

The Civic Party's Position on Public Open Space

Insufficient Public Open Space

1. Government recognizes the need for open space for the enjoyment of all who live in Hong Kong. Open space is defined as land use zoned for the provision of open space and recreation facilities "*for the enjoyment of the general public*". Government also recognizes that apart from recreational use, open space allows the penetration of light and air movement, as well as for planting areas for visual relief and is an essential land use element in urban design. Currently, the Government's own guidelines on the provision of open space in the urban areas is a minimum of 2 sq.metres per person.

2. We, in Civic Party, see as the key element that open space is "for the enjoyment of the general public". We invite the Government to disclose clearly what is counted as open space in meeting the minimum provision and whether such open space is truly open, available and accessible for the enjoyment of the public with minimum restrictions.

3. These are the questions which Government must answer:

- i) How much of the 'open space' is within private residential or commercial developments?
- ii) How much of this open space is clearly signposted as open space for public enjoyment?
- iii) Is this open space directly accessible and visible from the street or is it on an upper floor on top of a podium?
- iv) What are the facilities available for use by the public in such open space such as seating, shade?
- v) What are the restrictions on use of the space?
- vi) How well does Government "police" the contracts with private owners and developers to see that the spaces are made available and that the terms of the contracts are being observed?



4. We, in Civic Party, believe that there is insufficient provision of public open space in Hong Kong for the use and enjoyment of those who live and work in the urban commercial and residential areas. We believe that the current system of using spaces within private commercial or residential developments does not satisfactorily meet the requirements for public open space which should be freely accessible and enjoyable by the public with minimum restriction. This is not just a matter of the quantity of space but the quality of its enjoyment. Areas which do not meet defined minimum standards should not be counted against the open space requirement. What that minimum standard should comprise is an issue on which public input is essential.

5. Often, restrictions are imposed which are incompatible with the free enjoyment of open space. A notorious example is the Times Square restriction "*No person shall bring any food or drinks on to the area*". The system brings the public into conflict with the private owner who has other legitimate interests to protect through the imposition and policing of restrictions by privately employed security guards. In the case of Times Square, the public is supposed to enjoy the right of passage as well as passive recreation. If a member of the public were on a street or pavement, imagine a policeman trying to stop him or her from drinking from a can of soft drinks.

Public Rights of passage

6. Public open space and pedestrian space ought to be open to the public with minimum restrictions as is set out in the law with respect to the public highway (public road or street): *a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not obstruct the highway by unreasonably impeding the primary right of the public to pass and repass: within these qualifications there is a public right of peaceful assembly on the highway.* (DPP v. Jones [1999] 2 AC at 257.)



7. The rights of the public over a highway encompass not just the right to pass and repass but all reasonable activities so long as such activities are not inconsistent with the right of passage. Such activities include handing out leaflets, collecting money for charity etc. even if the persons conducting such activities remain in one place provided the use by other persons is not obstructed. These rights should be incorporated into the minimum standards referred to above.

Public Rights on Private Land

8. Public space and passages within private property cannot be regarded as a satisfactory substitute for true public open space and public roads and streets. The land lease arrangements between Government and the private land owner do not confer any rights on the public at all, and deeds of dedication are expressed in terms even more restrictive. For instance, the Deed in the case of Times Square makes the Owner the arbiter of whether conduct is likely to cause annoyance or nuisance or to interfere with use and enjoyment of the Dedicated area, it permits the Owner to set up temporary structures for temporary exhibitions and displays such right being exclusive to the Owner and contains numerous other restrictions. This is not the owner's fault but the Government's for failing to secure certain minimum benefits and facilities for the public in the negotiation of the Deed.

9. Passages through buildings and pedestrian footbridges which connect buildings are subject to conditions set by the private land owner, including closure after certain hours, and cannot be considered as on a par with rights over public roads and streets.



Other unsatisfactory features of the current system

10. Landowners have been granted bonus plot ratio/site coverage or enjoyed lower land premiums in return for making areas available to the public upon these restricted terms. This has led to higher buildings and denser development in the urban areas. This denser development has brought more traffic and more people into the urban areas thus creating greater pressure on the already limited areas available for public enjoyment.

11. Arguably, the power to grant additional plot ratio and/or site coverage has not been lawfully exercised. A fuller description and explanation of the legal problems and questions over the legality of such grants are attached as Annex 'A' to this paper. But irrespective of the legality of the exercise of these powers, what is undeniable is that the outcome has benefited developers and it is questionable what has been gained by the public. In many cases, substantial overdevelopment beyond that provided as a maximum in Regulations 20 and 21 of the Planning Regulations has been allowed. Thus, the control to prevent overdevelopment which has been put in place in the public interest has been circumvented.

12. The negotiations between landowner and Government are conducted behind closed doors; there is no public participation and the public is not in any way involved in setting the minimum requirements which should be achieved for the public.

13. Buyers who have bought in residential developments which have within them areas for public use are liable to pay maintenance charges for these areas although the developer who made the arrangement has the benefit of additional plot ratio or site coverage without the financial responsibility of paying for the ongoing maintenance. Buyers' rights or expectations of privacy and exclusive enjoyment of areas within the development have been blatantly disregarded. Again, it is the developers who benefit. This is clearly unfair. Enforcement is against the buyers; the developers wash their hands of all responsibility.



Civic Party's Position

14. We call on Government to answer the questions above. We call on Government to enforce current deeds of dedication and agreements where open space and rights of passage for the public exist over privately owned land generally but to find a solution, whether financial or otherwise, to the existing problem created by Government for owners in private developments who have lost their rights or expectations of privacy, security and exclusivity to the enjoyment of their homes and surrounding areas within the private development but who are being required to pay maintenance charges so that members of the public can enjoy the spaces within such developments. This is a problem of Government's making. They have the responsibility to solve it.

15. For the future, minimum standards containing no less than the rights which the public enjoy over highways must be set for open space with the rights enforceable at the instance of the public. In making land available for private development, giving developers benefits in terms of site coverage, plot ratio or gross floor area or using any power under the Buildings Ordinance to relax any requirement or permitting any modification in return for making available space within proposed private residential developments should be minimized and no such benefits should be given unless such areas are set apart from areas within the private development for the exclusive use of owners within the development and unless the developers are prohibited from selling such areas and remain responsible for the maintenance and unless the space satisfies the minimum standards. Areas set apart for public enjoyment in private developments must be clearly indicated in all sales brochures or publicity material before sales within the development are permitted.

16. A review should be conducted by Government to ascertain the extent of unlawful grant of plot ratio/site coverage and the Government should in each case propose a solution to remedy the situation compatible with the provisions of the relevant legislation and the public interest.

The Civic Party Limited

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Annex A

Use of deeds of dedication

1. Deeds of dedication are legally binding on the landowner and the landowner's successor in title. The general public are not parties to the Deed and the deeds are neither enforceable by nor against the public. As far as the public is concerned, the dedicated area is private property over which the public walks by the leave and licence of the landowner. Even where the dedication is for the purposes of public passage and Regulation 22 of the Building (Planning) Regulations, public passage is not a right but only enforceable by Government for breach of the deed if the public passage is denied. This is substantially different from the right of the public along a public road or street.
2. There are areas in Central where it is possible for one half of a person to be standing on ground where that person has a right to be and the other half liable to an action in trespass. This happens where, for instance, someone is standing in Central to hand out flyers to collect money for charity. It also means that activities which are permitted on the public pavement may be forbidden or restricted by the landowner; thus, the half/half problem. The existence of a right is not just theoretical but practical.
3. Deeds contain many restrictions. Deeds which do not refer to "passive recreation" permit only public passage and confer the right on the Owner to evict persons loitering or using the dedicated areas other than for passing or repassing so the right to hand out flyers even if there is no obstruction or nuisance caused, does not exist on the dedicated area. Where the Owner evicts a person for using the dedicated area for a purpose other than for passing or re-passing ie someone standing and waiting for a friend, the obstruction to pedestrian traffic is likely to be greater if the person has then to stand wholly on the public pavement.

4. Deeds of dedication may relate to indoor / inaccessible areas not at street level of which the public are unaware.
5. Terms of deeds of dedication” vary and are not widely known to the public. These should be available on the area in question. It is not right that the public can only find out the terms of the deed by making a search at the Land Registry.
6. It is unfair to place the financial burden for maintenance charges of these dedicated areas on private owners in residential developments containing such dedicated areas when it is the developer who has had the financial benefit of selling off the development and where the developer has secured plot ratio and site coverage in return for the dedication.

Bonus plot ratio/site coverage under Regulation 22 of the Building (Planning) Regulations

7. Insofar as Government grants bonus plot ratio and site coverage in return for “deeds of dedication” which do not have the effect of annexing the dedicated areas to the adjoining street, it is probably *ultra vires* because:
 - Reg. 22 only applies where a building is set back from a boundary which abuts a street and the land is not built upon, which means it can only apply to outdoor areas on ground level
 - The word “dedication” in Reg. 22 is clearly a reference to the “common law” concept of dedication and acceptance of highways, which means the *vesting of rights* in the public.
 - Unless the “deeds of dedication” are effective to confer rights on the public, their presence on the dedicated private land would continue to be “at sufferance” as far as the position between the public and the landowner is concerned.
 - As a matter of law, the public can only be vested with rights over land if the dedication is irrevocable for the duration of the Government lease. Thus insofar as a “deed of dedication” limits the period of dedication or reserves a rights of revocation (albeit subject to Government’s consent) they are ineffective to vest rights in the public.



- If “deeds of dedication” are ineffective to vest rights in the public, they can be removed at the landowner’s whim and this would be so regardless of whether they are observing the terms of the deeds of dedication. The Government would also face difficulties in taking enforcement action against a landowner who acts in breach of the terms of the deed because in most cases the Government would not be able to prove any loss.
- If Reg. 22 was intended to make available areas at street level and adjoining the public highway for use on the same terms as the public highway, it must be intended that the dedicated areas would form part of the street and activities which are allowed on the street should also be allowed on the dedicated areas. Thus insofar as the terms of a “deed of dedication” place restrictions on activities which are lawful if carried out on highways they are not a proper dedication for the purposes of Reg. 22