



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

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This research aims to analyse the use of administrative guidance such as the local development exaction system for collecting impact fees from developers in connection with housing developments from the viewpoint of “soft law”, as a collection of nonbinding social norms in Japan. It takes a brief look at the history of Japanese administrative guidance on impact fees from 1960s to 1990s, to identify how it contributed to public infrastructure development as a form of soft law in Yokohama. Furthermore, it considers the situation now faced by rapidly growing cities in developing countries and what they may learn facing a similar dilemma to that which confronted Japanese local governments in the past. Finally, it recommends more effective soft law for the management of urban development by cities in developing countries, and identifies challenges, some of which Yokohama experienced and others which it did not, which are likely to arise in developing countries wishing to make use of soft law such as local development exaction systems.

Keywords: soft law, local governments in Japan, urban development management, administrative guidance on impact fees, planning legacy and heritage

Research objectives and introduction: Why local governments needed administrative guidance on impact fees for housing developments yet refrained from using them

This research aims to analyse the rationale behind Japanese local government use and abolition of administrative guidance such as the local development exaction system for collecting impact fees from developers in connection with housing developments in 1960s and 1970s then consider whether similar guidance could be used to address public infrastructure development issues in major cities of developing countries, using Japan's experience in the 1960s and 1970s as a precedent. Insofar as an analogy may be drawn, this research intends to consider how such guidance could work more effectively than it did in Yokohama, which remains one of the model cases of implementing such guidance successfully from the viewpoint of “soft law”, as a collection of nonbinding social norms.

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. This included space-intensive projects, such as public schools for compulsory education consisting of elementary and junior high schools, and urban parks, which are required to be built both in proportion to the number of school children by the School Education Act, and the dimensions of the housing development in new housing areas, respectively. However, local governments' budgets could not accommodate the sharp increase of expenditure that accompanied such rapid population growth and housing development, since their additional revenue, especially that levied as local inhabitant tax from new residents, would not become available until the housing development for those new residents had been completed and those residents had moved in. In addition, although local governments sought a land value capture method to fund investment in public infrastructure, land readjustment could only provide rather small-scale spaces such as for roads, but was not sufficiently robust to secure space for large-scale infrastructure of the type mentioned above. Miki¹ analysed that the “benefit principle” system under Urban Planning Act could be utilised only for building sewerage because it was difficult to place a concrete value on the benefits realised from other public infrastructure. In order to levy additional local taxation, local governments are legally required to obtain permission from central government for tax not stipulated in the Local Autonomy Act. Furthermore, local governments were required to permit urban development according to the laws imposed by the central government, and Usui² said that they did not have any discretion to take the local situation into consideration when granting development permission. Therefore, many local governments established so-called “administrative guidance” including a local development exaction system (hereinafter called the “LDE system”) to require contributions of land in connection with housing developments, which relieved a significant portion of the financial burden on local governments that would otherwise be caused by these developments.



LDE systems typically stipulated the scope of their applicability and standards setting out the required dimensions of land to be provided for public infrastructure, as in Yokohama (see Table 1). Although it did not have legally binding force on developers, most local governments were able to obtain developers' voluntary compliance and have them contribute a portion of their developed land for free or at a nominal³ price. Developers' willingness to contribute should be seen against the prevailing economic circumstances in which a rapid increase in land prices meant developers could afford to comply, and their early compliance could facilitate cooperation of local governments, especially in the 12 major cities entitled to permit urban development in the early 1970s.

Applicability	All housing development projects*
Land required to be contributed for parks	Equal to or greater than 4% (for a public developer) or 3% (for a private developer) of development area without compensation
Land required to be contributed for public schools for compulsory education	Equal or more than 5% of development area with compensation for their costs, excluding their loss of income

*: From 1972, this was applicable to housing developments with an area equal to or greater than 0.1 ha.

Table 1: The administrative guidance of Yokohama concerning its LDE system in relation to housing development (excerpt). *Chosa Kiho (Quarterly Journal of Policy Studies) (in Japanese)*. [City of Yokohama, 1968] 75-78.

The city of Yokohama was the first major city to establish such administrative guidance since it had been rapidly populated by a large number of commuters to Tokyo, which imposed a severe financial burden for public infrastructure development. As a result, about 60% of land used for public schools for compulsory education, equal to land for 150 schools, was procured and 1.9 times the statutory minimum size of park land was secured from developers during the 25 years up to 1995 as calculated by Toshihiro and Sato⁴ and Taguchi⁵. As Yokohama's success was observed by other local governments, approximately 99% of local governments in Tokyo, 70% of local governments in Japan's three largest urban areas and 46% of all local governments nationwide had established similar guidance by 1996. (see Figure 1)

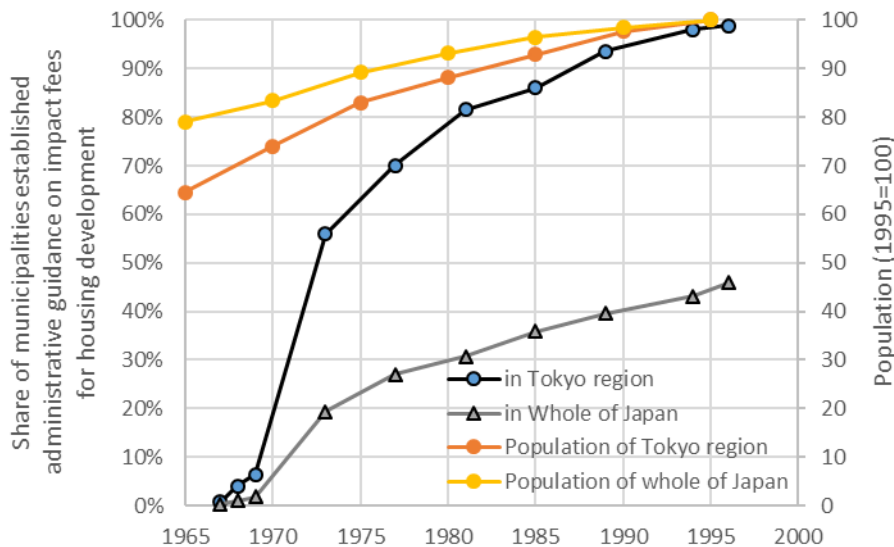


Figure 1: Share of local governments establishing administrative guidance on impact fees for housing developments and population growth. *National census*. [Ministry of Internal Affairs and Communications, 1995], *Takuchi Kaihatsu Yoko no Minaoshi no Pointo (How to revise administrative guidance on impact fees for housing development) (in Japanese)*. [Ministry of Construction, 1997], 8.



However, the lack of binding force behind these guidelines also caused tension between local governments' demands and non-compliant developers. Furthermore, some non-compliant developers brought lawsuits against the local governments to confirm the lack of binding force of the guidance and/or claiming compensation. A few small and mid-sized local governments lost such cases, as in *Yamaki Kensetsu Kabushiki Kaisha v. the City of Musashino*, [Tokyo Dist. Ct. 1975], since they could not control permits for urban development and abused their discretion to refuse non-compliant developers' requests for access to water supply and/or sewerage infrastructure. Those cases due to local governments' abuse of their discretion using administrative guidance became a source of social criticism and were blamed for raising land prices, and the Ministry of Construction issued 11 official circulars notes from 1982 to 1996 requesting that local governments refrain from imposing their LDE systems on developers. In addition, public demand for housing developments had been moderated by the slow-down in economic growth from the late 1970s, shifting the focus of local governments from "restraining" to "inducing" housing development in order to generate needed revenue from local tax by increasing their local populations. Accordingly, the majority of local governments refrained from implementing such guidelines, perceiving them negatively as stopgap measures to an issue that required the enactment of alternative laws and regulations at a national level, as evaluated by Ministry of Construction⁶.

Re-evaluating administrative guidance by restructuring the logical framework as soft law: How the city of Yokohama implemented it successfully

Even without legal binding force, administrative guidance (soft law) in Japan is considered a social norm in the same manner as laws and regulations (hard law) are, in terms of their common intent to serve the public welfare. The defining characteristic of soft law is a tool to lead people in a specific direction intended by the social norm maker. Therefore hard law is unnecessary where soft law can successfully elicit voluntary cooperation between parties. Moreover, soft law is somewhat superior to hard law in terms of its ability to build solid consensus without binding force, and its flexibility in establishing procedures to address various cases and accommodate changes in the market involving parties. Because of the abovementioned advantages, local governments were able to use administrative guidance to contribute to urban development control through the soft law of the LDE system. Therefore, administrative guidance should be perceived more positively as an effective policy tool.

From the viewpoint of law and economics, a party's obedience of a social norm is understood as based on maximising its own interests, and whether those interests will best be served by compliance with or non-compliance with that norm, considering the benefits and consequences of each option, as explained by Tyler⁷. Regarding the factors considered when one assesses whether to comply with a social norm, Iida⁸ identified sanctions, the necessity of the norm in question and individual morality as major factors that affect parties' decisions regarding the above, and sanctions are one of the most significant factors affecting parties' decision making. Sanctions can be categorised into two types: (1) those imposed by an authority, such as penalties, and which may be accompanied by hard law, and (2) those imposed by society, such as damage to reputation, which may be accompanied by soft law as well as hard law. In terms of this classification, administrative guidance may be regarded as soft law accompanied by sanctions imposed by society, such as the reputational effect⁹.

Yokohama's administrative guidance applied to developers can be considered a model case of an LDE system in terms of eliciting voluntary compliance, which is considered one of the most critical challenges for utilising administrative guidance as soft law. The following discussion addresses why Yokohama was successful.

As mentioned above, it is important to increase the impact on a party's interests in complying with the norm, including the detriment caused by violation, to lend credibility to soft law. According to Fujita and Matsumura¹⁰, the interests consist of the following three types: (1) direct and subjective benefits from compliance shared only between the local government and the developers, (2) long-term benefits (if prioritised by the developer), and (3) indirect benefits that may be accrued by demonstrating their compliance with the guidance.

Regarding (1) subjective benefits, since most developers in Yokohama are private companies, they will comply with guidance where compliance aligns with their economic interests. The economic interests of developers were served by the following in the case of Yokohama. Land in Yokohama had a higher scarcity value for housing development since as Tamura¹¹ said the Yokohama administration allowed a comparatively smaller area for development, approximately only 75% of the whole administrative area, compared to the area in Kawasaki, which is an adjacent city to Yokohama and has topographical characteristics similar to Yokohama, which opened approximately 88%. This enhanced the attractiveness of Yokohama, especially to commuters who continued to work in Tokyo, and created a strong incentive for developers to build housing in Yokohama. Furthermore, since the city of Yokohama was vested with the authority to issue land development permits as one of the government-designated major cities, that fact encouraged developers to comply with the guidance as early as possible in order to swiftly obtain land development permission. In addition, the guidance strengthened the bargaining power of the city of Yokohama by integrating the departments in charge of public infrastructure that normally



negotiated individually with developers, since the guidance concerned various sections of public infrastructure, which helped the Planning and Coordination Bureau work as a central authority under the strong leadership of Dr Akira Tamura. Therefore, the city of Yokohama offered (1) subjective benefits to developers to facilitate voluntary compliance with their guidance as a result.

The (2) priority given to long-term benefits applies to developers who prioritise long-term benefit over short-term gain, and attracts developers seeking long-term benefits through their compliance with norms. Fujita and Matsumura¹² identified the factors that affect the impact of (2) on a party's interests, such as the size of the group or party affected by the norm, as well as its type and degree of homogeneity. In the case of Yokohama, since housing development to be subject to the administrative guidance is predominantly promoted by railway company seeking transit-oriented development which could provide long-term benefits more than the other kind of housing development, the number of major developers prioritising long-term benefits was relatively few, and this factor increased the homogeneity of developers. The public, especially potential buyers of housing real estate, could easily identify each developer individually and this enhanced (3) the reputation effect, discussed below. This meant that developers tended to follow the leading developer, Tokyu Corporation, which fully complied with the administrative guidance since it had been derived from agreement between Tokyu Corporation and the city of Yokohama. Therefore, although the city of Yokohama might have utilised the homogeneity of developers in order to facilitate their voluntary compliance with the norms that the leading developer had already accepted, the feature of homogeneity among parties is not one within the control of a local government, and the city of Yokohama had no power to increase a developers' preference for (2).

Regarding (3) indirect benefits that may be attracted by developers demonstrating their compliance with the guidance, Fujita and Matsumura¹³ explained (3) indirect benefits can be accessed by information about a vendor which can be conveyed only indirectly by demonstrating the differences between vendors to consumers. In the case of administrative guidance, a developer's compliance would indicate that the accompanying public infrastructure has been properly built, and accordingly, the quality of the residential land is guaranteed to an extent, indicating that land meeting the specifications of administrative guidance may be of a higher standard, or that a compliant developer may be expected to develop land for comfortable living. The local government could signal the above to the general public, and the developer would therefore realise value through such compliance by gaining a greater profit from higher sales of their residential land. In addition, as the guidance set specifications on more essential public infrastructure for living, non-compliance with those specifications would cause larger loss due to reputational effects. Although the city of Yokohama at one stage intended to place a notice in a newspaper indicating that an area developed by Tokyu Corporation would not have an elementary school if Tokyu Corporation refused to obey their guidance as Tamura reminisced,¹⁴ they did not take measures to credit compliant developers. Local government might be able to further enhance developers' compliance with administrative guidance if they demonstrated a positive endorsement for compliant developers, such as an accreditation system for housing land meeting the specifications of their guidance.

Applicability to growing cities in developing countries: Implications of LDE systems

Local governments are responsible for providing various kinds of public services. Although the types of services supplied by local governments varies, local governments in Indonesia and Vietnam are responsible for the same kinds of services as those in Japan (see table 1). However, only small budgets are allocated for the services in local governments, for example, local governments in Indonesia spend less than 1/60th of the average expenditure in Japan (see table 2). Considering the decentralisation of authority in developing countries tends to assign local governments to deliver public services at their cost without taxation allocated from central government, many local governments in developing countries cannot afford to supply sufficient public services for rapidly developed housing areas at their own expense, though grants from central government to local governments partly fill the gap, as analysed by Kimura¹⁵.

Country	Planning	Basic education	Basic social welfare	Basic health service	Water supply	Electricity supply	Public transport	Business development support
<u>Japan</u>	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
China	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes
India	Yes	Yes	No	Yes	Yes	No	Yes	Yes
<u>Indonesia</u>	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Malaysia	Yes	No	No	No	Yes	No	Yes	Yes
Philippines	Yes	No	Yes	Yes	Yes	No	No	Yes
Thailand	Yes	Yes	Yes	No	Yes	No	Yes	Yes
<u>Vietnam</u>	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes



Table 1 Service delivered by local governments in the Asia-Pacific region, *Decentralization and Local Democracy in the World: First Global Report* by United Cities and Local Governments 2008. World Bank Publications. (Cities, U., & Governments, L. 2008) 67.

Country	Total public expenditure a) as % of GDP b) €per capita	Local public expenditure (local and meso level only) a) % of GDP b) €per capita	Ratio of local public expenses/total public expenses	Tax shares + general grants as % of the total LM income	Local tax revenues (=tax revenues subject to a local tax power) as % of total LM income
Japan	a) 22.9% b) 7,243	a) 12.3% b) 3,903	53.6%	69%	34%
Indonesia	a) 19% b) 189	a) 6% b) 62	33%	70%	<10%
Vietnam	a) 24% b) n/a	a) 11% b) n/a	48%	44%	24%

Table 2 Relative size of local governments' expenditure and income in the Asia-Pacific region, *Decentralization and Local Democracy in the World: First Global Report* by United Cities and Local Governments 2008. World Bank Publications. (Cities, U., & Governments, L. 2008) 68.

Furthermore, it is unrealistic for local governments in developing countries to establish additional local tax independently from central government. In Indonesia and the Philippines, since the variety of the local tax is limited/controlled by national law, they do not have any discretion to establish additional types of local tax. In those circumstances, they cannot increase revenue from the current taxation settings. Therefore, in order to raise revenue they would be greatly assisted by a voluntary LDE system based on soft law, such as the administrative guidance adopted in Japan.

Since soft law can bring certain incentives for land developers even in developing countries, and economic incentives are of major benefit to developers, developing countries may wish to consider the feasibility and effectiveness of a similar LDE system to that implemented by the Yokohama administration, by considering the incentives of (1), (2) and (3) above. Local governments in developing countries could increase the benefits offered to developers under (1), especially those which are vested with the right to issue land development permits as in Yokohama. However, a major part of housing land in developing countries' major cities tends to be developed by foreign developers who decrease the homogeneity of developers and could reduce (2) as a result. However, local governments could learn from Yokohama's experience by making greater use of the reputational benefits such as those in (3) if they successfully launched a labelling and/or certification system that recognised compliant developers.

The way forward: Concluding remarks

Rapidly growing cities in developing countries face a similar dilemma to that experienced by Japanese local governments in the past, and they may likewise be expected to have difficulties in raising capital for public infrastructure investment. This research has considered key taxation and public spending settings in a small number of developing countries for the purpose of exploring whether Japanese local government use of soft law could act as a kind of model. Nevertheless, successful application of soft law in developing countries will require further analysis of enabling environment of those countries for such a soft law, including their differences from Japan, in order to ensure that the implementation of LDE systems can be successful. Subject to that additional analysis, soft law of LDE systems may be a more appropriate solution than legislation, especially in developing countries where the rule of law is weak, since they have greater difficulty developing and enforcing laws when compared to Japanese local governments that have experienced high economic growth. Therefore lessons learned from Japanese local governments, especially the Japanese experience of using soft law for urban development management, including how to achieve such a solid consensus without the availability of legal coercion, could contribute to more effective practice of using impact fees to solve this dilemma in developing countries.



However, local governments in developing countries making use of soft law such as LDE systems would face the other challenges outlined below, some of which Yokohama experienced and others which it did not, but are likely to arise in developing countries.

As Uga¹⁶ identified, Japan's experience was that administrative guidance incentivised¹⁷ developers to scale down the size of their land developments in order to avoid requirements of the guidance that specified minimum sizes in determining its scope of applicability including in Yokohama. Since those local governments never found a satisfactory solution to that issue, it remains one of the big challenges accompanying the use of administrative guidance. In addition, there are the other issues that are faced commonly by local governments in developing countries, such as the governance and institutional capacity of the local governments.

Regarding governance capacity, local governments' direct collection of impact fees from developers would engender a risk of bureaucratic corruption, such as bribery. All taxes, including local taxes, are generally collected by central government, and this provides a safeguard against corruption in local governments that tend to have lower capacity in terms of governance than central government.

Regarding institutional capacity, the city of Yokohama invited professionals to organise the Planning and Coordination Bureau as a central authority for implementing administrative guidance, including Dr Akira Tamura, head of the Bureau, who was directly invited by the Yokohama city mayor of that time, Ichio Asukata. In addition to having their bargaining power boosted by the guidance and institutional reform to establish the Bureau, competent professionals working as tough negotiators brought continued success to their application of their guidance. Since local governments in developing countries still face many issues due to their varying individual capacities, successful application of such guidance would seem more challenging in developing countries.

Soft law can contribute to fundraising for public infrastructure, just as the LDE system did in many Japanese local governments, including Yokohama. As discussed above, it has certain advantages and should be considered as an alternative to legislation from central government. If local governments in developing countries are able to strengthen their capacity sufficiently to implement such administrative guidance, they can learn from the experience in Japan generally, and especially the model provided by Yokohama.

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No potential conflict of interest was reported by the author.

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Bibliography

Fujita, Tomokata, and Matsumura, Toshihiro, "*Shakaikihan no Hou to Keizai*" ("*Law and Economics of a social norm in Japanese*"), submitted to the 1st symposium on soft law of interaction between market and nation (2004)

Iida, Takashi, "Hou wo Mamoru Doki to Yaburu Doki" ("Incentives to compliance and non-compliance" in Japanese), *The Japanese Journal of Labour Studies* 57, no. 1 (January 2015)

Kimura, Shunsuke, "Hikaku Seido Kenkyu: Ajia San-kakoku no Tihoubunken to Tihouzaisei" (A Comparative Study of Decentralization and Local Public Finance in Three Asian Countries: Analysis of Local General



The 18th International Planning History Society Conference - Yokohama, July 2018

Revenue of Indonesia, The Philippines and Japan) (in Japanese), *The Hitotsubashi Journal of Law and International Studies* 14 no. 1 (March 2015)

Miki, Yoshikazu, *Juekisha Futanseido no Houteki Kenkyu (Legal study on beneficiary liability: in Japanese)* (Tokyo: Shinzansha Publisher, 1995)

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

Shima, Norihisa, A Study on the Development Trend based on Development Permission in Jakarta Special Province, Indonesia, *Journal of the City Planning Institute of Japan* no. 45-3 (2010)

Taguchi, Toshio, interviewed by the author, October 11, 2017.

Tamura, Akira, "*Tamura Akira no Tatakai*" ("*Tamura's struggle with urban development in Yokohama*" in Japanese), (Tokyo, Gakugei Shuppan Sha, 2006)

Toshihiro, Atsutaka, and Sato, Kyoto, "Yokohama administrative guidance on impact fees for housing development" in *Practical Method of City-Planning: A record of ten years of experience of Yokohama City's Bureau of Comprehensive Planning*, ed. Aiko Hasegawa (Tokyo: Kajima Institute Publishing, 1978)

Tyler, Tom R., *Why People Obey the Law* (Princeton University Press, 2006)

Uga, Katsuya, "Yoko Gyosei" ("Administrative guidance" in Japanese), *Jurist* 880 (1987)

¹ Yoshikazu Miki, *Juekisha Futanseido no Houteki Kenkyu (Legal study on beneficiary liability: in Japanese)* (Tokyo: Shinzansha Publisher, 1995), 3.

² Mitsuaki Usui, *Toshi Gyouseihou Seigi (Urban administrative law: in Japanese)* (Tokyo: Shinzansha Publisher, 2014), 427-436.

³ In the case of Yokohama's LDE system, the local government obtained the land for the schools at the cost of developers' procurement without a premium.

⁴ Atsutaka Toshihiro, and Kyoto Sato, "Yokohama administrative guidance on impact fees for housing development" in *Practical Method of City-Planning: A record of ten years of experience of Yokohama City's Bureau of Comprehensive Planning*, ed. Aiko Hasegawa (Tokyo: Kajima Institute Publishing, 1978), 62-63.

⁵ Toshio Taguchi, interviewed by the author, October 11, 2017.

⁶ Ministry of Construction, *Takuchi Kaihatsu Yoko no Minaoshi no Pointo (How to revise administrative guidance on impact fees for housing development: in Japanese)* (Tokyo: Gyo-sei, 1997), 3-20.

⁷ Tom R. Tyler, *Why People Obey the Law* (Princeton University Press, 2006), 3-7.

⁸ Takashi Iida, "Hou wo Mamoru Doki to Yaburu Doki" ("Incentives to compliance and non-compliance" in Japanese), *The Japanese Journal of Labour Studies* 57, no. 1 (January 2015): 19.

⁹ *Ibid.*, 20.

¹⁰ Tomokata Fujita, and Toshihiro Matsumura, "*Shakaikihan no Hou to Keizai*" ("*Law and Economics of a social norm*" in Japanese), submitted to the 1st symposium on soft law of interaction between market and nation (2004): 5.

¹¹ Akira Tamura, "*Tamura Akira no Tatakai*" ("*Tamura's struggle with urban development in Yokohama*" in Japanese), (Tokyo, Gakugei Shuppan Sha, 2006), 174-180.

¹² Tomokata Fujita, and Toshihiro Matsumura, "*Shakaikihan no Hou to Keizai*" ("*Law and Economics of a social norm*" in Japanese), submitted to the 1st symposium on soft law of interaction between market and nation (2004): 6.

¹³ *Ibid.*, 10.

¹⁴ Akira Tamura, "*Tamura Akira no Tatakai*" ("*Tamura's struggle with urban development in Yokohama*" in Japanese), (Tokyo, Gakugei Shuppan Sha, 2006), 140-143.

¹⁵ Shunsuke Kimura, "Hikaku Seido Kenkyu: Ajia San-kakoku no Tihoubunken to Tihouzaisei" ("A Comparative Study of Decentralization and Local Public Finance in Three Asian Countries: Analysis of Local General Revenue of Indonesia, The Philippines and Japan" in Japanese), *The Hitotsubashi journal of law and international studies* 14 no. 1 (March 2015): 85.

¹⁶ Katsuya Uga, "Yoko Gyosei" ("Administrative guidance" in Japanese), *Jurist* 880 (1987): 106-113.

¹⁷ Similar incentives under development permission system in Indonesia was reported by Norihisa Shima, A Study on the Development Trend based on Development Permission in Jakarta Special Province, Indonesia, *Journal of the City Planning Institute of Japan* no. 45-3 (2010): 35.