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Comparison of the impacts of non-negotiable and negotiable developer obligations in Turkey

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ABSTRACT

Due to financing limitations, city governments increasingly rely upon private sector finance to support the supply of social and technical infrastructure. Accordingly, developer obligations have become increasingly important in urban planning and in land and property development. Compared to the numbers of previous studies related to 'non-negotiable developer obligations' (N-NDOs), the studies related to 'negotiable developer obligations' (NDOs) are much more limited. Also, there is a lack of studies comparing their respective impacts. The aim of this article is to compare the impacts of N-NDOs and NDOs within the specific country context of Turkey. The findings of study demonstrate that efficiency of N-NDOs and NDOs is closely related to the balance between certainty and flexibility in planning and land development system, the degree of transparency and the level of accountability, and value capture capacity.

1. Introduction

In general, social and technical infrastructure such as roads, green areas, and social facilities have traditionally been provided by the state through the general taxation system (Fox-Rogers & Murphy, 2015). In this system, the taxes levied seek to capture all or some of the rise in real property values under the direct rationale that landowners should contribute a share of their community-derived wealth to the public pocket (Alterman, 2013, p. 14). Under this direct rationale, the 'unearned increment' should be redistributed. However, in many countries there is a decreasing tendency for the responsibility for the financing of social and technical infrastructure to fall on the public (Crook, Henneberry, & Whitehead, 2016; Smolka, 2013). This change can be for various reasons, including the fiscal pressure on city governments under enabling strategies (Turk & Korthals Altes, 2013a), the impacts of neoliberal policies (Fox-Rogers & Murphy, 2015), fiscal decentralization towards local authorities (Mahon & Macdonald, 2010; Miller, 2007; Smolka, 2013), the influence of multilateral agencies promoting public value capture (Peterson, 2009), and booms in real estate markets (Monk & Crook, 2016; Renard, 2003). Therefore, city governments have increasingly relied upon private-sector finance to deliver public goods and services (Clinch & O'Neill, 2010; Crook et al., 2016; Healey, Purdue, & Ennis, 1996). The use of value-capture instruments, based on an indirect rationale, have gained more and more importance in many countries (Alterman, 2012; Healey et al., 1996).

One type of indirect value capture instrument is the contributions by the developer or landowners for the supply of infrastructure,

facilities, and services subject to the obtaining of planning and development permission (Campbell, Ellis, & Henneberry, 2000; Ennis, 1996, 2003; Munoz Gielen, 2016). These contributions are known as *developer exactions*, *mandatory land dedication*, or *community benefit agreements* (CBAs) in the United States (Wolf-Powers, 2010; Baxamusa, 2008), *planning gains* or *planning obligations* in the United Kingdom (Crook et al., 2016; Monk & Crook, 2016), and *participation* in France (Renard, 2003). In some sources in the literature, a proposed general term is *developer obligations* (Alterman & Kayden, 1988; Alterman, 2012; Munoz Gielen, 2016). In this article, *developer obligations* is used as a general term.

There are two sorts of developer obligations: non-negotiable developer obligations (N-NDOs) and negotiable developer obligations (NDOs). N-NDOs are usually based on detailed legislation that regulates their scope with the use of legal standards and categorizations. They are usually prescribed and detailed in local legally-binding land use or zoning plans or in other local policies (Munoz Gielen & Van der Krabben, 2017, p.11). In this mechanism, local governments have the authority to take a limited portion of land from landowners, for the provision of social and technical infrastructure, subject to obtaining planning and development permission (Alterman, 2007). On the other hand, NDOs are a product of the 'give and take' bargaining, endemic to the zoning administration of local governments (Alterman & Kayden, 1988). In this mechanism, the private developer is informally asked for a contribution as a condition of approving the project. The type of contribution may be a direct provision or a monetary payment. In general, contributions are orientated to off-site capital works, on-site

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capital works, facilities, and services (Ennis, 2003; Campbell et al., 2000). In many countries, NDOs are not openly based on legal sources, so in these countries local government-related units can take *ultra-vires* actions, or illegal decisions, in the application of this mechanism (Alterman & Kayden, 1988). Local governments, for the most part, rely on their contractual power under special rules of law for the legitimacy of their use of this mechanism (Alterman, 2007). The NDOs in this form have a mostly *ad hoc*, informal structure that changes from project to project (Fox-Rogers & Murphy, 2015; Campbell et al., 2000; Crow, 1998). NDOs emerged depending on the needs of private sector (developer/landowners) in land markets without having legal base. In this sense, they can be regarded as an institutional innovation. However, the knowledge developed in relation to NDOs seems to be much more limited although there are a lot of studies related to N-NDOs, and there is a lack of studies comparing their impacts.

The aim of this article is to compare the impacts of N-NDOs and NDOs within a specific country context – Turkey. The impacts of N-NDOs and NDOs are compared in respect of three main aspects: their impacts on ‘the urban planning and land development system’, ‘transparency and accountability’, and ‘value capture capacity’. Comparing their impacts can serve to understand their efficiency in planning and land development system in Turkey context.

This study focuses on Turkish cases. A Turkish study is needed for two reasons. First, in the international literature, the studies related to developer obligations from the perspective of a developing country are quite limited. Second, in the international literature, the studies comparing the impacts of the N-NDOs and NDOs within a specific country context are limited. Turkey study has an important practice related to use of N-NDOs and NDOs. Therefore, Turkey study is suitable for comparing their impacts within planning and land development system.

Section 1 outlines the use of N-NDOs and NDOs in the international context, while Section 2 examines their use in the Turkish planning system. Section 3 provides some case studies. This section is divided into two sub-sections. The first sub-section provides the case studies and the second sub-section explains the findings of these case studies. Section 4 compares the impacts on the urban planning and land development system, transparency and accountability, and value capture capacity; and Section 5 draws conclusions.

2. Context of Turkey: use of N-NDOs and NDO

2.1. Turkish planning and land development system

Despite the rational comprehensive character of the planning legislation in effect (Dede, 2016; Unal, 2008), there exists a dichotomy between the planning legislation and practice in Turkey. Local governments in Turkey have been striving to overcome the rigidity of the current planning system by introducing certain elements of flexibility in order to create a favorable environment for developers and to meet the demands of the market. This approach has directly affected the land development system (Turk & Demircioglu, 2013b; Turk, 2016). As a result of this, the voluntary method has been popular in comparison to the use of the other land development instruments like land readjustment (LR) and expropriation (Turk, 2004). The use of Plan Notes that precede the decisions of local spatial plan has been effective (Özkan & Turk, 2016). Also, NDOs (or ‘protocols’ as they are called in Turkey) particularly for large-scale development projects have been one of these elements of flexibility.

2.2. The voluntary method as a N-NDO

The voluntary method is a legal instrument that emerges within the scope of Articles 15 and 16 in the Reconstruction Law (No. 3194). The voluntary method is the process through which the landowners (developers) voluntarily change their land from cadastral plots to urban plots without waiting for LR, which is the basic instrument of urban

land production in Turkey.

As a result of the implementation process, the landowner (developer) is able to obtain building permission for the plot because it has been converted into an urban plot. No compensation is given to the landowner for the parts that are ceded to the public. Because this process is made voluntarily by the landowner, by definition, the municipalities cannot force the landowners to undertake this voluntary method. The voluntary method, despite being a method made at the request of the landowner, arises mostly from an obligation, and this arises because of the neglect of the relevant municipality in respect of LR or expropriation.

Although there is no established contribution percentage for the voluntary method, the contribution percentage in LR project has been established as 40%. Generally, the landowners prefer to give contribution up to 40%. In the practice of this method, if the landowners’ contribution percentage was above 40%, the landowners do not opt for the voluntary method.

2.3. Plan Notes

The use of Plan Notes can be considered as a transition stage from N-NDOs to NDOs. Plan Notes occur depending on local spatial plans. In legal sense, Plan Notes mostly preceded the decisions of local spatial plan. The main function of the Plan Notes is to give detailed information of unexplained issues in local spatial plans. However, in time, their scope has widened. Plan Notes, enable the variants such as mixed land use functions, optional land use functions, or development with a preliminary project. Besides, they can set up the rules related to extra contributions for social and technical infrastructure.

Generally, the amount of the social and technical infrastructure areas that are envisaged on local spatial plans are large, and in most cases, the share of social and technical infrastructure, as a part of the planning area in the local spatial plans, is more than 40%. In most cases, the social and technical infrastructure envisaged in the local spatial plans could not be met by the contribution percentage (40%) determined for LR project. In this case, the difference would be obtained by the municipality through expropriation or purchasing. However, the municipalities cannot use the compulsory purchase or purchasing methods due to their financial constraints. Usually, they simply don't have enough money. In this situation, the only option under public law is that the landowner gives a contribution percentage of over 40% through a voluntary method. Generally, the landowners do not prefer to give extra contribution more than 40%. Therefore, in the early 1990s, the municipalities sought alternative solutions to the methods described in the Reconstruction Law (No. 3194) (Turk, 2003; Ülkü, 1997). Since the existing implementation instruments are those arising from the public law, they do not provide the municipalities with the possibility of negotiation with the landowners to obtain social and technical infrastructure. These instruments cannot be used in a different manner. However, alternative solutions have been produced in connection with the local spatial plans through Plan Notes. With this approach, the municipalities have been able to negotiate with the property owners, and the municipalities have found these alternative solutions rather attractive (Ülkü, 1997). However, there has been a higher judiciary resolution against such Plan Notes implemented by municipalities (State Council 6th Circuit E: 1999/2248 K: 2000/4203 of 06/22/2000). Because they are based on local spatial plan instead of law, the higher judiciary ruled that the Plan Notes cannot replace legal consequences of the land development instruments.

2.4. NDOs in the Turkish planning system

From the 1990s to the early 2000s, the construction of large-scale projects was a nascent organizational field in Turkey, but during this period the construction of certain large-scale projects began, especially in Istanbul. With the implementation of these projects, NDOs started to

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