IV *World Planning Schools Congress*
Rio de Janeiro, July 3rd to 8th, 2016

Public Charge and Private Transfer of Building Rights in Brazil: the need for coherence in regulation and implementation

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Urban policy instruments began to be specifically referred by Federal Law in Brazil with the National Constitution of 1988, which was followed, after twenty years of debate in Congress, by the City Statute (Federal Law 10,257/2001). This national Law came to establish urban policy principles and guidelines for municipal action, including the regulation of urban policy instruments. Among those, the Municipal Charge on Building Rights (MCBR)[1] and the Transfer of Building Rights (TBR)[2] were defined in general terms as instruments to be used by municipalities according to local specificities and needs, in order to contribute to the principle of fair distribution of benefits and costs from the urbanization process.

The Articles 28 to 31 of the City Statute provide the bases for the MCBR, a charge to be collected by municipalities from additional building rights over a basic or regular FAR[3]. Once infrastructure and urban services are provided by the public and densities depend on their availability, this charge works as a value capture tool aimed at preventing the private appropriation of land value increments that result from administrative decisions on densities allowed in each city zone. The TBR, in its turn, is defined in Article 35 of the same Law. It allows the owner of an urban property to exercise in another location, or dispose of for this purpose, the right to build that for public interest reasons cannot be used in his property.

These urban policy instruments share a common origin in Brazil. During the seventies of the XX century the main concepts associated to them – and in use in other countries - were studied by urban planners in order to advance on municipal land use control. Eminent lawyers discussed back then the legal aspects involved and brought about a synthesis document called *The Letter of Embu* (1976), in which they concluded that charging for building rights over a basic FAR was constitutionally guaranteed for municipalities. Accordingly, a group of urban planners from *São Paulo* proposed the articulation of three instruments to set forth the notions around this concept: the establishment by municipalities of a basic and flat FAR for all urban land; a municipal charge on additional building rights; and the possibility for private landowners to transfer basic building rights in case they were prevented from using them in their properties.

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[1] In Portuguese, *Outorga Onerosa do Direito de Construir*, OODC.
[2] In Portuguese, *Transferência do Direito de Construir*, TDC.
[3] Floor Area Ratio. Known in Brazil as CA (*Coeficiente de Aproveitamento*).

Despite the coherence of this idea and specially the combined use of the instruments, studies on their regulation and implementation by Brazilian municipalities[4] show, in most cases, a different perspective. Both MCBR and TBR have been regulated in many cases without considering the basic FAR as the fundamental notion that must underlie their implementation. As a consequence, municipal experiences present a series of problems that result directly or indirectly from this inadequate understanding. It is common to find the authorization for the TBR up to the (potential) maximum FAR, disregarding that the additional building rights over the basic FAR should be considered as public resources. In the same line, it is also common to find the use the MCBR for the acquisition of extra building rights over the maximum FAR.

The implementation of one instrument in the absence of the other is almost a rule. When they are used together, besides the lack of coherence in their regulation, their use is disconnected from infrastructure availability/capacity, or the additional building rights are applied in a cumulative way, leading to excessively vertical buildings at inadequate zones. Another evidence of the incoherence is found in cases where the use of one of the instruments inhibits the application of the other; this can be observed in both ways. In sum, far from their role of regulating land uses and densities and adding in equality for the urban process, the MCBR and the TBR have been used by in an irresponsible way, just as market tools. From the private side, they have been understood as facilitators to buy extra densities; from the public side, they have been used as an easy way to grab new financial resources.

Clearly, a better understanding of the relations between the MCBR and the TBR is in need. This includes observing the basic (flat) FAR as the limit between private and public rights, establishing the maximum FAR for each zone according to the infrastructure and defining the rules and regulation for a coherent and articulated implementation of the MCBR and the TBR.

[4] Among other cities included in the studies carried out by the authors and other colleagues in the last decade, evidences cited come specifically from Belo Horizonte (MG), Curitiba (PR), Goiânia (GO), Porto Alegre (RS), São Paulo (SP) and Salvador (BA).