

Public rights over private property

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With the intensification of our land use, there is a benefit in having public rights established over private property for street widening, passage, recreation, or for community facilities such as stations, parking, and transport interchanges. However, we should discuss how far we should go.

1. There is not enough street widening and we need to do more. The architects and planners have for many decades called for setbacks when buildings are redeveloped to provide circulation space for the increase in people.
2. There are world class examples of public passages – especially in ‘old’ Central where the elevated network provides a high quality additional pedestrian network – and there are many calls to extend this network further. However, there are an increasing number of bad examples in the new areas of West Kowloon, Tai Kok Tsui, Ma On Shan, Hung Hom, Wanchai North and the future Central Harbourfront, where the public is made entirely dependent on elevated walkways and podium decks in private property and the public street is turned into barren dead zones. Elevated networks should be seen as additional capacity or as strategic links but never to the detriment of the outdoor, street level environment.
3. The lack of public open space in urban areas is made worse by counting open space in private developments to meet the requirement of 2 sq.m. per person. In North Point today, 50,600sq.m. - half of the existing 106,063sq.m. local open space - is now within private property and are either inaccessible or badly maintained. Many private open spaces do NOT meet the Hong Kong Planning Standards and Guidelines specifically those on elevated levels and incorporated in the development. The guidelines state in Chapter 4 that the use of open space is for active and passive recreation, for the enjoyment of the general public, that open space should be visible from public roads, accessible for all segments of the population and not isolated. The entrance should be easily identifiable. It also says that the space should not be the remainder of other land uses.
4. The cumulative effect of bonus, unaccountable and free GFA 'paid' as incentives in return for public rights and facilities is resulting in massive bulk and height of buildings well above and beyond what was intended under planning (in ways for more detrimental than exemptions for green features and club houses).
5. The public gains are limited as public rights over private property are often limited to pass and re-pass subject to opening hours and with few rights for recreation, sitting, congregating, handing out leaflets, or playing music. The location of the space and passage is such that access is limited, no seating is available or possible, and there are genuine additional security concerns.

6. The system of establishing public rights over private property has failed. Decisions on 'how suitable is the space', 'what public rights can be agreed', 'what incentives are given in return', and 'how is the space classified' are made behind closed doors. The losers are the public users who 'paid' dearly with development rights or other forms of compensation. Often it is the developer who enjoys the benefit from the additional saleable area or the betterment of his development. When properties are sold the ongoing maintenance cost and public nuisance is left with the unhappy new owners.

Examples of public rights over private property

7. How can the Times Square Piazza have been classified as 'public open space' when it is circulation space and rights are limited to ensure safe passage? The piazza should have been required under building regulations and not been paid for with additional floor area.
8. The corner of Central Tower (Marks and Spencer) is dedicated for street widening. By failing to resume this land, however, the government has failed to ensure that public rights on that pavement are identical to those on the public pavement next to it. These rights are 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.)
9. The podium of Central Station (IFC2) and the Kowloon Station (above Elements) are unsuitable as public open space given the security concerns of the owner, the access through the shopping mall, and cost of the conveniences available. Rooftops and podiums are by nature private public spaces. Having declared these public spaces has made quality al fresco dining here impossible. Now that these are declared as public open spaces, commercial al fresco dining has been ruled out, and the Outdoor Seating Accommodation licensing system is not applied. As private spaces, access for the public is by leave and license of the owner and no additional development rights or a reduction in land premiums would have been required.
10. The Portofino residential low rise complex is in the middle of a nature conservation area in Clearwater Bay. A completely unnecessary public open space is included on private property and one can only guess how the developer benefited. Neither the new owners nor the public has gained any benefits.
11. The public open space on the podium of Metro Harbour View has no benefit for the surrounding community and the location creates security and nuisance concerns for the residents. The owners should be given an option to convert the land lease and buy back the obligation for public access at a nominal sum.

12. Both Portofino and Metro Harbour View demonstrate the need for a better mechanism and more transparency of any public commitments when flats in these properties are sold.
13. Island Place and Tanner Garden in North Point are examples of developments with public spaces at both street level and podium level. The street level spaces are well designed and easily accessible. Although it is unclear what the public rights are, the development or premium incentives are worth it and these are properly classified as public open space. However, the podium gardens should be classified as private open spaces and, as with club houses, it is unclear the developer should be awarded incentives for these.
14. The residual space around the drop off and road to the car park of Belcher's are counted as 4,000 sq. m. of public open space, in complete disregard of the Hong Kong Planning Standards and Guidelines. The road and set back should be the minimum required under building regulations for a development of this size and nature, and not incentive should be provided.

The phenomenon of private rights over public property

An example is the Public Open Space on Government land immediately to the west of the Bank of China on Garden Road which is designed, constructed, managed and maintained by the Bank of China. There are no seats, there is no access. For a small benefit – cost savings – the public has lost the rights over public land.

The phenomenon of 'no' rights over public property

The Director of Administration has advised that the public open space on Tamar will be open to the public 'subject to security and operational requirements'. If so, then these should be classified as private gardens with public access by leave and license of the owner.

Conclusions regarding public rights over private property

1. Priority should be given to have public open space on Government land at street level;
2. Podium and elevated levels are unsuitable for public open space, although public rights of access may be desirable for certain places (viewing platform);
3. More street widening and set-backs is required, with the Government resuming land for street widening, or otherwise guarantee the same rights as for the street;
4. Extending the network of elevated passages is required as ADDITIONAL capacity and never to the detriment of the street level environment, and planning for new areas need to reviewed to reverse this trend;
5. Agreements on public rights over private property can no longer be a private matter between Government and land owner/developer, and an open and transparent system is required, including obtain District Council feed-back and seeking Town Planning Board approval;
6. A review is required of all existing agreements, and where necessary the public rights should be re-negotiated and space reclassified.
7. The Government must lead by example for its own developments.

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