

## Case Study: Hong Kong: Sidestepping Property Rights in Preservation

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### Summary

In Hong Kong, the government applies an inequitable, ex post method of heritage conservation on privately owned sites. This retrospective approach often arrives out of crisis management, as a site's heritage status, or lack of one, is revisited once demolition is underway. At present, regardless of whether sites are deemed heritage worthy, the government will declare any privately owned site a "proposed" monument to allow for more time to negotiate with the owner to preserve the building, stopping development. This practice overrides the protection of property rights, which is stipulated in Hong Kong's Basic Law.

Jurisdictions that value the rule of law generally frown upon ex post facto practice. Owners of privately owned heritage sites rationally transact under the assumption that the government does not perceive any heritage value, yet under pressure from conservancy groups or members of the public, the government u-turns and places the property under monument status, halting all development. The ad hoc, ex post form of heritage conservancy puts property rights aside and creates the unintended consequence of uncertainty, for both the government's conservation efforts, the public, and owners.

### History

Heritage preservation responsibilities are divided among many different departments. The Antiquities and Monuments Office (AMO), under the Leisure and Cultural Services Department, is one of the professional advisers to the government on heritage issues. At present, the Secretary for Development has the autonomous power to declare a site a proposed monument despite whether or not the site is perceived to possess heritage value. This legal interjection stops any planned demolition or development of the property, while the Secretary tries to meet a consensus with the owner. A proposed monument is then either extended to a "formal" monument, or downgraded to a "Graded" site.

Buildings with government conferred heritage value, but are not monuments are Graded One, Two and Three (highest to lowest) to reflect historical value, but only the conferral of monument status prevents demolition. Many of the sites that are "declared" monument status may never have previously been assessed or graded as possessing heritage attributes, leading to uncertainty about whether a privately owned heritage site truly deserves the name. The current legal and administrative framework for heritage assessment is inadequate, clearly lacking cohesion and a systemic strategy, evident in the number of instances where the AMO has undergone repeat assessments of the same sites, yet come up with divergent conclusions regarding actual heritage value.

The public generally agrees that some heritage sites are worth saving, but the idea that everything must be "saved" (development halted) is reckless and substantiates the government's ragtag heritage policy. Notably, a monument status can be declared at any point in time, with or without comprehensive review, thus redevelopment of a site becomes an unfeasible task since the Secretary's right to declare on private property is always looming. Using the declaration of monument status to halt demolition projects skews the grading process and undermines the AMOs credibility. In essence, a proposed monument allows the government to hold private property hostage, regardless of heritage value, eventually forcing private sector participation in the charade that is heritage conservation. The following examples illustrate how such declaratory powers lack any sense of property rights, but can halt actions of surprising owners who have planned demolition works or redevelopment for some time and have gone through the channels to commence work.

## Case Studies

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### **The Ho Tung Garden and Mansion, No 75 Peak Road**

In a recent case, the government entered dialogue with the owner concerning preservation of the Grade One, 83-year-old site, but the government communication ceased abruptly. The owner, free to move ahead, secured plans to demolish the structure, at which point the Secretary held up development by declaring the site a proposed historic monument. The Secretary said that she will try to reach an agreement, but threatened "final" monument status should a consensus not be met. Such behavior clearly usurps any notion of lawful legitimacy and due process.

Should final monument status be conferred, the owner may claim a financial loss, a timely matter requiring significant financial resources that would need to be resolved in court. Although the Secretary has mentioned that economic incentives will be provided to compensate the owner (likely through land exchange) it is unlikely to equate to the multi-billion dollar development the owners originally had in mind.

### **Jessville Mansion, 128 Pokfulam Road**

Jessville Mansion was scheduled to undergo redevelopment, but in the final months preceding construction, the Secretary declared the site a proposed monument. Months later, the site was downgraded to a Grade Three historic building after the owner agreed to use the site as a clubhouse, paying for its preservation. The site was reassessed, with a very different heritage valuation than was given in the months preceding. The u-turn in the government assessment and abuse of the Secretary's power to declare monument status, created confusion for the owners as to the value of their property, the economic opportunity and legal right to develop.

### **King Yin Lei, 45 Stubbs Road**

The AMO had been invited numerous times over previous years to assess the site, however, the mansion was not Graded for any heritage significance, indicating it held no heritage value. In the early stages of demolition, a conservancy group campaigned to save the site and asked the government to intervene. Without justification, the Secretary declared the site a proposed monument, imposing considerable constraints in a last-minute attempt to stop the owner from exercising legitimate rights over the property.

The government used a land exchange preservation mechanism, in which the owner is held responsible for restoring the "new" heritage site to AMOs satisfaction at his own expense. The owner then surrendered the restored property for preservation and was granted an adjacent lot for private residential development. This case is a clear indication of the blatant abuse of power used to stop development at the Secretary's whim, regardless of any previous assessments.

## Case Study Conclusion

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The power to "declare" has effectively become a bargaining tool of the state, which is used to force landowner's to succumb to altering their initial plans and spending both additional time and resources in preserving sites where "heritage" value is often very questionable. Despite reviews stating that the current policy lacks coherence and advocating the need for some form of standard guidelines, nothing has been done and the administration is sticking to a ragtag policy that settles issues that come up on a case-by-case basis, refusing to take on any form of one-size-fits-all guidelines.

The Secretary for development stated that the government will take "no action if our enemy does not make any move," but this policy ensures both opportunity and real costs to owners, as well as destruction of heritage that might have been preserved had sufficient consultation and proper mechanisms been employed. Whether King Yin Lei deserved heritage status is, at best,

questionable, but by the time the government intervened, twenty percent of the mansion had already been defaced. Owners lose much in revenue, as development is wrongly halted while “negotiated” outcomes through ex post heritage ultimately mean conservation costs are borne out of the private owners’ pocket.

Conservationists believe there are many buildings in Hong Kong that are of greater heritage value than King Yin Lei, and remain ungraded. Notably, the government has said that purchasing sites such as those outlined above would be a very “last resort” because of the high costs involved as well as all the controversy that would be implicit in the use of taxpayers’ money. Yet, the government has no difficulty invading the property rights of legal owners by holding up development prospects and surprising owners with new or revised heritage claims. With over seventy percent of identified heritage buildings privately owned and more ungraded, the need for overhaul is pressing.

## Remedies

All privately owned, heritage worthy sites have been in the same state for decades, thus there is no well-founded reason why, after years of government survey, research and assessment, that those sites which have not been declared monuments should suddenly be rendered protected as such. There is clearly a lack of a long-term, broad based heritage conservation policy that respects property rights. A standardized mechanism protecting property owners should be initiated.

Hypocritically, the Secretary for Development has said, “if a law can be played around by an official like this to stop someone from carrying out some lawful acts, I think it would not be accepted by the Council and the community at large. This would also be contrary to the three major principles mentioned in the land policy recently – certainty, stability and uniformity.” And yet, the government has “played around” with property rights and the law in precisely the same way, and sadly, there is no sign that this will change. Thus, infringing upon property rights will remain the principal strategy, leading to confusion for all stakeholders involved, while at the same time endangering heritage preservation, until it is overhauled.