



## Managing Urban Growth using Soft-law – Lessons learnt from Yokohama in 1960s/70s and Koto in 2000s

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The city space transformation is more rapid and pronounced in growth than in urban shrinkage. Furthermore, the city space transformation in the growth phase has led to severe deterioration of the urban environment, including sprawl, since the financial revenues of municipalities required to develop public facilities in response to city growth rise behind population growth. In Japan, where this problem arose in the 1960s and 1970s, administrative guidance (soft law) were developed as de facto rule that required land developers to pay for part of the land and funds needed to improve public facilities, thus ensuring strong urban spaces during the growth phase of cities. However, those rules, which only required voluntary cooperation from developers, resulted in many failures as well as successes due to poor operation<sup>1</sup>. Later, in the 2000s, cases emerged where ordinances (hard laws) were developed to reinforce the weaknesses of these soft laws. This paper takes one of the 2000s' cases where hard laws reinforcing soft laws were developed, and shows that a combination of both is useful for a system that requires urban developers to bear the financial burden of public facilities, taking into account the characteristics of each, and suggests what roles soft laws and hard laws should play in such a system, also provides insights on what role soft law and hard law should play in such a system.

**Keywords:** Soft-law, Urban growth management, Land development exaction system for public facilities

### **Research objectives and introduction: How local governments in Japan provided public infrastructure that they are mandated to deliver in rapidly expanding housing development in 1960s and 1970s.**

The rapid housing development that accompanied Japan's high economic growth starting in the 1960s primarily advanced in areas adjacent to major cities. This forced local governments, which were legally responsible for the construction and maintenance of public infrastructure, to incur significant expenses investing in such infrastructure. Since those public infrastructure includes space-intensive projects, such as public schools for compulsory education consisting of elementary and junior high schools, local governments therefore were legally responsible for providing lands and buildings for them. Their costs for those land and buildings are supposed to be covered by their general account budget consisting mainly of revenues from the fixed asset tax and municipal inhabitants' tax, but their budgets could not accommodate the sharp increase of those expenditure. In addition, the central government did not regulate sufficient system to support local governments for the procurement or provide financial arrangement for the development. Therefore, the local governments in areas adjacent to major cities, needed to levy additional local taxation, which was not legally stipulated, as the last option.

For local autonomy including the above local taxation, the Constitution<sup>2</sup> and the Local Autonomy Act<sup>3</sup> vest local governments the comprehensive authority to enact ordinances within the limits of the law. However, it was argued, these provisions had been interpreted so narrowly that anything different from the law conflicts with the law and is therefore illegal. Guaranteeing this narrow interpretation, the central government had left little room for local policy making<sup>4</sup>.

Those situation necessitated the local governments to evolve a set of "extra-legal" policy instruments that skirt the issue of authority<sup>5</sup>, especially in public infrastructure development, and one of the "extra-legal" policy instruments is administrative guidance (Gyosei Shido) for developers in connection with housing developing.

Administrative guidance is a common Japanese regulatory technique that, although generally nonbinding, seeks to conform the behaviour of regulated parties to broad administrative goals<sup>6</sup>. For easier compliance with their administrative guidance by improving the readiness of the regulated parties, local governments tend to announce publicly "outline guidance" (Shido Yoko), which is legally internal guideline for governmental officials on an individual administrative guidance, but usually enforced effectively as directives to the regulated/guided parties, though it lacks legally binding force.

In the context of public infrastructure development by local governments, many local governments proclaimed "Outline Guidance Concerning Housing Development" (Takuchi Kaihatsu Shido Yoko) and included a local



development exaction system (LDE system) to require contribution of land/fee in connection with housing development. The contribution from the developers relieved a significant portion of the financial burden on local governments that otherwise would have been caused by the provision of public infrastructure<sup>7</sup>.

Considering the non-binding nature of administrative guidance and outline guidance, the content of administrative guidance and outline guidance should be realized based solely upon the voluntary cooperation of the regulated party. Governmental officials imposing the guidance should not engage in conduct such as compelling the regulated party to comply with their guidance. Local governments tended to add pressures to non-compliant developers' compliance on their guidance, in compensation for local governments' cooperation on development permission, and then it caused tension between local governments and non-compliant developers.

Yokohama's case of the administrative guidance under their outline guidance in 1960s and 1970s, was introduced as the good practice for encouraging voluntary compliance on their guidance and creating vast extent of land for public infrastructure<sup>8</sup>. Three types of factors for Yokohama's success by analysing their operation and enabling environments from the viewpoints of Soft Law, non-binding social norms, that needs to provide incentives for compliance were identified<sup>9</sup>. Some of the factors were incentives provided by Yokohama local government itself, but some were created by enabling environments in luck, such as the developers' priority on long-term benefits from their housing developments, that were out of local governments' control. Local governments should not expect those enabling environments for compliance on their guidance, but should develop the other policy instruments to increase their incentive of compliance instead.

This present research paper takes one step further in this direction by comparing the case of Yokohama with that of Koto, one Tokyo's special wards. It explores how local governments reinforce the other incentives of the factors that they can manage, especially in the cases that they would not be assisted by those uncontrollable incentives—as happened in Yokohama during the 1970s. The case of Koto shows how they enhanced the developers' compliance with their outline guidance concerning the developers' contribution on public infrastructure by creating ordinances to elaborate legal justification of the outline guidance (Soft Law), instead of regulating the contribution in their ordinance as obligation.

### **Previous Researches on the Relevant Topics of this Research**

Outline guidance have drawn academic attentions, especially in Japanese studies, as one of typical administrative styles of Japanese local governments since the outline guidance was created for housing developers in the late 1960s and early 1970s. The administrative guidance under their outline guidance was discussed in relation to administrative control from the central government, but the elements for the voluntary compliance was not<sup>10</sup>. The request of the outline guidance to the housing developers for direct negotiation with the surrounding residents was discussed as one of the Japanese consensual approach, but how the outline guidance has encouraged voluntary compliance or how it has been further reinforced in the connection with hard-law were not<sup>11</sup>.

In terms of soft law in public law, economic incentives of the voluntary compliance were are mainly in international law or business law, but no research on the economic incentives in public law. On the other hand, there are few researches on soft law in public law that focused the emotional aspects for complying as techniques from social psychology or affective science, not from economics<sup>12</sup>.

The history of Yokohama administration's outline guidance for housing development was analysed, but the developers' incentive for their voluntary compliance was not<sup>13</sup>.

### **The latest case of the outline guidance in Koto (Tokyo), compared with that in Yokohama (Kanagawa) – How Koto upgraded the outline guidance based on lessons learnt from Yokohama**

#### **Outline of the Yokohama's case in 1970s**

The City of Yokohama is located in the vicinity of Tokyo. From the early 1960s to the early 1970s, it grew as a commuter town to Tokyo since people relocated to Yokohama seeking better quality of life standards. Due to the lack of planning regulation to control such urbanization, the incoming socialist mayor—who had defeated the conservative candidate in 1963—enhanced local autonomy and outlined a plan to tackle urban problems, which includes “Outline Guidance for Housing Development”, adopted in 1968<sup>14</sup>. The Outline Guidance did not have legally binding force on the regulated, namely housing developers, but it requires their voluntary contributions of land for public infrastructures to be provided by Yokohama city government, in connection with their housing developments in Yokohama. It relieved a significant portion of the financial burden on local governments that would otherwise be caused by these developments



The city of Yokohama was the first major city to establish such outline guidance since it had suffered more rapidly by a large number of new settlers and a severe financial burden for public infrastructure development. As a result, about 60% of land used for public schools, which local governments are mandated to provide, equal to land for 150 public schools, was procured from the developers during the 25 years up to 1995<sup>15</sup>. In addition, it brought public spaces also for green area and parks in housing area (see Figure 1).

In the first years of this adoption, it received considerable attention throughout Japan. Many other local governments in the area adjacent to mega cities, Tokyo as well as Osaka, Nagoya, began to follow Yokohama's approach to land development<sup>16</sup> and approximately 99% of local governments in Tokyo had established the similar outline guidance by 1996<sup>17</sup>. Due to moderated demand for housing development in Yokohama, a series of official circulars issued by the Ministry of Construction requesting local governments to refrain their use of the outline guidance, and a fierce resistance from the developers on rise of their contribution in their profit, Yokohama refrained from implementing the guidance in 2004 as the other governments did.



Another city ↔ City of Yokohama

**Figure 1 – Example of the differences on public spaces in housing area between the city of Yokohama and the neighbouring city. The housing area in the city of Yokohama in this figure has more green area and public spaces. It was developed under the administrative guidance provided by the outline guidance for housing developers. (with the city boundary added by the author with a dotted line.)**

#### **Outline of the Koto's case in 2000**

Koto is one of the 23 special districts of Tokyo. It is located adjacent to the centre of business district of Tokyo, but due to delay of railway transport development, land prices in the area remained lower compared to neighbouring districts. In the late 1960s, as deindustrialisation advanced, brownfields of medium and large-scale factory sites were redeveloped into housing.

Responding to rapid housing development, as the other local governments in Tokyo did, Koto government had also proclaimed “Outline Guidance for the Development of Collective Housing” in 1973, and accordingly was giving administrative guidance on contribution of land/fee for the public infrastructure to development applicants. Along with slowing down of housing development and population growth, population in Koto declined from 1990. As the other local governments did, Koto also stopped their guidance on the contribution after 1993. Due to land price dropped down by excessive land supply from factories after the collapse of the bubble economy, the population in Koto grew again from 2000. Also facilitated by national policy of living in urban centre and Tokyo Metropolitan Government’s plan on Tokyo-Bay waterfront development, Koto area experienced a housing development boom that facilitated collective housing and demanded much more public infrastructure than housing development in 1960s and 1970s; as a result, Koto government restarted their guidance on the contribution to the applicants in 2002, based on the outline guidance that they amended.

Although Tokyo’s special districts are limited on local autonomy, they are vested with the power to make their own ordinance similarly to other Japanese cities or towns. In addition to the Outline Guidance, Koto enacted “Ordinance on Collective Housing Development” temporarily with a 4-year term limit from 2003. This allowed the local government of Koto to request land buyers for prior notification to the government of buying land in Koto for earlier intervention on their planning state, and designate area prohibited of new collective housing due to lack of public schools for newly settling school children. After a 4-year term, Koto focused the prior notification and enacted “Ordinance on Prior Notification of Collective Housing Development” specifically, and “Ordinance



on Collective Housing Development”, (the Ordinance) for the other issues including specifications of collective housing, and stopped designating the prohibited area, to the present.



**Figure 2 – High-rise condominiums at housing development area in Koto. They have rapidly increased the number of school children to be mandatorily accepted in public schools provided by the Koto government.**

### **Comparison between Yokohama in 1970s and Koto in 2000s**

Two analogies and two differences between the cases of Yokohama in the 1970s and Koto in the 2000s are discussed below to identify how Koto might learn from Yokohama’s case.

Firstly, Koto in 2000s and Yokohama in 1970s had similar conditions in terms of needs for the developers’ contribution to additional public infrastructure for new housing developments. Koto was considered as an exceptional case of rapid growth on the population accelerated by newly-built high-rise condominiums, while Yokohama suffered from rapid expansion of housing development area built with low-rise condominium or individually-detached houses as generally observed in the other cities in high economic growth period starting in the 1960s. Both of them had, however, a difficulty commonly to accept the growing number of school children in their public schools which they manage to build within their budgets.

Secondly, Koto in 2000s has not regulated the developers’ contribution in Hard Law, namely their ordinance, but still utilizes Soft Law, namely the outline guidance, as Yokohama in 1970s. In the case of Yokohama in 1970s, since land/finance should be arranged urgently to provide additional public infrastructure enough for rapidly growing needs, those pressing needs justified the Yokohama government to excuse their using the outline guidance instead of the ordinance, which generally requires too long time for democratic procedure to address such an urgent issues. On the contrary, the Koto government in 2000s cannot justify using the outline guidance requesting land/fee donation to additional public infrastructure for rapidly growing population since they once experienced the similar issues in 1960s and 1970s, and they should be ready for the second time with the other policy options than the outline guidance.

Thirdly, the Local Autonomy Act was amended between 1970s and 2000s. The Article 94 of the Constitution, and Local Autonomy Act accordingly, allow the local governments to enact their ordinances only within law and would be invalid if the ordinance regulate beyond the precedent laws in the case that the laws have already regulated in the same matters and there may be any conflicts between them. These provisions have been interpreted so narrowly that the ordinance is not allowed in the matter that the law does not regulate, but is interpreted to leave as it is. In legal terminology, central law pre-empts local ordinances unless the law specifically states otherwise. Moreover, this narrow interpretation is guaranteed by the authority of the concerned ministry in order to protect their authority<sup>18</sup>. According to global trend of decentralization, the Local Autonomy Act was amended in 2000 to



promote decentralization and enhance local autonomy, including legislation and taxation power of the local governments.

Lastly, Koto in 2000s could not expect the developers' compliance with their outline guidance on their contribution so much as Yokohama in 1970s. Housing development of Yokohama in 1970s were predominantly promoted by railway companies seeking transit-oriented development which could provide long-term benefit from train fare<sup>19</sup>. Therefore they had incentives to comply with the outline guidance for such a long-term benefit that would be more secured by improving living environment of their housing development under the outline guidance. On the other hand, Koto in 2000s had various type of the developers, which mostly did not think about transit-oriented development and did not seek the other long-term benefit to be brought by living environment improvement.

### **Viewpoint and discussion 1 - Why the contribution from the developers has NOT yet been regulated in the ordinance directly?**

As described previously, the local governments have been allowed by the Article 94 of the Constitution, and Local Autonomy Act accordingly, to enact their ordinances within law, but the ordinance was not allowed in the matter that the law does not regulate. It made local governments shrink from exercising their legislation power on the matter that the precedent law concerned.

In the case of additional revenue of local governments to be used for public infrastructures, since the Local Tax Act regulated the Housing Development Tax (Takuchi Kaihatsu Zei) in 1969 to be used impact fee for some kinds of public infrastructures, excluding public schools, and has been interpreted that the other kinds of public infrastructures should be paid by local governments revenue from the existing real estate tax. Although that tax has not ever used by any local governments since its establishment due to its limitation on use and too low maximum rate of the tax, any impact fee to be imposed by the Ordinance for housing development is considered invalid<sup>20</sup>.

### **Viewpoint and discussion 2 - The outline guidance is still workable as it was? - Legal justification for acceptability of the developers**

One of major incentives for the developers in complying with the administrative guidance or the outline guidance was categorised as "the reputation effect"<sup>21</sup>, in the context of the Soft Law on the cost sharing of public infrastructure development that would bring "indirect benefits that may be accrued by demonstrating with the guidance". The "reputation effect" could be enhanced, once the administrative guidance or the outline guidance is agreed by majority of the citizens and/or authorized directly or indirectly by democratic process.

In addition, the outline guidance was tolerated by the developers as well as the Ministry of Construction since they admitted that the guidance was the last option under such an emergency situation of insufficient capacity of public infrastructure, mainly public schools, for new settling households and accepted it as the last option in rapidly growing housing development<sup>22</sup>. Their understanding assumed such the outline guidance would not be valid after such an emergency situation was over and could not accept it when local governments had decades to get readiness for creating more legally valid policy instrument, after public demand for housing developments had been moderated, even at another boom of housing development. Therefore, local governments' request of the developers' contribution by administrative guidance under outline guidance after the first boom should require legal justification within local autonomy.

### **Viewpoint and discussion 3 - How the Ordinance contribute to legal justification of the outline guidance - Lessons learnt from Koto**

According to democratic process of ordinance within local autonomy, the ordinance is one of the most powerful policy instruments of local governments. Accordingly, the ordinance is the most appropriate instrument to grant legal justification on local governments' operation of the local autonomy, it could enhance the developers' acceptability on the outline guidance and encourage them to comply with it.

Considering the above discussion on conflict between ordinance and laws, the ordinance cannot directly quote/mention the outline guidance, but it can demonstrate certain linkage by aiming the same policy purpose as the outline guidance does, that can be enhanced by the purpose of the outline guidance.

In the case of Koto, the Article 1 of the Ordinance specified the purpose of the Ordinance as in "(it aims) good quality of housing and living environment in collaboration between the government of Koto and housing developers, toward safe and comfortable city." And its Article 5 paragraph 1 specified the best-effort obligations



of the developers, as in “(the developers) shall endeavour to harmonize their housing development plan with urban development plan of Koto.”

One the other hand, the Outline Guidance declares direct linkage with the Ordinance as in “(this Outline Guidance) specifies the other matters regarding collective housing development in addition to the Ordinance”, and describes the Mayor requests the developers’ contributions of land, building or any other facilities in the Article 12, and financial contribution in the Article 13, for their development of the public infrastructures.

### **Conclusion – implications to developing countries experiencing rapid growth of housing development**

Local governments in developing countries tend to rely heavily on intergovernmental fiscal transfers for delivering their mandated public services, and it is unrealistic for them to establish additional local tax independently from central government<sup>23</sup>. Considering that fiscal autonomy is one of the most essential factors for their autonomy on urban management including public infrastructure delivery, local procurement power, whether on local tax or on the other sources donated from the regulated, would contribute to the higher degree of local autonomy that enables the more sufficient supply to the public demand. Therefore, local governments in developing countries still need policy instruments to secure the financial resources at their fully-complete disposal that is sufficient to cover all services that it is mandated to deliver.

Policy makers of local governments in developing countries should also be careful of whether ordinance have conflict with precedent laws at drafting stage if the ordinance covers subject regulated by precedent laws. Since local governments in developing countries also have certain limitation in legislation, especially at the conflict with national laws, administrative guidance and/or outline guidance would contribute their achievements on the above purpose<sup>24</sup>.

On the other hand, they would work only as Soft Laws and need authorization for higher compliance with them. The ordinance can contribute to more compliance of outline guidance by legitimating outline guidance, even without legal binding force.

Generally, implementation of Soft Law is more difficult than that of hard law while establishment of hard law is more difficult than that of Soft Law. Nevertheless, Soft Law including outline guidance that administrative guidance derives from may be a more appropriate solution than legislation especially in developing countries<sup>25</sup>. The above discussed combination of multiple policy instruments, such as outline guidance and ordinance, would contribute to more compliance with administrative guidance and easier implementation of outline guidance as Soft Law.

### **Acknowledgements**

I appreciate the input of Dr Toshio Taguchi and the other members of the Akira Tamura Memorial-A Town Planning Research Initiative NPO, who provided me numerous suggestions and feedback on this research topic. I noticed significant improvements in this research through dialogue with members in the last several months. In addition, Dr. Fernando Ortiz Moya played a key role as proof reader by reviewing this paper with his expertise of urban planning.

### **Disclosure Statement**

No potential conflict of interest was reported by the author.

### **Notes on contributor**

Kenji Asakawa is a programme manager, and conducts research and investigation on good practices guidance on low-carbon and sustainable city development in Japanese cities to be applied to emerging cities in developing countries. Currently he is also a member of the Akira Tamura Memorial-A Town Planning Research Initiative NPO.

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### Image sources

**Figure 1:** Geospatial Information Authority of Japan (GSI), Aerial photograph of Nara-machi area in City of Yokohama, in 2019.

**Figure 2:** Photograph taken by the author in 2017.

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<sup>1</sup> Asakawa Kenji, *The Status and Use of Soft Law in Local Governments' Management of Urban Development: Restructuring the Logical Framework of Administrative Guidance on Impact Fees for Housing Development in 1970s Japan* (Conference paper of International Planning History Society (IPHS) 2018, Vol. 18 No.1.)

<sup>2</sup> Article 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.

<sup>3</sup> Article 14, paragraph 1. Local public entities may establish their ordinances on matters concerning their administration specified in Article 2, paragraph 2 insofar as they do not violate law.

<sup>4</sup> Reed, Steven R. *Is Japanese government really centralized?* (Journal of Japanese Studies, 8(1), 1982) 133-164

<sup>5</sup> Ibid.

<sup>6</sup> Young, Michael K. *Judicial review of administrative guidance: governmentally encouraged consensual dispute resolution in Japan* (Columbia Law Review, 84(4), 1984) 923-983.

<sup>7</sup> Asakawa, op. cit.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Reed, op. cit.

<sup>11</sup> Young, op. cit.

<sup>12</sup> Flückiger Alexandre *Soft Law Instruments in Public Law* (In: Ladner A., Soguel N., Emery Y., Weerts S., Nahrath S. (eds) Swiss Public Administration. Governance and Public Management. Palgrave Macmillan, Cham.) 2019

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<sup>14</sup> Taguchi, op. cit..

<sup>15</sup> Asakawa, op. cit.

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<sup>17</sup> Ministry of Construction Japan *Takuchi Kaihatsu Yoko no Minaoshi no Pointo* (How to revise administrative guidance on impact fees for housing development: in Japanese) (Tokyo: Gyo-sei, 1997)

<sup>18</sup> Reed, op. cit.

<sup>19</sup> Asakawa, op. cit.

<sup>20</sup> Local Autonomy Promotion Board (Chiho Bunken Suishin Honbu in Japanese) *Ordinance for Local Autonomy* 2004

<sup>21</sup> Asakawa, op. cit.

<sup>22</sup> Ministry of Construction Japan, op. cit.

<sup>23</sup> Asakawa, op. cit.



## The 19th International Planning History Society Conference - July 2022

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<sup>24</sup> Asakawa, op. cit.

<sup>25</sup> Asakawa, op. cit.