



## Zoning and private property rights in land: Static and dynamic boundary delineation



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### ABSTRACT

The traditional approaches to zoning, as an area and locational-specific action, treat it as a means of the state to attenuate and/or establish private property rights over land. The old approach regards zoning as necessarily one of *attenuating private property rights* over land whether it is from an interventionist or libertarian perspective. A more recent approach finds zoning possible by contract and characterizes it as a means by which the state establishes and/or attenuates private property rights over land. Informed by Coasian transaction cost economics, this paper: (a) reiterates the view that zoning, as lot boundary delineation by the state, is the institutional foundation of private property rights over land; (b) explains the relationship between private property rights held by citizens, which are often wrongly treated as necessarily restricted access, and those of the state, which are often mistaken as common because they are called “public,” which, in fact, means open access; (c) discusses the distinction between static and dynamic boundary delineation for three forms of incursion into private land by the public; and (d) uses a case study on history of reclamation in Hong Kong, as a *form creative zoning* by dynamic boundary delineation from 1844 to 2015 to illustrate the importance of dynamic boundary delineation.

### 1. Introduction

Conditioned by local usage and understanding, zoning, as a key-word in the planning of land and oceanic resources, is seldom clearly understood. The uncoordinated division of labour in learning and true inter-disciplinary learning has led to a disciplinary distinction in treating matters of property rights. Also, few planning researchers are well-trained in both the institutional economics and property law, in one jurisdiction, not to mention in other planning systems.

To pave the way for further and better interdisciplinary research on this topic, this paper will state the traditional approaches to zoning, which treats private property rights and zoning as two variables. Then it will explain the neglected view given by [Lai and Davies \(2017\)](#), who argued that zoning is inherent in private property rights over land, elucidating various Euclidian-spatial meanings of zoning and offering a typology of zoning. Finally, the confusion between *de jure* property rights and *de facto* access restrictions in private property zones will be explained in order advance the point that there are two boundary types – static and dynamic – and the argument presented here uses the case of colonial Hong Kong to illustrate dynamic boundary delineation. This paper, therefore, takes one step forward to articulate the point

advanced in the very last sentence of the work of [Lai and Davies \(2017\)](#): “the possibility and mode of an area expansion of the Coasian transaction domain” in relation to land production through reclamation as a fiscal means to keep the economy going, according to zoning by contract or mutual consent. To set in place the scene of the discussion, it is imperative to recollect the basic premises of [Coase \(1959, 1960, 1988\)](#), insofar as they are relevant for *spatial* analysis, in the tradition of [Cheung \(1982, 1990\)](#), [Barzel \(1997\)](#), and [Yu, Chen, and Lai \(2017\)](#) in light of their applications to planning and development ([Lai & Lorne, 2014](#); [Lai, Davies, & Lone, 2015](#); [Yu, Shaw, Fu, & Lai, 2000](#)). Cheung identified three Coase theorems, the first two owing to Stigler ([Lai, 2007](#)), who deduced them (the “invariant” and “efficiency” theorems) based on the farming fable in [Coase's 1960](#) work, “The Problem of Social Cost,” and the third a statement in [Coase's 1959](#) paper on the US Federal Communications Commission. The first two theorems state that when transaction cost is nil and property rights are clearly defined, then resource allocation does not depend on (or is invariant to) the institutional arrangement and is always Pareto-efficient. Stigler's theorems are expressly predicated on “zero transaction costs” and “clearly defined property rights,” but the third does not rely on either. The third theorem states that “delimitation of rights is a prelude to market

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transactions” (Coase, 1959). Coase endorsed this third theorem as “the” Coase Theorem in his 1988 book, *The Firm, the Market and The Law*, in which he also mentioned that in the real world, some state rules can enlarge a market, given some conditions. This may be called the fourth Coase theorem (Lai & Lorne, 2015).

As for the point that “institutions do matter” for resource allocation, encapsulated in the so-called “corollary of the Coase Theorem” and applied by Cheung to predict that China would become capitalist (Cheung, 1982), the third and fourth Coase theorems point to a potentially positive role for the state to assign and reassign property rights when technology is not given and can be enhanced by investment and innovations ruled out in the Stigler scenarios. Here, Coase meets Schumpeter (Lai & Lorne, 2014), which is a point used by Yu et al. (2000) to define sustainable development as the transformation of negative externalities into positive ones given appropriate IP arrangements for a production function that is non-linear, but stochastic.

Regarding spatial inquiry, a closer analysis of the farming story in “the Problem of Social Cost” (Coase, 1960) shows that “clearly defined property rights” refer to the *de jure* boundary delineation of the two adjoining pieces of land rather than duplicating zero transaction costs (Lai, 2007). Such *cadastral* boundary delineation sets the scene of the initial pattern of rights allocation, within which the firm, the market, and/or the law may operate on the land market. Moreover, institutionally, this *presupposes* the existence of a property rights system, which is something very important that the authors will turn to next. However, even more important for this discussion on space, is that the almost universal assumption by economists on a fixed quantum of land – and *static* boundary adjustment in this sense – must be relaxed. This entails the “creation” of property rights over land that can be considered a process of expansionist *dynamic* boundary delineation. This goes beyond an “exchange of rights” through true “Coasian bargaining,” which is a transaction cost phenomenon excluded by Stigler’s theorems (Lai et al., 2015) through a conferment of property rights to squatters and land formation by the state (Lai, Chua, & Lorne, 2014; Lai, Lorne, & Lu, 2014).

Predicated on the ideas of two Nobel laureates in economic science, Joseph Schumpeter and Ronald Coase, as articulated recently by Lai and Lorne (2014) in their work on a meeting between Coase and Schumpeter, this paper should attract the attention of researchers who are interested in institutional innovations.

This paper fits into the context of institutional innovation by factoring a Coasian property rights framework for zoning into the notion of innovation, which, in turn, is concretised in the form of strategic land reclamation that bypasses vested interests and allows a free hand for government action. The case of Hong Kong is definitely instrumental for articulating the issues of development in the developing world.

## 2. Property rights systems

Property rights are rules that are socially, culturally,<sup>1</sup> and even legally accepted *de jure* to govern relationships between individuals and groups in respect of resources.

Economists generally accept the threefold classification of property rights into three systems<sup>2</sup>: common, communal, and private. Common property rights is a situation in which no one can claim exclusive use of a resource over anyone else. This situation is one of non-exclusive rights for all (i.e., everyone has an equal right to a resource). Access to the resource is *de jure* “open”. Unlike common property rights, communal and private property rights are exclusive. Communal property rights is a regime in which a *group* can claim an exclusive right to use, derive

<sup>1</sup> Culture is “along time” as a “democracy of the dead” and socially is more here and now, often contractual and global.

<sup>2</sup> The typology follows the tradition of Alchian-Cheung, as elaborated in Alchian and Demsetz (1973).

income from, and alienate a resource over outsiders. Finally, private property rights is a regime in which an *individual*<sup>3</sup> can claim an exclusive right to use, derive income from and/or alienate a resource over anyone. Property rights have a certain moral authority and the common law recognizes and protects all these systems.

How property rights are actually respected or enjoyed *de facto* depends on choice and ability to exclude<sup>4</sup> and/or to innovate. Access to common property can be restricted by powerful groups against social norms. Communal or private property can become open access through the consent or negligence of the rights holder.

Since the world has been partitioned and repartitioned over the millennia into states with common borders, which are often subject to re-delineation by brute force, it is hard to find any true example of common property rights over land resources. So-called “common pastures” before their enclosure were actually forms of communal property within a state rather than open to everyone in the world. Colonists disregarded pre-existing indigenous rights and claimed all land as the private property of the colonial government. Only the internationally undisputed portion of the ocean is largely common *de jure* and thus with open access to all.

## 3. The traditional approaches to zoning

The traditional approaches to zoning treat the granting of private property rights and zoning as two distinct variables. They share the understanding that it is the area and locational-specific means of the state.

The oldest approach to regarding zoning is necessarily one of attenuating private property rights over land whether it is from an interventionist or libertarian perspective. Both the interventionist supporter and libertarian critic of zoning see it as necessarily one by edict, which is an erroneous view that reinforces the false dichotomy between the market and the state (Lai, 2016). This dichotomy sees that either the government zoning plan prevails over the market (or private planning) or *vice versa* and is often interpreted as a fight between the Pigovian and libertarian.

Correcting the old view, the more recent approach (Lai, 1996, 1997, 1998, 2016) has found zoning possible by contract, and characterizes it as a means of the state to establish and/or attenuate private property rights over land. This approach recognizes the reality, that not only can a government zone by contracting with its citizens, but that the most famous model of successful private planning by restrictive covenants in the economic literature, namely, Houston (Siegan, 1970), involved basic state planning rules and regulations.

The allocation of leasehold interests by auction and tender to developers in Hong Kong is a good example of zoning by contract (Lai, 1998, 2010). In Houston, as in Milwaukee (Beuscher, 1958), the actual mechanism of land development was not one of non-zoning (zoning defined as private property boundary delineation by the state), but of private-zoning, as elaborated on in the next section.

## 4. Zoning as boundary delineation by the state

Zoning is the form of land-use planning by the state and/or private parties (Lai, 1997) because land boundary delineation is the form (in a Thomist sense) of private real property and thus is also a form of zoning (Lai & Davies, 2017).

A historical review of the emergence of private property rights in

<sup>3</sup> Individual here refers to a *de jure* formally recognized individual entity like a person, a legal business entity, corporation, or the state. In contrast to the group in a communal regime, the group here refers to those collective entities that do not have any formal *de jure* recognition, as one can loosely be seen as a unity. This might have happened in villages or some squatter slum areas during ancient times.

<sup>4</sup> Excluders here could be one or many and can be at different levels. See Lai’s (1997, pp.182 & 216) distinction between intra-zonal and inter-zonal exclusion.

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