

Transfer of Development Rights Approach: Striking the Balance between Economic Development and Historic Preservation in Hong Kong

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ABSTRACT

Can the Transfer of Development Rights work in Hong Kong? This paper looks at the fundamentals of the TDR; the current control on property development and its effect on heritage buildings; the conditions for applying the TDR in Hong Kong; and examples of completed TDR cases, before concluding that the future looks promising for TDR applications here. It examines certain TDR cases like the early Letter B land redemption certificates; the redevelopment of the Hoover Theatre into the Paliburg Plaza and Regal Hotel in Causeway Bay; the HSBC Tower at 1 Queen's Road Central; Tai Fu Tai at San Tin, Yuen Long; the Morrison Hall in Tuen Mun; the well-known case of the Ohel Leah Synagogue on Robinson Road, Mid-Levels; and the recent case of King Yin Lane at 45 Stubbs Road. With the establishment of the Development Bureau in July 2007 overseeing planning, land, buildings, works and heritage, it is possible to find the fulcrum between economic development and historical preservation.

KEYWORDS

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INTRODUCTION

Based on a UNESCO-sponsored conference paper in 1999, Cody (2002) wrote an interesting article on the Transfer of Development Rights (TDR) as an incentive for historic preservation in Hong Kong. After examining the strengths and weaknesses of five TDR-related cases of the 'Letters B' land redemption certificate (Nissim, 1999); the Lee Theatre; Pun Uk in Yuen Long; the London Mission Building; and Cheung Kong Centre, he was cautious about the viability of this incentive scheme in Hong Kong.

After a brief introduction, this paper will consider the fundamentals of TDR; the current control on property development and its effect on heritage buildings; the conditions for applying TDR in Hong Kong; and examples of completed TDR cases, before coming to the conclusion that the future looks bright and sunny for TDR applications here.

The establishment of the Development Bureau in July 2007 - which puts planning, land, buildings, works and heritage under one roof - makes it possible to find the fulcrum between development and preservation.

FUNDAMENTALS OF TDR

Early Practice of the Transfer of Development Rights

The TDR can be applied in Hong Kong as an effective tool in preserving many of the heritage buildings under threat and at minimal public cost. Interestingly,

Hong Kong has pioneered and practiced a form of the TDR since the 1960s. The government implemented a land redemption certificate system for land resumed in the rural area, which was commonly known as the Letters A and B. Lai (2000) argued that the Letter A/B system had the beauty of settling compensation for resuming rural land in the New Territories for small house development with minimal government spending.

This worked so efficiently in the transfer of development rights that Cody (2002) suggested resurrecting the Letter B system. He also lamented the unfortunate case of the Lee Theatre¹ in Causeway Bay where no transfer of plot ratio was permitted under the rigid planning and density control mechanism for 'non in-situ sites'.

Rationale behind the TDR

In essence, the TDR is the transfer of surplus development rights from a sending site to a receiving site. Commercially, the transfer of surplus development rights from one lot to another enables a developer to increase density at the receiving site in a popular district so that he can reap higher profit. In the United States, developers benefit from the clarity and consistency that the TDR programmes offer (Pruetz, 1997), and they make development more predictable. The sending lot owner can realize his unused development rights and recoup a lump sum from the sale.

It can be argued that the difference between the existing and permissible plot ratio can be transferred and traded openly in the market place.

Proceeds from these sales could be used for preservation, maintenance or improvement of the historic heritage buildings. This would perhaps help to ease the burden on public spending and provide an incentive for private owners to maintain their private lot.

Need for Sustainable Development

In his Policy Address the Chief Executive spelt out a policy statement on heritage conservation which was endorsed by the Executive Council in 2007. Increasingly, the public is concerned about the hidden environmental and social cost of development. This is expressed in outcries and sometimes by radical actions taken by green groups, consumer advocates and political parties. Conservation and economic growth are not mutually exclusive and are in fact compatible with each other. The need is to strike the balance between preservation and development.

Theoretical Basis

Increasingly economic considerations are taking precedence over cultural, political, social and aesthetic values when it comes to making decisions and in allocating resources for conserving cultural heritage. This trend is occurring in many countries and often decisions about what and how to conserve are strongly influenced by economic considerations. The Getty Conservation Institute (GCI) of the United States has conducted in depth studies and attempted to bridge the gap between economic expansion and cultural conservation. The GCI invited various prominent scholars to participate in their research and published their findings in

a series of paper in December 1998.²

Government intervention can be in the form of issuing administrative orders against demolition; incentives measures like permission for transferring development rights, and direct funding in repairing heritage sites. King Yin Lane was saved this way when the owner and the Government reached an understanding on 25 January 2008. The owner will surrender the whole site to Government after restoration and an adjacent slope site of similar size will be granted to the owner for the same development parameter of 0.5 plot ratio and maximum three storeys, see http://www.amo.gov.hk/en/news_20080711.php.

CURRENT CONTROL ON PROPERTY DEVELOPMENT AND ITS EFFECT ON HERITAGE BUILDINGS

The Harsh Reality Facing Owners

The harsh reality for cultural conservation is that the market demand for properties has been so intense that prime sites with development potential are very much sought after. As evident in older areas like Sheung Wan or Wanchai, many pre-war buildings could only provide low return for their owners because of their old age, functional obsolescence and rent control measures. In the meantime commercial retail activities and large-space users had expanded and moved to other popular commercial areas. While government subsidies on repair and maintenance for private heritage buildings were

virtually unheard of until lately, there was little incentive for owners to hold on to dilapidated or under-developed structures, which offered low income.

Existing Control Over Building Development

The Planning Department, Lands Department, and Building Department are the key bodies that look after and maintain control on the real estate and building development relying, respectively, on the Town Planning Ordinance, the Government leases and the Buildings Ordinance and administrative Practice Notes (Lai, Ho and Leung 2004) .

It is worth mentioning that the government has taken the view that terms of the Government leases can be varied to allow changes in the use of land. This can be for a longer term in the form of lease modification or land exchange, or for a temporary basis such as short-term waivers for minor changes of uses. These changes of lease

conditions form a solid base for land related income to government.

Compensation to Owners of Declared Monument Buildings

The relevant Ordinance governing compensation for land resumption for conservation purposes is the Antiquities and Monuments Ordinance (Cap 53) enacted in 1976.³ Its main purpose is to protect historic buildings and antiquities in Hong Kong. The spirit of the Ordinance allows the authorities to preserve significant historic structures for the public's benefit and for the enjoyment by future generations.

Frequently, when a site of historic interest is under threat or is about to be demolished, the government announces in a *Gazette* notice a proposed monument status for the site. There were two occasions when the proposed monument status was used, firstly in the case of the Ohel Leah Synagogue in 1986, and in the case of the Morrison Hall at Tuen Mun.⁴



Ohel Leah Synagogue



Morrison Hall

Figure 1: Government declared a proposed monument status for both the Ohel Leah Synagogue and Morrison Hall in order to preserve the buildings.

Source: photo by Raymond Chan

A Declaration of ‘proposed status’ is valid for twelve months and may be extended. However the affected owner may object to the ‘proposed’ status. If an objection fails, he can make an appeal to the Chief Executive (CE). The CE may direct the declaration to stand, vary the declaration or withdraw the declaration altogether. The CE’s decision is final and is not subject to review by the Court.

Currently there are over 80 declared monuments in Hong Kong <http://www.amo.gov.hk/en/monuments.php>, but because of the discretionary compensation system, the Authority has issued declarations sparingly. However, extensive surveys for heritage buildings have been conducted and a record of the locations of important heritage buildings is kept by the Authority. In 2007 the Government listed nearly 500 buildings in Hong Kong as historical buildings, but King Yin Lane was not on the list.

CONDITIONS FOR APPLYING THE TRANSFER OF DEVELOPMENT RIGHTS IN HONG KONG

In order to make the TDR a success in Hong Kong, it is necessary to establish an efficient, open, fair and transparent system so that there is clarity and a reasonable procedure for the public to follow. The Hong Kong experience and additional control mechanisms required for implementing the TDR are considered here.

Hong Kong practiced some kind of transfer of development rights in the form of land redemption certificates commonly known as Letters A and B during the 1960s to 1980s. According to the former Director of Lands, Bob Pope,⁵ these redemption certificates were issued to fulfill the desire of indigenous New Territories landowners for owning land. Pope argued that an attachment to the land was established long ago as the rural community had by tradition made a living through farming and were dependent on land to survive. Major clans had owned land for generations and were influential in local politics, as such their co-operation was beneficial in new town development and the government was keen to appease them by offering two square feet of building land in exchange for five square feet of agricultural land resumed. Building land surrendered was exchanged on a foot for foot basis.

In the final phase of operating Letters A and B, the government was concerned that there was insufficient land for redemption by certificate holders. The issuance of Letters A and B came to a halt in the early 1980s. A flexible approach was made and the government allowed Letters A and B to be used as cash in land premium payment, rates and government rent. In the mid- to late-1980s, most remaining Letters A and B ended up in the hands of major developers like Henderson and Chinachem. They were allowed to bid for prime sites in the new town areas such as sites near the Shatin Race Course. Huge profits were made following the soaring property prices, and developers were able to move



Figure 2: Large amounts of rural lands were resumed using Letters A and B. These agricultural lands were turned into developable land thus making room for massive housing projects and the construction of railway lines. The above shows a traditional Chinese pagoda at Ping Shan in the foreground and public housing estates in Tin Shui Wai.

Source: Photo by Raymond Chan

these remote rural development rights around without much restriction. Lai (2002) believed that as well as opening up new development areas in the New Territories without offending the indigenous villages, the certificates of land entitlements method also promoted urban renewal in the old urban areas, and hence more balanced development in the core and peripheral areas.

One could argue that the Letters A and B system had taken a different role from its original purpose and became a form of TDR. In most cases the original rural sites being compulsorily acquired were in places like Yuen Long, Tuen Mun and Taipo. Through trading, the passage of time and eventual redemption, building land lots were granted to developers in places such as Tsuen Wan and Shatin

thus transferring development rights across districts. Because of this measure the government was able to assemble land and to complete important infrastructure projects with minimal administrative cost or use of public funds.

Additional Requirements for Implementing the TDR

Costonis (1974) mentioned a number of requirements in order to facilitate implementing the TDR, and in the context of Hong Kong the following are suggested:

Designation of TDR Transfer Districts

A TDR Transfer District is an area or boundary within which development rights can be transferred. In order to allow easy TDR trading and treating

them like ordinary daily sale of properties, it is suggested that TDR sales could commence from trading of rights between similar land lots within the same district. For instance, property rights of commercial/residential zoned sites in an area like Wanchai can be traded within Wanchai.

A TDR transfer district boundary for an urban area of Hong Kong should adopt and follow existing Outline Zoning Plan boundaries. The advantage in using OZP Plans is that most land use zoning restrictions are well defined and their density control specified. With these Transfer District Boundaries in place, further analysis can be made to ensure that the first transfers could take place between sites of similar zoning restrictions, characteristics and land value in order to smooth the way forward.

Heritage Assessment Certification

A comprehensive survey check list for heritage properties including confirmation of title ownership, formulation of statements of significance, existing use value, potential development value, layout plans, structural defects, unique repair problems and remedies required can be prepared prior to conferring the TDR status. Such a comprehensive survey certification process is needed to establish a base line for quantifying the TDR values for heritage structures and for determining possible remaining surplus development right values available for a property. Hong Kong has a sizable pool of building professionals and consultants, and their talents can be used in formulating a high standard of

reporting for heritage assessment and TDR purposes.

Valuation for Transfer of Development Rights

It is suggested that the valuation of Development Rights should be made on a basis similar to resumption of land by the government. This should enable easy administration and allow officials to follow precedents established in similar situations. In fact, the Lands Tribunal has been operating successfully for many years, and over the years, a large number of precedent cases have been built up for assessing compensation for land development rights. Such experience is crucial in formulating a solid base for quantifying and assessing the transfer of development rights in Hong Kong.

As in most land resumption cases, the main principle for assessing land compensation is based on the differences in the open market value before and after a declaration of resumption. This involves the assessment of existing land-use value against possible value after lease modification or change in permissible density and uses.

Accepted Lands Tribunal valuation methods include a 'comparative method', 'residual valuation', 'investment method', 'contractor's method' and 'profits method'. Of these, the 'comparative method' is widely used and preferred by the Lands Tribunal.

Possible Legal Instrument for the TDR

There are cases where a successful

application of the TDR principle has been achieved, for example, in the case of the redevelopment of the Hoover Theatre into the Paliburg Plaza and Regal Hotel at the junction of Yee Wo Street and Pennington Street, Causeway Bay.

These adjoining sites comprise two plots of land, and the developer has transferred surplus plot ratio from the office tower portion onto the hotel site. This arrangement proved beneficial as the hotel portion is extremely profitable.

The surplus development rights were put to proper uses. If the office lot (Paliburg Plaza) were to be redeveloped, its maximum plot ratio permitted would be equivalent to its existing bulk.

As regards enforcement of the TDR in Hong Kong, instruments such as restrictive covenants can be used. As in the case of the Paliburg Plaza and the Regal Hotel, a restrictive covenant was executed between the parties and registered at the Land Registry. The document stated clearly the transfer

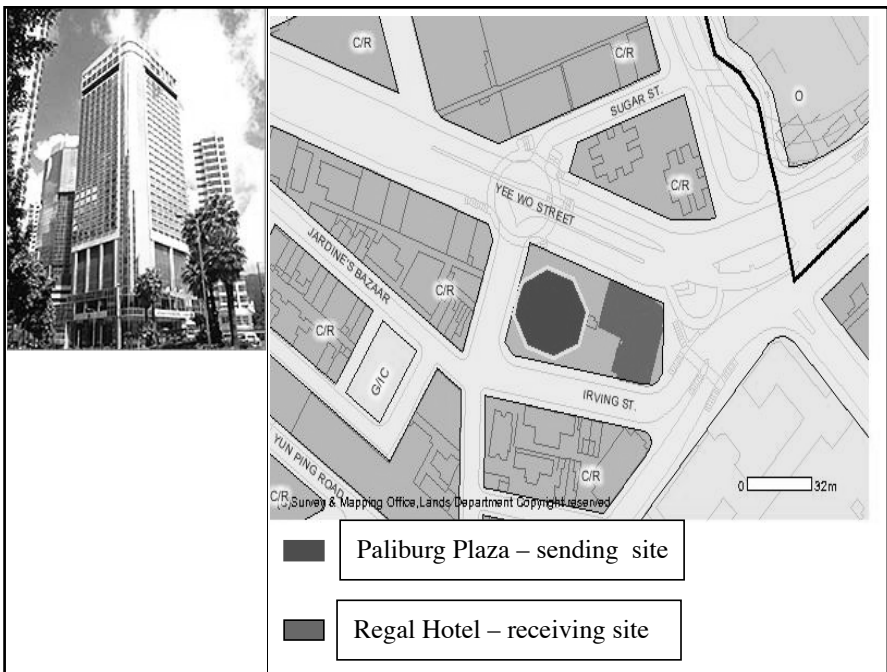


Figure 3: Paliburg Plaza as shown colored red has transferred its surplus plot ratio to adjoining Regal Hotel shown colored blue. This has resulted in increased floor area at the hotel than what would have been permitted under existing Building (Planning) Regulations.

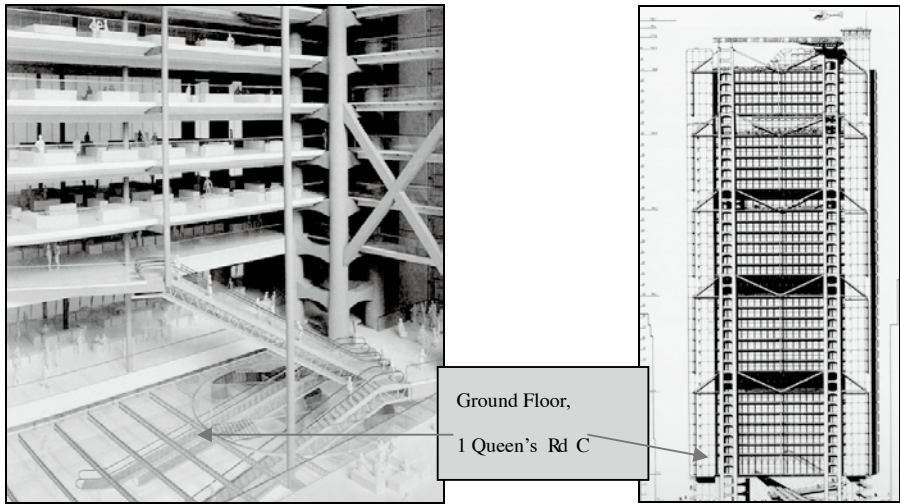


Figure 4: Ground level of the HSCB Bank Main Building at 1 Queen's Road C. The creation of the plaza at ground level has resulted in an increased plot ratio for the building by 20 % (Lambot & Chamber, 1986).

of rights between the lots and the permanent diminution of development rights on the sending lot.

Incentive Zoning and Bonus Plot Ratio

One important building planning control concept is incentive zoning, better known in Hong Kong as bonus plot ratio, which is related to the TDR. New developments bring about higher density, increased traffic flow and generally impose additional burdens on existing infrastructure. In order to ease congestion, additional open spaces or public amenity areas are needed. The authorities have been encouraging developers to provide these amenities by granting them bonus plot ratio. The intention is to encourage the developer to dedicate part of his site for public amenity purposes. In return he is

compensated in having a higher density than would normally be permitted. For example, in the case of the HSBC Tower at 1 Queen's Road Central, where the ground level is used for public passage, in exchange the Bank was allowed additional floor spaces in the upper floor office portion.

There is a limit to the extent of the permissible bonus. By a rule of thumb, the dedication of one square foot of ground floor space will gain five square feet at the upper floor level in Hong Kong.⁶ The intention is to compensate owners with an equivalent amount of space for his effort, so that he is not better or worse off than before. Granting of a bonus plot ratio is the prerogative of the government and it is not a compulsory act.⁷

Summary

Hong Kong has a well-defined Buildings Ordinance; an established outline zoning plan system under the Town Planning Ordinance stating the specific density permissible in most urban areas or districts; an efficient bureaucratic framework for land administration and registration, and a well-established legal and court system for land compensation cases. Therefore it is well equipped to launch the TDR.

The real estate industry is accustomed to the planning regime and regulatory controls. With the help of the anti-corruption agency there are limited cases of official impropriety. This has helped to lay the ground for launching the TDR.

Hong Kong's law courts are well experienced in dealing with claims or counter claims in land-related court cases, and precedents for land resumption, compensation valuation and related decisions are plentiful. We have a solid judicial system that is well accustomed to offer fair compensation for cases involving land interest disputes. The TDR can be easily accommodated in the Lands Tribunal, District Court or Court of Appeal situations.

EXAMPLES OF COMPLETED TDR CASES IN HONG KONG

Transfer of Development Rights for Adjoining Sites

This type of TDR sites must be contiguous or next to each other. But

not all heritage sites have the benefit of being next to another lot ready for development. Many of the heritage sites are surrounded by buildings of different ages or held under fragmented ownership. As developers have no obligation to consider preservation as a compulsory step in building plan submission, they forego conservation opportunities when it seems convenient. Therefore matching suitable transfer sites can be difficult. For this reason a limited number of contiguous site transfers have taken place.

Completed TDR for Adjoining Sites

The case of Tai Fu Tai⁸ is one example of the TDR of contiguous sites. Tai Fu Tai is a grand, official mansion built by Man Chung-luen in 1865 at San Tin, Yuen Long. Lengthy negotiations between the owners and the government took place and in exchange for preserving the site, the government agreed to exchange land at an adjoining lot, allowing it to be developed for residential use. Tai Fu Tai was restored in 1986 and was hailed as a major success for heritage conservation at the time. The adjoining site is now used as a low-rise residential housing project.

The other well-known case is the Ohel Leah Synagogue⁹ in Robinson Road, Mid-Levels. In the case of the Synagogue conservation, transfer of development rights for adjoining sites took place. In this case the developer, Swire, joined with the Synagogue and used its surplus plot ratio to develop a twin residential tower block on an adjoining site. The development is a commercial success as it has achieved a successful transfer of development



Figure 5: Tai Fu Tai is an example of adjoining site TDR, the dotted line area behind Tai Fu Tai mansion is developed into a residential complex using government land in exchange for conservation of the grand mansion.

Source: map from www.centanet.com and photo by Raymond Chan

rights between sites and the developer was rewarded with a handsome profit.

Transfer of Development Rights for Non-Contiguous Sites

Like the TDR at adjoining sites, TDR for non-contiguous sites is a common

practice outside Hong Kong. In the United States, the technique has been in use since the 1970s and improved versions are now used in preserving important heritage buildings and land resources such as farmland, rain forest, dessert, swamp, and areas of special

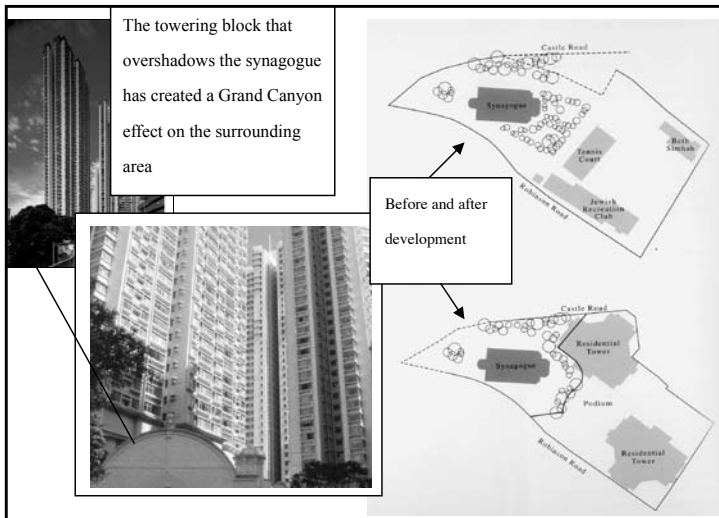


Figure 6: Plan of the Synagogue and Robinson Place (McDougall & Pettman, 2000)

Source: photo from Swire Group Annual Report

scientific interest (Pruetz, 2003). In Canada and Australia, owners of non-contiguous sites can sell their unused development rights in return for cash to refurbish or preserve heritage buildings.

Similarly, non-contiguous site transfer allows development rights to move from a sending lot and go where

they are needed. In the case of Hong Kong we propose that the surplus development rights could go to other sites within the same Transfer District. Surplus development rights could be traded and travel to other sites elsewhere, and not be restricted to an adjoining plot.

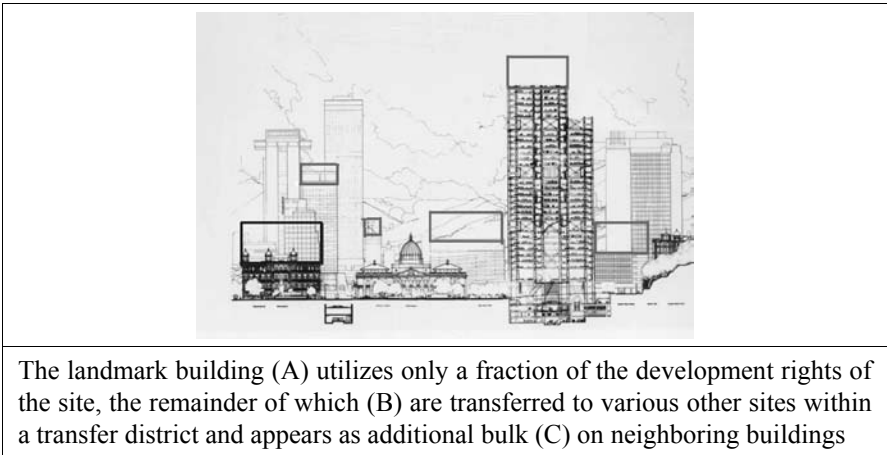


Figure 7: TDR for non-contiguous sites

Another possibility in Hong Kong is to allow redistribution of surplus development rights to different parts of a TDR Transfer District in contrast to confining all transfer on to a single receiving site. The difference between non-contiguous transfers against bonus plot ratio is that it aims to redistribute permissible development rights designed within a district and not to

create new ones. When additional bonus development rights are awarded to owners, it is in essence creating additional spaces above what was originally planned within an area. But the non-contiguous TDR simply redistributes and does not disturb existing density or upset infrastructure limits.

CONCLUSION

Heritage buildings can be considered as a form of public goods in that no one can be excluded from enjoying them. Government intervention in these areas could be in the form of funding, in regulating and administration of these services. While competition for public resources by different interest groups, lobbies and different agencies is relentless, the TDR permits the tapping of an important resource within the heritage building stocks. Generating funds from heritage buildings through the application of the TDR can allow money to be expended for on-going maintenance and repair. The involvement of private property owners is essential, as they also hold the key to the success of the TDR. However, the government should take the lead in conservation and implementation of the TDR in forming bodies like a Land Development Rights Bank.

If the TDR is in place, heritage-building restoration could be self-financed and these restored buildings could continue to generate a reasonable economic return. Thus the TDR could help to shift the attitude of favoring redevelopment and allow owners of old buildings to have an option in restoration. These incentives could change the public perception of heritage conservation. Developers would think more carefully whether there can be profit from restoration. Redevelopment need not be the only profitable option.

Local heritage conservation will gain more if consideration can be given to including the TDR, so that the

redevelopment potential from heritage sites can be turned into a useful asset for both the property owner and a benefit for the public. Bold steps put forward by the then Secretary for Planning and Lands, Mr John Tsang, back in 2001 should be in place so that the TDR could work, namely:

To designate heritage areas instead of just individual historical buildings;

To transfer GFA credits from a sending site to a receiving site that are not contiguous; and

To relax the maximum plot ratios and site coverage permissible under the Building (Planning) Regulations and the statutory town plans.¹⁰

With the proactive steps taken by the Development Bureau in trying hard to preserve such historic buildings as King Yin Lane and the Jessville on Pokfulam Road, there is some light at the end of the tunnel. As the Chief Executive put it in his Policy Address 2007: 'I can assure you that we are adopting a very positive attitude towards heritage conservation. We feel that the time really has come for us to treasure the sense of place, the sense of identity that this generation has developed and attached to Hong Kong's cultural history and the past so that we have a story to tell for our future generations'.¹¹

ACKNOWLEDGEMENT

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NOTES

1. According to the booklet on relics and historic buildings published by the Wanchai District Council in 1992, the Lee Theatre on Leighton Road was built by the Lee Hysan Family in 1925. The theatre was famous for its revolving stage where both traditional Chinese and Western opera and dance were performed. Most of the time movies were shown here. It has been redeveloped into a 22 storey shopping arcade with a total of 313,770 sq ft gross floor area. The podium and its basement have been used as a gym and department store, and its upper floor comprises a cinema, furniture showroom, health club, shopping spaces and restaurants.
2. In late 1997, the Getty Conservation Institute (GCI) began development of a multi-year inquiry to explore the values and benefits of cultural heritage conservation. The findings of their meeting in California were published in a series of papers and publications by the GCI in 1998.
3. Under the Antiquities and Monuments Ordinance (Cap 53), 'Antiquities' means –
 - (a) a relic and
 - (b) a place, building, site or structure erected, formed or built by human agency before the year 1800 and the ruins or remains of any such place, building site or structure, whether or not the same has been modified, added to or restored after the year 1799;'Monument' means a place, building site or structure, which is declared to be a monument, historical building or archaeological or palaeontological site or structure under Section 3.

The Ordinance extends to antiquities and monuments on 'private land' which includes land held under a lease, agreement for lease, tenancy, licence permit, deed or other valid title from government. The Ordinance is administered by the Secretary of Home Affairs and for the purpose of the Ordinance is referred to as the 'Authority'.
4. The Secretary for Home Affairs, in his capacity as the Antiquities Authority under the Antiquities and Monuments Ordinance, Cap 53, decided to declare the Morrison Building in Hoh Fuk Tong Centre, Tuen Mun, a Proposed Monument with effect from 11 April 2003. The declaration, which was published in the *Gazette* on 11 April 2003, would have effect for twelve months. This gave the historical building temporary statutory protection from demolition to enable the Government to negotiate with the owner to reach a consensus on its preservation.
5. Bob Pope, former Lands Department Director, wrote an article for the *Hong Kong Institute of Surveyors Journal* in 1984 explaining the origin and structure of Letters A and B.
6. The current Building Ordinance permits additional plot ratio and site coverage where part of a site has to be surrendered, or is resumed, for street widening purposes, or where land at ground-floor level is retained by the owner but dedicated to the public use. Where land is surrendered, the plot may be increased by
 - a. 20 % or,
 - b. $5 \times$ area of land acquired / area of site left which ever is less.
7. Gordon Cruden was the President of the Lands Tribunal, Hong Kong and wrote extensively on the subject of land law. He mentioned that the granting of an additional plot ratio to a developer is not compulsory and the authority may decide against the granting of an additional plot ratio if it considers such a decision is in public's interest (Cruden, 1999).
8. Tai Fu Tai was an elegant mansion built as a residence in the 4th year of Tongzhi (1865) of the Qing dynasty by Man Chung-luen whose ancestors settled in San Tin in the 15th century. The building is considered one of the most beautifully embellished traditional Chinese buildings in Hong Kong and is renowned for its fine architectural decorations. 'The Governor in Council approved the declaration of Tai Fu Tai on 28 January 1986 and it was formally gazetted as a historic building on 10 July

1987 upon the conclusion of negotiations to transfer development rights of the plot to an alternative site'. *Antiquities Advisory Board Report* (1986 & 1987, p.10)

9. The Ohel Leah Synagogue was built in 1902 by a banker, Sir Jacob E. Sassoon, in memory of his mother, Mrs Leah E. Sassoon. It is a two storeyed Eastern Jewish-styled building. It was restored in 1998. The restoration project obtained the Outstanding Project Award of UNESCO Asia-Pacific Heritage 2000 Awards for Cultural Heritage Conservation.
10. A speech on the transfer of development rights delivered by the Secretary for Planning and Lands, Mr John C Tsang, at the annual general meeting of the Hong Kong Institute of Architects on December 18, 2001. <http://www.info.gov.hk/gia/general/200112/18/1218098.htm>
11. 'Conserving Hong Kong's Heritage', a speech delivered by Mrs Carrie Lam, Secretary for Development, to the Hong Kong Democratic Foundation on 10 December 2007. <http://www.hkdf.org/newsarticles.asp?show=newsarticles&newsarticle=208>

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