

# How to Abolish Hong Kong's Small Housing Policy: Experience of Land Development Rights Transfer in Chongqing

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**Abstract:** The essence of the ding rights is indicated in the land development right. It causes conflicts between traditional interests and quite a number of factors promoting the advancement of modern society. The government should issue ding rights certificates to all eligible indigenous inhabitants, and meanwhile establish an open and transparent transaction platform to allow free transaction of certificates. This plan may present inspiration and enlightenment for other areas in the world to handle the issues concerning traditional rights in the future.

**Keywords:** Small house policy, Land development right, Land Tickets.

## 1. Introduction

In 1997, the British government transferred the sovereignty over Hong Kong to China. In accordance with Article 40 of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter referred to as The Basic Law) as well as the commitment declared by the People's Republic of China Government that the Hong Kong Special Administrative Region (HKSAR) would remain unchanged for a period of 50 years, the lawful rights and interests of the indigenous inhabitants of the New Territories (NTIIs) shall be protected after the handover of Hong Kong. Lu Ping, deputy secretary-general of the Drafting Committee of the Basic Law, holds that after the Hong Kong handover, the ownership of land by NTIIs should be returned to them. However, since the residents sought to not restore the private ownership granted to them during the Qing Dynasty, both the Chinese government and the British government, as the compensation for NTIIs, agreed on the lawful traditional rights and interests stipulated in Article 40 of The Basic Law, including small house concessionary right, which is nicknamed "ding rights" [1].

The removal plan of SHP intends to eradicate existing practices of ding rights. The rights will eventually be unable to be exercised with the continuous decline of the land available for the building of small houses. It hereby aims at reducing potential adverse impacts on society when ding rights cannot be effectively exercised. These potential impacts can be indicated in the housing needs of the NTIIs as well as their response when being incapable of exercising the ding rights. Meanwhile, there is not a final say on whether The Basic Law will be implemented or not after 2047. If the ding rights are still constitutional and granted by then, the NTIIs' appeal for protecting their traditional and lawful rights and interests will bring uncertainties to Hong Kong's institutional arrangements after 2047. Future policies shall make sure the orderly removal of the scheme and deal with, within a limited period of time, the contradictions between the protection of traditional rights and the development of the society, so that the corresponding compensations shall be

assigned to the groups enjoying the benefits of traditional rights and interests.

## 2. Nature of Small House Concessionary Right

The advent of ding rights has direct relation to the British Administration of Hong Kong's land in the 20th century. Considering the situation that a large number of temporary and illegal buildings were present in the New Territories, the colonial government introduced SHP in 1972. This policy met the efforts of the colonial government, which were to develop the New Territories on a large scale with the rapidly growing population. Meanwhile, it also provided economic benefits for NTIIs as a way of encouraging them to voluntarily abandon temporary accommodation and illegal old houses, and eventually the purpose of raising the housing and health standards in the area can be fulfilled. Some analysts believe that SHP is perceived as a means of obtaining support from both the indigenous residents and the Heung Yee Kuk which comprises of representatives of NTIIs, for the government to secure part of the rural land for the new town development in the New Territories [2] To this day, the SHP is endorsed as before and qualified NTIIs still enjoy ding rights.

The Buildings Ordinance (Application to the New Territories), first enacted in 1961 and subsequently amended many times to meet the changing policy environment, provides the legal basis for SHP. It clearly stipulates the height and covered area limits for all New Territories Exempted Houses. Its regulation on these buildings is in line with that stipulated in SHP, i.e., "a building that may not exceed three storeys, may be constructed to a height of not more than 8.23 meters and may not exceed 65.03 square meters in roofed-over area". If the size of a building exceeds the criteria imposed by the law, the building is hereby unauthorized. The following consequences can be the removal of the house and its owner, under The Buildings Ordinance applicable in Hong Kong, may be subject to fines or criminal prosecution for the building does not conform with the exemption conditions.

The essence of the ding rights is indicated in the land development right. It stems from the nationalization of the developmental rights specified in The Town and Country Planning Act passed in the United Kingdom in 1947, and since then, has been used for reference by the United States, Japan, France, and other countries and regions. Although the specific conditions and appellation of the land development right may differ at various times and regions, the basic message remains unchanged; i.e., land development right mainly suggests the entitlement to alter the use of land and development density, which indicates the goal of controlling the land use and promoting the diversified utilization of the land [3].

The ding rights are not exercised under no condition, and only when they conform to land property rights can small house concessionary right holders develop the land. If the indigenous residents are to perform the right, they must legally hold the land and make a statutory declaration to the government. The Hong Kong government has not taken the initiative to define or interpret this right via legislation, because whether it is to explain, redefine, or abolish the entitlement, the action will surely lead to political backlash in the society.

### **3. Proposal of the Small House Concessionary Right's Removal**

NTIIs hold that the ding rights are one of the legitimate traditional rights and interests of the New Territories, and that the introduction of the SHP by the colonial government showcases itself the respect for these traditional rights and interests [4]. However, on the other hand, against the backdrop of the industrialization and urbanization of Hong Kong and the increasing concentration of such values as equality and human rights, together with the long-lasting imbalance of supply of land and demand for houses, it is becoming progressively more difficult for the society to accept such a system of using and inheriting land, which is typically present in a patriarchal society. They thereby consider the ding rights as an outdated practice against both economic growth and such legal values in modern society as equality and fairness. Therefore, they appeal to the government and the legislative institution against the ding rights as a feudal privilege, as it causes conflicts between traditional interests and quite a number of factors promoting the advancement of modern society.

#### **3.1. Conflicts with Gender Equality**

In fact, the United Nations raised criticism of Hong Kong's SHP, alleging it to be discriminatory against women and stunt their status in society. In the sensational case of "the judicial review on small house concessionary right", the Hong Kong citizen Guo Zhuojian endeavored to challenge the legality of ding rights via judicial review and appealed to the court to endorse the SHP unconstitutional. His reason was that the unequal treatment of male and female violated the provisions of The Hong Kong Bill of Rights Ordinance and The Sex Discrimination Ordinance, as well as Articles 25 and 39 of The Basic Law. He also made the argument that the benefits granted to NTIIs by SHP were not guaranteed in Article 40 of The Basic Law and hereby the court shall declare SHP unconstitutional. Although the Hong Kong Court of Final Appeal ruled that the policy was constitutional, sex discrimination in the policy was also acknowledged by the

court [5]. The laws, instead of being set in stone, should progress with the advancement of the time and social changes. Since the conflicts between the values of modern society and the traditional rights and interests of NTIIs have spurred, it is of outstanding significance to, in an orderly manner, put an end to the small house concessionary right which is criticized for disregarding gender equality and modern values.

#### **3.2. Conflicts with Land Supply**

SHP intensifies the imbalance between land demand and supply. As of 2018, the residential land per capita in Hong Kong was only 10.4 square meters, an extremely low level even compared with the densely populated metropolitan areas in Asia, with that figure in cities of mainland China 23 to 38 square meters [6]. As the economy develops and the population continues to grow, more intensification of the land use is anticipated to happen. Nonetheless, the construction of small houses, a mode of low-density development, is one major reason for the rising tension between land supply and demand in Hong Kong [7]. Carrie Lam, during her tenure as Secretary for Development Bureau, pointed out that SHP led to the conflict of "unlimited demand but limited land supply". The data released by the Lands Department in Hong Kong reveals that the average amount of applications for small houses is more than 2,000 each year, while the current backlog of applications is close to 9,000, which indicates the common phenomenon that small house grant applications cannot be handled in a short period of time [8]. In order to deal with the long waiting time required to approve the application, the government secured private lands to meet the demand of the indigenous residents. However, plenty of people, with Carrie Lam a representative, consider that if the village zone is expanded in a substantial way to satisfy the request of NTIIs for small houses, the government's plans to develop other industries in the New Territories will be undermined and the housing demand of other citizens cannot be met [9].

#### **3.3. "Cheating" Behavior**

Varying degrees of manipulation and abuse do take place in the SHP practices, with the commonly known "cheating" behavior a typical example. The SHP framework actually allows property developers to use the lands in the name of NTIIs. In this way, when utilizing agricultural land for construction, the developers are qualified to avoid the obligation to pay the land compensation while conform to the government's plan. The developer and the indigenous residents usually sign an agreement, which specifies that the developer holds the ownership of the small houses and obtains the authorization from the indigenous residents to buy or sell the houses. The reason behind this cheating behavior relies that since the desirable lands for the construction of small houses are not available to a couple of NTIIs, some indigenous residents having the right but insufficient land choose to cooperate with developers having land but no right. In essence, the ding rights were sold to developers. The indigenous residents are required to make declarations that they are the only legally registered landholder when small house grant applications are raised. Hence, the basis of this behavior is to, with the false declaration of a NTII, deceive the Lands Department into issuing the permission to build houses [10]. For example, in the case of the HKSAR accusing Li Yam Pui et al, 11 NTIIs were convicted and sentenced to prison for 30 to 34 months as their consequence of cheating,

and the developer was also sentenced to prison for three years [11]. In the case CACC 425/2015, 11 accused villagers made their declaration in the Small House Application that they were the only legally registered holders of the corresponding land titles, but none was proved to be the real holder nor to have the wealth to build a small house. These villagers and the property developer who owned a broad swath of land in Tai Kok Tsuen, Sha Tin, entered into a contract, in which they agreed to discontinue their ownership of the houses and concealed the contract from the Lands Department for a remuneration of 200,000 Hong Kong dollars each person. Such a contract clearly contradicts the declaration which was made when the villagers applied, in accordance with SHP, for a free grant of building houses. Eleven villagers and one developer were hereby faced with the charges of conspiracy to commit fraud, and the trial ruled all 12 people to be guilty.

#### **4. Enlightenment from Land Ticket Transactions System of Chongqing Municipality**

Similar practices as the securitization scheme have been proved efficient in a number of areas, with the “Land ticket transactions” in Chongqing Municipality, China, a significant example. As long as the government grants land ticket index to the farmers who recultivate rural collective construction land, which in a way securitizes the collective construction land to allow the selling, the conflict between protecting farmers’ rights and advancing social development can be resolved naturally by the land transaction market [12].

The land ticket system, in essence, is to, on a voluntary basis of farmers and collectives, recultivate rural collective construction land, including rural homestead and land for affiliated facilities, land for township enterprises, land for rural public facilities, and land for rural public welfare. Then, after the land for the rural development guaranteed, the construction land index, which receives its application in Chongqing Municipality, is formed to undergo public auction in the Chongqing Rural Land Exchange [13].

Approved by the Chinese Ministry of Land and Resources, the Chongqing Rural Land Exchange was established on December 4, 2008, in an attempt to carry out the experiment of the land ticket system. It has been striving to improve the supporting policies for the system and conduct research on relevant institutions and theories. It also introduced The Interim Measures for The Management of Chongqing Rural Land Exchange, and formulated regulatory documents on the procedures of trading land tickets and on the management of the reclamation project. The land ticket system entails four key links, i.e., reclamation - inspection - transaction - use.

The first link “reclamation” means to, on the voluntary basis of farmers and collectives, recultivate rural construction land, which is not within the “expanded boundary” designed in the overall plan for land use, while to guarantee the land for rural advancement and comply with the procedures of the reclamation project. Five prerequisites for the completion of the first link do exist, which are the compliance with planning of land, definite land ownership, voluntary application of villagers, other stable homes and sources of income for farmers, and written consent of the collective economic organizations. The fourth prerequisite attempts to avoid such problems as tough life and being homeless for farmers after transferring their land tickets. The fifth prerequisite makes endeavors to prevent any damage to the benefits of the rural

collective economic organizations, as it stipulates that if this organization applies for the reclamation of the construction land, the organization must provide the written consent of at least two-thirds of the entire membership or its representatives.

The second link “inspection” occurs when the Municipal and County Bureau of Land and Resources as well as Agricultural Committee assess and inspect both the quality and quantity of the reclaimed cultivated land. Then, if the inspection is passed, the land ticket index is formed to grant land tickets and the certificate on readjusting construction land in Chongqing Municipality is issued.

The third link “transaction” refers to the public transactions of land tickets in the Chongqing Rural Land Exchange. The underlying asset is the land tickets issued by the Municipal Department of Land Administration in accordance with the extent of increased farmland. Five measures are adopted to secure the successful transactions. First, for the purpose of fair competition, it is necessary to sell land tickets by bidding, and more than two institutions are required to make a bid when only one institution puts the land ticket for sale. Second, in order to increase competition, the land ticket selling large areas of the lands shall be divided into sections with each 100 mu and each section then is allowed for transaction. Third, to avoid the extremely low transaction prices, the municipal government implements price protection measures for the transactions, with the consistent benchmark price for land tickets established. If the transaction price is lower than the benchmark price, the landowner enjoys the priority of repurchasing. Fourth, as a way of securing the normal operation of the land ticket system, it is regulated that the purchase of land tickets is a must for profit-oriented lands in the metropolitan area, including the lands for business, tourism, entertainment, petrol (gas) stations and commercial housing, as well as all lands used by municipal reserve agencies. Fifth, to make sure the overall quantity control of the transactions, the municipal government holds the responsibility to manage the amount of the transactions. Judging from the current situation, a balance between supply and demand is basically fulfilled in the rural land transaction market. Furthermore, the municipal government, viewing the Shanghai Stock Exchange as a model, endeavors to build the Rural Land Exchange into a transaction center for land tickets to promote the transfer of linking target among various areas, with the slogan that “With Chongqing Municipality a headquarter, it aims at expanding to the southwest of China and going national.”

The fourth link “use” is seen in the process for a buyer who obtains a land ticket to use the land. The buyer firstly selects the deserted land which conforms to the urban planning and the comprehensive land use plan; then after the Land Department expropriates, converts the use of the land and compensates farmers, it transfers the land use rights to the buyer; finally, the buyer obtains the grant to use stateowned construction land through bidding, auction, transfer and other procedures.

Plenty of scholars have studied the legal nature of land ticket transactions, and a common view holds that the transactions should be defined as the deal on land development rights [14]. A couple of similarities exist between the construction land index practiced in mainland China and small house concessionary right exercised in Hong Kong. The land ticket system in Chongqing Municipality hereby offers experience for the securitization of small house

concessionary right. As mentioned above, this right, a kind of particular development rights, does not provide interpretation on the ownership of land and receives restriction by several administrative regulations of the government, but small house concessionary right holders are do allowed to build houses on their land. The practice in Chongqing Municipality reflects the transaction and transfer of construction land index, and presents typical securitized transactions on the index between the seekers for urban land and farmers providing rural construction land [15].

The small house concessionary right is in fact an index for development rights, but the index shall only meet its application on the land in every village of the New Territories. The land ticket transactions practiced in Chongqing Municipality satisfy the demand to purchase the construction land index in rural areas and develop the land in cities. If a scheme is formulated to permit small house concessionary right to be exercised elsewhere via trading, more exercises of the right, which previously cannot be fulfilled due to planning restrictions, will be achieved [16]. Apart from that, after the transfer of the right, since the assignee pays the consideration, the government can regain the rural land in the New Territories at a lower price, which benefits the government to formulate a larger planning program. If borrowing from the practice of the land ticket system, the scheme to securitize small house concessionary right for the permission to trade, which is a type of special development rights, provides inspiration for resolving the issue of abolishing the right.

## 5. Enlightenment from Transaction Theory

Transaction theory suggests that the right to control the property may give rise to rent dissipation of the land and the property [17]. Since the use of land is under the control of government policy, to convert the agricultural lands in the New Territories into the housing lands shall be performed in a designated village area with the grant of small house concessionary right, or else that operation must conform to the government's land planning and compensate the land price which leads to the high cost of the performance. In this way, higher risks for non-native residents to invest the land in the New Territories emerge, diminishing the rental value of the lands in the region and making the lands used for low value-added purposes.

Tracts of village lands in the New Territories are Tso/Tong lands [18], which are collectively owned and inherited from ancestors. The areas of Tso/Tong lands are generally held in the name of the clan, with members of the clan stakeholders. The sale of Tso/Tong lands must obtain the unanimous consent of all the stakeholders, but it is unrealistic to secure all the consent, which severely hampers the sale. In the past five years, the District Officer only approved over 300 applications, with a great number of applicants rejected which was brought about by the objection of few people [19]. Due to stringent criteria for the sale of Tso/Tong lands, the registered managers of the clans tend to rent the lands for the utilization of low economic values, such as the use for warehouses and barbecue sites. In reality, NTIIs do not completely refuse the transfer of land, and some even show their consensus to an extent. Several representatives of NTIIs suppose that the procurement of lands with high prices can promote almost half of the lands in the New Territories to be sold. As for another half, including Tso/Tong lands, they

proposed a "public-private partnership (PPP)" model for it, as a way of benefiting NTIIs from the development of the New Territories [20]. As long as incentives can be simultaneously provided for all stakeholders to sell their lands, the transfer of lands in the New Territories can be improved to use the lands effectively.

Since NTIIs think the future value of their lands is uncertain, they are reluctant to cash out their lands. It, to a great extent, reflects their expectation of appreciation in the lands. It is difficult to measure the potential value of the lands in the New Territories in today's farmland prices. Landholders expect their lands in the New Territories to be used for shopping malls, residential buildings, etc., so the development of the lands will bring about much higher prices than the current value of the land which is only used for agricultural purpose. Economic research on technological innovation suggests that information asymmetry caused by uncertainties may reduce the efficiency of transactions [21]. With the theory applied to analyze the land transactions, the uncertainties about the future value of the lands and the income therein hinder the efficiency of transactions. To lead to the trading of potential benefits brought about by land rights, it is necessary to reduce the uncertainties of the expected interests and provide guidance to measure the potential value of the lands.

Likewise, small house concessionary right, as a land right, cannot be transferred at NTIIs' wish due to policy restrictions, so it cannot obtain the optimal value in the market and leads to rent dissipation. However, if the right cannot be traded in the legal market, transactions in the black market may spur, known as the cheating behavior. Although such transactions are illegal, they only, considered from the perspective of economics, intend to maximize the value of the right through the black market [22]. If the small house concessionary right is matched with the ownership through the market mechanism, those who are competent to develop the lands can obtain both development rights and ownership of the lands. In this way, the transaction costs for developing the lands in the New Territories can be reduced and the value of the lands maximized. If the rights are free to be traded, it is expected to resolve the current issues that some people have rights but no land and that some own the lands but no right under SHP. Meanwhile, due to the height limit of the small houses, the lands in the New Territories can only be used for low-density development, resulting the insufficient use of the lands. If small house concessionary right combines with other rights through market mechanism and the lands are used for high-density housing or commercial hubs, property developers may be encouraged to develop the lands in the New Territories. The government can even require the developers to spend money constructing the infrastructure in the New Territories when they use the land for residential or commercial properties, or directly request developers to build the supporting facilities for the properties. After developers weigh all the costs and revenues, there will be the developers, who are competent to reduce costs while increase revenues, to maximize the potential value of the lands. Securitizing the rights and allowing them to be traded will magnify the potential value of the lands, which is consistent with the economic logic indicated in transaction theory [23].

However, the legalization of trading small house concessionary right is sure to be criticized. Article 40 of The Basic Law, which provides basis for SHP, aims at protecting the traditional customs of NTIIs. The employment of this

custom to make profits shall inevitably receive ethical criticism from Hong Kong citizens. The existing practices under SHP prohibit the transfer of small house concessionary right and obstruct the sale of small houses, because the policy is aimed to improve the living standards of NTIIs. If the right is allowed to be trade freely, other Hong Kong citizens will doubt that NTIIs enjoy a privilege which help them profit from a livelihood guarantee [24]. Although the lands in the New Territories are originally entitled to NTIIs and SHP has actually limited the complete exercises of the right, the general Hong Kong citizens would not think so. Their opinions shall be taken into account, when the issues related to the lands and SHP are handled, and solutions to encourage their participation shall be raised, as a way of benefiting them from the development of the New Territories and increasing their willingness to support such development. On this basis, the paper argues that the securitization of small house concessionary right and the establishment of a corresponding Exchange not only can promote Hong Kong citizens to support the development of the New Territories, but also consider the economic value of the traditional rights and interests of NTIIs.

## 6. Policy Recommendation: to Establish the Securitization System of Small House Concessionary Right

The securitization put forward in this paper is for the government to issue, before a certain date, one-off certificates to all eligible male NTIIs, and meanwhile establish an open and transparent transaction platform to allow free transaction of small house concessionary right certificates, which is similar to the exchange entitlements used in the past. The exchange entitlements were issued by the government as a certificate to landholders when regaining the lands, due to the need to recover large tracts of land in the New Territories for the development of new towns. The free transactions of exchange entitlements motivated a host of property developers to compete to purchase the entitlements, which not only provided suitable compensation for landholders but also boosted the development of the New Territories [25]. Hence, emulating the success of exchange entitlements, this paper assumes that the development rights of NTIIs can be securitized in a similar way and thus be freely traded in the market.

The exercises of small house concessionary right seem endless, as it is entitled to any male who is 18 years old and is descended through the male line from a NTII. If the certificate is given only to those who are now 18 years old and are already with the right, strong opposition may spur. Therefore, it is recommended that certificates be issued to all males who are 18 years old by 2047. The certificates have no value in themselves, and the value shall only be manifested when commanded in the market. If the total amount of certificates keeps growing with the increasing number of male NTIIs, the market value of the certificate is objectively to decline. Since the annual increase of the male population in the New Territories is not huge, the effect on the value can thus be little. What really influences the price is the amount of land to be developed under the exercises of the ding rights, namely the demand for the certificates on small house concessionary right, while the amount is stipulated in the government's development plan for the area.

With the proper operation of the government, the balance

between the supply and demand of the certificates on small house concessionary right shall be secured. For example, the certificates can be used as a ticket to land auctions. This paper advocates that a certain proportion of land auctions should be assigned each year, and that only the individuals or institutions holding a certain number of the certificates are allowed to attend the auctions, and that the certificates are required to bid for the land in some auctions. The progression of land auctions allows the certificates in circulation to eventually be fewer and finally depleted. NTIIs are free to decide when to sell their certificates and whether to purchase the certificates for the purpose of land development. In addition, when the government formulates the land planning, it can allow property developers to replace the compensation for the land price with a certain number of certificates if they attempt to convert farmland into the lands for residential or commercial properties. As shown in Figure 1, This pattern is beneficial for both the government to resolve the problems in urban development at a lower cost and NTIIs to obtain reasonable compensation for their traditional rights.

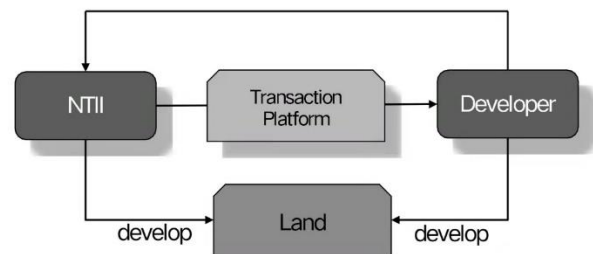


Figure 1. process of ding rights transaction and use

When small house concessionary right is securitized, Hong Kong citizens, no matter they are male or female, indigenous or non-indigenous inhabitants, can embrace the transactions of certificates. This scheme is capable of eradicating gender discrimination naturally indicated in small house concessionary right, and narrowing the gap between the rural society and the urban society, so that the interests of various groups in Hong Kong are likely to be consistent. Hence, the securitization of the right can not only bolster the modern value of gender equality, but also promote the harmonious development of society.

## 7. Conclusion

This paper discusses the practice of the land ticket system in Chongqing Municipality, and applies the transaction theory. It hence advocates for the transactions of small house concessionary right, as a way of promoting the land improvement in the New Territories. Through the transactions, incomplete property rights can be combined to form a full right for land development. Moreover, there are regulations on the proposed transactions of small house concessionary right, with the illegal transactions in the black market absent in the proposal. Also, the transactions of the right should be conducted on a transparent and open trading platform that allows both the general public in Hong Kong and developers to be free to purchase or sell. This design permits certain groups to cash out the traditional rights and interests embraced by them, thus avoiding the perpetuation of special rights and interests and eventually fulfilling the removal of the small house concessionary right.

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