



Implications of Development Rights Granting Procedures

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Abstract

Over the last fifteen years and particularly from the early 2000s, relatively new planning gain procedures have been introduced within the Italian planning legislation and practice. Such instruments base their rationale upon the concept of developers' contribution for the provision of community facilities and services. This is justified by the lack of financial resources which affects local planning authorities and therefore their ability to provide for these services. In recent years, trends tend to confirm an increase in the use of such tools as well as in the range of facilities developers must provide. However, the practices in use differ from each other on the basis of the nature of development rights granted to developers and may constitute cause of delays within the planning process. Particularly, regarding development plans preparation and approval processes. Practices are mainly three and their use varies with regard to the context and objectives aimed at. Nevertheless, there is one basic and common target: to recoup and return some development value to the community. The first practice aims at an equal treatment of landowners and of their property rights, granting the same amount of development rights, independent of the use allocated on their parcels, in order to achieve the overarching cited objective. The second is a form of compensation for the loss of part or of the whole market value as a consequence of a public planning action. The last practice works as a bonus to developers and aims to incentive certain characteristics and uses of development proposals.

The use of these practices involves some main implications, such as transfer and purchase of development rights, relationship between involved landowners of sending and receiving areas, scope and rationale underlying planning gain procedures, which need to be examined to understand the evolution of the current Italian planning system.

Introduction

This paper will deal with some of the main aspects, difficulties and problems, particularly relating to development rights granting procedures, which are deemed to affect development plans implementation and their technical effectiveness. Factors influencing the achievement of development plans' objectives are numerous. According to many authors (Garkovich, 1996; Karrer, 2007; Mello, 2007 and Stanghellini, 2009) they mainly concern the relationship between structure plans and development plans with reference to setting planning restrictions and granting development rights; structure of land ownership; transfer and purchase of development rights; negotiation between local authorities and developers.

During the last fifteen years in Italy many regions have started a reform process of their planning legislation and practice which derived from the necessity to overcome an old and obsolete national



system. At present 9 of the 20 Italian regions have reformed their planning system and introduced such procedures in their legislation. Whilst, the remaining regions, some of which have the reform process in progress, have introduced them in practice albeit not in their planning legislation. Equalisation, Compensation and Bonus-rights (respectively *Perequazione*, *Compensazione* and *Premialità*, this is how these planning tools are named in Italy) are all planning practices which involve the transfer of development rights and consequently all the problems and difficulties to them related (which however go beyond the aim of this paper and will not be further discussed). Moreover, they may be compared to and considered as practices for securing planning obligations since through their use developers are asked to contribute to community facilities and services. The element of interest in the use of such practices is the fact that over time they have seen their scope and objectives widening. As a consequence, the negotiation phases which involve developers and local authorities in determining contributions lack certainty, transparency and speed so that implications for development plans' effectiveness arise. In consideration of this, when talking about effectiveness it will be referred to the technical effectiveness, concept firstly introduced in Italy by Ferraro (1998), as the capability of development plans to achieve their own spatial objectives as stated at the stage of approval. The frame is therefore complete and it is straightforward to comprehend the role such tools play within the planning process.

Therefore, what are the impacts and main implications for the planning process which arise from a wide use of such practices? Do they allow local authorities to achieve objectives of distributive justice or they are tools by which to attain other public planning objectives?

The focus of the paper is explicitly placed on the operation of the three planning practices which, nowadays, represent the most widespread planning measures local planning authorities use for allocating development rights and negotiating with developers. The research is conducted through the case study research methodology by collecting data from the Tuscany Region and analysing a few cases such as Florence and Rome Local Plans and Tuscany, Emilia Romagna, Veneto and Lombardy Regional Acts, where explicit introduction and use are made of equalisation, compensation and bonus-rights practices.

The findings will be used to highlight the trend towards which the Italian planning system could evolve and the positive and negative features which characterise some current regional planning systems towards which all other regions are likely to evolve.

The first part of the paper explores in brief the factors which impact on plans effectiveness.

In the second part the introduction of the three tools within planning legislation and practice is discussed and their general and "legislative" scope and objectives are analysed. The three planning tools are then presented separately in order to show their functioning, scope and issues and point out some of the main implications for effectiveness of local plans.

1. Effectiveness-impacting factors

A brief account of those factors influencing achievement of local plans' spatial objectives is considered necessary in order to understand the context within which Development Plans operate after the innovation process brought about by regional legislative initiatives. The factors, therefore, relate in part specifically to the new structure of the local plan and partially to exogenous elements which are not under the direct control of planning. They vary substantially and relate to different aspects which may be summarised as follows:



- Firstly, the structure itself of the new planning system which is now articulated, on the basis of the reform supported by INU (National Planning Institute), into three levels. It can be argued that such a new structure does not contribute at all to making the planning process less time-consuming than it was (Urbani, 2008). In fact, the elaboration process, which in the Tuscany region takes on average 4 years only for the structure plan to be approved and totally 7 years for the structure and development plans, is considered to be far too long to hold the idea that the new system is more rapid, flexible and effective (IRPET, 2009; Tuscany Region, 2009)
- Secondly, the relationship of development plans with structure plans in terms of the implications of planning decisions on classification of land, granting development rights to landowners, setting building indices for certain categories of land parcels and, therefore, making the property structure comply with the plan's prescriptions.
- Thirdly, the three planning practices which are currently most used by planning authorities to implement development proposals, secure community facilities and services and to achieve other objectives which are beyond the planning field such as distributive justice and returning some development value to the community.
- Last but not least, other aspects such as structure of land ownership, transfer and purchase of development rights, agreements between developers and local authorities which may generate conflicts and lack of transparency.

These can be viewed as the elements which mostly influence the whole planning process including the realization of development plans. However, it may be held that particular impacts arise on the elaboration and implementation stages from the use of practices such as equalisation, compensation and bonus-rights whose criteria of use are defined either in the structure plan or development plan. Such a decision varies among regions and even among cities within the same region.

2. Equalisation, Compensation and Bonus-rights

The use and scope of these tools have been increasing during the last fifteen years since their introduction and this trend is still in progress. It could be claimed that areas, services and community facilities which are demanded to building producers within development proposals are increasing over time in order to both overcome the financial crisis local authorities are going through and return a part of the development value to the community. Furthermore, research has shown that important differences exist between development rights granted through each one of the three practices. Such differences relate to the legal nature of development rights, to economic and fiscal aspects and to the aims aimed at through their use. In the next sub-paragraphs the practices are presented separately from each other by analyzing several aspects such as legislative definition, objectives, functioning, nature of development rights, introduction within a national regulation or law and impacts on the planning process.



2.1 *Equalisation (Perequazione)*

Firstly, clarifying the fact that this practice has yet not been introduced within the national legislation, for a clear explanation of such a tool it is fundamental to start from its definition given within the academic debate and in the regional legislations.

Bearing in mind the small differences among regional bills, which however are irrelevant here, the equalisation is intended as a mean for aiming at an equal distribution among landowners of the advantages and disadvantages which come from urban development (Boscolo, 2008; Karrer, 2009; Stanghellini, 2009). The same logic is at the basis of the regional legislation of those regions which have introduced such a tool. On the one hand, advantages relate to the granting of development rights and therefore to the increase in land value which is accrued by landowners. On the other hand, disadvantages refer to real property council tax (ICI) and contributions to the community which developers are required in terms of services and facilities. In this case development rights are constitutional rights granted to landowners by the local administration through its planning powers. Therefore, the equalisation mechanism functions as an equal allocation and distribution of development rights and burdens among those landowners whose area, classified as urban land and irrespective of the land use designated by the action plan for a given land parcel, is either initially designated for development by the structure plan or lies within successive development proposals. Hence, each land parcel is attributed a building index relatively to its physical and legal status on the basis of land classification made by the structure plan, not with regard to the land use defined for it by the following action plan. However, as specified within the introduction, this implies the transfer of development rights (using or selling them) from those areas which are designated for public uses (sending areas) to those areas identified for private development (receiving areas). Afterwards, owners of land parcels assigned to public uses must relinquish their property to the local authority (Micelli, 2002). Therefore, it can be claimed that the principles which make up the rationale of such a planning tool are those of equity and distributive justice among landowners.

Nevertheless, the fundamental element that needs to be highlighted and that has major implications for plans effectiveness is the fact that aside from those services and facilities developers must provide by law under decree n. 1444/1968 as planning obligations (standard areas to be ceded), the equalisation practice requires building producers to relinquish additional areas for public facilities which go beyond such obligations. The functioning of the whole system along with this particular features arises concerns which cannot be denied.

Firstly, the negotiation process between the local authority and the developer for determining the amount of contributions, in terms of percentage of the whole area to be ceded (extra standard) and services to be provided, is not regulated at national level and varies among plans or within the same plan between different development sites. The fact that negotiation may be needed over every development undoubtedly determines delays within the planning process. Secondly, according to Karrer (2009) in-kind and infrastructure contributions which exceed those set up by law can constitute additional taxation on development and go beyond what can legitimately be required by the planning authority. A feature, this, which is also recognized by Cullingworth and Nadin (2006: 201) with reference to the English system of planning obligations. Such aspect may have a strong impact on transparency and speed of the planning process as well as on the total cost of a development which consequently falls on the final acquirer.



In fact, while in Italy an increase in the use of such practices for obtaining developers contributions can be noticed, in other countries such as England the debate is evolving towards the introduction of a new measure (Planning Gain Supplement) which should reduce developers contributions and replace it with a form of taxation (Barker, 2004; HMT, 2005). Therefore, the evolution in England highlights a different trend which shows the potential for facing future problems that may occur in some regional planning systems.

To give an example of such an “extra-taxation” the Florence local plan, adopted in July 2007 but not yet approved, will be referred to. In its norms the plan, article 33, states that:

“within interventions of urban transformation a minimum of 50% of the development area must be relinquished to the Comune in order to comply with the legal requirements on planning obligations (decree n. 1444/1968) and form a reserve of public areas for the achievement of pre-determined (before cession) public objectives” (text in brackets added) (Florence City Council, 2007).

Moreover, other problems which may arise from the use of such a practice relate to its introduction exclusively in practice while not in legislation. This is the case of the new Rome local plan approved in March 2008 where equalisation was used along with compensation. The plan, based on the national planning system as defined by the national Act n. 1150/1942, has introduced the equalisation practice within its norms albeit not disciplined in the regional legislation. Landowners have appealed against planning decisions and use of such a tool and are now waiting for judgment by the administrative justice (Del Re, 2009).

It becomes clear with these examples that apart from objectives of equity and distributive justice, the implicit purposes aimed at are those of acquiring and securing areas to the public estate and uses by avoiding using the regulative planning tools of expropriation and restrictions on land.

According to Boscolo (2008), over recent years the number of local administrations implementing their local plans by employing such a practice is growing even if the number of those authorities constructing the plan elaboration process through the use of the equalisation remains low.

2.2 *Compensation (Compensazione)*

As well as for equalisation, compensation in the form of granting development rights has not been introduced by a national planning Act. Its use within planning is due to some regional planning bills, some of which include such practice in a more detailed statement than others (i.e. regional act n. 11/2005 Lombardy Region), but mostly to local plans which have used it in practice (see Rome Local Plan).

A common aspect of the two practices, equalisation and compensation, is that their use should be accepted by landowners on a consensual basis. Local authorities cannot oblige owners to transfer their development rights. Refusal generally leads to planning restriction on the piece of land designated for public use and afterward to expropriation.

The practice as intended at the present works through granting development rights to those landowners who own land which is of interest for the public administration's goals. Generally, compensation schemes aim at achieving public objectives such as environmental improvement and infrastructure provision by obtaining the land needed (whole property or part of it) through granting development rights which monetary value corresponds to the market value of the property taken. This works as an



incentive for landowners who must then relinquish their property or part of it and transfer their rights either on receiving areas identified by the plan or use them on the remaining part of their own property.

As can be noticed, an important difference exists between development rights deriving from equalisation and those deriving from compensation. In fact, rights from compensation are classifiable as an indemnity for a loss determined by a public planning action which will definitely be granted to the affected landowner when the obligation is completed. According to Boscolo (2008), a significant aspect which clarifies the difference existing between the two typologies of rights is that equalisation rights can be withdrawn by the local authority as a legitimate exercise of its planning powers while the same cannot be done for compensation rights when obligation is already complied with.

Other concerns that may arise when using the compensation tool may be compared to the ones related to the equalisation. Negotiation between landowners and local authorities may be very long and time consuming. Acceptance of transferring development rights to another area seems to be taken for granted while, instead, is a long lasting process that implies re-adjustments and agreements between landowners.

As regards the targets aimed at, these concern acquisition of public areas for environmental objectives and off-site infrastructures not directly related to a development. Moreover, through the compensation practice local planning authorities aim to avoid the use of planning restrictions and expropriation so reducing public spending in an austere economic cycle. Nevertheless, this trend, along with the issue of extra-taxation on landowners and developers as highlighted in the previous paragraph, may make the local authority totally dependent on the building sector for obtaining public areas and carrying out public works and infrastructures, with the risk of having a planning system even slower than the national system (Karrer, 2009). The compensation tool generally works along with the bonus-rights practice, which is dealt with in the following section, to provide landowners with a greater economic advantage so as to encourage the transfer of development rights.

2.3 *Bonus-rights (Premialità)*

Such a planning practice is the only one which has been introduced within the planning system by law albeit the act which introduced it was the Annual Financial Act n. 244/2007. It stated that (article 1, subsection 259):

“as to encourage the implementation of interventions aiming at realisation of social housing, urban and housing regeneration schemes, improvement of settlements’ environmental quality, the local authority, within its planning instruments, can grant a bonus-increase in buildable volumes (...)”

Such a statement as well as the Act itself which introduced the bonus-rights practice makes it clear that such a tool has to do with financial aspects of the planning and building activities. Therefore, development rights deriving from it have a peculiarity. In fact, as can be noticed, bonus rights are granted to landowners or developers for particular characteristics (often qualitative) of their urban interventions (including social housing, environmentally sustainable developments, town centre regeneration schemes, environmental improvements and protection, etc. etc.). Therefore, this implementation procedure can be defined as a bonus in terms of development rights granted to developers whose actions contribute to the achievement of objectives of public interest. Nevertheless, it may be argued that this third practice may not at all be considered as part of the planning obligation



system. In fact, according to Bartolini (2008), when this instrument is applied the planning authority does not receive any facilities in terms of public services and infrastructures so that no planning gain is collected by the planning authority itself.

Thus, if the first two instruments are ways through which planning authorities may recoup and return some development value to the community through acquisition of land to the public estate, the third one is not suitable for such a purpose and can be classified as a state aid to developers when concerns and is granted for the operation of services of general economic interest such as social housing (Bartolini, 2008). This is coherent with the Commission communication on State aid elements in sales of land and buildings by public authorities which considered the above-cited sales as State aids when conducted in absence of an open and unconditional bidding procedure (European Union, 1997). Therefore, development rights over a certain economic threshold granted for the operation of general economic services should be considered as state aids and subject to the European community regulation on state aids .

3. Conclusions

During the last fifteen years new planning practices have been introduced within the Italian planning legislation and practice. The use of such tools is increasing over time as a growing number of regions and local authorities are introducing them within their legislations and local plans. The three practices, equalisation, compensation and bonus-rights, aim at the achievement of different public objectives and differ from each other on the basis of the nature of development rights granted through them.

The first practice aims at an equal treatment of landowners and of their property rights by granting the same amount of development rights to landowners, independent of the use designated for their land parcels, in order to achieve objectives of equity and distributive justice. The second is a form of compensation for the loss of part or of the whole property market value as a consequence of a public planning action. The last practice works as a bonus to developers and aims to encourage certain characteristics and land uses within development proposals.

As already said legal differences exist between development rights deriving from equalisation, compensation and bonus-rights procedures. In the first case development rights are constitutional rights granted to landowners by the local administration through its planning powers. In the second case, development rights are classifiable as an indemnity for a loss caused by a public planning action which will definitely be granted to the affected landowner when the obligation is completed. In the third case, development rights granted to landowners or developers can be seen as a bonus (economic incentive) for the achievement of objectives of public interest. Such differences are, therefore, very important since the use that can be made of development rights by local authorities depends on their own nature.

The findings of the paper put in evidence how these new planning techniques are being used and what targets planning authorities try to reach by employing them. Achievement of objectives such as distributive justice and reduction of development value accrued by developers is surely made easier through the use of these practices, especially equalisation and compensation. Moreover, it is also true that, in a planning system where constitutional development rights are granted for a long period of time and their withdrawal may result quite challenging, the organisation of the local plan on three planning documents seeks to solve this problem by delaying the granting of development rights to the



second phase of the local plan. Such an evolution may result interesting for those countries which have a rigid planning system relatively to development rights issues and may face the same problem.

These practices are presented within legislation and local plans as means through which it is possible to achieve objectives of greater equity and distributive justice among landowners, environmental improvement, regeneration schemes and social housing provision. However, it is believed that local authorities also use them as instruments for tackling the lack of financial resources, securing additional services and facilities, dealing with the question of betterment, creating reserves of public areas and avoiding the use of expropriation and planning restrictions, so denoting a wider scope than that proper of the planning discipline. Therefore, apart from the goal of social housing provision which may fall within the planning objectives, the role of planning should be reduced and brought back to its essential targets, and local authorities should make a better use of other policies and tools such as those proper of fiscal and welfare-state policies for the attainment of objectives of different nature.

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