

Legal Confiscating based on Zoning Plan in Turkey

Yakup Emre ÇORUHLU, Bayram UZUN, Turkey

Key words: ownership, expropriation, legal confiscating, zoning plan

SUMMARY

Right of ownership is the fundamental human right guaranteed by international conventions. This right is guaranteed by law in some countries in which the principles of private property is valid such as Turkey. Right of ownership can only be restricted by law in the name of public interest. However, the right of ownership of the immovable can be transferred to the public authority only for its price. In some cases, however, a real estate can be converted into a public service without expropriation. This process is called “confiscating without expropriation”. This concept was introduced into the Turkish Legal System in 1956 by unauthorized conversion of the immovable property to the road. Today, especially in the planned area, there is a different type of confiscating without expropriation. As it is known, zoning plans are a public tool that reorganizes the properties in the name of public interest. However, the uncertainty in the implementation process of these plans negatively affects the parcel owners remaining in public use in the zoning plan. This is defined by the terminology “legal confiscating without expropriation”. In this study, the subject is discussed in the light of European Court of Human Right (ECHR) decisions and also Turkish judicial decisions. Which institutions are responsible for what kind of zoning functions were investigated. Mandatory and voluntary applications were compared. Conceptual visualizations were made on the subject. According to the results of the study, it should be stated that all public spaces in the zoning plan will cause not "legal confiscating without expropriation". The protected area, geological objectionable area, the parcels remaining in agricultural areas can be allocated as public areas in the zoning plan due to their location or characteristics. In these cases, there are no legal confiscating without expropriation. In terms of plan classification, the following explanation is made. Only in areas with a 1/1000 scale implementation zoning plan, the existence of legal confiscating without expropriation can be mentioned. Land readjustment should be made officially and urgently as a solution for solving the problem. Alternative models are also needed. Otherwise, public institutions will be subject to serious financial burdens. Granting zoning right to the cadastral parcels in the public areas in development plan, granting all cadastral parcels in the plan the right to construction in certain amounts and development of zoning right transfer system can be given as a few of the recommendations.

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1. INTRODUCTION

Ownership is used to describe both the thing itself and the rights and responsibilities on it (Leonard and Longbottom, 2000). International law (URL-1, 2020; URL2, 2020) take ownership into account (Figure 1) as the basic human right.

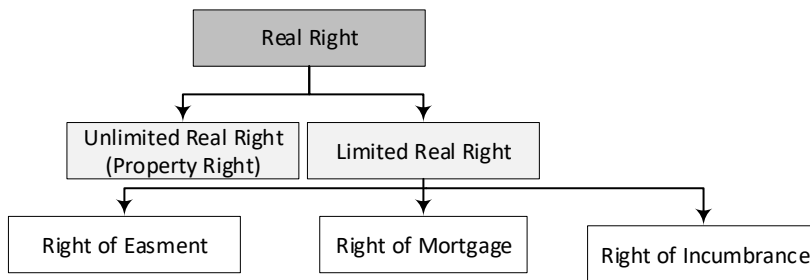


Figure 1. Right of property ownership

Property right is the widest, most comprehensive and absolute dominant right that the legal order allows to be established on property (Eren, 2012). The right to property, which is also defined in the Turkish Constitution (Official Gazette, 1982), can only be restricted for public interest by law (Ayaydın, 2010). This right includes "right of usage", "usufruct" and "bare ownership" (Official Gazette, 2001) (Figure 2).

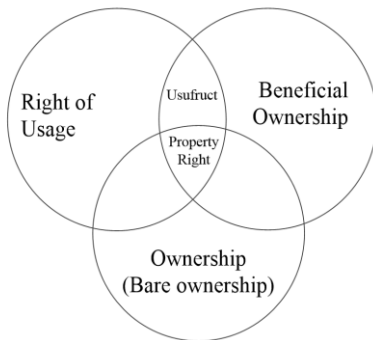


Figure 2. Components of Property Rights

Property right is actually a three-dimensional concept (Figure 3) which has put forward by Dale and McLaughlin in 1988, this concept has been known as land object.

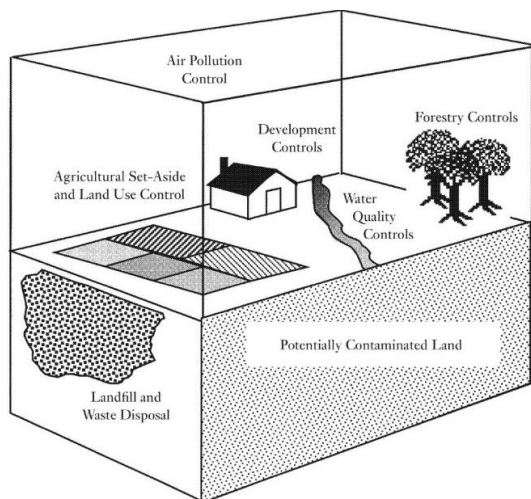


Figure 3. Land object (Dale and McLaughlin, 1988)

Obtaining the property right by the Public Authority: Public Interest and Expropriation

According to international legal norms and the Turkish legal system, property right can be restricted only for public interest and by law (Official Gazette, 1982; URL-1, 2020; URL-2, 2020). The most familiar method of this is expropriation. The "public interest" must be found in order to be expropriated a real estate. The public interest has replaced the concept of "common good" after the French Revolution in 1789. The Turkish Constitutional Court defined it as "ensuring the peace and well-being of the person and the society" (Tekin, 1991). Public interest can vary according to time, place and event (Tokuzlu, 2013).

1.1 Problem Definition

Administrations must comply with the rules of law in all their actions and transactions (Official Gazette, 1982). This issue is also included in the general principles of law and the concept of the rule of law (Başpınar, 2009). However, administrations can sometimes go beyond the general principles of law, for various reasons, knowingly or unknowingly, and cause violations of rights. One of the most important of these is a property right violation. The most violation of the property right occurs in the expropriation process in Turkey. The expropriation process is presented in Figure 4 with its components. In this study, "disappling zoning plan comes from legal confiscating without expropriating" will be taken.

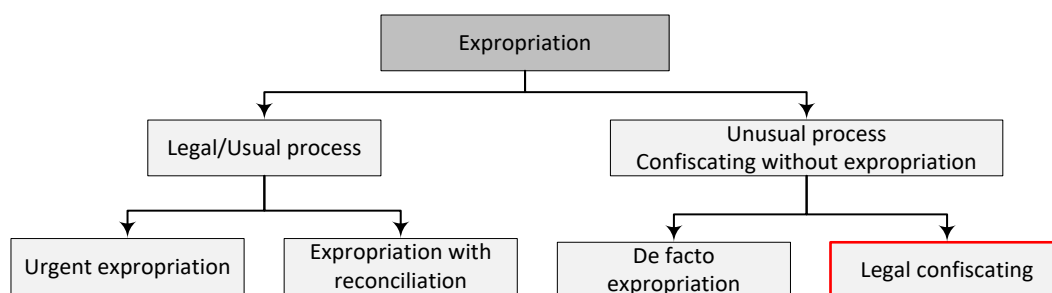


Figure 4. Components of Expropriations in Turkey
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 Yakup Coruhlu and Bayram Uzun (Turkey)

Confiscating Without Expropriating

In many countries, "expropriation", which is one of the means of real estate acquisition of the public administrations/enterprises, is dealt with under two main headings. These are "legal / usual expropriation" and "unusual process / confiscating without expropriation". "Legal / usual expropriation" operation is divided into two as "urgent expropriation" and "expropriation with reconciliation". However, apart from general legal norms, the act of handling the immovable property without expropriation is the expropriation process. These actions are called "confiscating without expropriation". Confiscating without expropriation, is divided into two "de facto expropriation" and "legal confiscating "

Seizing a real estate without any legal basis is defined as confiscating without expropriation. At the same time, the failure to exercise the powers granted by the property right through an administrative transaction is also defined as confiscating without expropriation (Tezcan, 2013). If an immovable property is confiscated (Çağlayan, 2013), built on it, or restricted its property via zoning plan against the expropriation procedure by a public authority, there is "confiscating without expropriation" (Arcak, 1987). If the transaction actually took place on the real estate, this is called "de facto confiscating without expropriation". If the transaction took place in the form of legal restrictions, this is called "legal confiscating without expropriation".

In practice; if the cadastre parcels allocated to "public areas" according to the zoning plan have not been expropriated for more than 5 years, immovable evaluation possibility of the owner is restricted. At the same time, evaluation possibility of the owner on his immovable property in accordance with market value is also restricted. However, administrations should not harm property rights. This is also valid for the zoning plan and its applications/implementations. In practice, especially due to the "insufficient appropriation budget", the expropriation does not take place on time, making the property right unusable for an indefinite period of time. This leads to a fair balance disruption, which should be found between one's rights and freedoms and the public interest. This situation also causes the restriction or elimination of the powers granted by right, which is guaranteed by Turkish Constitution. Therefore, both "de facto confiscating without expropriation" and "confiscating without expropriation" are the same. Therefore, both cases are "confiscating without expropriation" in Turkey (Çabri, 2011).

Process of confiscating without expropriation and its development experienced in Turkey

Confiscating without expropriation, was first emerged in Turkey due to some private properties turning into public road (Cretans and Akgun, 1987). This concept entered the Turkish legal system with the decision of the Supreme Court of 1956. In 2010, the expropriation law was renewed as "compensation due to confiscating without expropriation" (Tutal, 2016). The following principles with the amendment in expropriation law, objective principles in compensation payment, eliminate the suffering of those who lose their property right, minimizing the financial burden of expropriation and reconciliation at first, were targeted (Ünlü, 2012; Tutal, 2016). However, this amendment could not solve the problem. Similarly, some important decisions were taken within the European legal system. In the Turkish and European legal system, relevant decisions (Çoruhlu et al., 2019; European Court of Human Rights, 1982; 2005a) are presented in figure 5.



Figure 5. Key dates based confiscation without expropriation related to the study

Court decisions from European legal system are also very important for the Turkish legal system. Because "right to individual application" has been recognized to ECHR in Turkey in 1987. "Right to individual application" was also given to the Turkish Constitutional Court in 2010 (Nalbant, 2015). Therefore, a case based on the study subject can be transferred to ECHR.

If the following conditions are provided in Turkey, the owner of an immovable property can claim "without confiscating legal expropriation" by going to the court.

- At least five years must pass after the zoning plan comes into effect.
- Whether LR and expropriation etc., methods, which are among the implementation tools of zoning plan, will be applied or not should be investigated through official correspondence.
- The property owner must have been in possession of the property as owner for at least five years after the zoning plan comes into effect.

The owner of the immovable cannot claim "legal confiscating without expropriation" without fulfilling these conditions.

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ECHR's Cases based on Property Right and Expropriation

The ECHR imposes states on the obligation not only to non-interfere with the rights and freedoms of individuals, but also to take necessary measures to ensure that these rights and freedoms can be effectively used (Şimşek, 2012). ECHR has acknowledged that the government also has positive obligations after the Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" V. Belgium (Merits) (European Court of Human Rights, 2004a). Similarly, it was stated in the "Case of Öneriyıldız V. Turkey" decision that the state did not fulfill its positive obligation. The duty of the state is to guarantee the rights and freedoms defined to individuals. The expression of Annex 1. Article 1 of the Protocol "Every natural or legal person is entitled to the peaceful enjoyment of his possessions." protects individuals (European Court of Human Rights, 2004b), against the unfair intervention by the states. Confiscating without expropriation and expropriation were considered as the same in "Case of Sporrong and Lönnroth v. Sweden" (European Court of Human Rights, 1982). It was ruled that there should be a proportional payment between the value of the property and the compensation amount paid to the applicant in "Case of Broniowski V. Poland" (European Court of Human Rights, 2005a). If de facto confiscating without expropriation becomes legal with legal tools without real expropriation, it is the same as legal confiscating without expropriation in "Affiliate I.R.S. Et Autres C. Turquie" (European Court of Human Rights, 2004c). According to Gelinsky, Fromonts, accepting that only real/legal expropriation is regulated in the convention will not be suitable for the convention to provide effective legal protection. Whether targeted by the administration or not, as soon as there is a danger of violation of property right, the protective mechanism of the convention must come into play. Government activities must comply with the rules of law. At the same time, acquired rights must be respected. The principle of respect for acquired rights is included in the general principles of law and the concept of "constitutional state". The purpose of this principle is to ensure the legal security of individuals (Günday, 2011).

1.2 The aim of the study

In this study, "legal confiscating without expropriation" is discussed. The relation between the international legal norm and the "legal confiscating without expropriation" has been investigated. Rights, authorities and responsibilities of public institutions and immovable owners who are the parties of "legal confiscating without expropriation"; are discussed. With this study, it is aimed to develop suggestions that will eliminate the problem of "legal confiscating without expropriation".

2. MATERIAL AND METHOD

The tool of "legal confiscating without expropriation" is the zoning plan. In this topic, planning hierarchy, the relationship between zoning plan and property and implementation methods of zoning plan will be discussed. As it is known, property; can be restricted by the zoning plan. This restriction is essential for the creation of a number of public areas for the common good via public interest. What kind of public spaces are planned, which institutions will have authority to manage the places and how these areas will be administered become known to everyone thanks to the zoning plan. If the zoning plan is implemented with plan implementation

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Yakup Coruhlu and Bayram Uzun (Turkey)

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methods, "legal confiscating without expropriation" cannot be mentioned. For this reason, the main material of the study; zoning plan and plan implementation methods.

Planning and Property

Thanks to the upper scale plans and implementation plans in Turkey (Official Gazette, 1985) public spaces and living spaces (Doebele, 1986) are created in cities in which people can live at modern standards in the name of public interest (Uzun and Celik Simsek, 2018). Perhaps the most meaningful relationship between plan and property can be explained by large-scale implementation plans. These plans contain definite data on building conditions. Generally, these plans are 1/1000 scaled and are known as elementary zoning plan (Yomralioglu, 1993). These plans also contain property data (Yomralioglu et al., 1996). Therefore, these plans can create restrictions or can create opportunities (Uzun, 2009). LR and other plan implementation methods directly provide assurance of the implementation of these plans.

2.1 Plan Implementations Methods

Zoning plan implementation methods are classified as compulsory and voluntary. Voluntary implementations are carried out with the request and approval of the owners of the property. Mandatory implementations are carried out officially by public institutions. The zoning plan implementation methods are among the tools used by the public to free social areas such as roads, parks, etc., for free. In these plans, owners of some parcels may be advantageous while owners of some parcels may be disadvantageous. What is expected from the plan implementation methods is to ensure that the benefits and losses of the plan are the same to all parcels equally. Undoubtedly, the most important method providing this goal is LR. LR was implemented by the German Mayor of Frankfurt, Lex Adickes in the late 19th century. It is also known as "dough rule" (Doebele, 1982; Yomralioglu, 1993). The basic philosophy of this method is that the same rate is taken from all parcels included in the application in return for the increase in value arising with the plan. Public areas in the plan are acquired with this deduction amount. The remaining amount is allocated to the owners of the real estate (Uzun, 2009).

In some volunteer zoning plan implementation methods, negative results may occur. The cadastral parcel has the zoning rights it overlaps directly. Thus, a number of cadastral parcels, such as the building block or commercial block etc., may have zoning rights with an unearned income value. However, some cadastral parcel may overlap areas such as green, roads and school locations etc. A zoning block is given together with the cadastral parcels conceptually created in Figure 6 / a. Here, both methods can be applied. In the voluntary application method scenario, Figure 6 / b; Figure 6 / c appears in the LR scenario. As can be seen from these two situations, the distortions in the geometrical conditions of the parcels in building block still continue in voluntary implementation. In addition, each parcel contributes at different rates for the road/public area to be formed. However, in mandatory application, the geometries of the plots in the building island are properly shaped for establishment of the building facilities and infrastructure. In addition, each parcel contributes at the same rate for the road to be formed.

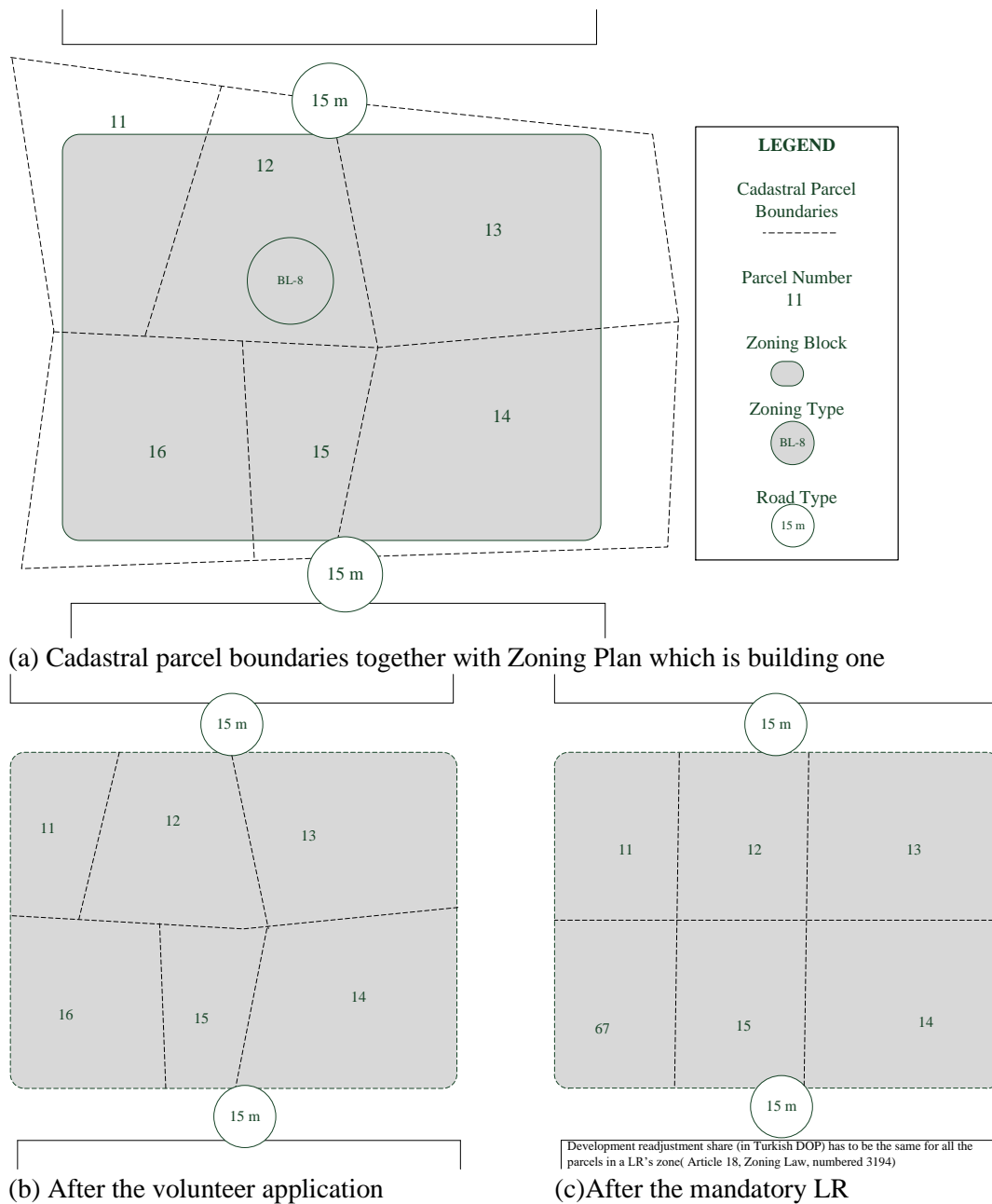


Figure 6. Voluntary and mandatory application scenario of a cadastral parcel which overlaps a building block in zoning plan (Çoruhlu et al., 2020-unpublished article)

2.2 Land Banking and Transfer of Development Right

According to Carr and Smith, 1975, public land banking is defined as a process in which a government authority collects land, generally on the periphery of an urban center, with the intention of selling it for development at a future date (Kamm, 1970). Land banking efforts in the United States have been hampered by several obstacles, most notably involving the structural and operational characteristics of a land banking agency. These are the difficulty of operating on a regional scale, the problem of linking land banking to the planning process, and

the scarcity of financial resources (Ender, 1986). According to Zhang et al., 2012, land banking
 Legal Consequences Based on Zoning Plan in Turkey (1998). According to Zhang et al., 2012, land banking
 Yakup Coruhlu and Bayram Uzun (Turkey)

is a mechanism launched 100 years ago in Western countries that refers to the legal advance acquisition of land acts before it was developed and stored for future land supply (Evans 2004). As a configuration tool of urban land, land banking will ensure optimal allocation of land resources and further promote the compact construction land process and the diversity of the city, which is believed to be the core concept of sustainable development of China's urban area (Qiu 2006). This mechanism was introduced to China during the period of urban land reform in the 1990s (Huang et al. 2008). However, some solutions were proposed for some countries in different platforms (Enders, 1986; Atmer, 1987; Laconte, 1987)

Land banking may contain targets; economic providing housing, putting the property in the tax records, repairing, removing, or re-abanded the team is developing characteristics, Yesil the field of the development of collection and a single, consolidated, deserted participate in a lot of sites that can be developed, and (Tappendorf and the sea, 2010) stabilize declining neighborhoods by facilitating brownfields revitalization.

The transfer of development rights (TDR) is widely discussed as a means to drive growth and protect low-density uses of land. The transfer of development rights is a potentially important tool for planners. The predictability of development can be improved, thus improving planning for public services. Permanent open space can be created without the “taking” of private property. But any vehicle can be incapacitated and any vehicle can be abused. No less than other land use control techniques, TDR can be used for exclusionary purposes. Sound planning, in a purely local context, is a prerequisite for Responsible Use (Steven, 1975).

3. RESULTS AND DISCUSSION

Relation between “confiscating without expropriation” and land registry

In Turkey, it is legally determined in which type of land enable private property right can be established. According to this; some kind of areas such as sea, lake, coasts, river beds, marshland and stony places are not valid for the establishment of private property. In addition to this, no one can obtain immovable property in such areas. These areas are also not registered on the land registry. Private property can be established in the remaining areas. The immovable properties in these type areas, where private property is valid, may be owned by both private persons and legal entities. Both the lands where private property is valid (state or private) and the lands where private property is not valid can be included in the zoning plan. In this case, whether some kind of land type may cause "legal confiscating without expropriation" or not was discussed in table 1 (Demir and Çoruhlu, 2009).

Table 1. Areas where private property is valid (adapted from Demir and Çoruhlu 2009).

| Type | Ownership | Registration | Legal Confiscating |
|------------------|-----------|--------------|--------------------|
| Sea | State | No | impossible |
| Forest | State | Yes | impossible |
| Coastal area | State | No | impossible |
| River | State | No | impossible |
| Pasture | State | Yes | impossible |
| Lake | State | No | impossible |
| Road | State | No | impossible |
| Bridge | State | No | impossible |
| Cadastral Parcel | Private | Yes | possible |
| | State* | Yes | impossible |
| | State ** | Yes | possible |

* Public Special Provincial and Treasury, ** other Public Bodies

3D Cadastre, Cost Recovery and Legal Confiscating without Expropriation in Turkey

Immovable property is dealt with in Turkey as a 3 dimensional approach (Dale and McLaughlin, 1988) just like land object (Kaufmann and Steudler, 1998). Property right should be handled with vertical dimension as Z in figure 7, both + z and -z. For example, in +z dimension, flying an airplane or passing a cable car does not limit property ownership and therefore does not require expropriation. However, crossing an energy transmission line restricts property ownership and therefore requires expropriation. In - z dimension, tunnel crossing and the use of mines do not limit property ownership and therefore do not require expropriation. However, underground facilities restrict property ownership and therefore require expropriation (atıf). As it is understood, it is essential to determine and set the boundaries of the Z-sized property in + dimension and - dimension from the soil to ground up to the weather. This situation is provided in +z dimension with the zoning plan in the planned areas. However, it should be said that the necessary definitions and limitations in the - z dimension are not clearly made yet (Figure 7).

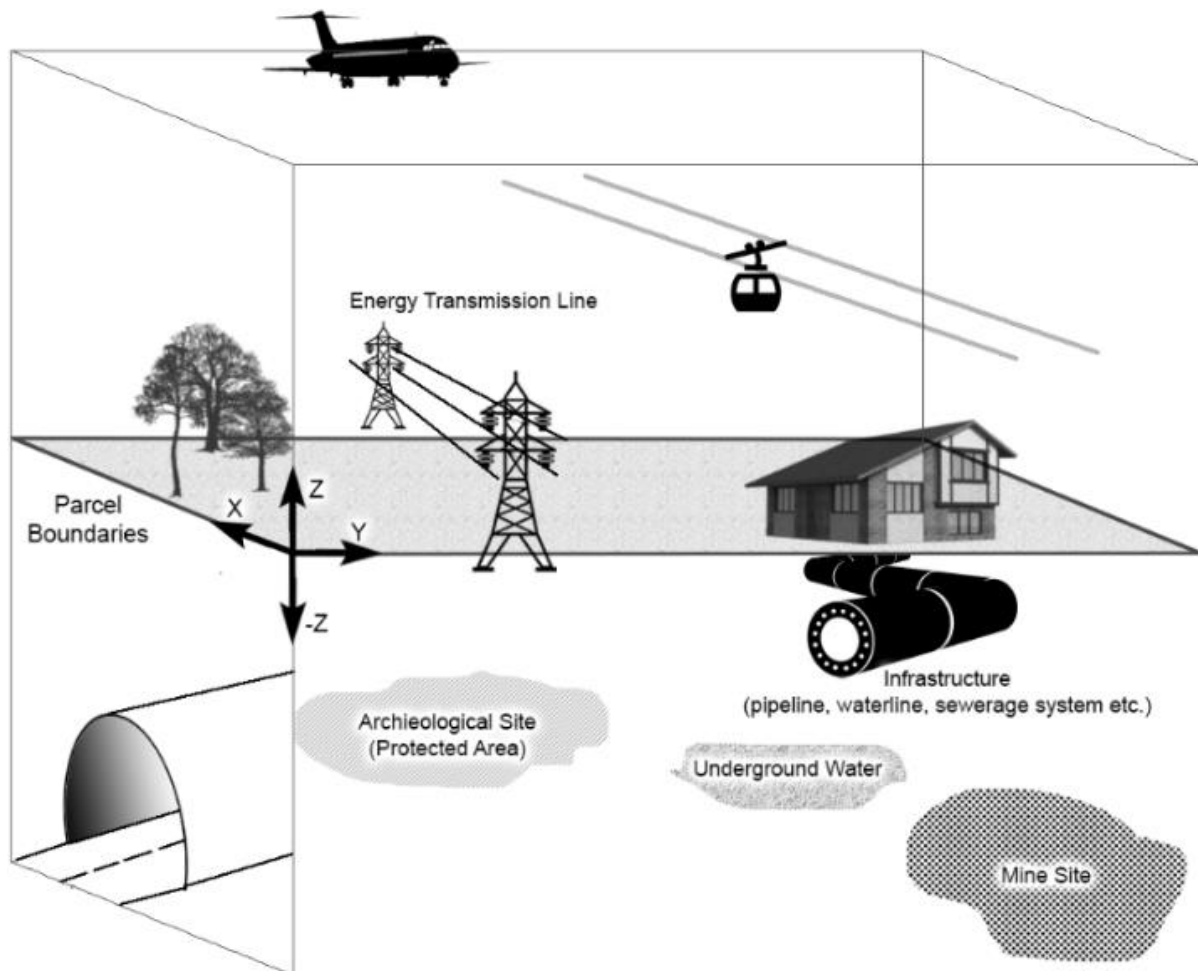


Figure 7. Representation the property rights as 3-dimensional in Turkey (Çoruhlu et al., 2020-unpublished article)

6.50 m construction right in vertical dimension has been granted to the parcel owners in unplanned areas according to the written planning provisions. While this right is considered to be a natural component of property ownership, it is considered that the right of construction more than 6.50 m belongs to the public. This public right can be converted into price, led by the public authority that put the plan into practice (Kamm, 1970; Enders, 1986; Atmer, 1987; Laconte, 1987; Evans 2004; Qiu 2006; Zhang et al., 2012). Zoning rights up to + 6,50m of parcel owners whose parcels are in the zoning plan functions as park, road and green area etc. zoning functions as can be purchased by other parcels' owners whose parcels have construction permit more than +6.50 m. To explain with an example, a parcel owner with a zoning function as +30.50 m construction right can purchase zoning rights up to + 6,50m of parcel owners whose parcels are in the zoning plan functions as park, road and green area etc., through a fund. Revenues, which may be generated through this fund, can be used for the acquisition, construction and maintenance of public areas in zonig plans. Thus, there is no need to expropriate some immovable properties that overlap some public areas parks, green areas and roads etc. As its consequence, the existence of "Legal Confiscating without Exporpriation" cannot be mentioned.

Relation between Legal Confiscating without Exporpriation and Land Readjusment (LR)

It is the public authority that transforms the less valuable land into a valuable urban land thanks to zoning plan. The public authority cuts definite amount of the parcels area included in the LR application as a result of this transformation. This amount, known as development readjustment share (in Turkish DOP), has to be the same proportion for all parcels, for the common interest. This deduction is neither “de facto exporpriation”, nor “legal confiscating without exporpriation”. Because the increase in value in the parcels with the zoning plan is always more than the deduction amount. Actually, despite the deduction, there is no decrease in the value of the parcels, there is increase in the value of the parcels.

ECHR considers that zoning plan amendment, new subdivision plan and LR allow oppurtunity to the relevant municipality to built road, square or green area etc. As a result, it concludes that the intervention served a purpose in the public interest. ECHR, in principle, acknowledges that the loss suffered by the person by transferring some of his land to the municipality in accordance with the zoning plan, can be seen as the equivalent of the increase in value resulting from the work done in this region. Consequently, the regulation imposed on the applicant for the zoning plan concludes that the partnership share does not endanger the fair balance between the public interest and the imperative of protecting the rights of the individual (European Court of Human Rules, 1982; 2004b, 2004c, 2005a, 2005b).

The principle of gradual association of plans is a rule of Turkish Zoning Law and it is an important urbanism principle. Development/zoning plans can be classified as upper and lower scale plans. In upper scale plans, the main principles regarding planning are determined. In sub-scale plans such as implementary zoning plan, detailing has been made up to the zoning rights that each parcel will benefit. Based on the sub-scale plan, public institutions; can create and construct public service areas such as roads, schools and parks etc. In addition, with these plans, private property owners can project their properties in accordance with the function in the zoning plan. With the 1/1000 scale implementary zoning plan, immovable properties in private ownership are directly associated with the plan. For this reason, the concept of Legal Confiscating without Exporpriation becomes objective in these plans. It is not possible to talk about "Legal Confiscating without Exporpriation" for other planning scales which are accepted as abstract and conceptual.

Presence of Legal Confiscating Without Exporpriation

As can be seen in Figure 8 / a, some cadastral parcels overlap the zoning islands suitable for building construction. Others overlap public service areas (green space, school location, etc.). Implementary zoning plan are discussed with 2 scenarios. In the first scenario, in the case of mandaroty LR application, all parcels are equally affected by the application, thanks to the same Development Readjustment Share (in Turkish DOP) (Figure 8 / b). Thus, it is not possible to talk about "Legal Confiscating without Exporpriation ". In the second scenario, LR is not made mandatory. In Figure8 / c, parcel owners 11, 12 and 13 have implemented the zoning plan in their immovable by voluntary application. As their immovables overlap the building block, they are not affected by the negative burden of the plan, except for a simple deducation amount. However, since cadastre parcels 14, 15 and 16 overlap public areas, they are not able to apply voluntarily in the name of doing zoning implemenation. Therefore, if LR is not made as mandatory in practice as soon as possible, owners of 14,15 and 16 parcel everytime put forward there is "Legal Confiscating without Exporpriation"

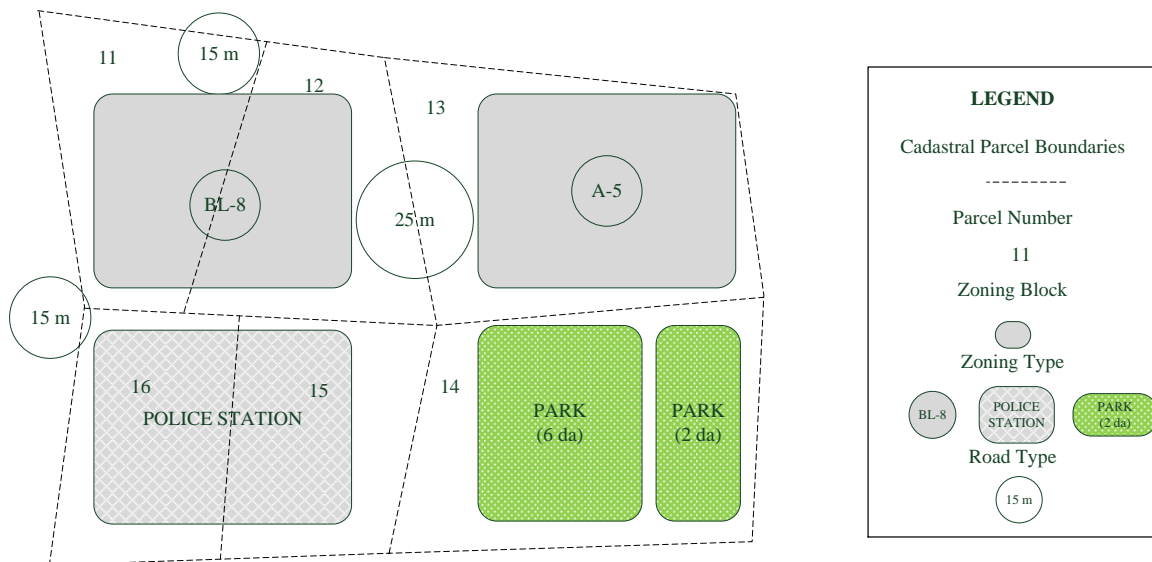
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Yakup Coruhlu and Bayram Uzun (Turkey)

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(a) Cadastral parcel boundaries with Zoning Plan which are building, public facility and green ones

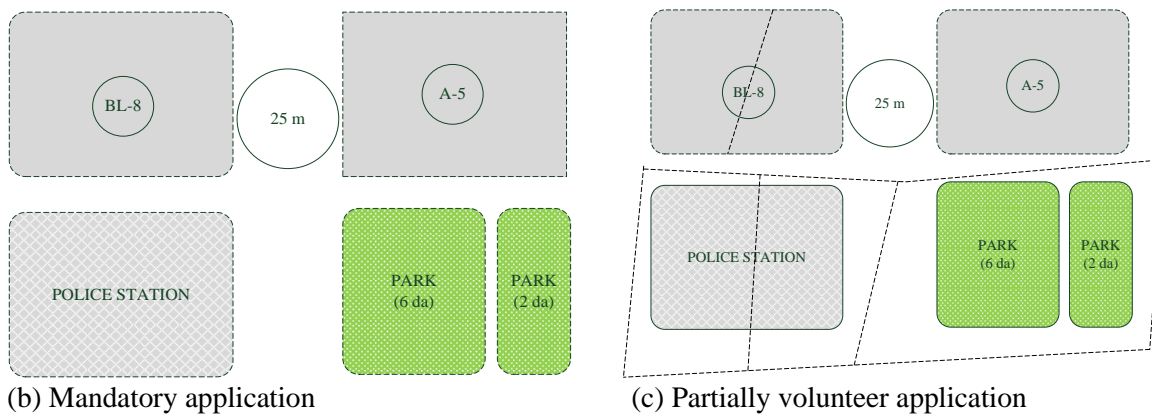


Figure8. Presence of Legal Confiscating Without Exporpriation (adapted from Çoruhlu et al., 2020, unpublished article)

4. CONCLUSION AND SUGGESTION

The main reason for "Legal Confiscating without Exporpriation" is that the zoning plan is not implemented. The main reason for this is that implementary zoning plans have been prepared in all areas where upper scale plans have been made. With the next 25-year perspective, it is foreseen that the city will be shaped by the zoning plan. However, the complete transformation of the city in accordance with the implementary zoning plan, together with infrastructure services and public facility areas, is often impossible in terms of budget and time. Therefore, immovable properties that overlap the public areas in the zoning plan cannot be converted to the functions which are planned in the plan in the short term. This causes the parcels to remain publicly functioned and consequently limited for years. For the reasons explained, prepaiaiont of implementary zoning plans should be abandoned for the areas covering all of the upper scale plans. Implementary zoning plans should be made only in the required fields, taking into account the needs and budget facilities.

On the other hand, in the Turkish Zoning Planning System, the zoning rights are given to the owners of the immovable property as an unearned earn, first bonus. Moreover, the technical and social infrastructure service for these immovables is provided by the public authority. Therefore, the public authority offers public resources to these parcel owners as a second bonus. On the other hand, this situation also causes dispossession for the immovable owners who are subject to expropriation since they remain in public function in the zoning plan. If converting the zoning rights which is granted by the public administrations to the price can serve the capacity to provide a large financial budget just as mentioned at TDR and Land Banking.

In the developed countries, both the financial burdens placed on the public administrations and the dispossession of the real estate owners subject to expropriation do not seem to be compatible with human rights. For this reason, the LR method is widely used to ensure fair distribution of the gains and constraints that come with the zoning plan by avoiding the expropriation procedure. LR method, which is defined as public-immovable owners joint venture model in the international literature, is a lawful method. In the light of this information, LR implementation should be carried out within a reasonable time from after the enforcement of implementary zoning plans. It is evaluated that the application of LR method will minimize the problem of "Legal Confiscating without Expropriation".

As an innovative solution approach; All parcel owners who remain in the planned areas can be granted a certain zoning right regardless of their overlapping function in the zoning plan. Transfer of Development Right etc. Methods can be investigated. In addition, Land Banking, which consists of public property immovables in the planning area, may be considered as an alternative to expropriation.

As a result; It is inevitable to carry out studies to renew the planning concept and its effects on private property in urban settlements in a way that can be more feasible and fairer by considering ECHR decisions.

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Legal Confiscation Based on Zoning Plan in Turkey (10458)
Yakup Coruhlu and Bayram Uzun (Turkey)

FIG Working Week 2020

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Amsterdam, the Netherlands, 10–14 May 2020

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BIOGRAPHICAL NOTES

Yakup Emre CORUHLU is a lecturer in the division of Land Management in Department of Geomatics Engineering at Karadeniz Technical University (KTU), Turkey. He received PhD

degree in 2001 based on his M.Sc. Thesis (in 2007). From 1999 until 2001 he worked for private Yakup Coruhlu and Bayram Uzun (Turkey)

FIG Working Week 2020

Smart surveyors for land and water management

Amsterdam, the Netherlands, 10–14 May 2020

surveying sector. Between 2005 and 2007 he was research assistant. From 2007 to 2014 he worked as geomatics engineer at General Directorate of Foundation. Since 2014, he is Professor (Associate) at KTU. His research interests are, land administration, cadastre, land registry, land valuation, foundational real estate, design of Geographical Database-real estate based, E-government, engineering education.

Bayram UZUN is Professors at Karadeniz Technical University (KTU), Turkey. He graduated from the Department of Geomatics Engineering at KTU in 1987 with his bachelor degree. He received his M.Sc. degree in 1992 and obtained his PhD degree in 2000. Between 1988 and 20075 he was research assistant. Since 2005 He is a lecturer in the same place. He took part in a lot of projects/works for private and public sector as consultant such as adviser for Turkish Electricity Transmission Corporation, and member of Urbanism Council under the authority of Turkish Presedancy. Professor Uzun's research interests are Expropriations, Land Management, Urban Area Design and Property Valuation, 3D Cadastre.

CONTACTS

Yakup Emre ÇORUHLU

Karadeniz Technical University
Department of Surveying Engineering
Trabzon / TURKEY
Tel: +90 (462) 3772773
Fax: +90 (462) 3280918
e - mail: yecoruhlu@ktu.edu.tr

Bayram UZUN

Karadeniz Technical University
Department of Surveying Engineering
Trabzon / TURKEY
Tel: +90 (462) 3772796
Fax: +90 (462) 3280918
e - mail: buzun@ktu.edu.tr