



DEVELOPMENT MANAGEMENT SCHEME COMPLIANCE ADVISORY: 6 OF 2021

CLARIFICATION ON THE CONCEPT OF AIR AND UNDERGROUND RIGHTS IN THE DEVELOPMENT MANAGEMENT SCHEME

1. PURPOSE OF ADVISORY

- 1.1. The purpose of this advisory is to indicate the Departmental position on the concept of air and underground rights as contained in the Development Management Scheme (DMS).
- 1.2. This advisory follows Departmental Circular 1 of 2021 on the same matter.

2. DEFINITION OF 'AIR AND UNDERGROUND RIGHTS' IN THE DMS

The DMS defines 'air and underground rights' as follows:

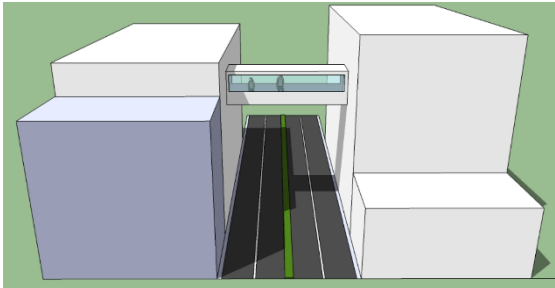
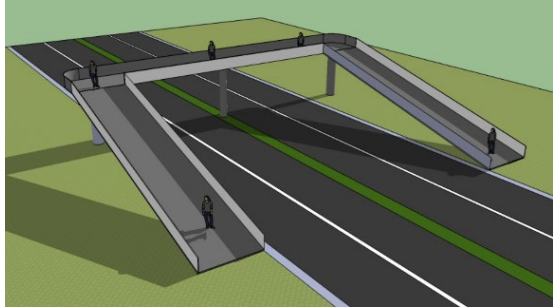
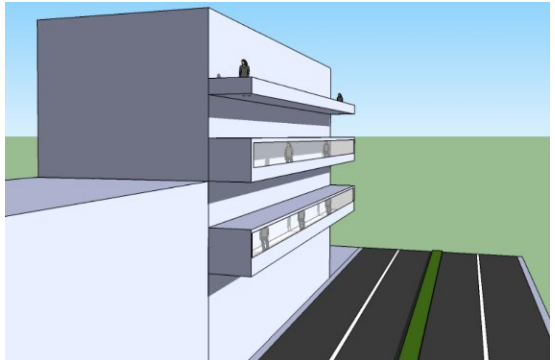
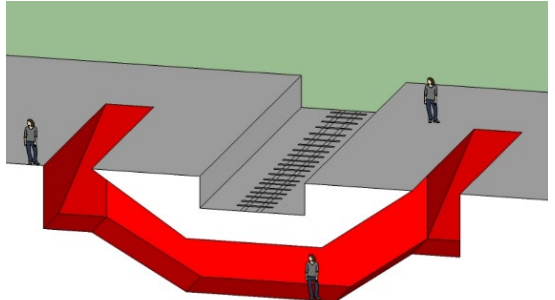
“‘air and underground rights’ means the development of a defined space above or below a public street, open space, railway line or another transport usage, and the allocation of use rights for such purpose which may include any use with the approval of the City;”

3. PURPOSE OF THE CONCEPT OF 'AIR AND UNDERGROUND RIGHTS'

- 3.1. The purpose of 'air and underground rights' is to allow the development of a defined space above (not on top or just above surface) or below a public street, open space, railway line or another transport usage. This must be achievable without interfering in the primary use or potential future primary use of a public street, open space, railway line or another transport usage in that zoning.
- 3.2. It is not the intention to allow such rights with any other land use.
- 3.3. Air and underground rights are available only in certain zonings and require a consent use application to the Department. The intention is to allow any use, which will be defined through the approval of the application that would maximise the potential space above or below a public street, open space, railway line or another transport usage.

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3.4. Traditional examples include, but are not limited to:

Air bridges (to enable pedestrian movement above street level between two buildings which is separated by e.g. a public street). The air bridge may include e.g. a small cafeteria.	
Pedestrian bridges (to enable pedestrian movement from one ground level to another ground level adjacent to e.g. a public street). The bridge may include e.g. informal trading as a further use.	
Overhanging portion (used as offices) of an office building over a transport use.	
Pedestrian subway below a railway line. The subway may include e.g. informal trading as a further use.	
Underground shopping centre (e.g. shopping centre in Adderley Street, Cape Town CBD).	

4. ZONINGS WHERE 'AIR AND UNDERGROUND RIGHTS' CAN BE CONSIDERED

- 4.1. 'Air and underground rights' are available as a consent use in the following zonings:
- Transport Zoning 1: Transport Use (TR1);
 - Transport Zoning 2: Public road and public parking (TR2);
 - Transport Zoning 3: Toll Road (TR3); and
 - Open Space Zoning 2: Public Open Space (OS2).
- 4.2. An application for 'air and underground rights' is, therefore, always required.
- 4.3. It is not only the zoning that allows the 'air and underground right'. It can only be considered where the proposed 'air and underground right' relates to (therefore above or below) a primary use of either public street, open space, railway line or another transport usage in these zonings.
- 4.4. The individual zonings where an 'air and underground right' are available as a consent use provide further provisions to such a proposed consent use:

Zoning	Provisions in the zoning relating to 'air and underground rights'	Further clarification to the provisions in the zoning
TR1	[Item 82(b)(i)] 'Air and underground rights' can be permitted as a consent use, provided that it does not detract from transport use as the dominant use. [Item 82(b)(ii)] If, in the opinion of the City, an 'air and underground right' application constitutes a significant and permanent change to the property from the intended primary use, the City may require a rezoning application instead.	[Item 82(b)(i)] An 'air and underground right' can only be permitted in a TR1 zoning above or below a transport use where it does not detract from the transport use (current, future or potential transport use) as the dominant use. It may therefore not interfere in a current, future or potential transport use in any way. [Item 82(b)(ii)] If the proposed 'air and underground right' interferes or disrupts the intended transport use permanently, the City may require a rezoning application to a more appropriate zoning.

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	[Item 86 (a) – (e)] The City may approve a consent use for air or underground rights provided that: (a) A site development plan is submitted to the City's satisfaction in terms of item 123; (b) The City is satisfied that structural components, clearance and operational characteristics are sufficient to ensure safe and efficient operation of streets, roads or parking; (c) Such consent use does not compromise the intended primary use of the land; (d) An agreement defining the extent of rights, time period, compensation, ownership and maintenance obligations relating to the property is concluded between the parties concerned and is approved by the City; and (e) A servitude in respect of the air or underground rights is	[Item 86 (a) – (e)] (a) A site development plan in terms of the DMS is at all times required for an 'air and underground use'. (b) All relevant departments must be satisfied that the structural components, clearance and operational characteristics are sufficient to ensure safe and efficient operation of streets, roads or parking before the consent use can be approved. Sufficient motivation and information must therefore be included in the consent use application to address these matters. (c) An 'air and underground right' can only be permitted in a TR1 zoning above or below a transport use where it does not detract from the transport use (current, future or potential transport use) as the dominant use. It may therefore not interfere in a current, future or potential transport use in any way. (d) Self-explanatory. This agreement can be made a condition of approval and can limit or set the extent of rights, time period, compensation, ownership and maintenance obligations relating to the property. (e) Self-explanatory. Can be made a condition of approval.
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	registered over the concerned land.	
TR2	[Item 90 (a) – (e)] The City may approve a consent use for air or underground rights provided that: (a) A site development plan is submitted to the City's satisfaction in terms of item 123; (b) The City is satisfied that structural components, clearance and operational characteristics are sufficient to ensure safe and efficient operation of streets, roads or parking; (c) Such consent use does not compromise the intended primary use of the land; (d) An agreement defining the extent of rights, time period, compensation, ownership and maintenance obligations relating to the property is concluded between the parties concerned and is approved by the City; and (e) A servitude in respect of the air or underground rights is	[Item 90 (a) – (e)] (a) A site development plan in terms of the DMS is at all times required for an 'air and underground use'. (b) All relevant departments must be satisfied that the structural components, clearance and operational characteristics are sufficient to ensure safe and efficient operation of streets, roads or parking before the consent use can be approved. Sufficient motivation must therefore be included in the consent use application to address these matters. (c) An 'air and underground right' can only be permitted in the TR2 zoning above or below a public street where it does not detract from a public street (current, future or potential) as the dominant use. It may therefore not interfere in a current, future or potential public street in any way. (d) Self-explanatory. This agreement can be made a condition of approval and can limit or set the extent of rights, time period, compensation, ownership and maintenance obligations relating to the property. (e) Self-explanatory. Can be made a condition of approval.

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	registered over the concerned land.	
TR3	[Item 92B (a) – (c)] The following development rules apply: (a) The City shall require a site development plan for a primary and consent use. (b) The site development plan as approved by the City shall constitute the development rules for a primary use and a consent use, if applicable. (c) The provisions for a site development plan in item 123 shall apply.	[Item 92B (a) – (c)] A site development plan in terms of the DMS is at all times required for an 'air and underground use' and shall constitute the development rules for the use. An 'air and underground right' can only be permitted in the TR3 zoning above or below a public street where it does not detract from a public street (current, future or potential) as the dominant use. It may therefore not interfere in a current, future or potential public street in any way.
OS2	[Item 102 (a) – (d)] The City may approve a consent use for air or underground rights if: (a) Such consent use does not compromise the intended primary use of the land; (b) An agreement defining the extent of rights, time period, compensation, ownership and maintenance obligations relating to the property is concluded between the parties concerned and is approved by the City; (c) A servitude in respect of the air or underground rights is registered over the land concerned; and (d) A site development plan is submitted to the City's	[Item 102 (a) – (d)] (a) An 'air and underground right' can only be permitted in a OS1 zoning if not on the public open space or where it does not interfere with the use of a public open space. (b) Self-explanatory. This agreement can be made a condition of approval and can limit or set the extent of rights, time period, compensation, ownership and maintenance obligations relating to the property. (c) Self-explanatory. Can be made a condition of approval. (d) A site development plan in terms of the DMS is at all

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	satisfaction in terms of item 123.	times required for an 'air and underground use'.
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5. GENERAL PRINCIPLES APPLICABLE TO 'AIR AND UNDERGROUND RIGHTS'

- 5.1. An 'air and underground right' may include any use whatsoever, as long as it does not interfere with the applicable primary use, or any potential for that primary use, in any way.
- 5.2. An 'air and underground right' may be a permanent or temporary right.
- 5.3. It would be up to an applicant to adequately demonstrate that the land in question can be defined as either a public street, open space, railway line or another transport usage (see definitions and notes below). If this cannot be demonstrated, then no application for air and underground rights can be accepted in terms of the MPBL.

Definition	Notes on ownership
'public street' means any land indicated on an approved general plan, diagram or map, other than a toll road, as having been set aside as a public right of way, whether for vehicles or pedestrians or public or urban squares, of which the ownership is registered in favour of or vests in the municipality in terms of this By-Law or any other law;	Land must vest in or be owned by the Municipality.
'open space' means land, not designated as public open space or not deemed to be an ancillary use, which is used primarily as a site for outdoor sports, play, rest or recreation, or as a park or nature area; and includes ancillary buildings, infrastructure and uses, but excludes shops, restaurants and gymnasiums;	Cannot be designated as public open space or an ancillary use. Most likely to be land vested in or owned by the Municipality due to zoning.
railway line is not defined but in simple English is the track on which a train can run, together with its reserve.	Most likely owned by PRASA.
'transport use' means the use of land, a building or structure for the operation of a public service for the transportation of goods (including liquids and gases) or	Land unlikely to be in public ownership.

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passengers by means of rail, road, sea or pipeline, including the use of such land, building or structure for the purpose of a harbour, railway station, bus depot or taxi interchange, a transport undertaking based on the provision of a transport service; and includes a public private undertaking such as a railway station, bus depot, taxi rank, public transport interchange, harbour and ancillary purposes, but does not include an airport or helicopter landing pad;	
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PLEASE NOTE

Always consult the City of Cape Town Municipal Planning By-law, 2015 (as amended) before any land use application is submitted to the Department.