

## Property Rights Restrictions on the Construction of Parking Spaces With Buildings

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### Abstract

The construction of parking spaces is the main solution of parking spaces shortage in many cities. The government imposes requirements on the developers of land or housing and owners to ensure the availability of parking spaces. However, at the same time, parking space allocation has the possibility of restricting property rights. It is necessary to demonstrate the legitimacy of the government's request for the construction of parking spaces for buildings through the control of private property by the government and the theoretical analysis of social obligations undertaken by private property rights, and to explain the rationality of the requirements of the construction of parking spaces with buildings through the realistic factors of management difficulties of large cities.

**Key words:** Construction of parking spaces; Property right; Expropriation; Legitimacy

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### INTRODUCTION

Many cities have imposed requirements on the construction of parking spaces with buildings in their parking policies and legislations of vehicles as an important measure to address the shortage of parking spaces in the urban areas. The supply of parking spaces in

the urban areas should be diversified. Some of the more extreme ideas believe that the right to travel is a basic human right, and the government is obliged to guarantee enough parking space; others believe that it is a personal affair to purchase a vehicle, to drive, and to park, and this matter should be resolved by the individuals. But in fact, from the results point of view, it is not conducive to the solution of urban traffic mitigation and parking problems if we focus on the "public" or "private" attributes of travel and parking too much. The fundamental idea is to join all the forces and solve the difficulty on parking together.

The primary concern of parking is the shortage of parking spaces. The main way to increase the number of parking spaces in a large city such as Beijing is through the construction of environmental greening and parking spaces by public building developers. In this way, parking spaces can be provided in batches, and such parking spaces are often included in or close to the living or working places. Therefore, the asynchronization between the demand and supply of parking spaces can also be solved.

### 1. THE ESSENCE OF BUILDING PARKING SPACES: PROPERTY RIGHTS RESTRICTIONS

The requirements of the construction of parking spaces with buildings is taking the problem that should be solved by the government or the individual and hand it to the land or building developer. It is an abstraction of the property rights of the parking space. From the perspective of land or building owners, they shall have full rights to possess, use, profit and dispose the land or building obtained from the government or secondary market through means of bidding or commercial transactions. These lands shall not be limited by the height, density, depth, materials, floor area ratio, daylighting rate, or floor configuration of the

buildings. However, in reality, every country imposes some restrictions on land use or construction.

### 1.1 Internal or External Restrictions

The government can impose restriction on property rights based on public interests and other reasons, but there is a logical relationship between “rights” and “restriction of rights”. One interpretation is to restrict the public interest as an external part to the property right, and the other interpretation is to treat the public interest as the internal property right restriction. The inherent limitation of property rights is the self-regulation of rights according to their nature. These two interpretations can be referred to as “external restrictions” and “internal restrictions,” respectively.

The so-called external restrictions mean that the citizen’s property rights are sufficient, but for certain reasons, the possession, use, income, disposal, and other rights of their property rights can be restricted. External restrictions theorists believe that the public interest is a constraint on fundamental rights other than property rights. According to this interpretation, the interests protected by the constitutional law include the public interest in addition to the personal interests of the property rights, and they are two different legal interests. In the event of conflicts and contradictions between the two different legal interests of personal interests and public interests, legislators need to coordinate and balance between them. In some cases, this is manifested as legislators restricting the basic rights in order to realize the public interest. Since the public interest is a legal benefit different from the personal interest, the restriction on the basic right from the public interest is an external restriction.

The so-called internal restrictions mean that the connotation of property rights includes the principle of modesty of public interests. The restriction on property ownership is inherent in the ownership structure. Ownership itself contains restrictions on the ownership. Ownership is a relative term, and it serves personal or public interest of other citizens. Internal restrictions are also called “essential restrictions.” This interpretation holds that the restriction of public interest is based on the nature of the basic rights itself and is a limitation that exists in the basic rights itself. Any right has a fixed scope, the restriction on the right, according to its social attributes. But it is outside the boundaries of this fixed range. In other words, the restriction of rights is not a real restriction. It stands for regimes where rights should never reach according to their nature. According to the interpretation of internal restrictions, the restriction of public interest to basic rights only means that the exercise of basic rights cannot harm the legal interests that are necessary for the survival of society or the social order necessary for the realization of rights. In other words, since individuals are people in society, from the premise

of social ethics and social morality, individual rights are subject to social constraints and social responsibility from the very beginning.

Looking at the two interpretations mentioned above, the advantage of the “external restriction” interpretation is that the logic is clear. It clearly separates the “composition of rights” and “restriction of rights” into two problems, and it’s not complicated and mysterious like the “inherent restrictions”. However, the “external restriction” interpretation implies the danger of “public interest superiority”, making the public interest clause a blank authorization for state power without limitation. The “internal restriction” interpretation believes that rights have natural boundaries according to their social attributes, so when we determine “what rights are,” we also determine “what the boundary of rights is” (Zhang, 2005, pp.24-25).

If the requirement for the construction of parking space is an internal restriction, that is, the restrictions on the rights holder’s land and building property rights are natural and the content is clear, then it is necessary to clarify the boundary of the “natural” rights that the right holder have on the land or building property rights; if the requirement for the construction of parking spaces is an external restriction, then the reasons for the government’s restrictions and its justification should be clarified, and the scientific nature of such restrictions should be ensured. The scientific justification for the justification and construction standards of the construction is clearly required (Liu & Wang, 2014, pp. 130-131).

First of all, the requirement for the construction of parking spaces for public buildings was not common in the early age. To be a little extreme, the history of buildings is much longer than the history of required constructions for buildings. The earliest provision defining the relationship between the building and the parking space was the notice issued by the State Planning Commission in 1987 on the issuance of the “Administrative Office Building Standard (Trial)”[Invalid]. “Article 14: The garage shall be combined with the construction of the office building as much as possible. The basement, the semi-basement and the overhead floor on the ground shall be used to for parking spaces of vehicles to save land for outdoor use and to increase the environmental greening area as much as possible.” The earliest legal documents requiring the construction of a parking lot/ station with the building were the “Interim Provisions on the Construction and Management of Parking Lots (Invalid)” and the “Parking Planning and Design Rules (Invalid)” jointly formulated by the former Ministry of Public Security and the Ministry of Construction in 1988. Article 5 of the “Interim Provisions on the Construction and Management of Parking Lots” stipulates that “large hotels, restaurants, shops, stadiums (gyms), theaters, exhibition halls, libraries, hospitals, tourist places, train stations, terminals, airports, warehouses, etc. that are

either newly built, rebuilt, or expanded must be equipped with (additional) parking lots. The parking lots should be designed, constructed, and open simultaneously with the main building. If the large public buildings are designed without parking lots, the urban planning department shall not approve such construction. Planning and construction of residential areas should be equipped with corresponding parking lots as needed. Government offices, organizations, enterprises, and institutions should have enough parking spaces to meet the needs. If the required parking lots are not built or the parking spaces are insufficient, they should be gradually built or expanded.” The regulations require that the construction of the parking lot covers almost all commercial buildings, residential buildings, and government buildings and institutions. The legal requirements for the construction of parking spaces are made in the Road Traffic Safety Law, which was enacted in 2003. Article 33 stipulates that “public buildings, commercial blocks, residential areas, large (middle) buildings, etc. that are newly built, rebuilt, or expanded shall be equipped with construction of (additional) parking lots. If the parking spaces are insufficient, they shall be rebuilt or expanded in time. The parking spaces must not stop their services or be used for other purposes.”

Secondly, the restrictions on the rights of land or buildings and the supporting facilities are gradually increasing, and the building standards are constantly increasing. The state has been increasing the requirements for a series of supporting facilities such as environmental greening, construction, entertainment, medical care, commerce, education, civil air defense measures, parking, etc. For example, in the “Notice of the National Construction Committee on Forwarding the Opinions of the State Administration of Urban Construction on Strengthening Housing Construction” in 1980, there were requirements for environmental greening, “the residential buildings must be planned in a residential area, and the green area and necessary living and cultural facilities should be arranged well.” In 1999, the Ministry of Construction and the Ministry of Civil Affairs issued a notice on the “Standards for the Design of Elder People in the Industry [Invalid]”. There were requirements for fitness facilities, “residential buildings for the elders should be located in residential areas with medical emergency, physical fitness, cultural entertainment, supply services, and management facilities in order to constitute a well life-support network system.” These early normative legal documents show that restrictions on land and building property rights are not static and are changing with times.

Therefore, China’s restrictions on land and building property rights is an external restriction, which is constantly “increasing” and is adjusted with the development of society. It also requires us to analyze the

legitimacy and scientific justification of such external restrictions.

## 1.2 Property Right Restriction or (Semi-) Expropriation

Under the framework of China’s legal system, restrictions on citizens’ property rights include two dimensions: one is the expropriation with compensation, and the other is the simple restriction without compensation (Cao, 2008, p.13).

### (a) Expropriation

Traditionally, the expropriation refers to the expropriation of the ownership of the citizenship by public power. The requisition is the compulsory acquisition of the right to use the citizens’ properties by the public power. Both result in the loss of the control of the property by the owner for a period of time or permanently. Therefore, legislatively, expropriation and requisition should be based on public purposes and give fair compensation to the owners. However, in reality, expropriation by the public power directly is rare. Many types of property rights restrictions are not included in the concept of expropriation or requisition. The public power adopts a certain regulatory measure, the effect of which is not to transfer the ownership or use of the property, but it constitutes a restriction on the citizen’s usage of their properties. Such restrictions may be classified as “indirect expropriation”, and the owners need to be compensated. Due to the social relevance of property rights, it may also be classified as a simple restriction without compensation.

### (b) Indirect Expropriation

The so-called indirect expropriation refers to the fact that although the means of directly expropriation of property rights are not taken, the effect of the measures is equivalent to expropriation or nationalization. Indirect expropriation is mostly a concept of international law. In the field of domestic law, the United States has created the concept of “regulatory expropriation” through case law (Huang, 2016, p.124). Regulatory expropriation is expropriation caused by excessive restrictive laws and regulations imposed by the state on private property rights, and some people call it “legislative expropriation.” It should be said that the government has the power to conduct economic management and social governance. In the process of law enforcement, the property rights of some entities are restricted. Therefore, not all government-restricted measures of property will constitute indirect/regulatory expropriations. To constitute an expropriation, it is necessary to prove that the basic rights of property ownership are severely expropriated. Justice Holmes Jr. of the United States has pointed out in the case *Mahom v. Pennsylvania Coal Co.* that “property can be regulated to a certain extent, but if the regulation is too far, it will be considered to become expropriation.”

The requirement of including parking facilities with new construction, reconstruction, and expansion is not

enough for severely expropriation of property rights, and it is not a directly expropriation of property rights. It does not constitute expropriation or indirect expropriation. Objectively, the construction of parking facilities is assigned to the developer, but it is actually paid by the users. In other words, a smooth loss through restriction of property rights can be achieved by other means.

## 2. LEGITIMACY OF THE CONSTRUCTION OF PARKING SPACES

### 2.1 Weakening of the Absoluteness of Property Rights

The legal status of property rights has undergone a series of changes. In Western countries that strongly emphasize private property rights, the concept of property rights has also changed. In the West, the concept of property ownership can be divided into two perspectives. One is the individualistic perspective of ownership, which corresponds to the absolute of property rights, emphasizing the property right of the owner to be absolute, exclusive, and sustainable. The other is the social obligation perspective of property ownership, which emphasizes the social nature of property and considers that the ownership is restricted by the interests of neighboring, the public, or the society. The concept of property ownership is not absolute or universal. The emphasis of individual or social factors is often dominated by the social development status, economic structure, and development level of productivity in a certain period (Wang, 2012, pp.402-403). Before and after the Western Industrial Revolution, the perspective of individualistic property ownership gradually dominated, emphasizing the absoluteness and exclusiveness of ownership. *La Déclaration Universelle Des Droits De L'homme* stipulates "Everyone has the right to own property alone as well as in association with others, and no one shall be arbitrarily deprived of his property". This idea has swept across the European continent and the United States. The emphasis on the concept of individualistic property rights is inseparable from the social background of that time. On the one hand, the concept of absolutism protects the interests of the emerging bourgeoisie during the industrial revolution. On the other hand, it promotes the development of individuals' natural resources and encourages people to make progress and wealth. With the development of society, the simple individualism is not enough to promote the steady development of society. People begin to emphasize "substantial fairness", focus on social welfare, implement no-fault responsibility, and protect the interests of consumers. A large number of public law factors are incorporated into the rules of private law. The legal system pays more attention to the overall interests of society, and the focus of property ownership changes from individualism to the social

obligation property rights. *Weimarer Verfassung* directly stipulated "Property imposes obligations. Its use by its owner shall at the same time serve the public good." Both the individualistic perspective of ownership and the perspective of social obligation recognize "No right is free of restrictions", and they both stipulate the obedience and respect for exceptions in the laws and third-party rights in the design of the system. The difference lies in the degree of emphasis on the social factors of property rights. It should be said that the connotation of property rights includes both personal and social factors. The difference between the two views of property rights lies in the emphasis and understanding of these two factors (Tian, 2014, p.229).

In China, property rights are a basic right of citizens. The protection of property rights as basic rights is stipulated in both international human right treaties and our constitution, and it is contained in the basic concepts of the central and local legislations in China. The "Decision of the Central Committee of the Communist Party of China on Comprehensively Advancing Certain Major Issues in Governing the Country According to Law" pointed out that legislation should uphold the principle of people-first and for-the-people, and the legitimate rights and interests of citizens should be reflected and embodied in the system design and legislative work. But at the same time, there is no universal, unconstrained right. From the perspective of rights themselves, the essence of rights is a type of interest. The claim and exercise of rights cannot damage other types of interests and cannot hinder the social order on which rights are based on. From the perspective of society as a whole, property rights often represent personal legal interests in society. In the meanwhile, there are public, legal interests of unspecified majority in society. When there is a conflict between personal interests and public interests, legislators should coordinate and balance between these two.

China is a socialist country. The Constitution and the Property Law stipulate that the legal property of citizens is protected by law and should not be subject to the damage by public power, especially by the public power that infringes upon the interests of the individual in the name of public interest. At the same time, the socialist system is the politics and the theoretical basis of China's economic system. The fundamental purpose of this system is to achieve shared wealth and shared prosperity of the whole society, emphasizing the realization of collective interests and public interests.

### 2.2 Social Relevance of Property Rights

In agribusiness, property such as cultivated land, houses, and currency are closely related to the survival of individuals. Individual life, production and development depend entirely on its ownership. If the ownership of the property is lost, the individual loses its basic survival necessities. Therefore, the constitutional and private laws

of modern countries since the bourgeois revolution have given absolute freedom of property rights. However, since the beginning of industrial society, the development of capitalism has caused more and more workers to abandon their dependence on the inherent property such as cultivated land and houses, and instead, maintain their lives and obtain opportunities for development through the employment of labor and social security measures. As Karl Larenz pointed out: "Today, the economic security of individuals depends not only on their own efforts but also on the civil air defense measures taken by themselves. It becomes more dependent on the payment from a collective, national or social insurance company." (Larenz, 2013 ed.) The change in the social foundation of this property right makes the life and development of the working class largely dependent on the bourgeoisie. Most industrial countries use the redistribution of resources from the bourgeoisie to the industrial class as a basic national policy. Therefore, achieving this goal will inevitably impose appropriate restrictions on the property rights of the bourgeoisie. For example, the production and operation activities of enterprises must take the interests of workers into account. The discharge of gas waste, residue, and water waste from factories must meet certain standards, and the construction of houses must conform to the overall planning of the region. With the change of the social basis of property rights, property rights are no longer the absolute right of private entities. The constitutionalists also began to reflect on the social ethical issues of property rights and become concerned about the social attributes of property rights. While protecting private property, maintaining the full rights of private property possession, applicability, and income remains the key of the modern property rights system. However, the realization of property rights should also conform to the basic concept of social fairness and justice. This means that the exercise of property rights has a free border, and this limit lies in its social obligations. Léon Duguit has pointed out, "The concept of ownership envisaged in *La Déclaration Universelle Des Droits De L'homme* and *Code Civil Des Français* is clearly no longer suitable. Undoubtedly, ownership today is no longer defined as the individualistic right that the owners have absolute controls over everything. It is no longer a special manifestation of absolute rights and personal self-discipline... Today, ownership is no longer the subjective right of individuals, but tends to become the social functions of people with movable and immovable property." (Léon, 1999 ed.) After the 20<sup>th</sup> century in Germany, the first person to advocate the idea of socialization of ownership was the famous civil law scholar Rudolph von Jhering. In his book, *Der Zweck im Recht*, he proposed: "The purpose of ownership exercise is should not be exclusive to personal interests, but also for the benefit of society. Therefore, the system of 'individualistic ownership' should be replaced by the system of 'social ownership'." (Liang, 1998, pp.249-

250) Later, the German scholar Otto Friedrich von Gierke inherited Jhering's ideology of ownership and believed that "ownership is by no means an unrestricted, absolute right that is opposed to the outside. On the contrary, everyone should behave 'in accordance with legal procedures' and 'take the nature and purpose of each property kind into account and exercise its rights'." (Wen, 1984, p.17) Some scholars in China refer to this important social change as "the social foundation change of the individual's survival based on private ownership to the individual's survival based on social relevance." (Zhang, 2012) In this era, "it is not difficult to find utilitarian reasons for interfering with property rights, just as utilitarianism affirms that these rights are justified. Even if the concept of property rights is strong with its inalienable Institutions, there must also be situations in which property rights must be restricted because market failures can hinder the realization of social welfare, the most important of which is the emergence of externalities." (Louis & Albert, 1996, p.155) From the perspective of economics, the social-related attributes of property rights become highly prominent. It means that property rights have a strong negative externality, that is, the exercise of rights by property owners is likely to damage the legitimate interests of others and increase the overall cost of society. Therefore, in order to overcome the negative externalities of property rights, it is necessary to impose restrictions on property rights.

In addition, Marxism tells us that the connection is universal. There is no existence of isolated persons, objects, or things, and so is property rights. The properties owned by citizens are connected with other individuals and the society. The modern concept of property ownership recognizes the social relevance of property rights and the role of property rights in social resources and social governance.

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### 3. LEGALITY AND FEASIBILITY OF THE CONSTRUCTION OF PARKING SPACES IN BUILDINGS

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#### 3.1 Planning of the Construction of Parking Spaces

Planning is a comprehensive and long-term development plan formulated by individuals or organizations. It reflects consideration and resolutions of the basic issues of the future and in a long term. In 2016, the "Opinions on Further Strengthening the Management of Urban Planning and Construction" issued by the Central Committee of the Communist Party of China and the State Council pointed out that "urban planning plays an important role in strategic leadership and control in urban development". General Secretary Xi Jinping pointed out, during his inspection of Beijing in 2017, "the master plan has statutory effect after being approved by legal procedures

and must resolutely maintain the seriousness and authority of the plan". Article 7 of the Urban and Rural Planning Regulation stipulates that "the urban and rural planning approved according to law is the basis for urban and rural construction and planning management and may not be modified without legal procedures". It can be seen that the relevant plans approved according to certain legal procedures have certain legal effects and are mandatory and must be enforced.

The construction of parking facility is one of the public service facilities in accordance with the size of the buildings or the size of the population. It is subject to the nature of the corresponding building and planning, the nature of the land where the building is located and its corresponding plan, and the urban parking facilities (special) planning. The construction is generally based on both public and residential buildings, such as shopping malls, hospitals, office buildings, and residential quarters, and different types of land and buildings have different requirements for construction standards.

Article 10 of the Real Estate Management Law stipulates that "the transfer of land use rights must comply with the overall land use planning, urban planning, and annual construction land use plan"; Article 12 stipulates "the use, term, and other conditions of each land that is being transferred needs to be planned together by the land administration department of the municipal, county governments, the urban planning and construction, and real estate management departments." The Notice of the Ministry of Housing and Urban-Rural Development and the Ministry of Land and Resources on Further Improving the Urban Parking Lot Planning and Construction and Land Use Policy (Urban Construction [2016] No. 193) stipulates that the special provisions for a reasonable layout of parking facilities shall be based on "the overall land use planning, urban master plan, and the urban comprehensive transportation system planning". It needs to be "in line with the Regulations for Urban Parking Planning, Guidelines for Urban Parking Facilities Planning, and other relative requirements of the construction of infrastructure.

When the developers obtain the land construction, it must comply with the relevant laws, regulations, and planning regulations; that is, when the developers obtain the land, they also need to follow the relevant legal obligations, such as the need to comply with ventilation and lighting and keep a certain space between buildings. It is necessary for them to comply with the regulations on environmental greening, fire protection, civil air defense measures, fitness, and cares for elders, obtaining necessary spaces and facilities. These are the statutory obligations attached to land property. These obligations are for the realization of certain public interests and are the embodiment of the social obligations of property rights. Such social obligations are statutory and objective, with clear provisions on legal documents, plans, standards,

indicators, and so on. They are passive social obligations. Facilities such as environmental greening, civil air defense measures, and transportation are responsibilities for the urban managers. The nation adopts legislation to socialize and marketize the realization of relevant obligations. The developers are also the beneficiaries and are responsible, and the government are the supervisors.

The provision of parking facilities is also part of the social obligation of property rights. It is included in the urban planning, is part of the public service facilities, and is an important component of the special planning of parking facilities. Therefore, the parking facilities are in a state that the developer can expect, the owners can trust, and the government can be held accountable: when the developers are recruited for the land, he knows he can expect that the civil air defense measures, the environmental greening areas, and the parking facilities need to be included. Article 12 of the State Council's Regulations on Urban Real Estate Development and Management (Revision 2018) stipulates that "urban planning and design conditions" and "construction requirements for infrastructure and public facilities" are one of the bases for the transfer of land use rights. Building users have a reliance on the integrity of the building functions and the necessary facilities. The owner can expect that the legal regulations and planning contents will be fully realized. The government is a law enforcer and has the obligation to enforce the laws and regulations, planning standards, and others. It is necessary to supervise the developers to build according to law, and the developers have to take corresponding responsibilities for any violations of the law. In 2016, the Central Committee of the Communist Party of China and the State Council issued "Opinions on Further Strengthening the Management of Urban Planning and Construction", stating that "we need to further strengthen the mandatory planning, and any violations of planning must be held accountable."

### **3.2 Realistic Considerations for the Construction of Parking Spaces**

The basic theory of Marxism believes that material determines consciousness. A country's view of wealth and ownership in a certain period is bound by the economic foundation. At the same time, consciousness has an impact on the development of matters. The construction of the upper system and the concept of the rule of law of the people will in turn affects the economic and social development and institutional reform of our country. The absolute individualistic concept of property ownership excludes legal provisions and administrative measures that hinder the possession, use, and domination of properties, and will oppose external interference with the object by the absolute theory of real rights, even if such interference is for the public interest. The social attributes of ownership pay more attention to the overall interests of

the society. On the basis of guaranteeing the basic rights of ownership, it emphasizes the social responsibility of property rights. The society that recognizes this theory is more likely to introduce laws, policies, and measures that contain social attributes.

The Constitution of China has provided a political basis and legal normative basis for the social obligation of property rights. Property rights have broad social relevance. Requiring building developers to build parking spaces is more of a reality, that is, the government or individual cannot fully provide the large-scale supply of parking spaces. It also stems from the analysis of economics. It is better supported by a building of living or working to provide a parking space.

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## CONSTRUCTION

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We do not deny the property rights, but due to the actual social and economic conditions, we impose limited and formal restrictions on the exercise of the power of part of the property rights. No right exists in isolation, nor does it merely stay in the text of legislation. The realization of rights must always be supported by certain material conditions. The full realization of land and building property rights relies on the full supply of social resources associated with property rights, buildings with complete service facilities, and at the same time its attractions on social forces to live, shop, and work here.

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