

Legal nature of the municipal agreement with owner in order to implement development projects (case study of Germe)

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ARTICLE INFO

Article history:

Received 12 March 2016

Received in revised form 14 Apr 2016

Accepted 25 Apr 2016

Keywords:

Municipality,

Urban laws,

Taking the possession,

Public laws,

Germe city

ABSTRACT

Objective: Germe city is one of the northern cities of Ardebil province which has been located in 120km of the province center. **Methodology:** According to the laws and provisions, municipality is a public and non-governmental institute, but in practice, on one hand due to the lack of financial independency of municipalities and their dependency on the governmental aids and on the other hand due to the concentrated management system of the country (except the short-term periods), although Iran's municipalities aren't governmental, anyway they haven't been also public and they are semi-governmental. **Results:** According to the governing laws, municipality at first with acquisition of the possessor satisfaction, takes the possession of the property, in the event of lack of acquiring the mutual agreement, municipality according to the article 8 of bill related to the manner of buying and taking the possession of lands and properties for execution of public, reconstructive and military plans of government approved in 1980, takes the authority and possession of intended property. There are four kinds of land possession in Germe city that cognition of them has an important role in planning and urban design. **Conclusion:** These four kinds of possession consist of: A-public possession, B-governmental possession, C-endowed possession, D-private possession. In such conditions, municipality not only undertakes the responsibility of satisfying the physical needs of city, but also it undertakes the manager, controller and compiler role of laws and provisions.

1. Introduction

Creating the streets, alleys, squares and public gardens is from the main duties of municipalities in line with reconstruction of city according to the clause one of article 55 of municipalities' law; the municipalities take action in this line by approving the reconstructive projects. Sometimes, execution of these projects faces with the obstacle of persons' private possession. In this event, any kind of reconstructive act in these landed properties necessitates for the municipality that at first to buy and take the possession of these landed properties; in the event of emergence of such a state, the need of city and citizens to create and execute the public projects is in conflict with the possession right of possessors.

Different solutions have been predicted in the laws existing for this problem; the municipalities for execution of their public utility projects are obliged to obey from these laws; for example, according to the article 3 of legal bill about «the manner of buying and taking the possession of lands and properties for execution of public, reconstructive and military plans of government» approved in 1980/2/1, the municipality is obliged to acquire the «mutual agreement» of the possessors of arena and standing properties included in the project. In this event, with payment of agreed price to the possessor, the landed property is delivered to the municipality and in the assumption of lack of mutual agreement, according to the proviso one of the unique article of law about «the manner of appraisal of buildings, properties and lands needed for municipalities», approved in 1992/11/19, the price of arena and standing properties is determined by a three-person-board of formal experts of Ministry of Justice. Then, the municipality with one of the methods inserted in the note 2 of article 4 of law about the manner of buying and taking the possession of lands and properties for execution of public, reconstructive and military plans of government included on the written communication, publication and attachment of advertisement in the place invites the possessor for doing the transaction. (Following the article 8), within one month since the announced date, he should refer for doing the transaction. After this period and in the event of lack of reference of possessor, for the second time, it is announced to the possessor to attend for transaction within fifteen days; after it, the

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DOI: <https://doi.org/10.24200/jsshr.vol4iss03pp55-60>

municipality can take the possession of the intended property by exerting the provisions of article 8 of law about the manner of buying and taking the possession.

The main question is this case that whether the mentioned stages, all are accounted in the category of «possessions» of municipality or merely execution of provisions inserted in the article 8 of law about the manner of buying and taking the possession of landed properties has the nature of «taking the possession» and forcible aspect. In other words, whether «mutual agreement» of municipality with possessor in line with execution of reconstructive project is in the category of possessions of municipality or merely it is a transaction that municipality like other persons concludes it with possessor and it follows the public rules of contracts.

One of the effects of this separation is an assumption which is done by the municipality without having former project or before approving the project, highest executive position or commission of the subject of article 5 of law in the higher council of urbanism, «studying and approving the detailed urban projects and their changes in each province by commission and with directorship of governor-general (and in his absence, the reconstructive representative of governor» and with membership of municipal, representatives of ministry of house and urbanism, ministry of Jihad Keshavarzi, organization of cultural heritage, tourism and handicrafts and also the head of Islamic council of the related city and the representative of engineering system organization of province (with architecture or urbanism expert knowledge) without the vote right. If the changes of the detailed maps are effective according to the urban comprehensive project, they should be confirmed by the approver authority of comprehensive project (higher council of Iran's urbanism and architecture or the authority determined by the higher council). The intended project should be agreed by the possessor or possessors mutually and he/they take the possession of property for execution of project. In the event of considering the municipality's act as a contract which follows the public rules of contracts, lack of project or lack of approval of it at the time of transaction, doesn't any effect on correctness of contract. But, whenever such a mutual agreement is known in the category of «possession» of municipality, since the authority or right of taking the possession for municipality is imagined for the municipality when there is an approved project, the mutual agreement accomplished with possessor is considered futile or invalid. In the meantime, whenever the mentioned transactions merely are considered as a contract in line with exertion of tenure, any kind of claim about invalidity or annulment of it is only in the competence of public court; but if these mutual agreements are accounted as the «possession» of municipality, they will be a kind of exertion of governance and lack of observation of laws in this field is from the complaints of persons to the executive organizations which is in the competence of administrative justice court. Other effects are also imagined on this segregation which will be mentioned in this paper (Hashemi, 1993).

At first, the theories of contractual mutual agreements of municipality, these possessive mutual agreements and legal documents of these views have been mentioned and the by analyzing and evaluating these ideas, the results of possessive mutual agreements of municipality are explained with regard to the topical laws; at the end, the research results will be also presented.

2. Materials and methods

In this research, it has been tried that the information to be acquired from the library method, studying the theses and articles written in the laws and urban rules subject, quality and quantity of studies done in relation with the studied subject and region.

2.1 The theory of contractual mutual agreements and their documents

According to this view, the mutual agreements of municipalities with possessors for execution of constructive projects have followed the public rules of contracts and they are accomplished through one of the acquisitive contracts.

2.2 Contractual mutual agreements

The theory of contractual mutual agreements of municipality and possessors of lands included in the execution of constructive projects is the dominant and known theory among experts of urban laws (Kamyar, 2009). From the view of private laws, by relying on the principles of the will governance and domination, financial exit from another one's asset needs the demand and will of its possessor.

Therefore, with this attitude, «the first ways of creating the possession are to utilize of the contracts related to the estates and properties which are realized by the parties' acceptance and affirmation. Therefore, the citizens can assign their possession right or easement and profit-making rights to the municipality and government by using of buying, renting, concealing, contracts or other determined contracts or contract of the subject of article 10 of civil law. This method which guarantees the full respect to the possession right of persons, has been mentioned evidently in the law about the manner of buying and taking the possession of lands and also law about the manner of appraisal of buildings and properties» (Kamyar, 2009).

One of the authors has reminded of acquisition of mutual agreement between municipality and possessor entitled «mutual agreement supply» (Beheshtian, 2009), it means that the owner of intended possessive rights should take the possession of possessive rights with mutual consent. In his belief, the first method of transmission of possessive rights is to utilize of the acquisitive contracts which is realized by the parties affirmation and acceptance and with regard to the articles of law about the manner of buying and taking the possession of lands, this method is prior and superior over other methods; therefore, if the field and context of mutual agreement are provided, the municipality should utilize of this method to supply the possessive rights (Beheshtian, 2010). This author has known the legal nature of non-consensual assignments in the category of contracts too and he believes that another person as the substitute of the right's owner takes action for assigning the rights to the municipality (Beheshtian, 2010).

Some other ones believe that «the term of mentioned «mutual agreement» in the law of the manner of buying and taking the possession of lands means the conformity of the will governance and consent of two or more persons in the contracts and commitments. If the parties of transaction namely possessor and municipality do the mutual consent with any quality and method, they will execute it in a manner that even without the expert intervention, these mutual agreements are practical» (Binam, 2000).

2.3 The documents of the contractual mutual agreement view

The believers in the contractual mutual agreements of municipality with possessors of lands and properties resort to some documents as follow.

2.3.1 Inference from the title of law about the manner of buying and taking the possession of lands

As it is inferred from the title of law about the manner of buying and taking the possession of lands and properties for execution of public, constructive and military plans of government approved in 1980, this law determines the manner of buying and taking the possession of private lands and properties of persons which is needed for the public, constructive and military plans of government. The legislator according to this law for becoming the possessor of private properties by the executive organization, has considered two methods: First, «buying» the properties namely using of the mutual agreement methods; and if impossible, «taking the possession» of needed lands: The recent act has had a forcible state and with regard to the article 8 of mentioned law depends on the existence of obstacles for acquiring the mutual agreement. Therefore, the initial principle in execution of this law is to transact and «buy»; municipality can become the possessor of its needed lands and rights as the result of mutual consent, not in this manner that is permitted to take the possession unilaterally and forcibly. In this assumption, the possessor can avoid from transaction by lack of accepting the price suggested by municipality, though it has been economical and even several times more than the today's price of property; this affair is an evidence for freedom of will in the contracts affair, because due to this principle, the persons are free to conclude treaty with each other in any reasonable form that they want and they can determine its effects, unless the contents of their mutual consent are illegitimate due to the opposition with law, public order or good morals (Katuzian, 2003). Following the article one of the law about the manner of buying and taking the possession of lands, two phrases of «buying» and «taking the possession» have been applied beside each other which confirm the above inference (Moein, 1984).

2.3.2 The phrases of «cost» and «damage»

In the article 3 of law about the manner of buying and taking the possession of lands, the phrases of «just cost» and «damages of possessors» have been reminded. What occurs in the mind from these two phrases includes: one, buying the property and another, civil responsibility. «Cost» is paid in an assumption that there has been a replaced contract and the parties have done mutual consent on a determined price; «damage» is proposed when without existence of a contract, a damage has been incurred on the possessor from the action or omitting the action of person. According to the evidence inserted in the article 3 which ordains: «If the price related to the transaction or damage of each one of the possessors is more than 25 dollars, the cost of buying the property or amount of damage and doing the transaction should be approved by the determined board or assembly of city (council of city) about municipalities». It is specified that the municipality should transact with possessor and acquire the lands of the project subject by his mutual consent and agreement. In the note 2 of article 3 of this law, «buying» and this issue that after acquisition of mutual agreement, the municipality is obliged to take action for buying the property or announcing its exemption from buying and taking the possession within three months are discussed.

2.4 The documents of the possessive mutual agreements theory

Eileen adduces to some evidences in the possessive mutual agreements theory.

2.4.1 The provisions of article one of law about the manner of buying and taking the possession of lands:

The legislator in the article one of law about the manner of buying and taking the possession of lands, under some conditions has ordained that buying and taking the possession of the lands needed for the executive organization such as municipalities is permitted. According to this article, firstly the executive organization has the right of buying and taking the possession of lands belonged to the people in an assumption in which considers some plans that opportune execution of them is necessary for the public and security affairs of organization; secondly, this obligation should have been approved by the highest position of executive organization; thirdly, its budget should have been supplied formerly; and fourthly, following article one of mentioned law, buying and taking the possession should be accomplished according to the provisions inserted in this legal bill. With precision in this article and comparison of it with public rules of contracts, the difference of this legal institute with other similar institutes is clarified. In buying or other replaced contracts in which the civil laws are governing, the buyer can do the purchase in the credit transaction form at the time of buying, while according to the appearance of article one of this law, the municipality should have supplied its credit before buying (property); in fact, buying the property without supplying the necessary credit is to violate from legal provisions that the guarantee of execution of it is to annul the possessive acts (Salehi, 2005).

Also, the municipality can not conclude the contract, unless has the approved project; this project in any kind has had special criteria and conditions such as different accounting criteria (Bahrami, 2009) and it should be approved by the highest executive position, while in the usual state, for doing the transaction, the real or legal persons don't need the approval of project and other formalities and as soon as they will, they can enter to the transaction freely, buy a property and take the possession. Another important issue is this case that following article one of law about the manner of buying and taking the possession of lands, the municipality should take action for transaction according to the contracts of this law; therefore, the municipality doesn't have freedom of will that like other buyers to buy the property in any form by mutual agreement with seller. In fact, the legislator determines the limits and manner of buying and taking the possession of people's properties so that the municipality not to be able to take action on detriment of possessor or executive organization (public people and treasury), this affair expresses lack of absolute freedom of municipality in concluding the transaction.

3. Discussion and results

3.1 The effects and results of the possessive mutual agreements theory

In a general view, in the event of accepting the possessive mutual agreements of municipality and possessors, the same effects associated on the articles 8 and 9 of law about the manner of buying and taking the possession of lands can be known current to these mutual agreements. As it was mentioned, taking the possession of possessive rights according to the mentioned articles is accompanied with many limitations and conditions; these limitations and

conditions, of course according to the intended case are also current about the mutual agreements of municipality. The question is this case that in the event of acceptance of the possessive mutual agreements theory, what effects are associated on it; in fact, how is the relationship between the municipality and possessors analyzed from this view? These effects are studied as follow:

3.2 Taking action for acquisition of mutual agreement of possessor without existence of project or before approving it

One of the results of contractual mutual agreements of municipality is this issue that if the municipality doesn't have the project or the intended project hasn't been approved yet, in the event of mutual consent on transmission of property and conclusion of contract, this contract will predicate on correctness; because the possessor with good essence has transmitted his property to the executive organization without acquisition of his mutual agreement as the result of compulsion or reluctance. Therefore, lack of project or lack of approval of it doesn't disorder the free will of possessor. Although, the municipality in the initial discussions of buying the property has mentioned the project and it has announced the purpose of doing the transaction as execution of a public project, this affair at most can be assumed as the transaction's direction. As it has been said, «the transaction's direction is indirect motive with intermediators that the transaction's party has in his head in formation of contract. This motive or purpose in different persons is different proportional with the personal situation and economic conditions» (Shahidi, 2004). According to the article 217 of civil law, merely the illegitimate direction, in the event of stipulation on it in contract has been effective and provides the causes of annulling the contract; otherwise, the direction doesn't any effect on contract. But, in the event that the mutual agreement of municipality is considered as «taking the possession» and unlike the view of some authors that have known it from tenure acts (Beheshtian, 2009), this act is accounted from the governance acts, taking action for acquiring the mutual agreement of possessor isn't transaction and contract so that can be also known correct even without existence of approved project. The municipality before existence of approved project doesn't have the right to acquire the mutual agreement of possessors; therefore, any kind of mutual agreement in this field is invalid. Since approving and executing the project has been exertion of governance and it is accompanied with forcible power, such a power can not be imagined for the municipality unless a project exists. Therefore the possessions without approved project are condemned to be annulled.

3.3 Change of the project or nullification of it after acquisition of mutual agreement and payment of price to the possessor:

In many cases, the municipality by adducing to an approved project after conclusion of contract with possessors takes the possession of their properties; but despite of existence of all significant conditions for the project and lack of any kind of legal forms, execution of project has faced with postponement or generally, the approved project is annulled. Currently, some judges of courts with knowing the mutual agreements as contract and transaction, haven't known the next change or annulment of project as an effective case in contract with municipality and they don't accept the lawsuit of possessors who refer to the court for annulling the possession (contract) and restitution of their properties. While, with knowing such mutual agreements as «taking the possession», nullification of the project approved by municipality means that the public need, benefit and policy of approving the project and right of taking the possession haven't existed since the beginning and nullification of project after acquisition of mutual agreement of possessors indicates this affair. Consequently, lack of public benefit and policy causes invalidity of project since the approval time; therefore, the accomplished possessions according to it have been also annulled and the possessor wants to reconstitute his property (Shambyati, 2012)

3.4 Competent authority for proposing the lawsuit and complaint

In the assumption of lack of approving the project of taking the possession and also in the event of objection to such possessions or non-consensual possessions, the administrative justice court is the competent authority for investigating the objection of possessor about the municipality possession with regard to the possessive mutual agreements; because, in each one of these assumptions, the municipality's act is to exert the governance and according to the principle 173 of constitution, investigation of people's complaints and objections about the officials and ministrations is in the competence of this court.

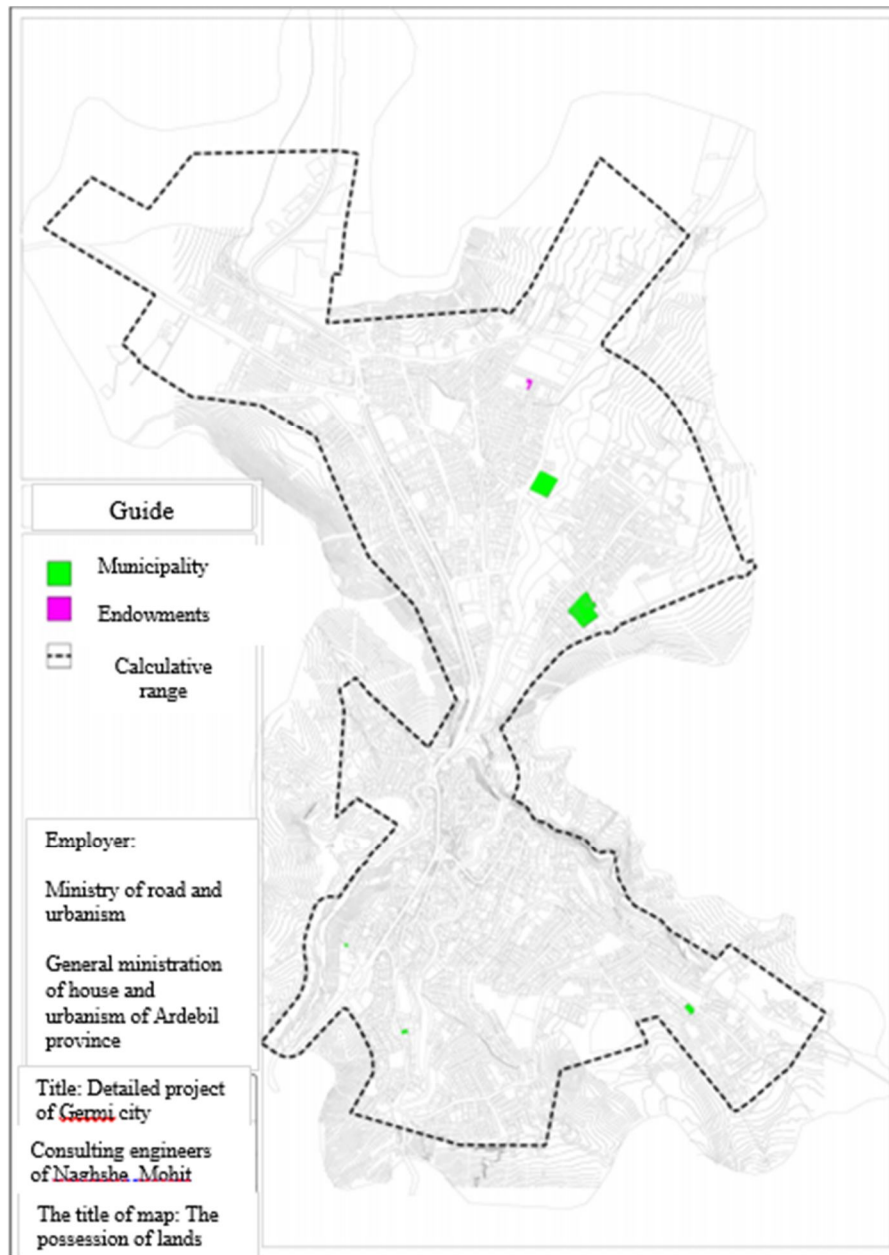
3.5 Transmission of document by the possessor and obligator authorities

One of the problems of municipalities is this issue that sometimes the possessor after mutual agreement with municipality and signing the transactions of property transmission, has prevented from receiving the cost and transmitting the property to the municipality's name formally and after receiving the cost of property, he doesn't want to transmit the document to the municipality's name; in the event of emergence of such a state, the municipality in order to realize the right and obligation of possessor to the formal transmission must refer to the Ministry of Justice and propose the lawsuit of obligation to transmit the formal document, while if these mutual agreements are considered as taking the possession, with unity of criterion from article 8 of law about the manner of buying and taking the possession of lands, with municipality's request, the public prosecutor or his representative by providing the conditions can transmit the property to the municipality's name with attending in one of the formal offices and signing the document. The ministration of documents and properties registration is also obliged to annul or reform the former documents according to the intended case (Mueller et al., 2001).

3.6 Detailed study of problems related to the land possession and determining the place and amount of lands belonged to the public organizations and institutes

There are four kinds of land possession in Germe city that cognition of them has an important role in planning and detailed project. These four kinds of possession consist of: A-public possession: Urban lands which belong to the public people and for using of them, payment of taxes isn't needed, are placed in this group. The streets, parks, green space and etc can be mentioned as some of these cases. The administrators of this kind of lands in the cities are mainly the ministry of house and urbanism and municipalities. All unutilized and developable lands of municipality inside the project range are a little more than 2 Hectare that from this amount, 7748m² and about 500m² have been allocated to the Motor Park and construction of several shops respectively. Anyway, 17.1 Hectare of the municipality's lands is in the unutilized and undevelopable form for the remained different public activities. The

situation of lands related to the municipality has been specified in the map 1. B-governmental possession: All lands which are in the possession and tenure of governmental ministrations and organs, are placed in this spectrum. According to the studies accomplished through referring to all governmental ministrations, currently the governmental ministrations of Germi city don't have the unutilized and developable land. A lot of ministrations have mentioned the buildings and constructions in which the ministrations have been located as the only lands and buildings under their possession. C-Endowment possession: It includes all lands which are in the possession of endowments organization and they should be applied for the public benefits and charity affairs. These lands mainly have been endowed with specified purposes by endower which should be considered in exertion of future uses. A lot of mosques existing in Germi city have endowment possession. From unutilized lands which have endowment possession, a piece of land which has an area of 652m² and construction of an allocated mosque can be mentioned. The situation of this piece has been specified on the map No.1. D-Private possession: All lands which are in the possession of personal and real persons, are placed in this group. With regard to this issue that in the detailed project, the situation related to the uses of all lands located inside the urban range should be specified and due to prevent from the subordinate problems, it is necessary that the possessions to be specified in the city level so that by cognition of the legal situation of lands in first degree, the possibility of realization of uses suggested in the intended lands to be determined legally and in the second degree, by identification of governmental lands and with regard to the situation and other considerations, the services related to different organs in the lands under the authority of each one of them can be predicted. Therefore, a main part of realization of this kind of uses which is indeed to take the possession, can be determined. Most of lands located in the legal range of Germi city have personal possession. These territories of unutilized lands embrace the garden and arable lands. The residential and commercial uses of city have been also formed in this kind of lands. Also, this kind of possession in addition to the lands inside the texture includes the lands out of texture too which have been in the authority of private possessor and currently have been allocated to the garden, arable and unutilized uses (Osman and Russell,1979).



The map No.1: Germi city

4. Conclusion

By studying the nature of mutual agreements of municipality with possessors of properties located in the path of execution of constructive projects, two views proposed in this regard were explained and analyzed. It seems that unlike the customary view, the mutual agreements of municipality with possessors of properties should be known from the kind of taking the possession and included in the public laws and they shouldn't be known in the category of private contracts which are concluded in the light of principle of the will governance; because, firstly, the view of taking the possession has more conformity to the juridical principles which form the country's foundation; and secondly, the results gained from this view supply the public rights of citizens and possessors better and more. Currently, with a customary consideration which knows such mutual agreements as contract, in many cases, the courts don't know the lack of project or its next change as a reason on nullification of «transaction» of municipality; while with presented view, in each one of these assumptions, «taking the possession» can be annulled. Lack of project or change of it after taking action for taking the possession according to the intended case and in order indicates lack of authority of municipality in taking the possession and lack of obligation in executing the project and taking the possession of people's lands. Therefore, the possessors of such properties can restitute their properties. Also, in the cases that the possessor after doing the mutual agreement refuses from transmission of document, with customary view, the municipality must propose the lawsuit of obligation to transmit in the public tribunals; an affair which has allocated much percent of municipality lawsuits to itself; while with acceptance of recent view and by using of the unity of criterion in the articles of law about the manner of buying and taking the possession of lands, the municipality with referring to the

governor-general can request for signing and transmitting the possession documents. From the view of tax provisions also according to the recent view, the possessors will be exempted from paying the taxes on transmission; an affair which seems more logical; because, there is no reason that a possessor whom have been often obliged to transmit his property without real desire, to be obliged to pay the tax to the government (governor); while the governance itself has caused this transmission.

The results gained from this research indicate that due to prevent from emergence of subordinate problems, it is necessary that the possession in the city levels to be specified, so that by cognition of legal situation of lands in first degree, the possibility of realization of uses suggested in the intended lands to be determined legally and in the second degree, by identification of governmental lands and with regard to the situation and other considerations, the services related to different organs in the lands under the authority of each one of them can be predicted. Therefore, a main part of realization of this kind of uses which is indeed to take the possession can be determined. Most of lands located in the legal range of Germi city have personal possession. The territories of unutilized lands embrace the garden and arable lands. The residential and commercial uses of city have been also formed in this kind of lands. Also, this kind of possession in addition to the lands inside the texture includes the lands out of texture too which have been in the authority of private possessor and currently have been allocated to the garden, arable and unutilized uses.

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How to Cite this Article:

Marandi M., Asadzadeh L., Legal nature of the municipal agreement with owner in order to implement development projects (case study of Germi), Uct Journal of Social Sciences and Humanities Research 4(3) (2016) 55–60.