it is not in operation, the crux is that there must be evidence to demonstrate that the use of testing laboratory has been approved under the Buildings Ordinance before the new land use zoning is imposed. LandsD will consult relevant departments to confirm whether an application meets the aforesaid criteria in the planning context.

Further details of the proposed measure

16. Under the proposed measure, applicants for the waiver of lease conditions will be required to make a self-declaration and provide evidence (e.g. accreditation status, operation record, expert opinions) to demonstrate that the proposed change of use of the premises is primarily for testing laboratory and ancillary purposes. Upon receiving an

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application, LandsD may seek advice from the Innovation and Technology Commission (ITC) in deciding whether or not the user as stated in an application is a testing laboratory eligible under this policy measure, and ITC may support the application, upon consulting HKCTC (or any subcommittee/panel of it) or other experts as necessary. The typical activities of a testing laboratory are set out at Annex A. Laboratories providing clinical testing services involving collection of samples from visiting human or animal on the premises are not covered by the proposed measure because the frequent patronage by a large number of individual clients will expose individuals to higher fire risks posed by other units which are still being used for industrial activities or storage of dangerous and inflammable goods, and because such use is usually not permitted in industrial buildings according to the Notes of Outline Zoning Plans³. Medical and veterinary laboratories that do not conduct testing of / collect samples from visiting human or animal direct on premises are eligible to apply.

17. For the avoidance of doubt, the applications for waivers will be subject to payment of the administrative fee which is assessed on the basis of recovering the full costs to Government of processing such applications. This is in line with the “user pays” principle. In addition, the proposed measure, if adopted, would not alter any rule and practice imposed by different authorities governing the operation of testing laboratories in industrial buildings and a laboratory would still have to comply with relevant requirements such as building and fire safety. Existing industrial building owners with temporary waivers at periodic payment granted for change of existing buildings to testing laboratory use now chargeable to waiver fees may choose to terminate (no refund of fees paid), or not to renew the existing waivers, according to the terms of the waivers and apply for the waiver under the new measure at nil waiver fee. Nonetheless, for those who have paid a lump-sum waiver fee to Government for a life-time waiver allowing for such use, they will not be affected by the proposed measure and no request for refund of the lump-sum waiver fee will be acceded to.

18. The measure will be implemented as soon as possible within 2015-16. LandsD will work out details for implementing the policy measure, including application procedures and other requirements in consultation with ITC in line with land administration practice.

³ If the laboratory concerned is located on the ground floor of an industrial building, application to TPB for planning permission can be made.

IMPLICATIONS OF THE PROPOSAL

B 19. The proposal has economic, financial and civil service implications as set out at Annex B. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no competition, family, productivity, environmental or sustainability implications.

PUBLIC CONSULTATION

20. The testing and certification industry has expressed great concerns if testing laboratories are required to pay the normal waiver fee in order to continue their operation in industrial buildings. The HKCTC shares this concern and suggests Government to implement measure that will allow the continued operation of testing laboratories in industrial buildings with minimal disturbance.

PUBLICITY

21. We will arrange briefings and articulate the new measure through dissemination of the policy on HKCTC's website (www.hkctc.gov.hk). The details of the proposal will be available afterwards when the LandsD's Practice Note is ready for issue in 2015-16. ITC will include the measure when it briefs the relevant Panel of the Legislative Council about the work of HKCTC.

BACKGROUND

22. Testing and certification is a sector where Hong Kong enjoys clear advantages. Government established HKCTC in 2009 to advise on the overall strategy to support the development of the industry. The HKCTC recommends a market-oriented dual approach of making general improvements to both the accreditation service and factors of production of the industry, while focusing particular attention on specific trades with good potentials for using testing and certification services. The HKCTC has worked closely with ITC to develop the testing and certification industry, for example, promotion, organisation of training and seminars, support to the development of new testing methods and certification schemes, and discussion with Central Authorities on inclusion of liberalisation measures under Mainland and Hong Kong Closer Economic Partnership Arrangement.

ENQUIRIES

23. Enquiries relating to this brief may be directed to Mr. Kesson

Lee, Secretary-General (Testing and Certification) of ITC, at 2829 4828.

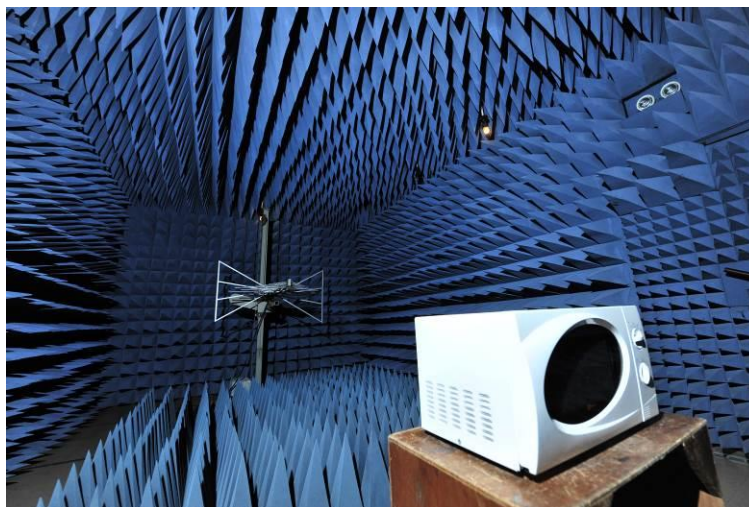
**Commerce and Economic Development Bureau
Innovation and Technology Commission
23 April 2015**

**Broad Categories of Typical Services Provided by
Private Testing Laboratories in Hong Kong at Present**

Calibration Services
Chemical Testing (including precious metal analysis)
Chinese Medicine Testing
Construction Materials Testing
Electrical and Electronic Products Testing
Environmental Testing
Food Testing
Forensic Testing
Medical Testing
Pharmaceutical Products Testing
Physical and Mechanical Testing (including gemstone testing)
Proficiency Testing Providers
Reference Material Producers
Testing Required by the China Compulsory Certification System
Textiles and Garments Testing
Toys and Children's Products Testing



Construction Materials Testing



Electrical and Electronic Products Testing



Toys and Children's Products Testing



Textiles and Garments Testing



Physical and Mechanical Testing

IMPLICATIONS OF THE PROPOSED MEASURE

Economic Implications

Testing and certification services sector is one of the industries that have been identified as enjoying clear advantages by Hong Kong. Local testing laboratories provide essential support to the manufacturers in the Pan-Pearl River Delta area, and also play an important role in the daily life of the Hong Kong community, such as by providing food testing. The proposed measure will facilitate the continued operation of testing laboratories in industrial buildings, and clear the uncertainty about waiver fee payment for new laboratories to be set up in these buildings.

Financial Implications

2. The potential revenue forgone to Government cannot be estimated at the present stage because the exact amount would vary among cases in view of the floor area of the laboratories involved and their locations, etc.

3. Furthermore, without the proposed measure, building owners may continue the laboratories use in breach of the land lease instead of proactively applying for waivers and paying the waiver fees and administrative fees until they are faced with LandsD's enforcement action (which would be taken if a breach of the lease conditions is discovered). Where lease enforcement actions are instigated against a non-compliant testing laboratory operated by the tenant of the premises, an owner may purge the breach of lease conditions by terminating the tenancy agreement and asking the testing laboratory to leave probably even without waiting till the end of the tenancy. For multinational testing laboratories, it is very likely that they would allocate the testing orders to laboratories on Mainland if the one in Hong Kong is shut down. Even if laboratories are re-locating within Hong Kong, they may try to find a building where the lease permits the operation of testing laboratories, and thus no waiver fee and no administrative fee will be involved as there would be no need to process any waiver application. It therefore appears that the potential revenue forgone may just be hypothetical.

Civil Service Implications

4. Depending on the market response to the proposed scheme, additional manpower resources may be required to process applications. Where necessary, additional manpower will be sought in accordance with the established mechanism.