

PRIVATE DEVELOPMENT AND MANAGEMENT OF PUBLIC OPEN SPACES ON THE VICTORIA HARBOUR WATERFRONT

Carine Lai | October 2021



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PREFACE AND ACKNOWLEDGEMENTS

24 years after the passage of the Protection of the Harbour Ordinance, and 15 years after the creation of the Harbour Planning Principles, major strides have been made in making Victoria Harbour’s waterfront accessible for public enjoyment. However, there is still much progress to be made. The Government intends for the private sector to play an important role in designing, building, and managing public open space and recreational amenities on the waterfront through commercial property development and public-private partnerships. This report takes a necessary look at the processes of planning, implementing, monitoring, and maintaining the quality of these spaces to ensure that they serve the public interest. It continues Civic Exchange’s longstanding research interest in the quality of the public realm in support of a liveable and sustainable Hong Kong.

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Chairman of the Board, Civic Exchange

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EXECUTIVE SUMMARY

Hong Kong is in the midst of a shift away from using the waterfront for logistics and infrastructure towards leisure and recreation. The Government is in the process of assembling a continuous public promenade along 38 kilometres of Victoria Harbour's 72 kilometre shoreline. In doing so, the Government expects the private sector to play a significant role in building and managing promenades and other amenities. It argues that the private and non-profit sectors possess greater creativity and flexibility, enabling them to provide unique attractions. The Government also wishes to take advantage of the private sector's expertise in forming commercial partnerships, organizing events, and attracting corporate sponsorships. This raises many questions about how the management of these spaces will be structured, given the problems that have been encountered in the past. While some policy adjustments have already been made, there are still issues which have not yet been fully addressed. This report aims to review existing mechanisms for the private management of waterfront public open spaces and recreational, leisure, and tourism facilities, identify gaps in quality of implementation, monitoring, and public accountability, and to provide recommendations for their improvement.

There are two major mechanisms through which privately managed public open spaces are set up: a) Public Open Spaces in Private Developments (POSPDs), and b) public-private partnerships (PPPs). Below, the major issues, challenges, and recommendations for each mechanism will be summarized in turn.

POSPDs

POSPDs are built and maintained by private developers under planning conditions imposed by the Government to help fulfil public open space requirements within a district. They are legally established through clauses written into land leases. They normally provide passive open space

ancillary to private developments, and have often been used in a waterfront context to require private developers possessing waterfront lots to build and manage publicly accessible promenades. There have been several well-documented problems with POSPDs in the past, such as developers using or renting out POSPDs for commercial purposes, managing public usage in a highly restrictive manner, making public access deliberately difficult, and substandard maintenance. Some POSPDs were also created within residential developments, generating objections from homeowners who had to pay for the maintenance of a public amenity. In response to these complaints, the Development Bureau has largely curtailed the creation of new POSPDs, particularly in residential developments, since 2009; and created design guidelines for POSPDs in 2011. However, the POSPD mechanism continues to be used to build and manage waterfront promenades in commercial developments, and the underlying problems with their governance and accountability have remained in place. The main problems are as follows:

- Land leases are an inflexible mechanism for governing the management of a public open space. They can only be altered when a lease is renewed (usually every 50 years) or when the developer applies for a lease modification. They are therefore unsuited to governing operational matters which may change over time.
- Land leases also lack a proportionate enforcement mechanism. If the developer is found to be in breach of a lease, the only recourse the Lands Department has is to place an encumbrance against the lot in the Land Registry, or to take back the land entirely. This latter course is only ever considered in very serious cases such as when public safety is endangered through negligence. Therefore, there is no effective means of enforcing lease terms.

- The 2011 POSPD design guidelines are basic, general, and not tailored towards waterfront promenades. They have a restrictive attitude towards user activities and towards commercial activities such as outdoor dining that can contribute to a more vibrant waterfront.
- While prescriptive design guidelines such as those being implemented at Kai Tak may set a baseline for consistency and forestall low-quality design, they also do not encourage or allow developers to exercise the creativity that the Government argues the private sector is better suited for.
- While the Government's recent practice of stipulating that a commercial developer should maintain a POSPD until the Government asks for it back provides the Government with easier recourse in case of mismanagement, the lack of any timeline in such clauses also discourages creativity. Since the Government must theoretically be prepared to take over such spaces at any time, it is unwilling to permit any designs or facilities which the Leisure and Cultural Services Department would not be able to manage itself.

As a result, POSPD waterfront promenades tend to provide basic passive space which is often restrictively managed, prohibiting activities such as walking dogs and fishing. Active frontages are quite limited even in areas intended for tourism. Different stretches of promenade have inconsistent opening hours, which can impede connectivity at night.

The Government has become increasingly interested in promoting active uses and programming on the waterfront, for example by planning a shared pedestrian/cycle track in Kai Tak, and by requesting that bidders for Site 3 in Central submit a plan for inclusive activity programming in the site's POSPDs. However, while the POSPD mechanism can require developers to build the physical amenities, it cannot ensure that the spaces are managed in an inclusive and vibrant manner.

Recommendations for POSPDs are as follows:

Planning

- If new POSPDs are planned, they should be on Government land as far as practicable. This will allow the Government to take back the management of promenades more easily in the future if necessary. Where possible, the Government should negotiate the surrender of promenade strips from owners of marine lots during redevelopment.

Quality implementation

- To facilitate developers in designing promenades with creative features and unique facilities, government takeback clauses in land leases should include a timeline (e.g. after 20 years unless renewed). This would give the developer the confidence to make the investment while the LCSD would not have to worry about having to take over facilities it is not prepared to manage in the near future.
- Design guidelines, applied through lease conditions, should be used to promote the construction of active frontage, as well as consider factors like crowd control, lighting, sound, and stage design for events, and activating the interface between land and sea.
- To support vibrancy at appropriate locations, the Harbour Office needs to provide high level policy co-ordination among different departments to improve connectivity to the hinterland during the planning of new developments. After they are completed, it needs to provide regulatory support and co-ordination to allow activities such as fairs, performances, and outdoor dining to take place.
- For landmark developments, the Government needs to use alternative methods to the normal land sale process to select the developers in order to promote creativity, innovation, and top quality design. The two-envelope tender utilized in the sale of Site 3 is a step in the right direction. Design competitions are another way forward.

Monitoring and accountability

- To enable better accountability and flexibility for POSPDs with more complex operational requirements, the Government should draw up separate operational contracts. Regular review mechanisms should be built into such contracts to ensure that standards are maintained over time.
- For less complicated spaces and older POSPDs, the Lands Department needs to keep up with its annual inspections. Civil society can also play a more energetic role in monitoring these spaces, for example through crowdsourcing.

PPPs

Public-private partnerships are structured through contractual arrangements between the Government and a private entity (for-profit or non-profit) to provide a specific public facility. Unlike a standard procurement contract in which the Government pays upfront for the construction of a facility, under a PPP, the private operator is subsidized or allowed to profit from a facility on an ongoing basis, with pay ideally being tied to performance. Most past examples of PPPs in Hong Kong have been for the design, construction, and operation of large infrastructure projects such as the Cross Harbour Tunnel. In the waterfront context, the Government aims to use PPPs to provide dedicated recreational, tourism, or cultural venues. There have been a few projects so far that fall under the PPP umbrella, but there is not yet an established method for implementing PPPs for public spaces. Hence, most deviate substantially from the typical PPP-for-infrastructure model and have been implemented through a wide variety of mechanisms. Existing projects can be grouped according to whether they are long-term or short-term, and whether they are for-profit or non-profit.

Long-term, for-profit projects such as the Kai Tak Sports Park currently under construction are closest to the typical large-scale PPP model. Short-term projects such as the Central Harbourfront Event Space have been implemented under the Lands Department's Short Term Tenancy mechanism (that allows government land to be rented out for a maximum of seven years)

and therefore involve smaller investments with temporary facilities. Profit-making projects allow investors to seek a return, while non-profit projects rely substantially on subsidies and donations and require any excess revenues to be reinvested back into the facility.

Most of the problems associated with PPPs derive from the conflict between the Government's expectation that these projects will be mostly self-financing to reduce government expenditures, and the need for public open spaces to be inclusive:

- Public open spaces are not fee-for-service facilities like tunnels; they must remain broadly inclusive and accessible. While there may be profit-making elements, operators must also provide substantial amenities or programming for free or low cost.
- High-quality public spaces still require a significant degree of investment, both upfront and in day-to-day maintenance.
- For-profit projects must therefore have a long contractual period to make back the investment, or be limited to temporary, low-cost materials. Depending on the nature of the facilities, they may still require substantial government funding.
- Non-profit projects are likely to be dependent upon a mixture of subsidies and private donations.
- The challenge is in how to structure government subsidies or profit-sharing arrangements to incentivize good performance, especially in terms of fulfilling the social objectives of inclusivity. In most examples to date, government subsidies were provided in the form of upfront investment in the infrastructure and facilities or in providing land at nominal cost. This has no relationship to performance.
- The inclusive character of public open spaces makes the public especially sensitive to signs of privatization. PPP projects may be controversial if they can be seen as exclusive or benefiting private interests.

Recommendations for PPPs are as follows:

Planning

- Public engagement needs to be carried out at an early stage to demonstrate transparency, understand community aspirations, and avoid unexpected opposition. It should not be assumed that non-profit led projects will automatically receive public acceptance, nor should it be assumed that it is sufficient to only consult district councils.
- When setting up a new PPP project, the length of leases must be commensurate with the level of investment necessary. E.g. short-term tenancies, which have a maximum of 7 years, are only suited to relatively low-budget projects, and the Government will likely have to provide the site infrastructure. For more complex projects, longer leases should be granted through “leases for special purposes” which may last up to 21 years.

Quality implementation

- To ensure high-quality, inclusive facilities, the Government needs to adjust its expectation that all waterfront PPPs can be financially self-supporting. Ongoing government subsidies tied to performance and social metrics will be necessary in many cases, especially for non-profit sites. The overall value for money, i.e. the cost of subsidizing a private operator that is able to provide a unique service, compared with a government department running a similar facility itself, should be considered.

Monitoring and Accountability

- Long-term PPP contracts should be structured to provide financial incentives for the fulfilment of performance goals and social objectives. Subsidies should be tied to performance, and profit-sharing arrangements could provide bonuses for meeting certain targets. Good incentives will reduce the need to use punitive measures and decrease the likelihood of the Government having to use its powers of re-entry.
- Learning from the example of the Avenue of the Stars, future PPP contracts need to include a mechanism for regular performance reviews and for addressing unsatisfactory performance. They should also incorporate ways for the public to be engaged in monitoring, reviewing, or even directly participating in the management of said spaces.



BACKGROUND AND CONTEXT

1.1 | Opening Victoria Harbour's Coastline for Public Access

Hong Kong is in the midst of a shift away from using the waterfront for logistics and infrastructure towards leisure and recreation. The Government is in the process of assembling a continuous public promenade along 38 kilometres of Victoria Harbour's 72 kilometre shoreline. This follows the 1997 Protection of the Harbour Ordinance, which forced Government to scale down its reclamation plans. In 1999, the Town Planning Board recognized that "The Harbour is to be protected and preserved as a special public asset and a natural heritage of the people of Hong Kong". The Government subsequently commissioned a planning study to examine how to make the harbour "attractive, vibrant, accessible and symbolic of Hong Kong", focusing strongly on tourism. Said study, completed in 2003, set the goal of creating "maximum continuity" of waterfront promenades around Victoria Harbour, especially in the "inner harbour core".¹

In 2003, the Society for the Protection of the Harbour mounted legal challenges against ongoing reclamation projects in Central and Wan Chai. While the courts allowed those projects to go ahead, future projects were effectively halted by the imposition in 2004 of a strict legal test requiring an "overriding public need" to justify further reclamation.² As a result of growing advocacy by professionals,

academics, environmentalists, and community groups,³ in 2004 the Government established the Harbourfront Enhancement Committee (HEC),⁴ the predecessor to the current Harbourfront Commission.⁵ It was granted advisory jurisdiction over 22 action areas on both sides of the harbour, stretching from Kennedy Town to Shau Kei Wan on Hong Kong Island and from Tsuen Wan to Yau Tong/Lei Yue Mun in Kowloon.⁶ The HEC promulgated a set of *Harbour Planning Principles and developed Harbour Planning Guidelines* in 2006 and 2007 respectively (discussed in detail in Section 2) to serve as guidance documents for government departments.

1.2 | A major role for the private sector in waterfront development and management

The *Harbour Planning Guidelines* encourage the development of land uses such as retail, dining, leisure, culture, and tourism along with public open space along the harbourfront to promote diversity, vibrancy, and public enjoyment.⁷ The Government expects the private sector to play a significant role in building and managing these and other amenities, particularly in the more commercial inner harbour core.⁸ It argues that the private sector possesses greater creativity and flexibility than the Government,⁹ enabling it to provide unique attractions in contrast to standard government-managed passive open

space.¹⁰ The Government also wishes to take advantage of the private sector's commercial expertise in contracting with partners, organizing events, and attracting corporate sponsorships.¹¹ It emphasizes that the "private sector" includes not only commercial organizations but also non-profits, social enterprises, community trusts, and other non-governmental bodies.¹² Another, less frequently articulated motivation is to reduce public expenditures as private operators are expected to contribute partially or fully to the development and running costs.

There are currently two major mechanisms through which the private sector can be recruited to build and manage public open space and other public facilities. The first is through Public Open Space in Private Developments (POSPD), a form of planning gain in which commercial developers are required to provide public open space within their properties to obtain planning approval. Said conditions are usually written into the land leases for the site and enforced by the Lands Department. The Government has implemented POSPDs since at least 1980, making them a longstanding method of providing public space in land-constrained Hong Kong. The 2003 *Harbourfront Planning Study* stated that developers would be expected to provide promenades in or adjacent to their waterfront properties.¹³ Several privately managed segments of waterfront promenade have already been constructed through this method, mainly in Hung Hom. POSPDs have fallen out of favour since 2008, when public controversies emerged over their misuse and mismanagement, discussed in Section 3.2.2. However, the Government continues to use the POSPD mechanism to provide waterfront promenades attached to commercial developments.¹⁴

The other major mechanism is through Public Private Partnerships (PPPs). In Hong Kong, PPPs have traditionally been used to build major infrastructure projects such as tunnels and waste treatment plants through a design-finance-build-operate model, in which a commercial operator is required to finance and build the infrastructure in return for the right to operate and earn profits for a period of around 20-30 years.¹⁵ There are

only a few examples of PPPs for public open space on the waterfront, notably the Avenue of Stars in Tsim Sha Tsui, which is managed by New World Development (NWD) under a 20-year contract. Another major project, currently under construction, is the Kai Tak Sports Park which was also contracted to NWD for 25 years in late 2018. The only other existing PPP-like waterfront recreational spaces are temporary spaces under short-term leases, discussed further in Section 3.3.1 and 3.3.2. In early 2019, when announcing his budget, Financial Secretary Paul Chan stated the Government's intent to pursue more PPPs on the waterfront and indicated that some of the funding allocated for harbourfront enhancement will be used to support such projects.¹⁶

This means that privately managed waterfront open space, whether carried out under land lease requirements or through PPPs, will be a major fixture of Hong Kong's built environment in the coming decades. It is therefore important to ensure that the spaces designed and built adhere to best practices (see Section 2) and are operated in the public interest.

1.3 | Report objectives

This paper aims to review the existing mechanisms for private involvement in the management of waterfront public open spaces and ancillary recreational, leisure, and tourism facilities to identify gaps in quality of implementation, monitoring, and public accountability.

Section 2 below will explain the emergence of the vision and principles that the Government hopes to achieve on the Victoria Harbour waterfront while placing them in an international context. This will establish the standards against which success should be measured.

Section 3 will map Victoria Harbour's waterfront, providing an overview of existing and planned privately-managed open spaces to identify gaps in the quality of implementation of existing POSPDs and PPPs.

BACKGROUND AND CONTEXT

Section 4 will compare post-construction monitoring performance accountability mechanisms for POSPDs and PPPs by looking at existing guidelines, how they have been or can be applied to waterfront projects, and their strengths and limitations in incentivizing good performance.

Section 5 will place privately managed waterfront open spaces into the broader harbourfront planning and development context in light of

the Government's 2017 decision not to set up a Harbourfront Authority. It looks at the ways in which the Government has so far addressed limitations and gaps in the existing system and problems that remain.

Section 6 will provide recommendations for improving processes for the development and management of POSPDs and PPP, as well as for waterfront development in general.