Created Land in the city of São Paulo: virtual land producing space and inequality

Solo Criado em São Paulo: terra virtual produzindo espaço e desigualdade

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Abstract

Created Land as a concept has been increasingly raising questions for Urbanism and Law. This article aims to present and discuss, under the urban and legal perspectives, the nature, dimensions and developments of Created Land in the city of São Paulo. This approach is important because it fosters a discussion on the commodification of such virtual land, which, used with a redistributive purpose, is at risk of working in reverse through income generation and transfer.

Keywords: urban law; urban policy; disposition of public goods; created land; urban concession.

Resumo

O Solo Criado enquanto conceito tem cada vez mais colocado questões para o urbanismo e para o direito. O presente artigo tem por objetivo apresentar e problematizar, sob as perspectivas urbanística e jurídica, a natureza, as dimensões e os desdobramentos do Solo Criado na cidade de São Paulo. A importância da abordagem consiste em fomentar uma discussão sobre a mercantilização dessa terra virtual que, utilizada com propósito redistributivo, tem risco de funcionar às avessas por meio da geração e transferência de renda.

Palavras-chave: *direito urbanístico; política urbana; alienação de bens públicos; solo criado; concessão urbanística.*

Introduction

Since the beginning of the 20th century, the development of construction techniques has allowed vertical construction. These floors expand the usable area beyond the area of the plot. This extension of area represents the creation of land (created land), which is increasingly posing questions for urbanism and the law. These cases are subject to different interpretations and uses, many of them ending up in court.[1]

This text discusses the questions surrounding the concept and nature of created land and its transformations over time. To this end, it analyzes its foundations in the disciplinary fields of urbanism and law and their respective interdisciplinary intersection.

Maricato (2011, p.185) expressed that the "sphinx" of the urban issue is the "crux of land". The reflection presented in this article begins with this idea, expanding it to explore the "crux of virtual land," i.e., "created land" or built space that expands beyond the area of the plot.

Because virtual land is the basis for the constitution of several of the so-called new urban instruments, discussing its legal and economic nature is critical. Here, we propose this discussion, including an analysis of its foundations in the disciplinary fields of urbanism and the law and its correspondence to economic values, such as the potential for income generation and transfer.

Urbanistic activities that produce the city are the result of actions by the government, which implements infrastructure and public buildings and regulates private actions. Urban parameters were created to condition urban form – its fabric and constructions. The development of the technique, which allowed verticalization, gave rise to the concept of created land.

The focus of the proposed discussion is the notion of created land, or immateriality that can become a building, and that materializes based on explicitation of building potential, expressed in terms of floor area ratio. It differs from setbacks, occupancy type or rate – whose explicit objective is to interfere with the shape of buildings – because it does not necessarily condition a form.

The notion of created land was absorbed in Brazil in the 1970s under different interpretative aspects, as will be shown below. From then on, it has been reshaped and has acquired different concepts and purposes, alternating its emphasis between urban reason and objective and economic reason and objective. This article focuses precisely on this consideration and its impacts, creating a basis for the development of a methodology that allows the identification of gains and losses of the different natures, including indirect and invisible processes, of income transfer.

At the turn of the century, in various forms and in several cities across the country, created land began to be monetized, reaching the limit, in São Paulo, of structuring itself as an exchange-traded security, in the form of the Cepac (Certificate of Additional Building Potential). The creation and sale of this virtual product enabled the generation and transfer of income.

What is the nature and property of this virtual land? And what sort of income transfer does it promote? These are the objectives that this text intends to discuss.

Currently, the manipulation of urban parameters is being explored as a way of financing urban development. The big questions lie in how this value is produced and where it is extracted from. There is no magic. As a result of the emergence of this value, who loses, where, and to what extent?

To refine our reasoning, let us compare the issue with the Brazilian tax system, particularly the Circulation of Goods and Services Tax (ICMS). It is evident that having greater resources from taxes allows the government to promote policies that provide public facilities aimed at social inclusion. However, due to the regressive format of the ICMS, if on the one hand it provides resources, on the other, it takes away from the poorest populations. Our hypothesis is that the Additional Building Rights Levy and its application, particularly in the Consortium Urban Operations (OUC, as per the Brazilian Acronym), and the way they work today, are similar to the ICMS in this sense. This is the discussion put forth here. It involves concepts and principles of law, some exemplary cases, and much calculation to provide us with a clearer picture.

From the 1990s onwards, especially after 1995, with the reform of the state, there were transformations of economic, political, and social orders. Economic reforms were carried out to favor the liberalization of markets. Privatizations had repercussions on the field of Law and its regulations and, consequently, on urbanism as a science and technique intervening in territories.

In this context, legal relations became increasingly complex, with goods and services, which were previously conceived and executed by the public power, being delegated to the private sector, increasingly blurring the boundaries between the two sectors.

It is in this context that we intend to analyze the various implications of the notion of created land, seeking to recover and understand the urban, legal, and economic nature of this "virtual land", in addition to the theoretical and legal accommodations that have recently been applied. With this perspective and theoretical framework, which allow us to ask questions, the next step, or our future proposal, is to structure a research methodology capable of advancing in the understanding of the process of appropriation and transfer of income triggered by the management of this "virtual land" through different urban instruments in different cities. We will begin our problematization in the city of São Paulo.

Foundations of Created Land in the disciplinary field of urbanism

Urbanism works with urban design and form. It establishes parameters for urban land division and for constructions, attributing a building potential to these properties, defined through specific urban parameters for each street or area, conferring the city a certain density and urban form. From this standpoint, urbanism is practiced by the government by means of public regulations of urban land use – regulations that, since the 1940s, have emerged in large cities, which progressively incorporated zoning elements (Feldman, 2005), that were expressed in a Construction Code and a Land Use and Occupancy Law.

In 1957, for the first time in São Paulo, Law n. 5.261/1957 limited the floor area ratio – sixfold for commercial plots, and four-fold, for residential plots.

During this period, the implementation of urban design in Brazil, and particularly in São Paulo, operated, as a rule, in a "command and control" format, based on strict norms and by means of licensing and monitoring the production of space.

The first time the norm was flexibilized was with Law n. 7.288/1969, which allowed land to be donated to the City Hall to expand Avenue Paulista. Thus, the donors could build using the floor area ratio of the remaining plot plus that of the donated area.

The Zoning Law of 1972 (Municipal Law n. 7.805/1972) introduced the Adiron formula,[2] which led to the production of certain typologies such as the vertical building in the center of the lot, with low occupancy rates, aiming to expand permeable areas and wind circulation between buildings. This paper does not intend to assess the merit or the presence of hidden agendas here, but only to define the procedure as formalized. Subsequently, other municipal legislations, such as Laws n. 8.006/1974,[3] n. 8.076/1974,[4] and n. 8.328/1975,[5] brought about other incentives that exclude areas from the floor area ratio calculation. Thus, the economic dimension of the building potential, expressed as floor area ratio, was introduced in the form of an economic incentive to achieve certain objectives.

The progressive process of verticalization in the largest Brazilian cities, starting in the mid-20th century, led to the first reflections in the country on the concept of "created land," emerging from São Paulo.

This concept emerged in the 1970s in Europe[6] and the United States.[7] In 1975, France, whose urban model inspired Brazil, created a new land policy aimed at increasing the effectiveness of the control of land use and occupation through the policy *Plafond Legal de Densité* (PLD),[8] which established that the expansion in area above the limit of building potential provided for in the legislation – if desired by the land owner – should be paid for as the value equivalent to the value of the square meter of land, in the exact proportion of the excess (Rezende et al., 2009, p. 53).

Originated in the field of urbanism, this concept corresponds to the area built beyond the dimensions of the plot. This type of created land (floors built on top of each other) is a built-up area that generates greater demand for infrastructure and public spaces. It is accepted that thus, this created land should offer some kind of counterpart to the collectivity.

In Brazil, the first discussions about created land occurred in the 1970s, within the framework of a study on issues related to land use and its potential carried out by the Greater São Paulo Executive Group (Gegran, as per the Brazilian acronym), a department of the Planning Secretariat of the State of São Paulo. According to Gegran's legal analysis, the right to build should be independent from to the right to property, insofar as the right to build belonged to the collectivity (Grau, 1983, p. 72) and, in some cases, could be alienated to the private sector.[9]

At the same time, in 1976, after intense debates promoted by Prefeito Faria Lima Foundation – Center for Studies and Research of Municipal Administration (Cepam), the São Paulo City Hall proposed the institutionalization

of the instrument of created land, with the purpose of guiding the control of urban growth and land use. This resulted in the so-called Embu Charter (Carta de Embu).[10] It was believed that the adoption of the concept of created land could provide better management of urban development. The document defined created land as the construction practice of floors one over the other, within the parameter of a single floor area ratio for the entire city. In this sense, according to the Charter, in the same way that the developer is obliged to donate areas destined to the road system, public facilities, and open areas for public use, created land should offer the community the necessary compensations for urban re-equilibrium made necessary by the creation of the additional land. Thus, the idea that the interested party should grant public authorities, areas proportional to the land created, or their replacement by the economic equivalent, advanced. It is worth noting that, in this sense, the Embu Charter emphasized the urban character of the created land.

The then mayor of São Paulo, Olavo Setubal, accepted the idea of created land and launched it at the XX State Congress of Municipalities, in Guarujá, in 1976, emphasizing its financial aspect for the municipalities. According to Silva (2008), this led to the emergence of two lines of thought regarding the instrument: the financial line of thought, concerned with raising resources, and the urbanistic line, which despised the financial aspect of the instrument and centered its argument around a collective interest, founded on the idea of social equity, for the same right to build for all.

National legislation at the time did not directly incorporate the concept of created land in the form of an urban planning instrument. However, as we have already discussed, there were laws that tried to operationalize the building potential (expressed through floor area ratio), in the sense of encouraging certain forms of occupation or uses, as mentioned above: the widening of Av. Paulista, Adiron's formula, and the Law of Hotels and Hospitals. From 1990 onwards, the concept of created land and its operationalization started to be incorporated into the city's Master Plans, where its application and potential effects were approached in a more pragmatic way.

This ambiguity between urban reason and objective and economic reason and objective will take shape and acquire different forms from then on, alternating emphasis between these perspectives.

The fundamentals of Created Land in the disciplinary field of law

The legal debate around created land in the 1970s and 1980s focused on the issue of its constitutionality and the separation, or not, of the right to property from the right to build (Greco, 1981; Silva, 2008).

There were two lines of approach within the scope of this debate. The Gegran line (Grau, 1983, p. 60) argued that this separation was patent, insofar as the right to build belongs to the community, because it impacts the urban environment. In this sense, the acquisition of the right to build should take place by authorization or concession upon payment of a public price. On the other hand, the line adopted by Cepam (Silva, 2008, p. 266) argued that created land did not imply the separation

of the faculty to build from the right to own the land, insofar as it transforms the faculty to build up to the limit of the floor area ratio equal to one into a subjective right, and only that which exceeds (created land) would represent the need to compensate the urban environment.

A Gegran seminar held in 1975, in São Paulo, jurists and urban planners was based on the premise of the need to separate the right to build from the right to property. They advocated the idea of regulating created land via federal law, and, in so doing, the competence for this distinction would belong to the Union. Based on their understanding that there is autonomy in the right to build, this line of thought also considered it possible to transfer the right to build to other plots of land. The other line of thought, adopted by Silva (2008), which emerged from public administration studies and from Cepam's seminars and courses, argued that the municipal law should be sufficient for its regulation.

The insertion of urban policies in the field of legal regulation and urban planning has undergone changes in terms of its foundations. Up to the mid-20th century, urban policies basically created rules limiting property based on police power and, therefore, were studied in the field of law – more specifically, administrative law.

With the advent of the Federal Constitution of 1988, urban development policies were allocated, from a normative topological point of view, within the framework of the economic order. Thus, urban planning activities began to occupy, at the normative-legal level, a category of state intervention in the economic domain with a view to ordering the full development of the social function of the city and guaranteeing the well-being of its inhabitants.

And more: because urban policies are inserted within the economic order, urban planning must submit to its principles and guidelines (Massonetto, 2015), and to the purposes of the Federative Republic of Brazil. Among the purposes of the Republic we can cite, by way of example, the construction of a free, fair, and solidary society and the eradication of poverty. Among the principles of the economic order, in addition to the social function of urban property, we highlight the reduction of social and regional inequalities, which corresponds to the redistributive principle (Massonetto, 2003).

This set of conditions implies, in view of the possibility of creating artificial land not directly supported on natural land, the idea of a construction potential (floor area ratio) unique to all lands, a "standard for land use" (Grau, 1983, p. 45), conferring greater equity among owners and correcting distortions. It also implies the perspective of prohibiting the concentration and appropriation of social wealth generated with the production of space. It is in this sense that urban instruments or projects that do not adopt this perspective are, conceptually, incompatible with the Federal Constitution.

It is in this same way that the legal instrument created land (expressed in the form of availability of potentially building above the ratio of one) together with the counterpart called additional building rights levy must be understood. It is a financial charge whose legal

nature is the urban-environmental offset – it is up to the land owners, if they want to build above the basic floor area ratio, pursuant to article 28 of the City Statute.

In the legal sphere, the direct basis of created land, or rather, the requirement by the public power of compensation for the creation of virtual land, stems from the constitutional provision regarding the social function of urban property (article 5, XXIII, of the Federal Constitution).

It is worth remembering that the principle of the social function of urban property, in the Brazilian legal system, also encompasses the environmental aspect. Thus, there is a principle related to the socio-environmental function of urban property (Humbert, 2009).

While created land has an urbanistic function, it also corresponds to a part of the air space that constitutes an environmental resource (Brasil, 1981, article 3º, V) destined to satisfy the common needs of human beings. In this regard, it simultaneously submits to the norms of urban law and environmental law, with the latter being tasked with verifying the needs of interested parties relative to use and forms of access to the urban-environmental resource of created land that best meet the interests protected by their spheres.

Therefore, created land must observe both the constitutional objectives of urban policies of organizing the full development of the city's social functions and guaranteeing the well-being of its inhabitants (Brasil, 1988, article 182). It also must promote and maintain an ecologically balanced environment, an asset of common use by the people and essential to a healthy quality of life (ibid., article 225).

Machado (2017, p. 72) mentions three forms of accessing these environmental resources that are governed by environmental law: a) access aimed at consuming the goods (hunting, fishing...); b) access causing pollution (dumping of pollutants); and c) access for contemplation of the landscape.

Created land, however, strictly speaking, can be categorized as an environmental element of space production that causes environmental degradation (Brasil, 1981, Article 3.º, II), as it increases traffic and pollution and creates impermeable surfaces in the urban space.

One of the objectives of Law n. 6.938/1981 (Brasil, 1981, Article 4.º, VII), which provides for the National Environmental Policy, is the "imposition, on the polluter and the predator, of the obligation to recover and/or indemnify the damage caused; and on the user, of contributing to the use of environmental resources with economic ends".

Thus, because of the environmental harm and pollution caused to urban space by the use of created land, the principle of paying-polluters applies, demanding financial compensation for the pollution of urban space, which has the nature of environmental compensation and is priced as a way to allow for prior measurement of the costs from the economic agents in the production of urban space.

This financial counterpart, which in the case of created land comes in the form of an additional levy, has the nature of an environmental compensation and has the urban function of trying to balance, in terms of what exceeds the basic floor area ratio, the relative imbalance between densification and infrastructure.

Thus, by virtue of the constitutional principle of the socio-environmental function of urban property, the exercise of the right to build can and must be conditioned to minimum and maximum uses. These must be compatible with the urban environment and in accordance with the rule of law (Grau, 1983), insofar as urban actions correspond/are to State intervention in the economy.

In addition to the basic and maximum ratio, the term "minimum floor area ratio" was coined, which corresponds to what the owner is obliged to build by law to fulfill the social function of urban property.

It is necessary to highlight that fulfilling the social function of urban property, in the economic field, implies the observance of the ultimate goal of the economic order. This means providing dignity to all, according to the dictates of social justice and the observance of the redistributive principle, despite the noticeable effort of the current correlation of forces to try to subvert this logic.[11]

Finally, it is important to point out that, in light of the above and considering that a building that exceeds the basic floor area ratio directly impacts infrastructure, urban environment (traffic, pollution, etc.) and the need for public spaces, the right to build beyond the single ratio must be understood as belonging to the community.[12] That is, it must be submitted to the public interest, just like its precedent on the horizontal scale, which was based on the obligation of the developer to allocate public areas, as mentioned above in item Fundamentals of Created Land in the Disciplinary Field of Urbanism.

The urban, legal, and economic nature of "virtual land"

In his seminal book, *Urbanism*, Choay (1965, p. 2), referred to urbanism as "a discipline that stood out from previous urban arts by its reflexive and critical character and by its scientific pretension." However, today it is clear that this field of knowledge has been transformed – with the advance of neoliberalism and deregulation – into an amalgamation of design, law, and economics, in which knowledge about this interrelation and its effective impacts is still limited.

However, many interventions in Brazilian cities have been carried out through urban instruments, several of them are included in the City Statute as promoting the public interest. However, it is observed that the balance between free enterprise and the construction of a more just and solidary society, with the reduction of social inequalities, has results that are still poorly evaluated, causing an overall apprehension that such interventions do not meet their expressed goals and benefits (Fix, 2001; Ferro and Carriço, 2017; Nogueira, 2019). Studies measuring impacts and "side effects" are even rarer. Research and assessment are lacking to show to what extent good intentions, in the urbanistic field, actually help, when there is not clear mastery of their repercussions in the different spheres. In particular, in the economic domain, it is needed to analyze whether they do not end up harming and penalizing precisely those whom the proposal claims to want to benefit.

Next, this article presents some points as frameworks for deepening the understanding of concepts and measuring potential results.

Translation into economic value: the beginnings

Unlike the ideals that underpinned the entire discussion about the concept of created land in the 1970s, from the end of the 1980s onwards, the perception that different urban indexes and parameters (floor area ratio) constituted a differential advantage to the urban lots granted with greater building potential became consolidated. Thus, an additional value was then established for this differential. In São Paulo, this resulted in the possibility of transferring constructive potential, in the case of listed properties for example, which, due to its listed condition, could not reach the maximum building potential of the respective lot.

According to Nobre (2019, p. 169), this idea, of North American influence, was brought to Brazil by Azevedo Netto. It was advocated from the perspective of land use control and historic preservation.

To preserve these properties of historical and cultural value, Municipal Law n. 9.725/1984 was implemented in São Paulo. This law provided for the transfer of building potential of preserved properties classified as Z8-200 (area or building listed as historical or environmental heritage).

In São Paulo, shortly afterwards (in Janio Quadros' administration), Municipal Law n. 10.209/1986 was implemented. Known as the "Un-slumming Law", it established the figure of Interconnected Operations, allowing the private sector to build Social Interest Housing (HIS) or to pay for it to be built, in exchange for reviewing the zoning indexes and use in areas where slums were removed. As of 1990, the procedure was no longer applied to the removal of slums in areas of real estate interest, reversing its initial foundation. It became possible to change indexes throughout the city – except in exclusively residential zoning – upon payment to the municipality of amounts intended for the construction of HIS by the public power itself.

The interconnected operations represented the first flexibilization of urban legislation that did not intend to promote a specific urban form presented as desirable (previously it was applied to schools, hospitals, and isolated residential buildings in the center of the lot).

Although certain regions often truly deserved greater density and verticalization, in practice, the interconnected operations allowed the creation of spaces of exception in the city, especially with the intervention proposals related to large-scale developments and megaprojects.

The Interconnected Operations, in its format defined by Law n. 11.426/1993, replacing the previous format that aimed to remove slums, started to operate in the city of São Paulo under the logic of the exception, not the rule, in relation to urban legislation. This occurred even though its objective included explicit income redistribution and equity promotion, since the resources were invested in HIS. The procedure was ruled unconstitutional in 2001, on the grounds that the law allowed the alteration of urban parameters via decree when, in fact, it should be via law. Therefore, it was interrupted.

Created land, or the amount of built-up area greater than the square footage of the lot, since its original formulation went from a material category (larger habitable area) to an economic category (involving price): as compensation for "losses", in case of the Z8-200, as a way of encouraging certain uses or typologies (buildings in the center of the lot, hotels, hospitals), or as a form of collection (with the goal of promoting HIS, in 1990). However, later on, and outside of São Paulo in other Brazilian cities, it morphed into an instrument with several other formulations, procedures, and objectives.

Additional building potential as incentive

Pursuant to article 174 of the Federal Constitution, the State is a normative and regulatory agent of economic activity and, according to the constitutional text, it can exercise the activity of regulation in three ways: inspection, incentive, and planning functions as means by which such regulatory role can be played.

Along these lines, the 2014 Master Plan provides for some possibilities for using the additional building potential as an incentive for urban planning. These include free grants to construct HIS in a Special Zone of Social Interest (ZEIS), non-computation for the purposes of consuming the additional building potential of areas destined for HIS in the operationalization of the solidarity quota and in the case of encouraging densification in Urban Structuring Corridors.

Although in some cases it is possible and even desirable to use economic incentives in urban regulation, it is a fact that its indiscriminate use can unduly benefit the real estate market or even considerably reduce revenues from the additional building rights levy and compromise the redistributive goals of the resources obtained from the program.

This perception of possible ineffectiveness has already been observed in the economic area in several studies on the impacts of tax incentives and exemptions. However, in the field of urban planning, there is a lack of knowledge and discussions regarding this type of impact that result from the use of various legal and urban instruments, particularly in the case of urban concessions, as will be seen below.

Additional levy, a legal-political instrument

Throughout the 1980s, awareness grew regarding the motivation to verticalize, that is, to create land. It became understood that it stemmed from a greater interest in a specific "point" due to existing public and private investments in its surroundings. The levy for additional building rights, in cases where the owner was interested in doing so (aiming at a more intense use of the property), would be a counterpart to the appreciation of the property that was generated by society, both through public infrastructure and through private investments which qualify the place, and should be returned to society. In the same way, properties that remained empty and

wasted the public investments made available, should bear responsibilities in the form of a progressive tax, successively to expropriation. These are the foundations of the "Urban Reform," whose goal was to socially distribute socially-built urban land appreciation.

In São Paulo, the 2002 Master Plan, developed on the grounds and effectiveness of the City Statute, approved the mechanism of additional building rights levy, establishing a basic floor area ratio, and a maximum floor area ratio. With the current Master Plan, approved in 2014, the floor area ratio equal to 1 was established for the first time, and the resources obtained with the additional levy were allocated to a separate fund, the Urban Development Fund (Fundurb), intended for transportation infrastructure and social housing.

It is then necessary to discuss some more aspects about the instrument of created land and its effectiveness via floor area ratio and payment of additional levy for its expansion. Explicit in the City Statute (Brasil, 2001), among the legal and political instruments, in article 4, V, the additional levy does not constitute a tax, but an urban planning obligation, with constitutional basis in the social function of the property. It is not a tax, because it is not impinged on someone. Owners will only make the payment related to the use of additional building potential if they want to build additional area.[13]

The resources obtained with the additional levy for the use of additional building potential or for an alteration of use can only be applied to actions related to urban policies of territorial nature, and the conditions to be observed are established by a specific municipal law, as determined by the City Statute (ibid., Article 28).

In the 2014 Master Plan of São Paulo (São Paulo, 2014), the additional building potential is expressed as a municipal property domain asset, i.e., owned by the City Hall, endowed with urban and socio-environmental functions.

This understanding, which expresses an effort to make the concept of created land compatible with legal categories, arose from Gecran's debates, based on the separation of the right to property and the right to build. The right to build gains greater autonomy with the "theory of patrimonializing the right to build" (Pinto, 2010), according to this theory, additional potential to build becomes a kind of asset, having an economic value that is incorporated into the land, but which goes beyond the payment of the urban costs with which the owner contributes for financing infrastructure.

In this regard, Pinto (2010) states that:

> [...] it is necessary to undertake a broad effort of theoretical reformulation, to identify and review all consequences of the conceptual model adopted by the City Statute. It is about building a new unifying theory that offers a global alternative to the previous doctrine and that can take in the new and old institutes within a coherent whole. (Ibid., 229)

The theory patrimonializing the right to build transposes the instrument of created land into legal theory as an "autonomous asset"[14] that can be appropriated and negotiated as something marketable and profitable.

The adoption of the theory of patrimonializing the right to build has some consequences. One of them is that it allows owners, once the right to build has been

incorporated to the lot through payment, to file a claim for damages for property "losses" suffered in the event of any legal supervenience that reduces the right to build. Another consequence is that the additional potential to build becomes an asset that can then be commercialized and remunerated by city hall and the agents that participate in the production of the space.

Along these lines, patrimonializing the right to build appears in the 2014 Master Plan in two provisions: article 116, which classifies the additional building potential as municipal property without a designated use, and § 3 of article 144, which, when dealing with urban concessions, foresees the additional building potential as the object of remuneration of the concession.

The legal framework of public assets in the Brazilian legal system characterizes such assets by a series of limitations and allocations, in addition to submitting them to the special legal framework of public law, not pertaining to private law. All assets belonging to legal entities of public law can be considered as public assets, as well as those that, although not owned by such entities, are allocated to a public purpose (Bandeira de Mello, 2005).

The Civil Code of 2002 that is currently in force, following the same approach as that of the Civil Code of 1916, classifies public assets as: a) those that are of common use by the people, i.e., they belong to everyone indiscriminately, such as streets, parks, oceans, environmental resources, atmosphere; b) those of special use, which are assets allocated to a public service, such as public schools and hospitals; c) and bem dominical (municipal property without a designated use / municipal property asset), which are those in the private domain of the State (Municipality), which are not allocated for public purposes and, therefore, can be alienated, such as vacant lands (*terras devolutas*).

Assets for the common use are those intended for the whole community, and their use, according to article 103 of the Civil Code, can be free or remunerated. Special use assets, on the other hand, are intended for the provision of public services and, therefore, are allocated for public purposes. Public assets allocated to some public purpose or destination are inalienable and cannot be counted as a pledge. Municipal property asset (*Bem dominical*), in turn, is not affected to any common use, nor to the provision of public services, and can be alienated or used as income generators for the State.

The classification of created land/building potential as a municipal property asset (*bem dominical*) has legal, urban-environmental and, above all, economic consequences.

This is because such classification does not only allow the attribution of economic value, with which the State collects and can waiver, but also its appropriation and commercialization by the private sector. This commercialization, in cases related to protected assets, had already been established in Brazilian law, when the instrument of transfer of the right to build was approved as a law. It allows individuals to alienate the building potential attributed to their property, but which cannot be used in their own property, due to its condition of listed building. However, the use of the instrument

of transfer of the right to build in the case of listed building has always been very restricted and conditioned.

In this regard, the 2014 Master Plan, when conceptualizing the additional building potential as a municipal property asset (*bem dominical*), allows the public power to use it not necessarily for urban and environmental purposes, but for exclusively economic purposes, especially as an object of remuneration for public-private partnerships between public administration and private agents in the production of urban space.

Thus, there is a clear debate about the legal nature of created land that constitutes itself as an asset, and it is worth remembering that it is not always possible to find compatibility between urban concepts in the law. Classifying it as asset refers to something free to transactions in the market by those who have the financial resources to do so.

It is, however, important to emphasize once more that, considering that building above the basic floor area ratio directly impacts the infrastructure and urban-environmental space, the right to build vertically must have its constitutional foundation in accordance with the values of urban order and environment. Furthermore, it must be understood as belonging to the collectivity, so that, if one admits that created land can be categorized as an asset, it certainly come closer to the concept of assets for the common use by the people of a diffuse nature[15] than of a municipal property asset, based on the understanding that the legal nature of created land is an environmental resource with urban function used in the production of urban space.

Consortium urban operations: Created Land as financial asset

By virtue of the provision in the City Statute, the instrument of created land served as input for structuring and modeling the Consortium Urban Operations. Although they already existed, it is in fact in the 2002 Master Plan that their regulation becomes denser and more specific.

The Consortium Urban Operation is a modality of urban intervention in certain areas of the city. In this delimited area, the additional levy must be invested in infrastructure in the place itself, thus the distributive principle must be expressed within the area. In addition, it became possible to operationalize the additional levy in the form of Cepac security titles, traded on the stock exchange. In this way, the additional building potential is detached from the lot, becoming a financial asset, subject to speculation, thus inserting a new meaning in the original material nature of created land.

In the urban context, the floor area ratio continues to be imagined as a material category, relative to the urban form, when in fact it has become a financial category and, as such, determines what will or will not be built, defying any urban logic.

Urban plans and legislations continue to use controls and logics of materiality and form, while the production of built space sees ratios as a financial asset. The urban dimension is subject to the financial calculation of feasibility to the entrepreneur.

Consortium Urban Operations end up generating two types of traps: selling a Cepacs requires showing evidence of the liquidity

of the buildings that use them, liquidity that derives from differential advantages, which makes the process concentrate its benefits in those areas of the territory, thus raising the price of land in these places.

The second trap is that, by operating with an asset traded on the stock exchange, the relationship between the Public Power and the investor is referred to the sphere of private law, in which the provisions of the contract prevail even if in certain circumstances it will negatively affect the public interest, thus contradicting the public function of the urbanistic activity.

The Concept of the common and its appropriation by the private

The idea of the common as a political principle that opposes the new neoliberal reason of the world (Dardot and Laval, 2016), marked by the logic of commoditization and competition which affects different dimensions of human existence, was brought to the light of social struggles as a form of opposition to the private appropriation of that which did not belong (Dardot e Laval, 2017).

In the context of cities and urban policy, especially with the advent of neoliberalism, although political management of social wealth, which encompasses the redistributive principle, is a power-duty of the State, some urban common property, that is, those belonging to the entire collectivity because they are produced by social wealth, are appropriated and destroyed by private interests (Harvey, 2014, p. 156).

And the created land/building potential, operationalized through an additional levy, fits into this perspective of the transformation of what was initially public property, intended for the realization of collective interests and fundamental common rights (Dardot and Laval, 2017), in an exclusively economic category subject to appropriation by the private sector.

Urban concession: Land Created as an object for paying the private sector

Urban concession is an instrument provided for in the 2014 Master Plan of São Paulo that allows the delegation of urban activity to the state company or, through a bidding process, to the private sector.

Pursuant to Municipal Law n. 14,917/2009, which provides, in general terms, on the instrument of urban concession in the Municipality of São Paulo, urban concession is

> [...] the administrative contract through which the granting authority, by means of a competitive bidding process, delegates to a legal entity or a consortium of companies the execution of urban works of public interest, in the responsibility and risk of the concessionaire company, in so that its investment is remunerated and amortized through the exploration of the resulting properties intended for private use under the terms of the concession agreement, based on a specific urban planning project and in compliance with the objectives, guidelines, and priorities of the law of the strategic master plan.

Although this text does not intend to discuss the urban concession instrument, it is necessary to understand its meaning and scope in order to clarify the role of the additional building potential in this instrument.

The urban concession is an instrument designed to delegate urban planning activities to the private sector to carry out urban works. One of the ways of remunerating the concessionaire, according to the current Master Plan, is through the exploration of the additional building potential to be used in the implementation of the Urban Intervention Project that underlies it.

In the legal framework of the urban concession, therefore, the possibility of alienation by the concessionaire of expanded building potential is part of the economic arrangement.

In this regard, the idea of the concessionaire's remuneration through the additional building potential can distort its urban and environmental purpose, insofar as the public resources to be obtained from the sale of the building potential, instead of being redistributed in favor of the whole society, may be appropriated by the private sector.

Conclusion

More than conclusions, what we seek is to open new outlooks.

Because virtual land is the basis for the constitution of the so-called new urban instruments, the very foundation of these instruments depends on how this instrument of "created land" is framed and how it is expressed as law, economy, and built space. This is what we tried to introduce in this text.

There are strong reasons for proposing this debate. The arguments that defend and criticize the aforementioned new urban instruments and their impacts are forceful, but there is a lack of reflections and evaluations that actually manage to advance beyond the most visible evidence.

As it is known, our Tax on the Circulation of Goods and Services (ICMS) is regressive and if, on the one hand, its increase makes it possible to expand public investments, primarily in the interest of the poorest part of the population, this tax is proportionally higher precisely for this group. The proposal here is to understand and evaluate the effective nature and impacts of the new instruments which present themselves as the great "magical" source of resources that represents only gains, and not a transfer of income or benefits, like any other source of resources. It is a matter of asking questions that are not being asked.

Similar to the advancement of the debate on the effectiveness and cost-effectiveness of tax incentives and exemptions, it is necessary to transpose this type of assessment for new urban instruments, particularly for the management of "virtual land."

The reflections developed in this article seek to advance the understanding of the nature of virtual land with the aim of developing a road forward and methodology that shine a light on the transferring processes (of income, resources, benefits?) that are not evident, and that are promoted by such instruments, based on the economic exploration of virtual land.

Created land, which is virtual land, since it first emerged as a concept, has undergone several transformations in the whole country and particularly in São Paulo city, with regard to formulation of urban instruments, their regulation, purposes, and application. Initially perceived as an expansion of habitable area and, therefore, an expansion as well of the demand for infrastructure and public open

spaces, it was natural to understand the need and fairness of demanding some form of urban-environmental counterpart for the appropriation of this created land, with the goal of creating balance between densification and urban infrastructure.

On the other hand, because of the different building potentials (floor area ratio) attributed to different areas of the city, the predominant debate took place around the financial potential of land created, based on the realization that the definition of one or another floor area ratio would imply greater or lesser profitability for landowners and economic agents operating in the real estate market. Thus, this led to the emphasis on the idea of the function of created land and the additional levy as capturing differential income (Rezende et al., 2009, p. 57; Ribeiro and Cardoso, 2003 p. 123).

Another aspect worth noting is that from the instrument of transferring right to build, building potential became an asset to be appropriated and marketed by the private sector. Moreover, later, when the Consortium Urban Operation was formulated, it became a financial asset. The arguments and historical processes of this construction have been addressed throughout the text.

However, it was the classification of created land as a public-domain asset that, in addition to allowing its appropriation and commodification, entrenched its feasibility of being transferred to the private sector, including as a source of gains and undue subsidy, which as already observed by some authors, legitimizes the abuse of economic power by real estate development.

By scrutinizing and deepening the interpretation of all these aspects, we seek to outline ways to identify income transfers operationalized through urban instruments based on the management of virtual land. In this regard, it is worth highlighting studies that have been following this path.

According to studies developed by Nogueira (2019) for the municipality of São Paulo, the percentage paid as additional levy in the developments object of his research was low in view of the appreciation of General Sales Value (VGV)[16] provided by the increase in additional building potential. That is, the additional levy was not capable of capturing the gains in profitability of the developments in proportion to the gains made available by the increase in building potential. In this same direction, the author assesses that the incidence of the planning factor (Fp), which has the function of guaranteeing discounts in the value of additional levy in developments located in areas where the Master Plan proposes densification, practically does not change the decision of the developer. Similar assessments have been made by Leite (2019), who pointed to the need to monitor, for example, the production of Social Interest Housing (HIS), relating it to the total exempted counterpart, or the relationship between social interest factor and the production of Affordable Housing (HMP). Likewise, the Transfer of the Right to Build model allows its sale to those interested to build above the basic floor area ratio in other parts of the city, as an alternative to paying the additional levy of the right to build (Souza et al., 2019).

These are important advances, but they say more about the economic element of those who gain. It still has much to advance on what generates this gain and in the identification of the place or person from which it is transferred.

The objective technical means capable of measuring the real additional building potential in each location in the city has limitations. Therefore, the maximum floor area ratio that should also take into account the construction's environmental impact to better assess the relative imbalance between densification and infrastructure, ends up, in fact, playing a fundamental role in the study of the economic viability and the profitability of a real estate development considering the increase it causes to the VGV. In these circumstances, created land, contained in the maximum floor area ratio, on the one hand serves as an indirect subsidy from the City Hall to developers and land owners and, on the other, as an instrument that calibrates the calculations of the developers (Nogueira, 2019, p. 56)

Consequently, it is noticeable that the real estate product has been evolving based on the standard of economic efficiency determined by values and forms of incidence of the additional levy. Thus, this produces an urbanism design based on calculations that rarely correspond to the products proposed and expected by Planning. This condition imposes on the urban form a product that has no urban basis but that represents the result of the calibration of a calculation. If, on the one hand, urban planners intend to encourage certain forms and products, the logic of economic calculation outlines others. Marketing is responsible for transforming cost reductions into desirable aspects – such as the creation, some years ago, of "gourmet balconies," which were sold as quality and status but that were really designed because "balconies" do not count as a built-up area. It is additional floor area, which is not computed in the floor area ratio metric and, therefore, is not subject to the additional levy.

Finally, it is necessary to come up with new questions so that one can see beyond.

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Notes

(1) Public Civil Action (TJSP) 1034059-70.2018.8.26.0053, which questions the transfer of the possibility of exploring the additional building potential by the private sector; ADIn 2028122-62.2018.8.26.0000, which has as its object the unconstitutionality of the "protocol right" that governs the rules on the right to build above the floor area ratio over time; Civil Appeal (TJSP) 1013904.47-2019.8.26.0053, which discusses the payment rules in the additional levy; Public Civil Action (TJSP) 1010569-20.2019.8.26.0053, which questions the need for a Technical Environmental Impact Study to quantify and assess the impact of the increase in additional building potential.

(2) Name given in reference to Benjamin Adiron Ribeiro, then Secretary of the General Planning Coordination. The formula inserted in the aforementioned Zoning Law established an inverse proportion between the floor area ratio and the lot occupancy rate. The developer could increase the floor area ratio as the occupancy rate decreased, which stimulated the minimum occupancy rate and had consequences for urban typology and form.

(3) Known as the Hotel Law, it authorizes "greater permissiveness in built-up areas and greater flexibility in their use," providing for an increase in the floor area ratio.

(4) It allowed maximum floor area ratio for hospitals

(5) Provides for the subdivision, use, and occupation of land in Z8 and expands the hypotheses of application of the Adiron formula for Z10 and 12, in addition to regulating incentives to increase the floor area ratio in the event of donation of partial area of the plot of land for the realization of works by the municipality.

(6) In 1971, in Rome, technicians linked to the United Nations Economic Commission for Europe signed a document in which they defended the separation between the right to property and the right to build, as well as the idea that the latter should belong to the collectivity.

(7) The Chicago Plan of the 1970s created the "bonus zoning" instrument, which provided for the permission of greater and, therefore, more profitable, floor area ratios, requiring a counterpart, and also the instrument of Transfer of the Right to Build (Rezende et al., 2009).

(8) In France, since 1975, there has been the so-called Legal Density Ceiling (plafond legal de densité), instituted by Law 75-1328 (Code de L'urbanisme), whose ratio was 1,5 for Paris and 1,0 for other cities.

(9) In the case of the preservation of properties of historic value.

(10) The Embu Charter derived from studies and events, especially seminars, which took place in the cities of Embu, São Paulo, and São Sebastião, promoted by Cepam (Grau, 1983).

(11) Law 13.874, of September 20, 2019, which establishes the declaration of the Rights of Economic and Urban Freedom which, in our view, is absolutely opposed to the provisions of article 170 of the CF, creates a hierarchy of the free exercise of economic activity and of property to the detriment of urban law guidelines and the social function of urban property.

(12) In this sense, cf. Grau (1983), a group of experts – from the Economic Commission for Europe – gathered in Rome in 1973, defined the need to affirm the separation between the right to property and the right to build, given the assumption that the latter must belong to the collectivity.

(13) In this sense, the Brazilian Supreme Court (RE 387.047-5) decided that the nature of the additional levy was not of a tax.

(14) In the general theory of law, "asset" means material or immaterial value that can be subject to legal allocation and incorporated into the person's patrimony.

(15) The word diffuse is used here in its legal sense of the term linked to something common to the collectivity and that cannot be measured individually, under the terms of article 81 of Law 8078/1990.

(16) Estimation of the revenue of a project by its potential considering the sale of all planned real estate units.

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