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II. The Planning System in the Federal Republic of Germany

Authors

Prof. Dipl.-Ing. Elke Pahl-Weber (TU Berlin)
Prof. Dr. Dietrich Henckel (TU Berlin)
Dr. Werner Klinge (Institut für Städtebau)
Ass. Jur. Petra Lau, Gastprofessorin (BTU Cottbus)
Dipl.-Verw. Wiss. Daniel Zwicker Schwarm (difu)
cand. -Ing. Benjamin Rütenik (TU Berlin)
cand. -Ing. Anja Besecke (TU Berlin)

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II. Planning System

1. The Planning System in General

1.1 The History of the Building Law

Development of Building Law up to 1945¹

Building law was largely codified at the state level in the second half of the 19th century and has since been supplemented and further developed by state and federal legislation. The following account deals with developments in *Prussia*. The present substantive and organisational division of German building law into building control law and building planning law is based essentially on local law and on the Prussian Code, the General Law for the Prussian States (*Allgemeines Landrecht für die preußischen Staaten – prALR*) of 1794 (hereinafter ALR). From Section 65 (1) sentence 8 of the ALR, which gave every owner a general right to cover his land with buildings or to alter a building, the principle of the freedom to build was developed under the influence of the emerging liberalism of the 19th century, although this right was restricted by various provisions.² The courts then interpreted the provision to mean that it served only to ward off dangers.³ The separation of streets and public squares from other land, i.e., the setting of building lines was regulated by Section 66 (1) sentence 8 of the ALR and was considered a police task.⁴ The right to collaborate in setting building lines was granted local authorities only in 1855.⁵ The police concept of Section 10 of the ALR provides the basis for the issue of building regulations in the form of police bye-laws. Building regulations settled only what was absolutely necessary to protect public safety and order.⁶

In reaction to industrial development, the enormous increase in population, and the consequent urban expansion after 1870, the “Act relating to the Laying Out and Alteration of Streets and Public Squares in Cities and Rural Communities” or Building Line Act (*Fluchtliniengesetz*) was adopted on 2nd July 1875. The act gave local authorities competence with regard to building lines for streets, expropriation of land for public thoroughfares and compensation, as well as for building prohibitions and frontager contributions.⁷ The Building Line Act introduced autonomous urban development law, for the transfer of building line planning to local authorities divided building regulation substantively and organisationally into two fields: urban development and building police.

Neither the 1794 Prussian Code, nor precautionary police regulations or the consequent building regulations, nor the Act against the Disfigurement of Outstanding Landscape Areas of 2nd June 1902 or the Act against the Disfigurement of Communities and Outstanding Landscape Areas of 15th July 1907 produced a

¹ Cf. for detailed treatment Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Einleitung 1 - 45.

² Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, ,Einleitung Rn. 4.

³ Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, ,Einleitung Rn. 4.

⁴ Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, ,Einleitung Rn. 4.

⁵ Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, ,Einleitung Rn. 5.

⁶ Cf. Jaeckel; Die Entwicklung des Baurechts in Berlin seit der Jahrhundertwende, in: Berlin und seine Bauten, Teil II, Rechtsgrundlagen und Stadtentwicklung, 11/12.

⁷ Cf. Schmidt-Eichstaedt, Städtebaurecht, 80 ff.

uniform urban development law. The manifest shortcomings in urban development of cities, the precipitous growth of cities clearly demonstrated the need for a two-stage planning system for the municipal and settlement area. The notion of large-scale inter-municipal planning (state spatial planning) was given first legislative expression in an act on the Ruhr Regional Planning Authority passed on 5th May 1920.⁸

Major advances in Prussian building law were achieved with the Prussian Housing Act of 28th March 1918, which eliminated obvious weaknesses in the Building Line Act and added urban planning and design elements to building control law. The Prussian Housing Act permitted the gradation of building development and the designation of specific land-use areas. But it also failed to meet the demand for comprehensive building law.

During the Weimar Republic (1919 - -1933), the drafting of a Reich Urban Development Act was under discussion, but political events prevented the project from coming to fruition.

During the Third Reich, from 1933 to 1945, codification efforts continued. On the basis of the comprehensive legislative powers vested in the Reich, the Reich Ministry of Labour drafted a German Building Code, which aimed to combine building police law and building law. The war prevented any progress on the draft legislation. Instead, numerous isolated amendments were introduced in sections of building law. Reich legislation between 1933 and 1945 also proved unable to develop a uniform system of urban development law. However, the establishment of the Reich Office for Regional Planning in 1935 offered an opportunity for state spatial planning throughout the country.

Development of Building Law up to 1945⁹

Massive destruction of cities, towns, and villages during the Second World War and the influx of refugees and expellees confronted local authorities with immense urban development problems. The building law arrangements inherited from the past proved completely inadequate to the task. Since, in the prevailing constitutional situation (the Federal Republic was founded only in 1949) there were neither legislative nor executive institutions at the national level, the states had no choice but to regulate building development matters within their territories themselves. Before reconstruction and reorganisation of the devastated towns and cities could begin, the rubble had to be removed and recycled. In 1948 and 1949, the states, with the exception of Berlin and Bremen, passed "rubble acts" for this purpose, along with reconstruction acts to control building development in towns and cities. The reconstruction acts dealt with urban planning, land reallocation, and building development. The law hitherto in force largely continued to apply in conjunction with reconstruction legislation. After the relevant institutions of the Federal Republic of Germany had been created and had taken up their work, a Federal Ministry for Housing addressed the establishment of country-wide building law bringing together and developing existing state law.¹⁰ Given that the unification of building law would be a protracted process, the Building Land Procurement Act was passed to deal with

⁸ Cf. Schmidt-Eichstaedt, Städtebaurecht, 87.

⁹ Note: The development of building law in the German Democratic Republic is not dealt with.

¹⁰ Cf. for detailed treatment Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Einleitung Rn. 51 ff.

the urgent problems of obtaining land for development.¹¹ The act provided for the expropriation of land for housing, for garden and cultivation purposes, for ancillary structures, and for public amenities.

The opinion handed down by the Federal Constitutional Court¹² on 16th June 1954 recognised the competence of the Federation to regulate urban planning, building land reallocation, realignment and replotting, real property transactions, provision of public services, and land valuation. It also recognised the exclusive legislative competence of the Federation for federal planning and concurrent framework legislative powers in outline state spatial planning. State jurisdiction in building control law (building regulations) was recognised.

The different legislative powers provide the basis for the distinction between spatial planning law, urban planning law, and building control law within public building law.¹³

Spatial Planning and State Spatial Planning

After the Second World War, spatial planning and state spatial planning were materially and formally revised and integrated into the national planning system.

In the 1954 expertise of the Federal Constitutional Court mentioned above, the competence of the Federation for spatial planning was recognised owing to the very nature of the task.¹⁴ After considerable preparation,¹⁵ the Federal Spatial Planning Act (*Raumordnungsgesetz – ROG*) was adopted on 8th April 1965. The states established the legal basis for state spatial planning within the framework of the act. An extensively amended version of the act¹⁶ came into force on 1st January 1998. The Federal Spatial Planning Act contained four subdivisions. Subdivisions 1, 2, and 4 were directly applicable throughout the country, and subdivision 3, owing to the rules on legislative powers applicable at the time, provided framework rules for spatial planning in the states.¹⁷ Deadlines were set for transposing these federal provisions into state law.¹⁸ With the introduction of the sustainability principle, the tasks, guidelines, and guiding principles of spatial planning were detailed,¹⁹ and the mutual feedback principle spelled out (Sections 1 and 2 of the Federal Spatial Planning Act).²⁰ Furthermore, the concepts, substance, and binding effects of spatial planning (Sections 3 to 9) were defined in detail and the possibility of prohibiting planning and measures contravening spatial planning for an unlimited period was introduced (Section 12), as well as the option of regional preparatory land-use planning (Section 9 (6)). Spatial planning procedures were also reorganised (Section 15) and, in the newly amended Spatial Planning Ordinance (*Raumordnungsverordnung – ROV*) the projects subject to spatial planning procedures were enumerated.²¹

¹¹ *Gesetz über die vorläufige Regelung der Bereitstellung von Bauland - Baulandbeschaffungsgesetz -* of 3 August 1953 (BGBl. I 720).

¹² Cf. BVerfGE 3, 407...

¹³ Cf. Entwurf eines Baugesetzes, Schriftenreihe des Bundesministers für Wohnungsbau: Bd. 9, 15 ff.

¹⁴ Cf. Runkel, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, „Einleitung Anhang Rn. 34.

¹⁵ For detailed treatment see Runkel in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Einleitung Anhang Kap II.

¹⁶ Article 2 of the *Gesetz zur Änderung des Baugesetzbuchs und zur Neuregelung des Rechts der Raumordnung (Bau- und Raumordnungsgesetz 1998 – BauROG – 18th August 1997, BGBl. I 2081).*

¹⁷ Cf. Runkel, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, „Einleitung Anhang Rn. 86.

¹⁸ Cf. Section 22 ROG.

¹⁹ Cf. Runkel, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, „Einleitung Anhang Rn. 90.

²⁰ Cf. Runkel, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, „Einleitung Anhang Rn. 93.

²¹ Cf. Schmidt-Eichstaedt, Städtebaurecht, 88.

Section 3 of the Act to Improve Preventive Flood Control²² broadened the scope for flood prevention under Section 7 (2) sentence 1 no. 2 and Section 3 sentence 2 no. 5 of the Spatial Planning Act.

Urban Development Law

It was not until adoption of the Federal Building Act (*Bundesbaugesetz*) on 23rd June 1960 that a uniform regulation of urban development law was achieved to replace arrangements encompassing many isolated laws on specific matters. The Federal Building Act created a system of building law that could do justice to the objectives of modern urban development. It conclusively regulated the delimitation of functions between spatial planning, urban planning, and building control law/building regulations, as well as the differentiation between local self-government and direct administration by higher levels of government (Federation and state) in urban planning.²³

The Federal Building Act required local authorities to organise and control urban development through urban land-use planning in conformity with federal spatial planning and state spatial planning.²⁴ The Federal Building Act was supplemented by the Plan Notation Ordinance²⁵ and the Land Utilisation Ordinance.²⁶

The Plan Notation Ordinance was introduced to standardise plans in urban land-use planning.

The Land Utilisation Ordinance, which came into force in 1962, and which has since been amended several times to take account of current developments,²⁷ enumerates general and specific categories of land use and sets rules for determining the intensity of built use, building method and design, and permissible lot coverage. This has standardised the urban land-use plans prepared by local authorities.

Once major reconstruction in the war-damaged cities had been achieved under the regime of state reconstruction and rubble acts (1945 to -1960), in particular restoration of the technical infrastructure and the provision of urgently needed housing, the nation-wide regulation of urban land-use planning and urban development began, the model espoused being that of the dispersed and structured city. This phase of urban development from 1960 to 1977 guided by the Federal Building Act produced *large-scale housing estates*, new development on the urban fringes (outer development), *extensive remedial measures* (“comprehensive rehabilitation”) in Gründerzeit neighbourhoods, and extension of the road transport system.²⁸

²² *Gesetz zur Verbesserung des vorbeugenden Hochwasserschutzes* of 3 May 2005 (BGBl. I 1224).

²³ Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, *BauGB*, Einleitung 45-72.

²⁴ Cf. Wambsganz, Ludwig; Die Umstellung der bisherigen städtebaulichen Planung auf die Bauleitplanung des Bundesbaugesetzes, in: Göderit (ed.), *Das Bundesbaugesetz und andere aktuelle Probleme des Städtebaus und Wohnungswesens*, Schriftenreihe der deutschen Akademie für Städtebau und Landesplanung.

²⁵ *Verordnung über die Ausarbeitung der Bauleitpläne und sowie über die Darstellung des Planinhalts – Planzeichenverordnung* – 9th October 1965 (BGBl. I 121). The Plan Notation Ordinance was last amended by ordinance of 19th December 1990 (BGBl. I 58).

²⁶ *Verordnung über die bauliche Nutzung der Grundstücke Baunutzungsverordnung – BauNVO* - of 26 June 1962 (BGBl. I 132). The ordinance was amended on several occasions, most recently by Section 2 of the Investment Facilitation and Housing Land Act (*Gesetz zur Erleichterung von Investitionen und der Ausweisung und Bereitstellung von Wohnbauland*) of 22 April 1993 (BGBl. I 466).

²⁷ On the development of the ordinance, see Fickert/Fieseler, *Baunutzungsverordnung*, 1 - 16.

²⁸ For a critical discussion of the development of urban development models from 1960 see Bodenschatz, Berlin im Jubiläen-Rausch, in: *Stadtbauwelt* 48 of 23rd Dec. 1988, 2146 ff and

Even while the Federal Building Act was being drafted, it was recognised that the tools it provided for rehabilitating dilapidated areas, for developing the edges of agglomerations, and for building new towns were inadequate.²⁹ After a prolonged legislative procedure, the Federal Building Act was supplemented in 1971 by the Urban Development Promotion Act.³⁰

From the mid-1970s, urban development was influenced by shifting societal values and by consequent changes in urban-development models.³¹ These changes found expression in amendments to the Federal Building Act in 1977 and 1979. Other important factors for urban development were a declining birth rate, slower growth, increasing maintenance costs for infrastructural facilities, higher energy costs, continued restructuring in industry and commerce, and stricter statutory requirements for *environmental protection and nature conservation*. This required urban planning policy to improve the quality of housing and the residential environment, and to address inner development by better safeguarding industrial and commercial uses in mixed-use areas. To this end, the tools provided by the Federal Building Act were supplemented by comprehensive planning (master/development planning), by greater public involvement, social compensation procedures, requirements to take account of environmental interests, and targeted tools for attaining planning objectives.³²

In 1986, the Federal Building Act and the Urban Development Promotion Act were combined into the Federal Building Code,³³ thus bringing together the whole of urban planning law. At the same time, urban planning concentrated more strongly on *inner development*, and greater attention was given to *environmental protection and the conservation of historic monuments*.³⁴ In order to remedy the housing shortage and in reaction to the withdrawal of the Federation from publicly-assisted housing, the Administrative Measures Act to Supplement the Building Code was passed on 17th May 1990.³⁵ To overcome the tight situation on the housing market prevailing at the time, obstacles to obtaining and designating housing land were to be eliminated and building permission for housing facilitated.

Prior to the reunification of Germany in 1990, the Building Planning and Permission Ordinance³⁶ was passed for the new states entering the Federation, which contained parts of the Building Code, as well as special provisions on comprehensive spatial planning and state spatial planning and new instruments like the project and

Bodenschatz, Berlin West: Abschied von der steinernen Stadt, in: Beyne, von, Klaus (ed.), Neue Städte aus Ruinen: Deutscher Städtebau der Nachkriegszeit, 75/76.

²⁹ Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Einleitung Rn. 100.

³⁰ *Gesetz über städtebauliche Sanierungs- und Entwicklungsmaßnahmen in den Gemeinden (Städtebauförderungsgesetz - StBauFG)* as promulgated on 18th August 1976 (BGBl. I 2318); it has since been incorporated in amended form in the Building Code.

³¹ On changes in models see Kaiser, Reinhard; Global 2000; see also Strohm, Holger; Friedlich in die Katastrophe; von Weizsäcker, Richard, Zukunftsaufgaben der Stadtentwicklung, in BAU Handbuch, 91 ff.

³² Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Einleitung 114-139.

³³ *Baugesetzbuch (BauGB)* as promulgated on 23. September.2004 (BGBl. I S. 2414, last amended by Art. 3 of the Act of 5th September 2006 (BGBl. I 2098).

³⁴ Cf. Krautzberger, Das Baugesetzbuch 1987, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Einleitung 145-160.

³⁵ *Gesetz zur Erleichterung des Wohnungsbaus im Planungs- und Baurecht sowie zur Änderung mietrechtlicher Vorschriften* of 17 May 1990 (BGBl. I 926) contains the *Maßnahmengesetz zum Baugesetzbuch (BauGB-MaßnahmenG)* in Article 2. This act was in force until 31 December 1997.

³⁶ *Verordnung zur Sicherung einer geordneten städtebaulichen Entwicklung und der Investitionen in den Gemeinden (Bauplanungs- und Zulassungsverordnung – BauZVO)* of 20th June 1990 (GBl. der DDR I Nr. 45, 739). It came into force on 31 July 1990.

infrastructure plan.³⁷ This ordinance initiated the step-by-step introduction of West German urban planning law in East Germany.³⁸ This was necessary because the legal and economic basis for urban development planning in the German Democratic Republic differed fundamentally from that in the Federal Republic.³⁹

Since the 3rd October 1990, the Federal Building Code, the Land Utilisation Ordinance, Valuation Ordinance, the Plan Notation Ordinance, and, until 31st December 1997, the Administrative Measures Act to Supplement the Building Code have applied throughout the territory of the Federation. This legislation provided for numerous transitional arrangements for the new states.⁴⁰ The many amendments and special provisions produced a cleavage between building and planning law in West and East Germany.⁴¹ The lacking reserves of building land in agglomerations and investment disincentives in the provision of land for development led in May 1993 to adoption of the Investment Facilitation and Housing Land Act⁴²

The Federal Building Code was amended in 1996 to improve conditions for the authorisation of renewable energy,⁴³ and projects for the research, development, and use of wind and water power were added to the catalogue of privileged projects under Section 35 (1) no. 6 of the Building Code (since 2004 no. 5). To improve controls under Section 35 (1) nos. 2 to 6 of the Building Code, Section 35 (3) adds provisos.⁴⁴

The Building and Spatial Planning Act 1998⁴⁵ unified the Federal Building Code and spatial planning law across West and East Germany, and the provisions of the Administrative Measures Act to Supplement the Building Code were incorporated in the Building Code.

The changes to the Federal Building Code and in spatial planning introduced between 1990 and 1998 were motivated by a national awareness of the need for advancing and adapting building law to meet new objectives in urban planning and to further the reunification of the country.⁴⁶

The amendments to the Federal Building Code in 2001 and 2004⁴⁷ were introduced essentially to adjust national law to the *requirements of EU law*. Thus, the Federal Building Code was amended by the Act of 27 July 2001 (BGBl. I 1950) implementing the EIA Amending Directive,⁴⁸ the IPPC Directive⁴⁹ and other EC environmental protection directives.⁵⁰ These amendments brought environmental impact assessment for certain binding land-use plans within the purview of the Building

³⁷ Cf. Krautzberger, Einführung der BauZVO, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB Kommentar, Einleitung 167-171.

³⁸ Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Rn. 164.

³⁹ Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Rn. 165 with further references.

⁴⁰ Cf. *Einigungsvertrag*, act of 23 September 1990, BGBl. II 885, Anlage I Kapitel XIV 11.1.5.1122.

⁴¹ Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Einleitung 179 - 189.

⁴² *Gesetz zur Erleichterung von Investitionen und der Ausweisung und Bereitstellung von Wohnbauland (Investitionserleichterungs- und Wohnbaulandgesetz)* of 22nd April 1993 (BGBl. I 466).

⁴³ *Gesetz zur Änderung des Baugesetzbuchs* vom 30. 7. 1996 (BGBl. I 1189).

⁴⁴ Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, ,Einleitung Rn. 190.

⁴⁵ *Gesetz zur Änderung des Baugesetzbuchs und zur Neuregelung des Rechts der Raumordnung (BauROG)* of 18th August 1997 (BGBl. I 2081; renewed promulgation of the act in force from 1st January 1998 on 3rd September 1997 (BGBl. I 2141, 1998 I 137).

⁴⁶ Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Einleitung 190-211.

⁴⁷ Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Einleitung 212 - 254.

⁴⁸ EIA: environmental impact assessment.

⁴⁹ IPPC: integrated pollution prevention and control.

⁵⁰ Section 12 of the *Gesetz zur Umsetzung der UVP-Änderungsrichtlinie, der IVU-Richtlinie und weiterer EG-Richtlinien zum Umweltschutz* of 27th July 2001 (BGBl. I 1950).

Code. The Federal Building Code was again comprehensively amended by the European Law Adaptation Act for the Construction Sector⁵¹ on 24 June 2004. Amendment was required to transpose Directive 2001/42/EC of the European Parliament and the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment in German urban development and spatial planning law.⁵² The transposition of this EU Directive was carried out in parallel by the Act on Environmental Impact Assessment (*Gesetz über die Umweltverträglichkeitsprüfung – UVPG*) and other specific acts. The European Law Adaptation Act for the Construction Sector made further amendments and introduced new elements into general and special urban planning legislation.⁵³ With the aim of reducing land take and speeding up important planning projects, especially in safeguarding and creating jobs, meeting housing and infrastructure needs, building and planning law was simplified and accelerated for relevant projects by the Act Facilitating Planning Projects for Inner Urban Development,⁵⁴ which came into force on 1 January 2007.

1.2 The Basic Principles of the Planning System

The federal structure of the state with the three levels of federal, state, and local government is decisive for the system of spatial planning in Germany. Spatial planning is accordingly decentralised in this country. The distribution of competence and functions between the three levels of government produces a system with legally, organisationally, and substantively differentiated planning levels.⁵⁵ While they are legally, organisationally, and substantively defined and clearly differentiated, they are interlinked by the mutual feedback principle as well as complex requirements of notification, participation, coordination and compliance.⁵⁶

Federal spatial planning is limited essentially to the development of guiding principles and, principles of spatial planning which also provide the legal basis for state spatial planning and superordinate specifications for sectoral planning. State spatial planning gives concrete form at the state level to the federal principles of spatial planning, while at the local level, final planning goals are developed in compliance with both federal and state spatial planning specifications. It is the responsibility of local authorities to regulate the use of land for building and other purposes at the lowest planning level.

Figure: Mutual feedback principle.⁵⁷

⁵¹ *Gesetz zur Anpassung des Baugesetzbuchs an EU-Richtlinien (Europarechtsanpassungsgesetz Bau – EAG)* of 24th June 2004 (BGBl. I 1359).

⁵² Cf. Krautzberger, in: Ernst/Zinkahn/Bielenberg/Krautzberger, BauGB, Einleitung 255-296.

⁵³ Cf. chapter. II.1.7.

⁵⁴ *Gesetz zur Erleichterung von Planungsvorhaben für die Innenentwicklung der Städte* vom 21. Dezember 2006, BGBl. I S. 3316.

⁵⁵ Cf. Turowski, Raumplanung, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 895.

⁵⁶ Cf. Turowski, Raumplanung, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 898.

⁵⁷ Cf. Bundesamt für Bauwesen und Raumordnung (ed.): *Räumliches Planungssystem in Deutschland*, <http://www.bbr.bund.de/raumordnung/raumentwicklung/planungssystem.htm>, accessed on 05. 10. 05.

According to the Spatial Planning Act, the task of *federal spatial planning* is to focus sectoral planning and public investment from the point of view of regional and national structural policy. It lays down material guidelines and guiding principles, which provide a binding, comprehensive and superordinate model for lower-level planning tiers, sectoral planning, and public measures affecting spatial development. The aim of superintending the spatial structure of the national territory is to establish equivalent living conditions in all parts of the country.

The structural policy of the states plays an important role in supporting and promoting spatial development in Germany and in reinforcing infrastructural measures. The Federal Spatial Planning Act requires the states to engage in state spatial planning. They adopt state spatial planning acts implementing the prescribed guiding principles and principles of spatial planning in a form adapted to conditions in the given state.

Planning in the states as stipulated by the Spatial Planning Act is a two-phase process. *State spatial planning* addresses spatial development in the state as a whole, while regional planning is concerned with subdivisions of a state. The competent planning authorities prepare state-wide and regional spatial structure plans setting out the principles of spatial planning to be taken into account in all spatially significant planning and measures, and spatial planning objectives to be observed.

State spatial planning authorities have to ensure that the goals and principles of national spatial planning and state spatial planning are respected and taken into account in local government planning. In a system of mixed top-down/bottom-up planning, they accept suggestions from local authorities and are required to coordinate local development goals with superordinate planning goals. The aim is to ensure that urban land-use planning does not frustrate the development aims of state spatial planning but supports them, thus avoiding investment mistakes.

Below the state level of spatial planning, *regional planning* is concerned with the detailed elaboration, sectoral integration, and implementation of the goals of state spatial planning. It accordingly mediates between state spatial planning and local urban land-use planning. Regional planning must conform with federal and state spatial planning.

The obligation to adapt local land-use plans to the goals of comprehensive spatial planning (Section 1 (4) of the Building Code) and the duty of mutual coordination between planning levels (mutual feedback principle) ensures that planning within the federal structures of government is not contradictory and that the guiding principles and principles of spatial planning are given increasingly specific and concrete form from tier to tier in the planning system.⁵⁸

1.3 Objectives, Scope, and Functions of the Planning System

Spatial planning is an area-related public sector task that can be subdivided into comprehensive (or overall) planning and sectoral planning (cf. chapter II.4). Comprehensive spatial planning addresses the supra-local (spatial planning) and local levels (urban land-use planning).

⁵⁸ Cf. Bundesamt für Bauwesen und Raumordnung (ed.): Räumliches Planungssystem in Deutschland, <http://www.bbr.bund.de/raumordnung/raumentwicklung/planungssystem.htm>, accessed on 05. 10. 05.

Federal spatial planning has no tools at its disposition for organising and developing the entire national territory. *State spatial planning* is limited to general spatially significant planning and measures. In contrast, both sectoral planning and local urban land-use planning deal with specific uses and specific areas and sites. *Sectoral planning* handles the final authorisation of special projects (e.g. railways) (cf. detailed treatment in chapter II.4). According to Section 1 (1) of the Building Code, the task of *local urban land-use planning* is to prepare and control the use of land for building or other purposes (cf. chapter II.3.2). Only in the subsequent authorisation procedure under state building regulations, unless an exception is made and where further ancillary conditions for approval have been met (e.g., immission control, conservation of historic monuments, nature conservation), are the permissible uses for a site laid down (cf. chapter II.3.4).

The highly differentiated system of comprehensive spatial planning and sectoral planning, and the associated distribution of competencies ensure that planning is coordinated at every level.

Federal spatial planning

Although the Federation disposes of no legally effective planning tools, it can exercise considerable influence at all territorial levels through its legislative powers in spatial, urban, and sectoral planning, through economic, financial, and transport policy tools, and in the exercise of joint responsibilities.⁵⁹ In carrying out spatially significant measures and planning, the principles of spatial planning set forth in Section 2 of the Federal Spatial Planning Act have to be taken into account when weighing interests and in discretionary decisions, and to be clearly defined and laid down in state and regional planning as aims of spatial planning.⁶⁰ Since there are no spatial structure planning instruments for the territory of the Federal Republic as whole, the Federal Government coordinates sectoral departmental policy, as well as state and European Union policy by other means. They include spatial planning reports, comments on state and regional spatial structure plans, participation in the development of European spatial development concepts, the development of guidelines and plans of action for the Conference of Ministers for Spatial Planning, and research and pilot projects.⁶¹

The 1998 Spatial Planning Act gave the Federation a notable, novel and informal tool for developing “guiding principles for the spatial development of the national territory and covering matters transcending individual states,” helping enhance recognition of federal spatial planning as an independent tier in the German planning system.⁶² The overriding purpose of spatial planning is now to achieve sustainable spatial development which will bring the social and economic demands made on an area into line with its ecological functions, and producing a stable and well-balanced order. A detailed treatment of the development of guiding principles for spatial development is provided in chapters II.1.4.1. and II.3.1.2.

State spatial planning

⁵⁹ Cf. Turowski, Raumplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 895.

⁶⁰ Cf. Turowski, Raumplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 896.

⁶¹ Cf. Sinz, Raumordnung/Raumordnungspolitik, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 867f.

⁶² Cf. Turowski, Raumplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 896.

Under Section 8 of the Federal Spatial Planning Act, an overall, superordinate plan has to be prepared for the territory of a state. In the city-states of Berlin, Bremen, and Hamburg a preparatory land-use plan pursuant to Section 5 of the Building Code can perform the same function. The chief matters covered by state-wide spatial structure plans are spatial structure, central place structure, and superordinate infrastructure, as well as the distribution of potential settlement areas and open areas.⁶³ The goals and principles of spatial planning as laid down are to be observed and taken into consideration by subordinate tiers of planning and in sectoral planning.

Regional planning

Within the German spatial planning system, in keeping with the federal structure of government and the principle of decentralised administration, regional planning is a function of state spatial planning concerned with subdivisions of the territory. It is independent of comprehensive spatial planning, state spatial planning, and local planning, with its own functions pursuant to Section 9 of the Federal Spatial Planning Act. It is concerned with broad, supra-local, and cross-sectoral, foresighted planning for the spatial and settlement structural development of a region.⁶⁴ It is differently regulated from state to state.

Except in Bavaria, planning regions are defined by state law. The states are divided into a varying number of planning regions (e.g., five in Brandenburg and four in Mecklenburg-West Pomerania). Regional planning is also organised differently from state to state. In most states it is entrusted to special associations set up primarily by local authorities, differing in organisational detail (e.g., Bavaria, Brandenburg, Saxony-Anhalt). In the other states, regional planning is assigned to counties (Lower Saxony), middle-tier state bodies (Hessen, North Rhine-Westphalia), or the government level (Schleswig-Holstein). Regional planning has not been introduced in Saarland.⁶⁵ Depending on the state, regional plans take the form of ordinances, local government statutes of bye-laws, or special types of government measure.⁶⁶

Local urban land-use planning

Local urban land-use planning is a formal tool on the basis of the Federal Building Code. According to Section 1 (1) of the Code, the task of urban land-use planning is to prepare and control the use of land for building or other purposes. The aims and principles of urban land-use planning are laid down in the form of planning guidelines (Section 1 (5) of the Building Code). Objectives include ensuring sustainable urban development and a socially equitable utilisation of land for the general good of the community, contributing to a more humane environment and to the protection and development of natural resources, and to the preservation and development of the urban cultural heritage. These general planning guidelines are defined in detail in Section 1 (6) of the Building Code, which sets forth a non-exclusive spectrum of planning requirements (e.g., healthy housing and working conditions, avoidance of unbalanced population structures, developing the appearance of localities and landscapes, protection of the environment). Public and private interests affected by urban land-use planning are to be duly weighed (Section 1 (7) of the Building Code).

⁶³ Goppel, Landesplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 563.

⁶⁴ Schmitz, Regionalplanung, in: „Akademie für Raumordnung und Landesplanung“ (ed.), Handwörterbuch der Raumordnung, 965.

⁶⁵ Cf. Hendlar, Raumordnungsrecht, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 882.

⁶⁶ Cf. Hendlar, Raumordnungsrecht, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 883.

Urban land-use plans are to be prepared, amended, supplemented, or set aside when and where required for urban development and planning purposes (Section 1 (3) of the Building Code). The goals and principles laid down in state and regional plans and other spatial planning demands provide the basis for local urban land-use planning, the most important level for the implementation of spatial planning requirements. The goals of spatial planning are strictly binding, whereas the principles and requirements of spatial planning are to be given due consideration in weighing interests. Urban land-use plans are to be brought into line with the goals of spatial planning (Section 1 (4) of the Building Code).

Local urban land-use planning is carried out on two levels: the preparatory land-use plan and the binding land-use plan. Details are provided in chapters II.1.4.3 and II.3.2.

1.4 Main Tools of the Planning System

The tools available to the planning system are statutory plans and programmes and the legally permitted means of safeguarding and implementing them at all levels. In addition to statutory planning tools, supplementary, informal planning is possible – which is not, however, binding, or at best unilaterally binding on the planner.

1.4.1 Spatial Planning Tools

As we have seen in chapters II.1.2 and II.1.3, no binding spatial structure plan is provided for as a tool for controlling and developing the national territory as a whole. Without prejudice to the tasks and responsibilities of the states, the competent Federal Ministry for Regional Planning, Building and Urban Development seeks to implement the principles of spatial planning in accordance with Section 2 (2), subject to the provisions of the guidelines of spatial planning and the mutual feedback principle in accordance with Section 1 (2) and (3) (Section 18 of the Federal Spatial Planning Act). On the basis of the regional plans and in cooperation with the supreme state authorities responsible for spatial planning, it primarily develops guiding principles for the spatial development of the national territory. The ministry also develops concepts transcending individual states, thus providing a basis for the coordination of spatially significant plans and measures between the Federation and the European Union, subject to the applicable provisions (Section 18 (1) of the Federal Spatial Planning Act). The guideline of spatial planning is to achieve sustainable spatial development which will bring the social and economic demands made on an area into line with its ecological functions and result in a stable and well-balanced order.

On 30th June 2006, the Conference of Ministers for Spatial Planning (MKRO) adopted new guiding principles and Strategies for Spatial Development in Germany.⁶⁷ The new models replace the 1993 Spatial Planning Policy Guidelines, because the general setting for spatial development had changed considerably.⁶⁸ Details on the content of the new models are provided in chapter II.3.1.1.

⁶⁷ Available at www.bbr-bund.de under Veröffentlichungen/Sonderveröffentlichungen. See also Bundesamt für Bauwesen und Raumordnung, Informationen aus der Forschung des BBR, Nr. 4/September 2006.

⁶⁸ Vgl. dazu im Einzelnen www.bbr.bund.de.

1.4.2 Planning Tools for State and Regional Planning

Various tools are available to state and regional planners in producing orderly planning in the face of competing economic, social, cultural, and ecological interests and in coordinating spatially significant plans and measures.

Planning tools

State spatial structure plans outline spatial and structural development for the territory of the different states. The states are required to prepare such plans.⁶⁹ For the territory of each state, a comprehensive, overriding plan is to be prepared (Section 8 of the Spatial Planning Act), and states whose territory encompasses the catchment areas of a number of high-order centres are required to prepare regional plans (Section 9 of the Spatial Planning Act). The function of these plans is to coordinate the spatially relevant planning and projects of all competent organisational units and to tie them in with the conceptual aims of state spatial planning itself. The names given state spatial plans differ from state to state (e.g., state development plan [*Landesentwicklungsplan*], state spatial structure programme [*Landesraumordnungsprogramm*], state development programme [*Landesentwicklungsprogramm*]) (see chapter II.3.5).

Spatial structure plans for subdivisions of a state deal with the spatial and structural development of regional planning areas. They are prepared on the basis of state spatial planning requirements. The spatial planning aims set forth in state spatial structure plans must be complied with and detailed in the plans drawn up for regions of the state. The name of regional spatial structure plans also differ from state to state (e.g., regional plan [*Regionalplan*], regional spatial structure programme [*Regionales Raumordnungsprogramm – RROP*], area development plan [*Gebietsentwicklungsplan*]).

Safeguarding planning

The Federal Spatial Planning Act and state spatial planning acts provide safeguards for spatial planning and state spatial planning to keep unwanted and unexpected developments under control.

Planning safeguards (Section 10 of the Federal Spatial Planning Act and corresponding state legislation)

To safeguard planning, the relevance of violations of procedural and formal requirements and the implications for the validity of spatial structure plans are regulated. Time limits are also set for lodging objections to violation of procedural or formal requirements or faults in assessment. Failure to observe these time-limits precludes objection.

Derogation procedure (Section 11 of the Federal Spatial Planning Act and corresponding state legislation)

Deviation from a regional planning goal is possible under a special procedure if the derogation is justifiable from the point of view of regional planning and if planning essentials are not affected.⁷⁰

⁶⁹ Cf. chapters I.2.2. and II.2.1. on legislative powers in spatial planning.

⁷⁰ Cf. for details: Höhnberg, *Instrumente zur Verwirklichung von Raumordnung und Landesplanung*, in: *Akademie für Raumordnung und Landesplanung* (ed.), *Handwörterbuch der Raumordnung*, 485 f.

Prohibition of plans and measures conflicting with the principles of spatial planning (Section 12 of the Federal Spatial Planning Act)

Spatially significant plans and measures covered by the binding effects of the goals of spatial planning can be prohibited for an unlimited period of time if they conflict with these goals. Spatially significant plans and measures can be prohibited for a limited period of time if there are fears that the realisation of spatial planning goals in the process of being established would be rendered impossible or significantly impeded.⁷¹

Notification and information obligations (Sections 14 and 19 of the Federal Spatial Planning Act and corresponding state legislation).

These provisions oblige federal and state authorities, as well as private persons to exchange information on spatially significant plans and measures necessary for the discharge of spatial planning functions.⁷²

Spatial planning procedures (Sections 15 and 19 of the Federal Spatial Planning Act and corresponding state legislation).

Spatially significant plans and measures are to be harmonized and coordinated with the requirements of spatial planning. Spatial planning procedure (*Raumordnungsverfahren – ROV*) supervises compliance of spatially significant plans and measures with the requirements of spatial planning policy as well as their harmonization and implementation in conformity with this policy. Spatial planning procedure includes the assessment of alternative sites and routes and of environmental impacts. Spatially significant plans and measures subject to spatial planning procedure are defined in Section 1 of the Spatial Planning Ordinance.

Spatial planning reports / state development reports (Section 21 of the Federal Spatial Planning Act and corresponding state legislation).

Spatial planning and state development reports supply information on the current state of affairs, on foreseeable developments in spatial and settlement structure, and necessary and envisaged spatially significant plans and measures. In addition, they inform about the geographical distribution of such plans and measures and about the impact of EU policy on the development of spatial and settlement structure.

Adaptation to the aims of spatial planning (Section 4 (1) sentence 1 of the Federal Spatial Planning Act)

Under this provision, spatial planning objectives are to be observed by public authorities in spatially significant plans and measures. Section 4 (1) sentence 1 and Section 1 (4) of the Building Code on the compliance of urban land-use plans (preparatory land-use plans and binding land-use plans) with the objectives of spatial planning tally substantively.⁷³

Spatial planning register (state spatial planning legislation).

Spatial planning registers are cartographic collections covering all spatially significant plans and measures relating to spatial and settlement structure. Spatial planning

⁷¹ Cf. for details: Höhnberg, Instrumente zur Verwirklichung von Raumordnung und Landesplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 484 f.

⁷² Cf. Höhnberg, Instrumente zur Verwirklichung von Raumordnung und Landesplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 487 f.

⁷³ Cf. BVerwG, DÖV 1993, 118.

registers are prepared by middle and upper-tier planning authorities. They are the functional basis for:

- the evaluation of spatially significant plans, measures, and investment;
- the substantiation and resolution of existing and potential conflicts between uses;
- coordination and consultation between public and private planning bodies,
- the preparation of spatial structure plans and planning decisions,
- the underpinning of spatial planning procedures.⁷⁴

Informal tools

Spatial planning and state development instruments are considered informal if they have no statutory binding force. Their purpose is to contribute to the realisation of spatial structure plans. Examples include:

- regional development concepts (Section 13, sentence 3 of the Federal Spatial Planning Act);
- city networks (Section 13, sentence 4 of the Federal Spatial Planning Act);
- contractual agreements on preparing and implementing spatial structure plans (Section 13 sentence 5 of the Federal Spatial Planning Act);
- guiding principles for spatial development (Section 18 (1) sentence 3 of the Federal Spatial Planning Act),
- information systems for spatial development in the country as a whole (Section 18 (5) of the Federal Spatial Planning Act),
- mutual consultation on fundamental and controversial issues (Section 19 (4) of the Federal Spatial Planning Act),
- the Advisory Council on Spatial Planning (Section 20 of the Federal Spatial Planning Act),
- regional conferences (HARA),
- regional management and regional marketing.

This substantially broadens the range of tools available. The advantage of these informal instruments is that they can be used flexibly and with focus on a given problem without legally binding requirements. Their impact depends on the persuasive power of their content. This calls for the active involvement of the relevant people and institutions. In the past, informal tools have steadily grown in importance. They are accepted as an indispensable supplement and extension of spatial structure plans and formal spatial planning instruments.

1.4.3 Tools for Local Government Planning

Local authorities, in which local planning powers are vested, have a range of tools at their disposition for preparing and managing the use of land in their territory for building and other purposes. The Federal Building Code does not, however, regulate the preparation, modification and amendment of urban land-use plans, but it does contain provisions on safeguarding and implementing them.

Planning tools

The most important local planning instruments are the preparatory land-use plan (*Flächennutzungsplan – FNP*) and the binding land-use plan (*Bebauungsplan – B-Plan*).

⁷⁴ Cf. Höhnberg, *Instrumente zur Verwirklichung von Raumordnung und Landesplanung*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 488.

The preparatory land-use plan is prepared for the entire municipal territory. It outlines the use to which land is to be put to meet the foreseeable needs of the community in keeping with the spatial planning and development goals of the municipality. This is the plan's particular role in urban development. Section 5 of the Federal Building Code regulates its content.

The *binding land-use plan* is drawn up for a section of the municipal territory. It must be developed on the basis of the preparatory land-use plan (Section 8 (2) of the Federal Building Code). The binding land-use plan sets out the legally binding stipulations for urban structure (Section 8 (2) sentence 1 of the Federal Building Code). These stipulations are arrangements concerning property within the meaning of Article 14 (1) sentence 2 of the Basic Law.⁷⁵ The binding land-use plan is adopted by the municipality in the form of a bye-law (Section 10 (1) of the Federal Building Code). Further details on urban land-use planning are provided in chapter II.3.2.

The assumption underlying rules on the authorisation of projects (Sections 29 ff of the Building Code) is that permissibility is primarily to be settled by local authorities through binding land-use plans.⁷⁶ Only where the local authority fails to discharge its control functions through binding urban land-use planning⁷⁷ does project authorisation fall under Section 34 of the Building Code (projects in built-up areas) or Section 35 (projects in outer zones).

Instruments for securing planning

Development freeze (Sections 14 ff of the Federal Building Code)

If the local authority has adopted a binding land-use plan, it can issue a development freeze to safeguard its planning intentions. In the planning area, development projects within the meaning of Section 29 may not be implemented or physical structures removed, or any major or fundamental changes of a kind which would result in an increase in value may be made to plots and physical structures. A development freeze is imposed for two years. It can be extended for a year and – for good cause – for a further year after that.⁷⁸

Postponement of building applications (Section 15 of the Federal Building Code)

If a local authority fails to impose a development freeze even though the conditions therefor are fulfilled, it may apply for the postponement of building applications. In this case, the building authority can postpone the decision on authorisation for up to twelve months.⁷⁹

Safeguards for areas of tourism (Section 22 of the Federal Building Code)

In order to safeguard tourist areas, municipalities that are major tourism centres may determine in a binding land-use plan or by means of some other statute that in the interests of safeguarding the functions of areas serving tourism permission shall be required for the establishment or subdivision of ownership of residential apartments or of property in part-ownership.⁸⁰

⁷⁵ Cf. Gaentzsch, in: Schlichter, Otto/Stich, Rudolf (eds.), Berliner Kommentar zum Baugesetzbuch, § 8 Rn. 2 ff.

⁷⁶ Cf. Kuschnerus, Ulrich: Der sachgerechte Bebauungsplan, Rn. 6.

⁷⁷ Cf. Kuschnerus, Ulrich: *ibid.*, Rn. 8.

⁷⁸ Cf. details in Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, §§ 14 ff.

⁷⁹ Cf. details in Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, § 16.

⁸⁰ Cf. details in Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, § 22.

General right of pre-emption (Section 24 of the Federal Building Code)

The municipality is entitled to exercise a pre-emption right in respect of the purchase of property in areas designated by Section 24 (1), nos. 1 to 6. The local authority may exercise its right of pre-emption – even in favour of a third party – only when this is in the public interest. In certain cases, exercise of this right is excluded. The purchaser may forestall the exercise of a pre-emption right where he is in a position to use the land within an appropriate period in accordance with building regulations or the aims and purposes of the urban development measure. Procedure and compensation are regulated by Section 28 of the Building Code.⁸¹

Specific right of pre-emption (Section 25 of the Federal Building Code)

In addition to its general pre-emption right, a municipality may assert by statute its right of pre-emption in respect of undeveloped land within the area covered by a binding land-use plan or in respect of areas for which urban development measures are being considered.⁸²

Plan implementation tools

Land reallocation (Sections 45 – 84 of the Federal Building Code).

It is permissible for both developed and undeveloped land to be reorganised through a process of reallocation in such a manner as to create plots suitable in terms of location, shape, and size for built development or for other uses. Reallocation can be carried out within the area covered by a binding land-use plan (Section 30 (1) of the Building Code) and within a built-up area (Section 34), or within the area covered by a non-qualified binding land-use plan (Section 30 (3)) if there are sufficient grounds for reorganisation. A distinction is drawn between reallocation (Sections 45 to 79 of the Building Code) and simplified adjustment of plot boundaries (Sections 80 to 84).⁸³

Law relating to compensation (Sections 39 to 44 of the Federal Building Code)

The provisions on compensation in the Building Code deal with the consequences of intervening through planning in the use of land.⁸⁴ A distinction is made between the following grounds for compensation:

- compensation following change or withdrawal of a permitted use (Section 42 of the Building Code),
- compensation for the adverse designation of public spaces (Section 40),
- compensation for encumbrances and obligations under the binding land-use plan (Section 41),
- compensation for breaches of faith (Section 39).⁸⁵

Expropriation (Sections 85 to 122 of the Federal Building Code)

The Building Code permits the expropriation (compulsory purchase) of private property when in the public interest and where the purpose to be served cannot be reasonably achieved by any other means. Section 85 (1), nos. 1 to 5 and 7 list six grounds for expropriation under the Building Code, while no. 6 is covered by state

⁸¹ Cf. details in Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, §§ 24, 26 – 28.

⁸² Cf. Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, § 25.

⁸³ Cf. Schieferdecker, in: Hoppe/Bönker/Grotefels, Öffentliches Baurecht, 372 ff.

⁸⁴ Cf. Battis, in: Battis/Krautzberger/Löhr, BauGB, Vorbemerkungen §§ 39 bis 44, Rn. 1.

⁸⁵ Cf. details Battis, in: Battis/Krautzberger/Löhr, BauGB, §§ 39 to 44.

law.⁸⁶ Expropriation is possible only against compensation. It is granted for the loss of rights and for property losses of other kinds arising from expropriation.⁸⁷

Land improvement (Sections 123 to 135 of the Federal Building Code)

Prerequisite for the use of specific land-use areas is the provision of local public infrastructure (land improvement). Initial land improvement is the task of the municipality unless it is imposed by a law or contract on another party. There is no absolute right to land improvement, but it may arise from certain conduct on the part of the municipality.⁸⁸ The precondition for the provision of local public infrastructure within the meaning of Section 127 (2) is the existence of a legally binding land-use plan. The binding effect of the land-use plan may be relaxed under certain circumstances.⁸⁹ To recoup otherwise unrecoverable public expenditure on local public infrastructure, local authorities may collect charges. Section 127 (2) of the Building Code lists the infrastructure for which recoupment charges may be levied. Expenditure on local public infrastructure within the meaning of Section 127 comprises costs in respect of the items listed in Section 128 (1) nos. 1 to 3. Where the local authority collects such charges, it has to bear at least 10 per cent of the legitimate charges for land improvements (Section 129 (1) sentence 3). In the event of a land improvement contract being concluded, the above mentioned arrangements do not apply. The local authority is required to adopt a land improvement charges bye-law. It is a precondition not only for liability to charges but also provides the legal basis for issuing notices of charges.^{90,91} Its content is regulated by Section 132 of the Building Code.

Urban development enforcement orders (Sections 175 to 179 of the Federal Building Code)

Urban-development enforcement orders serve in implementing urban development and structural measures in areas where a high measure of cooperation is required between local authority, owners, authorised users, and investors.⁹² Since arrangements are relatively “weak” (as regards building orders) and require a great deal of administrative input, such enforcement orders can prove more useful for active local authorities intent on implementing urban development planning as guides to procedure than as independent intervention instruments.⁹³ They have therefore played a relatively minor role in actual practice.⁹⁴

Informal tools

Informal tools have the advantage of being more flexible and problem-focused. As a rule, they are used to prepare alternative planning and are to be taken into account in the preparation of formal plans. Although informal plans of many sorts are conceivable, at the local government level standard master plans like the urban development plan or the framework development plan have evolved. The preparation

⁸⁶ Cf. Battis, in: Battis/Krautzberger/Löhr, BauGB, § 85 Rn. 1.

⁸⁷ Cf. Schieferdecker, in: Hoppe/Bönker/Grotefels, Öffentliches Baurecht, 390 ff.

⁸⁸ Cf. Löhr, in: Battis/Krautzberger/Löhr, BauGB, Vorbemerkungen §§ 123 bis 135, Rn. 8.

⁸⁹ Cf. Löhr, in: Battis/Krautzberger/Löhr, BauGB, § 126 Rn. 6 ff.

⁹⁰ Cf. Löhr, in: Battis/Krautzberger/Löhr, BauGB, § 132 Rn. 1.

⁹¹ Cf. details Battis, in: Battis/Krautzberger/Löhr, BauGB, §§ 123 to 135.

⁹² Cf. Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, Vorbemerkungen §§ 175 bis 179, Rn. 4.

⁹³ Cf. Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, Vorbemerkungen §§ 175 bis 179, Rn. 4.

⁹⁴ Cf. Schmidt-Eichstaedt, Städtebaurecht, 481 ff.

of informal master plans and programmes has become a permanent part of local government planning practice.

Informal plans deal with a shifting spectrum of urban themes, since changes in society bring about changes in the tasks facing urban planning.

The Building Code deals with informal planning in Section 1 (6) no. 11 and elsewhere. Although legislation has not provided for a legally specified third tier of planning, the Building Code proceeds on the assumption that urban development activities, including urban land-use planning, is embedded in a web of informal planning.⁹⁵

Section 1 (6) no. 11 explicitly states that urban development concepts and other urban plans are matters of public interest to be duly weighed.

In recent years, urban development concepts have gained outstanding importance in connection with urban redevelopment (Section 171a (2) of the Building Code) and the Socially Integrative City (Section 171e (4)). In the case of urban redevelopment, these concepts seek to integrate measures into a long-term strategy for the city as a whole. The aim is to enable sustainable urban development (urban planning objective) and to stabilise the housing market by reducing the surplus of permanently superfluous housing (housing industry objective).⁹⁶

The *urban development plan* is a long-term local authority development concept, an informal control tool that presents the focal points in development and guidelines for medium to long-term planning in a community. It is one of the most important urban planning instruments along with preparatory and binding land-use planning.

Urban development concepts are prepared for city-wide and sectoral planning goals. Typical examples are transport development plans, urban development plans dealing with housing, industry, commerce, or the social infrastructure.

The *framework development plan* is also an informal type of plan. In contrast to the urban development plan, it usually applies not to the entire territory of the municipality but to smaller areas (e.g., framework planning in preparation for urban rehabilitation measures (see chapter II.3.3).

Planning within the meaning of Section 1 (6) no. 11 of the Building Code has no direct legal effect. It is, however, internally binding, and has other effects (e.g., regarding matters material to the weighing of interests, pre-emption statutes in areas where urban development measures are envisaged, the interpretation of indeterminate legal concepts in the context of Sections 33 and 31 (2) no. 2 of the Building Code, the development of goals and purposes in rehabilitation, urban redevelopment, and the Socially Integrative City).⁹⁷ However, these effects depend on certain formal and material conditions being met: the informal plan must have been passed by the local council and, notwithstanding statutory provisions, the general public and public authorities must have been given a prior opportunity to participate.⁹⁸ Informal planning must comply with the aims and principles of urban land-use planning and seek to balance the interests affected.⁹⁹

⁹⁵ Cf. Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, § 1 Rn. 79.

⁹⁶ Cf. Bundestransferstelle Stadtumbau Ost, Glossar, www.stadtumbau-ost.info, accessed on 21.06.2006).

⁹⁷ Cf. details in Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, § 1 Rn. 81ff.

⁹⁸ Cf. Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, § 1 Rn. 85.

⁹⁹ Cf. Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, § 1 Rn. 86.

1.4.4 Sectoral Planning Tools¹⁰⁰

Apart from cross-sectional, comprehensive planning (urban land-use planning, regional planning, state spatial planning), there is specialised or sectoral planning. The range of sectoral planning is given statutory legitimation by a multitude of sectoral planning acts. Sectoral planning can be roughly divided into the sectors transport and communications, utilities, defence, agriculture, and environmental protection and nature conservation.

In approval and permission procedures both sectoral planning legislation and the Administrative Procedures Act (*Verwaltungsverfahrensgesetz – VwVfG*¹⁰¹) apply.

As a rule, the legislation on spatially significant sectoral planning requires public authorities and sectoral planners to coordinate their activities with comprehensive spatial planning.

The authorities and sectoral planners have a range of tools at their disposal. They are dealt with in detail in chapter II.4.

1.5 Main Elements in Spatial Planning

The main elements in planning are categories of use and types of settlement or area. There are two sorts of category. The first covers existing structures, the second describes planning goals at all levels of spatial planning.

The spatial structure types used by the Federal Office for Building and Regional Planning in the Spatial Planning Report provide the basis for analysing spatial differences throughout the country and for discussing and developing guiding principles for spatial development, and approaches to action.

These categories of area, differing chiefly in population and settlement density, are the basis for differentiated spatial studies, spatial development concepts and strategies all over the country. The spatial structure of the Federal Republic of Germany is characterised by a relatively balanced, decentralised concentration of population, workplaces, and infrastructure. This decentralised concentration applies not only to the country as a whole but also to all subordinate types of area such as:

- towns and cities,
- urban regions,
- agglomerations,
- large, continuous rural areas.¹⁰²

The additional category of urban region was introduced to take account of the special problems posed by interdependencies between cities and their catchment areas.

The concept of area categories was developed to lessen the gap between rural regions and agglomerations in population density, infrastructure endowment, and economic performance.¹⁰³

Planning elements of state spatial and regional planning

¹⁰⁰ Cf. Stürer, *Handbuch des Bau- und Fachplanungsrechts*, 531 ff.

¹⁰¹ *Verwaltungsverfahrensgesetz (VwVfG)* of 25th May 1976 (BGBl. I 1253) as amended and promulgated on 23 January 2003 (BGBl. I, 102); amended by Article 4 (8) of the act of 5 May 2004 (BGBl. I, 718).

¹⁰² Milke, *Raumordnung/Raumordnungspolitik*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 359.

¹⁰³ Cf. Bundesamt für Bauwesen und Raumordnung (ed.): *Raumkategorien*, <http://www.bbr.bund.de/index.html?/raumordnung/raumentwicklung/instrumente.htm>, accessed on 04.10.05.

The guiding principles for spatial development developed on the basis of analyses are given concrete form and implemented in the *spatial structure plans* at the state and regional levels (cf. chapter II.1.3). Section 7 of the Federal Spatial Planning Act provides a non-exclusive list of planning elements by means of which objectives are to be set in spatial structure plans. Section 7 contains provisions on the desired settlement structure, open space structure, and infrastructure routes. Among the most important of these elements are:

- spatial categories,
- central place systems,
- axes,
- functions,
- guideline values.

Spatial categories

Spatial categories (spatial order categories, area types) are areas defined in terms of specific criteria in which comparable structures exist and where similar goals are pursued. The most important spatial categories include:

- conurbations/agglomerations,
- regulatory areas,
- structurally weak areas,
- rural areas.¹⁰⁴

Conurbations or *agglomerations* have a higher population density and a high ratio of developed area to total area. This classification serves primarily to safeguard housing and workplaces.¹⁰⁵

Together with surrounding, peripheral areas, agglomerations form *regulatory areas* (*Ordnungsräume*). They are defined on the basis of intensive commuting relations between agglomerations and peripheral areas. Since these areas are subject to strong development pressure, regulatory measures play an important role, the aim being to concentrate future settlement along axes. The areas between axes are to be preserved for important recreational functions.¹⁰⁶

Areas where living conditions as a whole are well below the national average or where a decline is expected are termed *structurally weak areas*. Policy makers have a particular responsibility in these areas to do justice to the constitutional requirement of establishing equivalent living conditions.¹⁰⁷

Areas outside regulatory areas are referred to as *rural areas*. They often face a whole range of development problems. This is particularly the case with peripheral, structurally weak areas in Germany.¹⁰⁸

Central place systems

¹⁰⁴ Cf. Turowski/Lehmkühler, in: Akademie für Raumforschung und Landesplanung (ed.), Grundriss der Landes- und Regionalplanung, 160.

¹⁰⁵ Cf. Turowski/Lehmkühler, in: Akademie für Raumforschung und Landesplanung (ed.), Grundriss der Landes- und Regionalplanung, 161.

¹⁰⁶ Cf. Turowski/Lehmkühler, in: Akademie für Raumforschung und Landesplanung (ed.), Grundriss der Landes- und Regionalplanung, 161.

¹⁰⁷ Cf. Turowski/Lehmkühler, in: Akademie für Raumforschung und Landesplanung (ed.), Grundriss der Landes- und Regionalplanung, 162.

¹⁰⁸ Cf. Turowski/Lehmkühler, in: Akademie für Raumforschung und Landesplanung (ed.), Grundriss der Landes- und Regionalplanung, 161.

The central-place system aims to provide the population with area-wide infrastructural amenities. State and regional planning assign local authorities to categories in the central-place system. The service function includes public and private services and the employment situation,¹⁰⁹ and is performed by so-called central places at different levels.

- basic centres, low-order or small centres supply the basic daily needs of the population in the immediate area,
- middle-order centres are central places that meet more demanding needs of the population in the intermediate area;
- high-order centres are central places that meet demanding, specialised needs of the population in the extended catchment area.¹¹⁰

In order to distinguish the supply functions of the different categories of central place, spatial and state spatial planning have developed catalogues of facilities and amenities. They provide the framework for public planning and guidance for public and private investment.

Axes

This planning element is constituted by a concentration of transport and supply infrastructure routes and/or by a varying close succession of development centres. The distinction between *supra-local transport or communication axes* and *local settlement axes* has been largely accepted among experts.¹¹¹

- *Supra-local axes or communication axes* serve the far-reaching exchange of goods, services and people. They connect agglomerations with peripheral areas and are intended to provide locational advantages for the areas they traverse. They are also expected to stimulate development.
- *Settlement axes* provide for the linear concentration of settlements in coordination with public transport systems. They contribute to settlement structure and the preservation of open spaces, especially in regulatory areas.¹¹²

Functions

Comprehensive spatial planning and state spatial planning assign specific tasks to local authorities and sub-areas. A basic distinction is made between territory-related or regional functions and municipality-related functions. Regional functions can overlap and be prioritised. They include:

- nature conservation and landscape management,
- agriculture,
- forestry,
- water management,
- clean air and climate,
- tourism, leisure, and recreation,
- raw materials

¹⁰⁹ Cf. Turowski/Lehmkühler, in: Akademie für Raumforschung und Landesplanung (ed.), *Grundriss der Landes- und Regionalplanung*, 162.

¹¹⁰ Cf. Turowski/Lehmkühler, in: Akademie für Raumforschung und Landesplanung (ed.), *Grundriss der Landes- und Regionalplanung*, 163.

¹¹¹ Cf. Turowski/Lehmkühler, in: Akademie für Raumforschung und Landesplanung (ed.), *Grundriss der Landes- und Regionalplanung*, 164.

¹¹² Cf. Turowski/Lehmkühler, in: Akademie für Raumforschung und Landesplanung (ed.), *Grundriss der Landes- und Regionalplanung*, 164.

Municipality-related functions can be classified as main or subsidiary functions. They include:

- central place functions,
- commerce and industry,
- services,
- housing,
- agriculture,
- tourism and recreation.

Guideline values

These planning elements are standards for predicted or envisaged development in a planning area. They are primarily concerned with the development of population, employment, housing construction, settlement areas, industrial land, and infrastructural endowment. They may be set as benchmarks allowing a certain latitude, target projections, or binding targets for a given period. They are intended to provide a uniform basis for all public planning and measures.

There are no statutory rules on how these provisions are to be presented graphically in state and regional plans. Some states have adopted secondary legislation on the use of planning notation. The more specific the planning level, the greater is the density of regulation and the more tools there are for steering spatial development.

Planning elements in local urban land-use planning

Local urban land-use planning can be subdivided into preparatory and binding land-use planning. The preparatory land-use plan (*Flächenutzungsplan – FNP*) outlines land use for the entire territory of the municipality. The binding land-use plan (*Bebauungsplan – B-Plan*) determines binding uses for sections of the municipal territory. The content of preparatory and binding land-use plans is governed by Sections 5 and 9 of the Building Code.

Section 5 (2) of the Building Code enumerates possible contents of the preparatory land-use plan. They include:

- the areas designated for development in terms of general types of use (*Bauflächen*), specific types of use (*Baugebiete*) and the general density of built use (the Land Utilisation Ordinance (*Baunutzungsverordnung – BauNVO*) is to be drawn on for further differentiation of concepts and presentation);
- facilities and infrastructure for the public and private provision of goods and services, in particular public amenities and facilities serving the community such as schools, churches, and health, cultural, and social facilities;
- land for supra-local and local transport;
- land for utilities;
- green and open spaces, sports and recreation areas;
- areas where uses are restricted on environmental protection grounds;
- waterbodies, ports and harbours, as well as areas for water management, flood control, and drainage;
- areas for filling, excavation, and the extraction of mineral resources;
- agricultural land, forest and woodland areas;

- areas for measures to protect, preserve, and develop the natural environment and landscape.

A binding land-use plan can conclusively determine the aspects set forth in Section 9 of the Building Code. They include:

- category and intensity of built use;
- the type of development, lot coverage, and positioning of physical structures;
- land for ancillary structures;
- traffic areas and special purpose traffic areas;
- service areas;
- areas for waste disposal and drainage, including the retention and seepage of rainwater;
- public and private green spaces;
- waterbodies;
- agricultural and forest areas;
- incineration bans and the use of renewable energies;
- protected areas and pollution control;
- planting and care of trees, shrubs and greenery of any other kind;
- the setting of time-limits and conditions for designations on special urban development grounds.

The Land Utilisation Ordinance¹¹³ details the potential contents of the preparatory and binding land-use plans.

The building use category can be determined in terms of general and specific types of built use (respectively *Bauflächen* and *Baugebiete*). As a rule, the preparatory land-use plan describes general use areas, while the binding land-use plan designates specific use areas.¹¹⁴

The following general uses for land are possible:

- residential,
- mixed,
- industrial and commercial,
- special uses.¹¹⁵

Land can be designated for the following specific uses:

- small holdings,
- purely residential areas,
- general residential areas,
- special residential areas,
- village areas,
- mixed areas,
- core areas,
- commercial areas,
- industrial areas,
- special areas.¹¹⁶

Apart from special areas, *Baugebiete* (specific land-use areas) are defined in terms of their purpose and admissible general and exceptional uses. However, while

¹¹³ Cf. Stich, Rudolf, Die Baunutzungsverordnung und die Planzeichenverordnung – Ein Leitfaden für die Bauleitplanung und Zulassung von Vorhaben auf der Grundlage der neueren Rechtsprechung.

¹¹⁴ See details in Sections 1 – 14 of the Land Utilisation Ordinance.

¹¹⁵ Cf Section 1 (1) of the Land Utilisation Ordinance.

¹¹⁶ Cf Section 1 (2) of the Land Utilisation Ordinance.

respecting the general purpose of an area, local authorities are empowered to limit and modify the types of use permitted under Section 1 (1) to (9) of the Land Utilisation Ordinance and, by virtue of Section 1 (10), permanently to secure uses that are not really allowed for the given type of area concerned.¹¹⁷

The general density of built use can be specified in the preparatory land-use plan by stating:

- the floor-space index,
- cubing ratio, or
- height of the physical structure.¹¹⁸

The binding land-use plan can determine the density of built use by means of:

- the site occupancy index or plot coverage rate;
- the floor-space index or floor area, the cubing ratio, or building volume;
- the number of full storeys;
- the height of physical structures.¹¹⁹

The binding land-use plan must always determine the site occupancy index or the proportion of the site to be covered by physical structures, but needs to specify the number of full storeys or the height of physical structures only if this is required to protect the public interest, in particular the overall appearance of the locality and landscape.¹²⁰ See Sections 16 to 21a of the Land Utilisation Ordinance for the definition and calculation of these aspects.

The building method and design can be specified in the binding land-use plan as:

- open,
- closed, or
- divergent.¹²¹

The permissible lot coverage can be determined in the binding land-use plan by setting:

- building lines,
- set-back lines, and
- coverage depths.¹²²

The descriptions of the preparatory land-use plan and the designations of the binding land-use plan can be given in graphic or textual form. The Plan Notation Ordinance, which applies throughout the country, lays down the details for graphic representation and designation.

The preparatory and binding land-use plans show sites that can be used only subject to restrictions or special constructional arrangements. Unlike representations and designations, they do not determine how or if the surface of a site can be utilised but point to impacts that can arise from the subsoil or vicinity of the site.¹²³ They include:

- land which, when developed, will require special physical arrangements to counter external forces, or for which special physical precautionary measures are required as protection against the elements;
- land under which mining activities are pursued or which have been designated for the extraction of minerals;

¹¹⁷ Cf. Kuschnerus, Der sachgerechte Bebauungsplan, Rn.528.

¹¹⁸ Cf Section 16 (1) of the Land Utilisation Ordinance.

¹¹⁹ Cf Section 16 (2) of the Land Utilisation Ordinance.

¹²⁰ Cf. Section 16 (3) of the Land Utilisation Ordinance.

¹²¹ Cf Section 22 of the Land Utilisation Ordinance.

¹²² Cf Section 23 of the Land Utilisation Ordinance.

¹²³ Cf. Löhr, in: Battis/Krautzberger/Löhr, BauGB, § 5 Rn. 36.

- land designated for building where the ground has been severely contaminated by hazardous materials.¹²⁴

Plans and other rules on use under other statutory provisions are also to be shown in the preparatory and binding land-use plans for informational purposes. They include complexes of physical structures listed under state law (preparatory land-use plan) and monuments protected under state law (binding land-use plan).¹²⁵

The binding land-use plan can include arrangements laid down by state law (Section 9 (4) of the Building Code). This allows local building regulations to be integrated into the plan.

Further details on local urban land-use planning are provided in chapter II.3.2.

1.6 Cross-Border Aspects

Cooperation in European spatial planning and development is becoming more and more important. Common ideas need to be developed about the spatial development wanted in the European Union and about the strategies required to achieve it. Member states of the European Union and their regional and local authorities have therefore been working together intensively for a number of years in this field.

At the federal level, for example, the Federal Office for Building and Regional Planning (*Bundesamt für Bauwesen und Raumordnung – BBR*) provides scientific policy advice in support of European cooperation. Innovative transnational cooperation projects, of particular importance from the national point of view, are also supported financially under the action programme Demonstration Projects of Spatial Planning (*Modellvorhaben der Raumordnung – MORO*).

Section 16 of the Federal Spatial Planning Act enshrines the “transfrontier coordination of regionally significant plans and measures” for federal and state spatial planning. Regionally significant plans and measures that may have a substantial impact on neighbouring countries are to be coordinated with the countries affected in accordance with the principles of reciprocity and equivalence. For local urban land-use planning, too, Section 4a (5) of the Building Code provides for municipalities and public authorities in neighbouring countries to participate in accordance with the principles of reciprocity and equivalence in the preparation of urban land-use plans where these plans may have a substantial impact on these countries.

1.7 Current and Future Changes

The serious demographic changes taking place¹²⁶ and their impact on all aspects of life are a subject of discussion at all planning levels throughout the country.¹²⁷ A “shrinkage process”¹²⁸ makes completely new demands on planners hitherto focused on growth. For a number of years now, planning has been addressing population decline in so-called “shrinking cities,” a crisis in urban development caused by

¹²⁴ Sections 5 (3) and 9 (5) of the Building Code.

¹²⁵ Sections 5 (4) and 9 (6) of the Building Code.

¹²⁶ Cf. Rietdorf/Haller/Liebmann, *Läuft die Platte leer, Möglichkeiten und Grenzen von Strategien zur Leerstandsbekämpfung in Großsiedlungen*, Auftrag des IRS für das Bundesministerium für Verkehr, Bau- und Wohnungswesen.

¹²⁷ Cf. Bundesamt für Bauwesen und Raumordnung (ed.), *Raumordnungsbericht 2005*, Band 21.

¹²⁸ Cf. Bundesministerium für Bildung und Forschung (ed.), *Auf dem Weg zur Stadt 2030*.

structural crises, outmigration, and general demographic decline owing to the surplus of deaths over births. Under these circumstances, urban planning cannot act with any expectation of growth but must address the problems facing more and more sparsely inhabited communities.

In the light of these demographic changes, the urban district and neighbourhood become more and more important settings in urban planning, since existing settlement structures often no longer meet present-day requirements, and require the intervention of planners. Urban redevelopment is primarily a problem in East Germany, where outmigration from the prefabricated housing estates makes restructuring necessary. The political response to this problem has been the “Urban Redevelopment East” programme. Development programmes have meanwhile been extended, so that comprehensive measures for restructuring existing districts or neighbourhoods can now be taken throughout the country under the headings “Urban Redevelopment West” and “Urban Redevelopment East.” In response to the challenges of urban redevelopment, provisions on urban redevelopment have been integrated in the Building Code (Sections 171a to d) through the European Law Adaptation Act for the Construction Sector.

As long ago as 1999, the federal and state governments had launched a programme under the title Socially Integrative City, a development programme for “districts with special development needs.” The aim of this programme is to combat growing social and geographical divisions in cities. The main focus is on integrating the population groups affected and local actors in urban neighbourhoods (neighbourhood management). Section 171e of the Building Code regulates the subject matter.

The European Law Adaptation Act for the Construction Sector¹²⁹ transposed the PEIA Directive into national law as regards urban land-use planning and spatial planning. An *environmental impact assessment* now has to be carried out in preparing, amending, supplementing, and rescinding urban land-use plans and spatial structure plans – thus in the state-wide spatial structure plan and regional plans. This obligation also applies with respect to sectoral legislation.

Current developments in the field of renewable energy, especially wind power plants, biomass, and photovoltaics, have been occasion to update regional plans, as well as preparatory land-use plans and partial PLUPs¹³⁰ to permit the appropriate control in siting such facilities.

Retail business attraction projects can be a major challenge for both supra-local and local planning authorities. *Structural change in the retail trade*¹³¹ endanger provision in sparsely populated areas. New service provision concepts are needed for rural and sparsely settled regions. However, the more intensive establishment of (large) retail projects in built-up areas not covered by qualified binding land-use plans (Section 34 of the Building Code) have in recent years cost local authority planners a great deal of effort in preparing binding land-use plans to exclude retail projects expected to have an adverse effect on existing service provision structures. In response to this problem, Section 34 (3) was inserted into the Building Code in 2004,

¹²⁹ Gesetz zur Anpassung des Baugesetzbuchs an EU-Richtlinien (Europarechtsanpassungsgesetz Bau – EAG Bau) of 24th June 2004 (BGBl. I 1359). I 1359).

¹³⁰ The option of partial preparatory land-use plans was introduced by Section 5 (2b) of the European Law Adaptation Act for the Construction Sector.

¹³¹ Cf. Runkel, Strukturwandel im Lebensmitteleinzelhandel und § 11 (3) BauNVO, Vortrag im 438. Kurs des Instituts für Städtebau „Städtebau und Recht“, Berlin 2002.

laying down that projects in accordance with Section 34 (1) and (2) must not give cause to expect any adverse impact on service centres in the community or neighbouring communities. Furthermore, it heightened the obligation for coordinating urban land-use plans with neighbouring communities by allowing local authorities to invoke functions assigned to them as aims of spatial planning and the impacts on their service centres.¹³²

The Act Facilitating Planning Projects for Inner Urban Development (*Gesetz zur Erleichterung von Planungsvorhaben für die Innenentwicklung der Städte*), which came into force on 1st January 2007, implemented the intention expressed in the coalition agreement of 11th November 2005 between CDU, CSU, and SPD to reduce land take and speed up important planning projects, especially in the fields of employment, housing, and infrastructure by simplifying and accelerating building and planning law.¹³³ This act introduced an accelerated procedure for binding land-use plans concerned with inner urban development into the Building Code (Section 13a). The purpose of Section 3 of the Building Code (to prevent projects from having an adverse impact on service centres) can be implemented pursuant to Section 9 (2a) of the Building Code.¹³⁴ A new section 171f has been inserted to promote private initiative in urban development. In accordance with state law and notwithstanding other measures under the Building Code, it allows the designation of areas for site-related projects in private responsibility pursuing a concept in keeping with the urban development goals of the community for strengthening or developing inner-city areas, neighbourhood centres, residential areas, and commercial centres, as well as other areas of importance for urban development. Arrangements may be made by state legislation with regard to the financing of measures and the equitable distribution of the expenditures involved.

In urban agglomerations, core cities and surrounding communities are seeking to join forces to replace the existing state regional planning tools by locally controlled planning, by *regional preparatory land-use plans*,¹³⁵ and thus to elaborate more adequately focused plans and exert greater influence on spatial development.¹³⁶

Cross-border *flood control*¹³⁷ has become increasingly important in the aftermath of recent flood disasters. Like climate and environmental protection, flood control is a regional and transnational, European matter. At the national level, the legal framework for preventive flood control has been considerably expanded by amendment of the Federal Water Act, the Spatial Planning Act, and the Building Code.¹³⁸

¹³² For details see: Vietmeier, Die Steuerung des großflächigen Einzelhandels nach §§ 2 und 34 BauGB, in: Baurecht 3/2005, 480 ff.; Janning, Der Ausschluss des zentrenschädigenden Einzelhandels in unbeplanten Innenbereichen, in: Baurecht 11/2005; Gronemeyer, Die Zulässigkeit von großflächigem Einzelhandel, in: Baurecht 9/2006, 1410 ff.

¹³³ Cf. Begründung zum Entwurf des Gesetzes zur Erleichterung von Planungsvorhaben für die Innenentwicklung der Städte, in: BT-Drs. 16/2496, 9.

¹³⁴ Cf. Section 9 (2a) of the Building Code.

¹³⁵ Cf. Section 9 (6) of the Federal Spatial Planning Act.

¹³⁶ Cf. Schmidt-Eichstaedt, Flächenutzungsplanung nach einer Gebietsreform, in: Baurecht 7/2004, 1102 ff.

¹³⁷ Cf. Bundesministerium für Verkehr, Bau und Stadtentwicklung (ed.), Hochwasserschutzfibel.

¹³⁸ For detailed treatment see: Hünnekens/Arnold, Bauen in Überschwemmungsgebieten - Neuerungen durch das Hochwasserschutzgesetz, in: Baurecht 8/2006, 1232 ff.

Cross-border cooperation is required in all fields of environmental protection, including flood control, climate protection, transnational transport networks, tourism, and industry. EU enlargement to the East, in particular, poses new challenges for spatial planning at the federal and state levels, notable in the new states. Joint transnational planning is being prepared or is already being put into effect in many fields of essential public services.

The *enlargement of the European Union* focuses attention on the impact of a forward-looking spatial development policy in Germany on spatial structures and regional development. Appropriate strategies for action are not only being developed by local authorities, to some extent in international cooperation and with the support of the Federal Government and the EU; at the European level, too, rules and procedures are being adapted to the needs of an enlarged union. The federal and state governments need to examine the effects of enlargement and to develop suitable strategies.

2. Legislation and Jurisdiction in the Planning System¹³⁹

2.1 Legislative Powers and the Statutory Framework at the Various Levels of Planning

A distinction is drawn in spatial planning between comprehensive spatial planning and sectoral planning. Comprehensive spatial planning is cross-sectional at all planning levels, whereas sectoral planning addresses single, mostly technical infrastructure sectors, dealing with specific projects like railways, airports, and waterways.¹⁴⁰

The Federation and the states have made use of their respective legislative powers to regulate comprehensive spatial planning and sectoral planning. In 2006, the legislative competencies of the Federation and the states were reorganised under the so-called “federalism reform.” For details see chapter I.2.2.1.

Since the abolition of framework legislation, the Basic Law now provides for exclusive legislative powers of the Federation and concurrent legislative powers.

Exclusive legislative powers are vested in the Federation for the fields enumerated in Article 73 nos. 1 to 14 of the Basic Law. In sectoral planning law they include air traffic (no. 6); the operation of railways wholly or predominantly owned by the Federation (federal railways), the construction, maintenance, and operation of tracks belonging to federal railways, as well as the imposition of charges for the use of such tracks (no. 6a); postal and telecommunication services (no. 7); the production and utilisation of nuclear energy for peaceful purposes, the construction and operation of facilities serving such purposes, protection against hazards arising from the release of nuclear energy or from ionizing radiation, and the disposal of radioactive substances (no. 14).

Under Article 72 (1) of the Basic Law, the states have power to legislate on matters falling under concurrent legislative competence, so long as and to the extent that the Federation has not exercised its legislative power by enacting laws. Under Article 72 (2) of the Basic Law as amended, the Federation has the right to legislate on these matters if and to the extent that the establishment of equal living conditions

¹³⁹ Cf. Bundesebene (Deutschland) in Wikipedia 11. 02. 06.

¹⁴⁰ On the relationship between urban land-use planning and comprehensive spatial and sectoral planning see: Erbguth, Bauplanungsrecht, Verlag C.H. Beck München 1989, 26 ff.

throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest. The proof required under Article 72 (2) of the Basic Law as amended must be furnished for the matters listed. If the Federation exercises its right of concurrent legislation, the states may legislate for deviating arrangements in the areas listed in Article 72 (3) nos 1 to 6).

The areas enumerated in Article 74 nos. 1 to 33 fall under concurrent legislation. In the field of spatial and sectoral planning, they include: mining (no. 11); the law regarding expropriation, to the extent relevant to matters enumerated in Articles 73 and 74 (no. 14); the promotion of agricultural production and forestry (with the exception of the law relating to land reallocation), preservation of the coasts (no. 17); real property transactions, land law (except for laws respecting development fees), the law relating to housing benefit, the regulation of assistance with old debt, miners' housing construction law and miners settlement law (no. 18); road traffic, motor transport, construction and maintenance of trunk roads, as well as the collection of tolls for the use of public highways by vehicles and the allocation of the revenue (no. 22); non-federal railways, except mountain railways (no. 23); waste disposal, air pollution, and noise abatement (except for protection against behaviour-related noise) (no. 24); land distribution (no. 30); spatial planning (no. 31); and water resources (no. 32). All areas of law not enumerated in Article 72 or 74 of the Basic Law fall within the legislative remit of the states. Among the most important competencies of the states is the law relating to culture (e.g., conservation of historic monuments) and regulatory law (e.g., building control law, police law).¹⁴¹

Certain areas in spatial planning have been affected by the abolition of framework legislation (Article 75 of the Basic Law as amended), like the law relating to comprehensive spatial planning and nature conservation. Where areas are transferred to the legislative remit of the Federation or to concurrent legislation, former framework law, including the legislative powers and obligations of the states it contains, persists as federal law (Article 125b (1) of the Basic Law). Even after the federalism reform has come into force, the states are entitled and obliged to regulate matters as required under the old framework legislation until such time as the Federation makes use of its new legislative powers.¹⁴²

Implementation of planning law by local authorities

Under Article 28 (2) of the Basic Law, local authorities have the right to regulate all the affairs of the local community on their own responsibility within the limits set by law. Within the limits of their statutory functions, associations of municipalities also have the right of self-government according to the law. Local self-government finds expression in personal sovereignty, financial autonomy, organisational autonomy, fiscal jurisdiction, and planning autonomy. Planning autonomy means having political and administrative freedom to decide on the uses to which land in the territory of the municipality is to be put without all-embracing and strict control by higher tiers of government, and to develop the planning guidelines needed to realise the potential for autonomous action without imperative governmental influence being exerted.¹⁴³ For this purpose, local authorities use the tools of planning law (urban development law).

Urban development law:

¹⁴¹ Cf. Schmidt-Eichstaedt, Städtebaurecht, 11 f.

¹⁴² Cf. Bericht über die Auswirkungen der Föderalismusreform auf die Vorbereitung von Gesetzentwürfen der Bundesregierung und das Gesetzgebungsverfahren, BR-Drs. 651/06, 3.

¹⁴³ Cf. Stüer, Bauleitplanung, Rn. 18.

Planning autonomy includes the power of local authorities under the Building Code to prepare urban land-use plans on their own responsibility. In the Building Code and secondary legislation (Land Utilisation Ordinance, Plan Notation Ordinance, Valuation Ordinance) for the implementation of the code, the Federal Government has provided local authorities with the legal basis for controlling the use of land. On the basis of the Building Code, local authorities can adopt binding land-use plans in the form of bye-laws. However, municipalities are required to adapt their plans to the aims of (federal and state) spatial planning. This means, in effect, that federal and state spatial planning goals are to be implemented. At the same time, their constitutional guarantee of self-government gives local authorities the right to participate in planning and measures carried out by federal and state government departments. Such participatory rights are recognised for all government planning and measures that can affect municipal planning and other autonomous functions. Participation in this sense refers to the right to be informed and heard.¹⁴⁴

Building control law (building regulations):

Building control law or building regulations deal with specific physical structures and buildings. Material building control law serves to avert dangers, to prevent unsightly development, and ensure the observance of social and ecological standards for healthy housing and working conditions. Formal building control law regulates building supervisory procedures and hence the enforcement of planning law with regard to the authorisation of projects, the enforcement of material building law, and the enforcement of related legislation pertaining to roads, water, landscape conservation, and the conservation of historic monuments.¹⁴⁵ Planning approval and permission procedures thus couple urban development law with building control law.¹⁴⁶ On the basis of state building regulations, municipalities and counties examine the permissibility of building projects and authorise them by administrative act. State building regulations empower local authorities to prepare local building regulations.

Overview: Local Authority Powers

Competence of local authorities	Preparation and updating	Binding effect	Judicial review
Preparatory land-use plan	Necessity under Section 1 (3) of the Building Code Planning horizon ca 15 yrs	Binding on public authorities	Concrete judicial review by administrative court
Binding land-use plan	Necessity under Section 1 (3) of the Building Code	Municipal statute, bye-law	Judicial review by higher administrative courts and concrete review by administrative court
Other statutes pursuant to the Building Code	Discretionary (e.g., statutes under Section 34 of the Building Code or mandatory (e.g., land improvement charges bye-law)	Municipal statute, bye-law	Judicial review by higher administrative courts and concrete review by administrative court

¹⁴⁴ For details see Stüer, Bauleitplanung, Rn. 20 ff.

¹⁴⁵ Cf. Hoppe/Bönke/Grotefels, Öffentliches Baurecht, § 1 Rn. 7.

¹⁴⁶ Hoppe/Bönker/Grotefels, Öffentliches Baurecht, § 1 Rn. 7.

2.2 The System of Administrative Courts

The system of administrative courts exercises judicial control over administrative activities. The administrative courts set up under Article 95 of the Basic Law provide for the constitutionally guaranteed reviewability of all administrative acts. They are responsible for non-constitutional public-law disputes (Section 40 (1) of the Code of Administrative Court Procedure).¹⁴⁷

The statutory basis for administrative court proceedings is the Code of Administrative Court Procedure. The principle of official investigation applies for these proceedings (Section 86 (1)).

The system of administrative courts has three levels. In each state there are administrative courts (*Verwaltungsgericht – VG*) and a higher administrative court (*Oberverwaltungsgericht – OVG* in some states called *Verwaltungsgerichtshof – VGH*), and at the federal level there is the Federal Administrative Court (*Bundesverwaltungsgericht – BVerwG*) in Leipzig (Section 2).

The administrative court is a court of first instance for all disputes falling within the remit of the system (Section 45).

The higher administrative court is a court of appeal from judgments and other decisions brought down by administrative courts (Section 46). Within its purview, the higher administrative court rules on application on the validity of bye-laws and local statutes issued pursuant to the Building Code and of ordinances pursuant to Section 246 (2) of the Building Code, as well as other legal provisions subordinate to state statutes where state law so provides (Section 47) (judicial review). The higher administrative court also rules in first instance on all disputes concerning matters enumerated in Section 48 (1) nos. 1 to 9). They include:

- the construction, operation, and alteration of power stations fired by solid, liquid, and gaseous fuels with a thermal output of more than 300 MW;
- planning approval proceedings for the erection and operation or alteration of high-voltage overhead transmission lines with a nominal voltage of 110 kV or more, underground lines with a nominal voltage of 110 kV, or gas lines with a diameter of more than 300 mm, and any modification of routing;
- procedures for erecting, operating and substantially altering stationary facilities for the incineration or thermal degradation of waste with an annual throughput of more than 100,000 tonnes, and of stationary facilities in which waste is completely or partially stored or deposited within the meaning of Section 41 (1) of the Waste Avoidance, Recycling and Disposal Act;
- the construction, extension, or alteration and operation of civil aviation airports and airfields with restricted building protection areas;
- planning approval procedures for the building or alteration of new sections of tramways, magnetic levitation railways, and public railways, as well as for the construction or alteration of shunting and container stations;
- planning approval procedures for the construction or alteration of federal trunk roads;
- planning approval procedures for the construction or alteration of federal waterways.

The higher administrative court also has jurisdiction to hear disputes on permits issued in lieu of planning approval, and disputes concerning all permits and authorisations required for a project, also those concerning ancillary facilities that are

¹⁴⁷ *Verwaltungsgerichtsordnung (VwGO)* of 21 Januar 1960 (BGBl. I, 17) as promulgated on 19.03.91 (BGBl. I 686), amended by Art 3 of the act of 21.12.06 (BGBl. I 3316).

spatially or operationally connected with the project (Section 48 (2) of the Code of Administrative Court Procedure).¹⁴⁸

The Federal Administrative Court hears appeals from judgments of higher administrative courts by virtue of Section 132, from judgments of administrative courts by virtue of Sections 134 and 135, and from complaints by virtue of Section 88 (2) and Section 133 (1) of the Code of Administrative Court Procedure and Section 17a (4) sentence 4 of the Judicature Act (*Gerichtsverfassungsgesetz – GVG*). The Federal Administrative Court rules in first and final instance on the disputes and actions enumerated in Section 50 (1) nos. 1 to 6. They include:

- non-constitutional public-law disputes between the Federation and the states and between states;
- actions against measures and decisions under Section 44a of the Members of the Bundestag Act and the rules of conduct for members of the Bundestag;
- all disputes affecting planning approval and permission proceedings for projects enumerated in the General Railway Act, the Federal Highways Act, the Federal Waterways Act, or the Magnetic Levitation Railway Planning Act.

Appeals (*Berufung*) from judgments may be filed under Section 124 (1) of the Code of Administrative Court Procedure if admitted by the administrative court or the higher administrative court. The admissibility of appeals is regulated by Section 124 (2) nos. 1 to 5 of the Code of Administrative Court Procedure. The administrative court will admit an appeal if the case is of fundamental importance or if the judgment diverges from a ruling by the higher administrative court, the Federal Administrative Court, the joint senate of the supreme federal courts or the Federal Constitutional Court, and the appeal is based on this divergence (Section 124a (1)). If admitted by the administrative court, the appeal is to be filed within one month, and substantiated within two months of the complete judgment being served (Section 124a (2) and (3)). If the judgement brought down by the administrative court does not provide for an appeal, a motion to that effect must be filed within a month of the complete judgment being served (Section 124a (4)). In both cases, the grounds for appeal are to be submitted to the higher administrative court unless they are submitted with the appeal or motion (Section 124a (3) and (4)). If the higher administrative court grants the motion for appeal, authorisation proceedings will continue as appeal proceedings (Section 124a (5)). The grounds for appeal are to be submitted within one month to the higher administrative court (Section 124a (6)). The higher administrative court considers the dispute within the scope of the motion for appeal to the same extent as the administrative court. Under certain circumstances (Section 128a), it also takes account of new facts and evidence (Section 127). The higher administrative court has to hear the necessary evidence and rule on the matter itself by judgment (*Urteil*) or decision (*Beschluss*) (Section 130 (1) and 130a). Under certain circumstances, the judgment can be set aside and the case remitted to the administrative court (Section 130 (2)).¹⁴⁹

An appeal on points of law (*Revision*) is admissible from a judgment of the higher administrative court (Section 49 (1)) and from decisions under Section 47 (5) sentence 1 if the higher administrative court or, upon dismissal of a motion for appeal, the Federal Administrative Court has granted it. The grounds for an appeal

¹⁴⁸ For other competencies see Section 48 of the Code of Administrative Court Procedure.

¹⁴⁹ For further details on appeal proceedings see Sections 124 to 130b of the Code of Administrative Court Procedure.

on points of law are set forth in Section 132 (2) of the Code of Administrative Court Procedure. An appeal on an issue of law can be based only on the elements enumerated in Section 137 and 138 of the Code of Administrative Court Procedure. Appeal is possible from dismissal of a motion of appeal on a point of law (Section 133 (1)). A leap-frog appeal is possible from the judgment of the administrative court (section 49 no. 2 of the Code of Administrative Court Procedure) if plaintiff and defendant agree in writing and if it is admitted in the judgment of the administrative court or, on application, by court order (Section 134 (1)). The parties can appeal on a point of law from an administrative court judgment (Section 49 (2)) to the Federal Administrative Court if an appeal is excluded by federal law (Section 135). An appeal on issues of law can be filed only if the administrative court or, upon appeal from refusal to admit same, the Federal Administrative Court has granted leave.

An appeal on a point of law is to be lodged within one month with the court that has brought down the decision and is to be substantiated within two months, in each case after service of the complete judgment or decision. If the appeal from refusal of leave to appeal on a point of law is successful or if the appeal is granted, proceedings continue as proceedings on appeal. An inadmissible appeal is dismissed, an unfounded appeal is denied (Section 144 of the Code of Administrative Court Procedure). In the case of a well-founded appeal, the Federal Administrative Court can itself decide or reverse the judgment and remit the case (Section 144).¹⁵⁰

Appeals from decisions of the administrative court, the presiding or reporting judge, which are not judgments or court notices, lie to the higher administrative court (Section 146). Excluded are procedural orders, orders for clarification, decisions on adjournment or the setting of deadlines, orders to take evidence, orders on the refusal of motions for the admission of evidence, on the joining and severance of proceedings and claims, and on the disqualification of judicial personnel (Section 146 (2)).¹⁵¹

2.3 Legal Remedies before the Administrative Courts

Legal remedies against statutory law, land-use plans, and other urban development statutes

- *Judicial review by the Federal Constitutional Court*

In case of disagreement on the constitutionality of legislation, the Federal Government, a state government, or one third of the members of the Bundestag may apply to the Federal Constitutional Court to review the legislation in question (abstract judicial review (Article 93 (1) no. 2 of the Basic Law). Where a court considers that a law on whose validity its ruling depends is unconstitutional (state constitution or Basic Law), it can stay proceedings and seek a ruling from the competent state court or the Federal Constitutional Court (Article 100 (1) of the Basic Law).

- *Judicial review by administrative courts*

¹⁵⁰ For further details on proceedings for appeals on points of law see Sections 132 to 144 of the Code of Administrative Court Procedure.

¹⁵¹ For further details on procedure for appeals from the dismissal of motions concerning procedural issues (*Beschwerden*) see Sections 146 to 152 of the Code of Administrative Court Procedure.

Under Section 47 (1) of the Code of Administrative Court Procedure, a higher administrative court may review:

- bye-laws and statutes pursuant to the Building Code and ordinances under Section 246 (2) of the Building Code, and
- other legal provisions lower in rank than state law, where state law so provides.

Review proceedings examine compliance with the binding formal and material planning provisions of the land-use plan or another urban development statute. Judicial review may be requested by all natural and legal persons claiming that their rights are or in the foreseeable future will be violated by the legal provision or its application, as well as by all public authorities. An application for judicial review can be filed only within one year of promulgation of the legal provision (Section 47 (2) of the Code of Administrative Court Procedure). According to Section 47 (2a) of the Code, an application by a natural or legal person with respect to a binding land-use plan or a statute under Section 34 (4) sentence 1 nos. 2 and 3 or Section 35 (6) of the Building Code is inadmissible if the applicant raises objections that were not raised, or not raised in due time, in the context of public display (Section 3 (2) of the Building Code) or of public participation (Section 13 (2) no. 2 and Section 13a (2) no. 1), but which could have been raised on these occasions, and where attention was drawn to this legal consequence in the context of participation. The higher administrative court brings down a judgment (*Urteil*) or, if it considers an oral hearing not to be necessary, a decision (*Beschluss*). If the higher administrative court concludes that the legal provision is invalid, it declares it to be null and void; in this case the decision is generally binding and is to be published by the opponent in the same manner as the provision (Section 47 of the Code of Administrative Court Procedure). In judicial review proceedings an interim order is to be issued if this is urgently required to prevent serious disadvantages or for other good cause (Section 147 (6) of the Code of Administrative Court Procedure).¹⁵²

A preventive application for an injunction (*Unterlassungsklage*) or action for a declaration (*Feststellungsklage*) against urban development statutes are possible if, even before instigation of any judicial review proceedings, a fait accompli is to be feared.¹⁵³ The direct review of binding land-use plans by means of constitutional appeal (*Verfassungsbeschwerde*) under Article 93 (1) no. 4a of the Basic Law in conjunction with Section 90 of the Federal Constitutional Court Act has recently been allowed by the Federal Constitutional Court.¹⁵⁴

The intensity of reviewing binding land-use plans and other urban development statutes is considerably restricted by Sections 214 and 215 of the Building Code.¹⁵⁵ The violations of the Code dealt with in these sections have varying consequences. They range from general irrelevance to relevance in the case of complaints (*Rüge*) lodged in due form and time, and to the invalidity of the plan or statute.¹⁵⁶

The principle of plan maintenance under Section 214 (4) of the Building Code permits the step-by-step correction of defective plans and avoids having to repeat the entire planning procedure.¹⁵⁷ The local authority can put a preparatory land-use plan or a

¹⁵² For detailed treatment see: Hoppe/Bönke/Grotefels, *Öffentliches Baurecht*, § 17.

¹⁵³ Cf. Hoppe/Bönke/Grotefels, *Öffentliches Baurecht*, § 17 Rn. 37.

¹⁵⁴ Cf. Hoppe/Bönke/Grotefels, *Öffentliches Baurecht*, § 17 Rn. 39 with further references.

¹⁵⁵ Cf. Hoppe/Bönke/Grotefels, *Öffentliches Baurecht*, § 17 Rn. 37 with reference to BVerfG vom 21. 11. 1986 – 4 C 22.83 -, BVerfGE 70, 35 ff.

¹⁵⁶ Cf. Hoppe/Bönke/Grotefels, *Öffentliches Baurecht*, § 17 Rn. 39.

¹⁵⁷ Cf. Hoppe/Bönke/Grotefels, *Öffentliches Baurecht*, § 17 Rn. 40.

municipal statute/bye-law into force retrospectively if the defects can be eliminated in supplementary proceedings.¹⁵⁸

A binding land-use plan can be challenged not only by means of abstract judicial review but also by concrete review (*Inzidentkontrolle/inzidente Normenkontrolle*). In contrast to abstract judicial review it is not subject to any time limit and can be undertaken in all judicial proceedings in which the decision depends essentially on whether a certain binding land-use plan is valid or not.¹⁵⁹ In contrast to abstract judicial review, concrete judicial review does not determine the invalidity of a plan with generally binding effect.¹⁶⁰

The preparatory land-use plan is not subject to judicial review, nor can it be challenged by an action to annul a decision (*Anfechtungsklage*), to compel a decision (*Verpflichtungsklage*), or to obtain a declaration (*Feststellungsklage*), since it is neither a legal norm nor an administrative act.¹⁶¹ However, concrete judicial review can be undertaken in all judicial proceedings in which the decision depends essentially on whether the preparatory land-use plan is valid or not.

Legal remedies against individual decisions

- *Refusal of building permission*

The party affected by a refusal of building permission can obtain performance of the refused or omitted administrative act by bringing an action to compel such performance (*Verpflichtungsklage*) (Section 42 (1 2) of the Code of Administrative Court Procedure). Before an action can be brought, preliminary proceedings pursuant to Sections 68 ff. of the Code are, with certain exceptions, to be carried out. Under certain circumstances, provisional legal protection can be granted (Sections 80 and 80a). Preliminary proceedings are instigated by lodging an objection. It must be lodged in writing or declared for minuting with the authority that has issued the administrative act within one month of the administrative act being published (Section 70). If the authority deems the objection to be justified, it takes remedial action (Section 70). If no remedial action is taken, a decision on the objection is issued (Section 72) against which an action to compel performance can be brought within one month of service of the decision (Section 74 (1) and (2)). Under certain circumstances, provisional legal protection can also be granted under Section 123. The date of the last oral hearing is relevant for the decision on the action.

- *Divergence of building permission from building application*

In practice it occurs relatively frequently that the developer/builder is granted building permission subject to ancillary provisions within the meaning of Section 36 of the Administrative Procedures Act to which he wishes to object. According to the prevailing view, however, and regardless of the legal form of the ancillary provision and the resulting procedural consequences, the developer is generally prevented from implementing building permission while taking action against the ancillary provision.¹⁶²

- *Delayed building permission*

If the building permission applied for by the developer is not processed at all or not within a reasonable period, he may bring an action for performance in the form of a

¹⁵⁸ For detailed treatment see: Battis, in: Battis/Krautzberger/Löhr, BauGB, Vorbemerkungen §§ 214 – 216, §§ 214 – 216.

¹⁵⁹ Cf. Kuschnerus, Der sachgerechte Bebauungsplan, Rn. 764.

¹⁶⁰ Cf. Kuschnerus, Der sachgerechte Bebauungsplan, Rn. 764.

¹⁶¹ Cf. Hoppe/Bönke/Grotfels, Öffentliches Baurecht, § 17 Rn. 4.

¹⁶² Cf. Hoppe/Bönker/Grotfels, Öffentliches Baurecht, § 17 Rn. 21 ff., especially for detailed account of legal opinions.

so-called “inactivity action” (*Untätigkeitsklage*) (Section 75 sentence 1 of the Code of Administrative Court Procedure) before the administrative court. As a rule and under normal circumstances, at least three months is deemed a reasonable period (Section 75 sentence 2).

- *Third party challenges to building permission*

In addition to the developer, a third party (e.g., neighbour or municipality) can bring an action against a building permit. According to Section 212a (1) of the Building Code in conjunction with Section 80 (2) sentence 1 no. 3 of the Code of Administrative Court Procedure, a third-party objection has no suspensory effect. However, the third party may apply to the competent authority for a stay to immediate implementation under Section 80a (1) no. 2 in conjunction with Section 80 (4) of the Code of Administrative Procedure. The developer may react to this stay in accordance with Section 80a (3) in conjunction with Section 80 (5) of the Code and apply for annulment of the authority’s decision. If the authority allows the objection of the third party, the developer may bring an action to annul the decision before the administrative court without the necessity of protest proceedings.

- *Legal protection against intervention orders of the building supervisory authorities*

If any public-law provisions are contravened in carrying out building measures or using physical structures, the building authority may intervene. They may, for example, stop works, forbid use, or order demolition of physical structures. The developer can challenge such intervention by the building authorities by lodging an objection, and, where unsuccessful, by bringing an action to annul the decision before the administrative court. With respect to this latter action, the relevant date for assessing the factual and legal position is, unlike in the case of an action to compel a decision, the date of the last decision taken by the authority.¹⁶³ Under Section 80 (1) of the Code of Administrative Court Procedure, the objection and the action for annulment have suspensory effect. The building authority can, however, order immediate execution under Section 80 (2) no. 4 of the Code. Under provisional legal protection, the developer can challenge this order in accordance with Section 80 (5) of the Code).

- *Legal protection for adjoining owners*

Although adjoining owners are not the direct addressees of official measures under public building law, they can challenge projects of neighbouring builders and developers and claim the protection of the authorities and the courts.¹⁶⁴ In Germany a distinction is made between protection for adjoining owners under public law and under private law.¹⁶⁵

3. General Description of the Levels of Spatial Planning

The function of planning is to guide and structure space in order to attain the various goals of balanced spatial development. These goals differ strongly from planning level to planning level. They range from specific requirements relating to the use of land in local urban development planning to the abstract models and guidelines advanced by federal spatial planning policy.

¹⁶³ Cf. Hoppe/Bönker/Grotefels, *Öffentliches Baurecht*, § 18 Rn. 28.

¹⁶⁴ Cf. Hoppe/Bönker/Grotefels, *Öffentliches Baurecht*, § 18 Rn. 29.

¹⁶⁵ Cf. detailed treatment in: Hoppe/Bönker/Grotefels, *Öffentliches Baurecht*, § 18 ff.

3.1 Supra-Local Planning Levels

3.1.1 Introduction

Spatial planning at the federal and state levels comprises all comprehensive, supra-local and superordinate activities for structuring and developing space. It is “comprehensive” in the sense that it has the job of coordinating spatially significant sectoral planning. It is “supra-local” in that its scope is beyond that of the territorial and material, autonomous scope of the individual local authority. The comprehensive and supra-local nature of spatial planning gives it “superordinate” status in the German planning system. All public planning authorities have to comply with or take account of the requirements of spatial planning in any spatially significant planning and measures they undertake. Planning and measures are said to be “spatially significant” if they make use of land or influence the spatial development of an area. According to the Federal Spatial Planning Act and state spatial planning acts, the task of spatial planning is to guide and develop spatial structure in the pursuit of sustainable spatial development.

In Germany, the essential purposes of spatial planning are elaborated and implemented by a range of tools on three levels:

- federal spatial planning,
- state spatial planning,
- regional planning.¹⁶⁶

3.1.2 Federal Spatial Planning

Given the federal structure of German government, there is no *overall, central planning authority*.¹⁶⁷

In the Federal Spatial Planning Act, the Federation lays down the tasks and guidelines (Section 1) and principles (Section 2) of spatial planning, providing a framework for state spatial planning acts.

The main aspects of federal spatial planning include:

- guidelines of spatial planning,
- principles of spatial planning,
- goals of spatial planning.

The *guidelines of spatial planning* provide the material basis and set the framework for spatial development. The key concept is “sustainable spatial development.” According to Section 1 (2) of the Federal Spatial Planning Act, sustainable spatial development is defined as bringing the social and economic demands made on a area into line with its ecological functions, producing a stable and well-balanced order throughout. These guidelines of spatial planning include the elaboration of a spatial development concept that:

- ensures the right to self-fulfilment within the community in responsibility to future generations,
- ensures the conservation and development of natural resources,
- ensures long-term scope for action on land use,
- eliminates regional and structural imbalances.¹⁶⁸

¹⁶⁶ Cf. Turowski, Raumplanung (Gesamtplanung), in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 896.

¹⁶⁷ Cf. Sinz, Raumordnung/Raumordnungspolitik, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 867.

The *principles of spatial planning* are general precepts concerning the development, structuring, and securing of spatial entities to be taken into account in weighing interests and making discretionary decisions. They are laid down by the Federation and can be supplemented by the states. These principles have to be taken into account by public agencies in spatially significant plans and measures. Examples of the principles set by the Federal Spatial Planning Act are maintenance of a decentralised settlement structure, the conservation and restoration of open spaces, the provision of the population with basic technical infrastructure for utility services, etc.¹⁶⁹

The *goals of spatial planning* are binding provisions in the form of spatially and substantively specified, definitive requirements. These goals are not determined by the Federation. This is the task performed in written and graphic form by state and regional planners in spatial structure plans (cf. chapter II.3.1.3, II.3.1.4).¹⁷⁰

Apart from the guidelines and principles of spatial planning, the act contains:

- provisions on state spatial planning (especially spatial structure plans and regional plans),
- provisions on the coordination of spatially significant planning,
- provisions on spatial planning procedure (cf. chapter II.1.4.2),
- provisions on the tasks of the Federation in the field of spatial planning.¹⁷¹

Notwithstanding the tasks and powers of the states, the federal ministry competent for spatial planning works towards realising the principles of spatial planning in accordance with the guidelines of such planning and the mutual feedback principle. On the basis of the regional plans and in cooperation with supreme state authorities responsible for regional planning, it primarily develops guiding principles for the regional development of the national territory and covering matters transcending individual states, thus providing a basis for the coordination of spatially significant plans and measures between the Federal Government and the European Union, subject to the applicable provisions. A number of programmatic statements on *spatial development* have been elaborated:

- the Spatial Planning Programme (1975),
- the Spatial Planning Policy Guidelines (1993);
- the Framework for Action in Spatial Planning Policy (1995),
- the Spatial Planning Report (current edition 2005),¹⁷²
- the Guidelines for the Spatial Development of the Federal Territory (2006).¹⁷³

The *Spatial Structure Programme* set goals in adapting federal planning with significant spatial impact. This formal programme was intended as the beginning of

¹⁶⁸ Cf. Sinz, Raumordnung/Raumordnungspolitik, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 866.

¹⁶⁹ Cf. Sinz, Raumordnung/Raumordnungspolitik, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 867.

¹⁷⁰ Cf. Sinz, Raumordnung/Raumordnungspolitik, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 867.

¹⁷¹ Cf. Treuner, et al., Handwörterbuch der Raumordnung, 864.

¹⁷² Cf. Sinz, Raumordnung/Raumordnungspolitik, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 868.

¹⁷³ Cf.

.bbr.bund.de/cln_007/nn_22518/DE/ForschenBeraten/Raumordnung/RaumentwicklungDeutschland/LeitbilderKonzepte/leitbilderkonzepte__node.html__nnn=true, Zugriff am 06.12.2006.

coordination in spatial planning policy between the federal and state governments. However, it did not prove effective, so that no further such programme followed at the federal level.¹⁷⁴

Such a conceptual basis was provided by the Spatial Planning Policy Guidelines (*Raumordnungspolitische Orientierungsrahmen – ORA*), elaborated by federal spatial planning in collaboration with the states in 1993. The Spatial Planning Policy Guidelines envisage future spatial structure with the aid of:

- a vision for settlement structure,
- a vision for the environment and land use,
- a vision for transport,
- a vision for Europe,
- a vision for structure and development.

For each of these visions or models, the ORA provides strategies for Germany as a whole.¹⁷⁵ The policy guidelines were worked out in more detail in the 1995 Framework for Action in Spatial Planning Policy (*Raumordnungspolitischer Handlungsrahmen – HARA*).

The most important aspects dealt with are presented below. The “structure and development” model, in particular, proposes a number of targets for state spatial planning. This spatial planning concept proceeds on the assumption that the former marked *contrast between city and country* in many parts of Germany is disappearing and that city networks, urbanisation trends, and the development of new urban landscapes mean that functional changes will shape future development. It is claimed that, owing to the strong links between cities and surrounding areas, the spatial structure of the country is strongly determined by urban forms and urban lifestyles. Urban agglomerations and rural regions are no longer opposites: they complement one another. Living conditions in the two types of area are becoming more and more similar. Rural areas are not necessarily structurally weak. Only peripheral areas present problems. Such areas generally play an important role in landscape conservation, in maintaining the ecological balance, and in protecting resources.¹⁷⁶ The decentralized settlement structure that has evolved in the course of history has proved a major locational advantage for Germany over other countries. Enhancing endogenous regional potentials and distributing functions among existing centres can positively influence spatial and settlement structure even in regions distant from agglomerations. Among the strategies proposed is to reinforce decentralised structures and to concentrate subsidies on existing centres. This model of decentralized concentration also governs other visions for transport, environment, and land use. The overall concept is integrated into the general European framework.

On 30th June 2006, the federal and state ministers responsible for spatial planning adopted new guiding principles and Strategies for Spatial Development in Germany (*Leitbilder und Handlungsstrategien für die Raumentwicklung in Deutschland*):

“Guiding principle 1: growth and innovation

With this guiding principle, spatial development policy seeks to bolster economic growth, particularly by promoting the knowledge society. All geographical areas are

¹⁷⁴Cf. Sinz, *Raumordnung/Raumordnungspolitik*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 868 f.

¹⁷⁵ Cf. Sinz, *Raumordnung/Raumordnungspolitik*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 869 f.

¹⁷⁶ Cf. Sinz, *Raumordnung/Raumordnungspolitik*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 869.

to be enabled to make their contribution by strengthening the strengths of each region.

Guiding principle 2: securing the provision of essential public services

Spatial planning remains committed to achieving equivalent living conditions in all parts of Germany. This vision addresses the dangers essential public services and facilities face owing to demographic change and tighter public finances.

Guiding principle 3: conserving resources, developing cultural landscapes

This guiding principle integrates the fundamental task of ensuring sustainable spatial planning in the new models and strategies.¹⁷⁷

These guiding principles for spatial development and strategies update the 1993 Spatial Planning Policy Guidelines. Following adoption of the new guiding principles and strategies by the standing Conference of Ministers for Spatial Planning (*Ministerkonferenz für Raumordnung – MKRO*), the Framework for Action in Spatial Planning Policy is also likely to be brought up to date.

The *Spatial Planning Report* provides information about past and future developments in spatial and settlement structure. It takes comprehensive stock of spatial development, of comprehensive spatial planning and sectoral planning.¹⁷⁸ Section 21 of the Federal Spatial Planning Act requires the Federal Office for Building and Regional Planning (BBR) to provide regular reports to the federal ministry responsible for spatial planning for submission to the Bundestag. This is generally done every four years.¹⁷⁹

Federal spatial planning uses various forms of report. We have already mentioned the federal *Spatial Planning Reports*, which provide information about state spatial planning, development trends, and planned and implemented spatial development measures. The Conference of Planning Ministers is advised by an *Advisory Council on Spatial Planning*, composed of representatives from local government, science, industry, management and labour. The Federal Office for Building and Regional Planning maintains an information system on regional development within the national territory. It continuously assesses, interprets and evaluates the general state of regional development and any changes as well as the consequences of such changes. The competent federal ministry makes the output of the information system available to the states.¹⁸⁰

3.1.3 State spatial planning

State spatial planning works towards establishing and safeguarding equivalent and healthy living and working conditions in all parts of the state.¹⁸¹ Its main job is to lay down principles and binding goals in spatial structure plans, which are prepared on the basis of all spatially significant sectoral plans pertaining to industry and commerce, transport, utilities, housing, labour and recreation, as well as nature

¹⁷⁷ Cf.

www.bbr.bund.de/cln_007/nn_22518/DE/ForschenBeraten/Raumordnung/RaumentwicklungDeutschland/LeitbilderKonzepte/leitbilderkonzepte__node.html__nnn=true, Zugriff am 06.12.2006

¹⁷⁸ Cf. Lutter, *Raumordnungsberichte*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 872.

¹⁷⁹ Cf. Lutter, *Raumordnungsberichte*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 873 f.

¹⁸⁰ Vgl. Sinz, *Raumordnung/Raumordnungspolitik*, in: Akademie für Raumordnung und Landesplanung (Hrsg.), *Handwörterbuch der Raumordnung*, S. 871.

¹⁸¹ Cf. Goppel, *Landesplanung*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 570.

conservation and environmental protection.¹⁸² The most important tool in state spatial planning is the comprehensive, supralocal, and intersectoral *state spatial structure plan* implementing federal planning principles, as well as state spatial development goals and ideas.¹⁸³ The name given such plans varies from state to state. They are termed state development plan (Landesentwicklungsplan), state spatial planning programme (Landesraumordnungsprogramm), state development programme (Landesentwicklungsprogramm), etc.

Some state governments prepare *state development programmes* as a preparatory stage of the state development plan. The programme covers a great deal of ground and requires cross-sectoral coordination.

The *state development plan* deals with matters, which include:

- spatial structure,
- division of the state into potential settlement areas and open spaces to be preserved,
- safeguarding natural resources that deserve conservation,
- designation of special development centres and areas eligible for support,
- preparation of spatially significant public and private plans and measures.

As a rule, it contains both text, plans and maps, and deals with the entire territory of the state (scale ca. 1:300,000).¹⁸⁴

Apart from principles of spatial planning for the spatial development and structure of the state, the state development plan presents goals for individual spatially significant projects of importance for the state.¹⁸⁵ The *main contents of state development plans* pertaining to spatial structure are:

- spatial categories (agglomerations, peripheral zones, rural areas);
- central places (high-order centres, middle-order centres, intermediate catchment areas);
- state development axes;
- separate regional development tasks for sub-areas.

Spatial categories: the states designate spatial categories in state development plans (e.g., regulatory areas/agglomerations, urban regions, rural areas) (see chapter II.1.5).¹⁸⁶

Central places: in state development plans, the states deals with the area-wide provision of public and private services and with employment. The concept provides for a hierarchical classification of places (see chapter II.1.5).¹⁸⁷

State development axes: settlement and communication corridors are a special spatial category, which have developed owing to the close spatial links between settlement development and efficient transport axes. High population density and

¹⁸² Cf. Goppel, Landesplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 563.

¹⁸³ Cf. Goppel, Landesplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 563.

¹⁸⁴ Cf. Hein, in: Akademie für Raumforschung und Landesplanung (ed.), Methoden und Instrumente räumlicher Planung, 191.

¹⁸⁵ Goppel, Konrad, Landesplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 563.

¹⁸⁶ Cf. Kistenmacher, in: Akademie für Raumforschung und Landesplanung (ed.), Grundriss der Landes- und Regionalplanung, 223 f.

¹⁸⁷ Cf. Turowski/Lehmkuhler, in: Akademie für Raumforschung und Landesplanung (ed.), Grundriss der Landes- und Regionalplanung, 162 f.

traffic load with persistently dynamic settlement and traffic development make this type of area particularly problematic (cf. chapter II.1.5).¹⁸⁸

Separate regional development tasks for sub-areas: in the spatial/functional distribution of tasks, state spatial planning assigns specific functions to sub-areas. These functions can overlap and be prioritized (cf. chapter II.1.5).¹⁸⁹

State spatial planning is governed by the “mutual feedback principle” that prevails in German spatial planning (system of mixed top-down/bottom-up planning): the state development plan gives concrete form to the principles and goals of comprehensive spatial planning. All ensuing spatial planning, especially regional planning, local urban land-use planning, and specific sectoral planning must take it into account or adapt to it. The principles and goals of state spatial planning are to be borne in mind and, depending on the level of detail, to be observed as legally binding provisions.¹⁹⁰

The Federal Spatial Planning Act makes the *preparation of state spatial structure plans* a statutory, mandatory task. State spatial planning acts provide the statutory basis for state development programmes and plans.¹⁹¹

State development programmes and plans are prepared by the highest state spatial planning authorities and adopted mostly by state parliament in statute form or by the state government in ordinance form.¹⁹² Since the organisation of state spatial planning is not uniformly regulated for the country as a whole, it is entrusted to different government departments in the various states:

- ministry of the Interior
- ministry of economic affairs,
- ministry of the environment,
- ministry of agriculture,
- minister president’s office.

In non-city states in the Baltic Sea region, responsibility for state spatial planning is assigned as follows:

- Brandenburg: Ministry for Infrastructure and Spatial Planning (*Ministerium für Infrastruktur und Raumordnung*);
- Mecklenburg-West Pomerania: Ministry for Labour, Building, and State Development (*Ministerium für Arbeit, Bau und Landesentwicklung*);
- Lower Saxony: Ministry for Rural Areas, Food, Agriculture, and Consumer Protection (*Ministerium für ländlichen Raum, Ernährung, Landwirtschaft und Verbraucherschutz*);
- Schleswig-Holstein: Ministry of the Interior (*Innenministerium*).

State development programmes and plans have a long-term planning horizon and are updated at regular intervals (generally every 10 years).¹⁹³ Section 7 of the

¹⁸⁸ Cf. Kistenmacher, Achsenkonzepte, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 19.

¹⁸⁹ Cf. Domhardt, in: Akademie für Raumforschung und Landesplanung (ed.), Grundriss der Landes- und Regionalplanung, 189.

¹⁹⁰ Cf. Goppel, Landesplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 563.

¹⁹¹ Cf. Turowski, Landesplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 896.

¹⁹² For details see Goppel, Landesplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 564.

¹⁹³ Cf. Goppel, in: Akademie für Raumforschung und Landesplanung (ed.), Grundriss der Landes- und Regionalplanung, 106.

Federal Spatial Planning Act and state spatial planning acts regulate procedures for preparation and amendment. In particular, environmental assessment and the participation of public authorities and the public are required.

In addition to the classical tools of state development programme, state development plan, regional plan, and spatial planning procedure, there are new strategies in state spatial planning. A number of *informal tools* have developed, also partly in use at the regional planning level. They have come into being in a context of changing spatial and structural conditions (German unification, EU integration, technological change). Such new tools include sub-area reports and spatial planning development concepts, cross-border development concepts, regional marketing concepts, and regional management. They aim to concentrate regional forces, enhance the self-awareness and identity of the region, and generate a spirit of optimism.¹⁹⁴

3.1.4 Regional Planning

Regional planning coordinates land use matters of supra-local interest transcending municipal boundaries. It defends the general interests of a region against the particular interests of local authorities.¹⁹⁵

According to the Federal Spatial Planning Act, it has an independent, legitimate mandate to:

- prepare and update the regional plan,
- integrate the landscape outline plan for the region into the regional plan,
- advise urban land-use planning authorities and other public and private planning agencies,
- collaborate in preparing and updating the state development plan and state sectoral development plans,
- engage in spatial planning proceedings,
- collaborate in state sectoral planning,
- take the initiative in regional policy to promote and develop the region,
- cooperate with regional agencies for joint programmes.¹⁹⁶

Section 9 of the Federal Spatial Planning Act does not regulate all the procedural and substantive details of regional plans. This is the task of state spatial planning acts. Regional plans set out:

- to fill out and concretise the prescribed federal and state principles, goals, and other requirements of spatial planning (in the case of cross-border regional plans, those of the countries involved);
- to review the specific structural and development problems of the region and to develop appropriate objectives, taking due account of local government planning;
- to coordinate supraregional projects with regional needs, as well as interlinking the latter in a regional development concept and establishing them in the regional plan.

¹⁹⁴ Cf. Goppel, Landesplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 563.

¹⁹⁵ Cf. Schmitz, Regionalplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 965.

¹⁹⁶ Cf. Schmitz, Regionalplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 965.

The Federal Spatial Planning Act provides for states whose territories encompass several large settlement centres – “catchment areas of several highest-order central places” to prepare regional plans. It also requires the involvement of superordinate and subordinate tiers of planning in regional planning in accordance with the “mutual feedback principle.” Thus regional plans are not only to be developed on the basis of state spatial structure plans but local authorities are to be involved, where they do not carry out regional planning themselves in regional planning associations. Moreover, federal law requires measures to be taken for joint, cross-state regional planning for regions that transcend state borders. One example is the Rhine-Neckar Region (straddling Baden-Württemberg, Hessen, and Rhineland-Palatinate).¹⁹⁷ Section 9 (6) of the Federal Spatial Planning Act also permits the preparation of regional preparatory land-use plans (e.g., Frankfurt/Rhine-Main Planning Association).

The states are responsible for regulating regional planning, defining regions, and determining the content of regional plans. The respective state spatial planning acts provide the legal basis.¹⁹⁸

Since competence for defining planning regions lies with the individual states, planning regions differ greatly in size, plans dealing with these regions go by a variety of names:

- regional plan (*Regionalplan*),
- regional development plan (*regionaler Entwicklungsplan*),
- area development plan (*Gebietsentwicklungsplan*).

Depending on how spatial planning is organised in the given state, it can be entrusted to various levels.¹⁹⁹ There are essentially *two organisational models for spatial planning*. State administrative authorities can be placed in charge of spatial planning (as in Mecklenburg-West Pomerania and Schleswig-Holstein). Or it can be entrusted to local government in the form of regional planning associations (as in Brandenburg). These planning or regional associations are legal persons (statutory bodies) with their own planning staff and an association assembly composed of representatives from county-free cities and counties.²⁰⁰

These differences in the organisation of regional planning have an impact on the territorial definition of planning regions. In states where regional planning has been entrusted to the intermediate state level, planning regions coincide with administrative districts (*Regierungsbezirke*). In most states with regional planning associations (*Planungsgemeinschaft, Planungsverband, Regionalverband*), planning regions tend to be defined in terms of spatial structural entities. In this context, the central place classificatory principle plays an important role in defining regions.²⁰¹ In any case, planning regions encompass the territories of several county-free cities and counties. In Brandenburg, for example, the five planning regions cover between

¹⁹⁷ Cf. Schmitz, Regionalplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 969.

¹⁹⁸ Cf. David, in: Akademie für Raumforschung und Landesplanung, Grundriss der Landes- und Regionalplanung, 85.

¹⁹⁹ Cf. Schmitz, Regionalplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 968.

²⁰⁰ Cf. Bentz/Frenzel, in: Akademie für Raumforschung und Landesplanung (ed.), Grundriss der Landes- und Regionalplanung, 342 f.

²⁰¹ Cf. Schmitz, Regionalplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 966.

two and five cities and counties. Only in Lower Saxony is regional planning entrusted to counties.²⁰²

The *content, form, and main elements of regional plans* are difficult to compare, since they adapt to constantly changing situations and the varying demands of the individual regions. There are, however, core elements common to all regional plans.²⁰³ They deal with territorial matters and with:

- settlement structure,
- open space structure,
- infrastructure.²⁰⁴

Among the settlement structure issues addressed is the designation of co-called central places²⁰⁵ – localities offering certain social, cultural, and economic facilities and amenities serving not only their own population but also that of a surrounding catchment area – other local authority functions, and areas for settlement development. The development of central places is an important approach to concentrating infrastructural and service facilities. It gives specific form to the concept of “decentralised concentration” in spatial structure. A distinction is drawn between high-order, middle-order, low-order and small centres, each to be endowed with specific infrastructural and service facilities and amenities (from university to shopping centre).²⁰⁶ Central places and settlement axes constitute the basic pattern of settlement structure. In sparsely inhabited, rural regions a minimum endowment with public facilities can thus be ensured, since state spatial planning designates high-order centres not only in agglomerations but also in backward areas.²⁰⁷ In some states, this system of central places has been supplemented by development axes of varying priority. Such point-axial systems differ considerably from state to state owing to differences in spatial and settlement structures.²⁰⁸

The aspects of regional planning relating to *open space structure* include the provision of habitat and nature conservation, regional, multifunctional green belts, ventilation corridors, local recreation, as well as the designation of areas for flood control and the extraction of near-surface mineral resources.²⁰⁹

For the *infrastructure*, regional planning determines sites and routes for transport infrastructure, locations and areas for utility services, for freight handling and wind power plants, or adopts the designations of sectoral plans.

The important role played by regional planning in spatial planning should be stressed. Only when given specific expression in the regional context do the principles of federal spatial planning and the goals of state spatial planning come fully to bear, thus attaining a degree of applicability that enables urban land-use planning

²⁰² Cf. Schmitz, *Regionalplanung*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 968.

²⁰³ Cf. Müller, in: Akademie für Raumforschung und Landesplanung (ed.), *Grundriss der Landes- und Regionalplanung*, 242.

²⁰⁴ Cf. Schmitz, *Regionalplanung*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 970.

²⁰⁵ Cf. Müller, in: Akademie für Raumforschung und Landesplanung (ed.), *Grundriss der Landes- und Regionalplanung*, 243.

²⁰⁶ Cf. Turowski/Lehmkuhler, in: Akademie für Raumforschung und Landesplanung (ed.), *Grundriss der Landes- und Regionalplanung*, 162 f.

²⁰⁷ Cf. Treuner et al., *Handwörterbuch der Raumordnung*, 16 ff., 547 ff.

²⁰⁸ Cf. Kistenmacher, *Achsenkonzepte*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 18.

²⁰⁹ Cf. Heinrichs, in: Akademie für Raumforschung und Landesplanung (ed.), *Grundriss der Landes- und Regionalplanung*, 224 f.

to be specifically adapted (pursuant to Section 1 (4) of the Building Code) and sectoral planning to be taken into account.²¹⁰ The scale used for regional plans ranges from 01:50,000 to 1:100,000.

Under the Federal Spatial Planning Act (Section 7) and the respective state spatial planning acts, public authorities and the general public are to be given the opportunity to participate in regional plan preparation, which stretches over a period of years. Regional plans have a long-term planning horizon and are updated at regular intervals (generally every 10 years).²¹¹

Regional planning has tools other than the regional plan itself at its disposal. For instance, the implementation of regional planning goals is ensured by the involvement of regional planning in spatial planning procedures and environmental impact assessment. (see chapter II.1.4.2).

3.2 Local Land-Use Planning

3.2.1 Introduction

In the framework of local government planning autonomy, local authorities regulate urban development and the structure of their territories by means of urban land-use planning in their own responsibility.²¹² Adapting their own planning to meet the goals of comprehensive spatial planning and state spatial planning, they control events at the local level.²¹³ Local government urban land-use planning has the task of preparing and guiding the use of land for building and other purposes in the municipal territory.²¹⁴

Under Section 1 (3) of the Building Code, it is the responsibility of municipalities to prepare land-use plans as soon as and to the extent that they are required for urban development and structural planning. It is incumbent on the local authority to decide when and where this is the case. Urban development planning powers may be exercised by a local authority if it is in the general public interest.²¹⁵ Whether a specific plan really is needed cannot be decided on the basis of the necessity principle under Section 1 (3) of the Building Code but rather by virtue of the precept of a balance of interests under Section 1 (7). But anyone can initiate the preparation, amendment, and supplementation of plans provided that urban planning and development is in the public interest.²¹⁶ However, there is no right to the preparation, amendment, supplementation, or repeal of urban land-use plans (Section 1 (3) sentence 2 of the Building Code).

The preparatory land-use plan (*Flächennutzungsplan*) outlines the development envisaged for the entire municipal territory.²¹⁷ The territory of the municipality is not only the object of urban land-use planning and other local authority planning but also of supra-local, comprehensive spatial planning and regional planning. Supra-local plans are implemented and concretised through land-use plans adapted to the goals of spatial planning (Section 1 (4) of the Building Code and Section 4 (1) sentence 1

²¹⁰ Cf. Schmitz, Regionalplanung, in: Akademie für Raumforschung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 965 f.

²¹¹ Cf. Goppel, in: Akademie für Raumforschung und Landesplanung (ed.), Grundriss der Landes- und Regionalplanung, 106.

²¹² Section 2 (1) of the Building Code.

²¹³ Section 1 (4) of the Building Code.

²¹⁴ Section 1 (1) of the Building Code.

²¹⁵ Cf. Löhr in: Battis/Krautzberger/Löhr, BauGB, § 1 Rn. 26.

²¹⁶ Krautzberger in: Battis/Krautzberger/Löhr, BauGB, § 1 Rn. 11.

²¹⁷ Section 5 of the Building Code.

of the Federal Spatial Planning Act).²¹⁸ Sectoral planning under Section 38 of the Building Code enjoys a certain priority over urban land-use planning firstly as regards material exemption from project authorisation rules and secondly as regards urban land-use planning and its binding effects.²¹⁹ Public planning agencies involved in preparing a preparatory land-use plan under Sections 4, 13, and 13a of the Building Code are required to adapt their planning proposals to the this plan unless they have entered an objection to it.²²⁰ The adaptation requirement serves to harmonise the uses for land proposed by the various public planning bodies.²²¹

Binding land-use plans are developed on the basis of preparatory land-use plans in the form of bye-laws (municipal statutes), laying down binding specifications for urban development. These specifications are in turn the basis for measures required under the Building Code such as the provision of local public infrastructure (land improvement), land reallocation, and compensation.²²²

3.2.2 Preparatory Land-Use Plan

The *preparatory land-use plan*²²³ (*Flächennutzungsplan*) outlines the types of land uses envisaged for the entire municipal territory in accordance with the urban development proposed to meet the anticipated needs of the municipality. The particular importance of the preparatory land-use plan for urban development is that it sets out the fundamental decisions of a community on how and for what purposes (building, transport, agriculture, forestry, recreation, nature conservation, etc.) the land available can and should be beneficially and appropriately used. It provides the framework and basis for binding land-use plans. The aims of comprehensive spatial planning and of state spatial planning, in turn, provide the framework for the preparatory land-use plan (Section 1 (4) of the Building Code; Section 4 (1) of the Federal Spatial Planning Act). Recourse is also had to the principles and goals developed in cross-sectional, informal planning like sectoral or sub-area development plans.²²⁴

The content of the preparatory land-use plan is described in chapter II.1.5.

The *preparatory land-use plan* is to be accompanied by an explanatory memorandum. This memorandum describes the goals, purposes, and effects of the proposed urban development, and records the procedure for and outcome of weighing the interests involved. The explanatory memorandum also includes the environmental report (Section 2a of the Building Code), which describes and assesses substantial environmental impacts.²²⁵

Since the plan has to be drawn up for the entire territory of the municipality, the scale of maps and plans ranges between 1:5,000 and 1:25,000, depending on the size of the community.

The local council adopts the preparatory land-use plan as a special type of government measure.²²⁶ It is accordingly not subject to judicial review pursuant to

²¹⁸ Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, § 1 Rn. 4.

²¹⁹ Krautzberger, in: Battis/Krautzberger/Löhr, BauGB, § 1 Rn. 6.

²²⁰ Section 7 of the Building Code.

²²¹ Löhr, in: Battis/Krautzberger/Löhr, BauGB, § 7 Rn. 2.

²²² Cf. Stüer, Der Bebauungsplan, Rn. 72 ff.

²²³ On basics, procedures and effects see Koppitz/Schwarting/Finkeldei, Der Flächennutzung in der kommunalen Praxis.

²²⁴ Cf. Stüer, Der Bebauungsplan, Rn. 72 ff.

²²⁵ Cf. Schmidt-Eichstaedt, Bauleitplanung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 78.

²²⁶ Cf. Löhr, in: Battis/Krautzberger/Löhr, BauGB, § 5 Rn. 45.

Section 47 of the Code of Administrative Court Procedure.²²⁷ It alone can justify no claims, in particular no claim to the granting of building permission. Nevertheless, it has considerable binding effect: binding land-use plans are to be developed on the basis of the preparatory land-use plan (Section 8 (2) of the Building Code). Furthermore, the preparatory land-use plan plays an important role in obtaining authorisation for projects in undesignated outlying areas (outer zone) under Section 35 of the Building Code. A privileged (subsection 1) or other (subsection 2) project is contrary or detrimental to the public interest if it contravenes the representations in the preparatory land-use plan (Section 35 (3) no. 1 of the Building Code). The preparatory land-use plan is binding on public planning bodies involved under Sections 4 and 13 if they do not file an objection to the plan. They are thus required to adapt their plans to the preparatory land-use plan (Section 7 of the Building Code).

3.2.3 Binding Land-Use Plan

The binding land-use plan (*Bebauungsplan*)²²⁸ is the second stage in the two-stage system of local urban development planning. In contrast to the preparatory land-use plan the binding land-use plan contains legally binding specifications steering and controlling urban development structures, the use of land for building and other purposes (Section 8 (1) of the Building Code). It is adopted in the form of a bye-law or municipal statute. The binding land-use plan is the chief instrument for implementing local government planning, and constitutes the basis for other measures needed to implement the Building Code. These include:

- land reallocation (Sections 45 ff of the Building Code),
- land improvement (provision of local public infrastructure) (Sections 123 ff.),
- compensation (Sections 39 ff.),
- expropriation (Sections 85 ff.),
- urban development enforcement orders (Sections 175 to 179),
- admissibility of projects within areas covered by binding land-use plans (Sections 30, 31). (see chapter II.1.4.3).

The binding land-use plan gives specific form to the preparatory plan through the clear, plot-by-plot definition of land use.²²⁹ The Building Code allows a wide range of content in binding land-use plans. Section 9 provides an exhaustive list. Possible specifications and other contents of the binding land-use plan are described in chapter II.1.5.

As a rule, the binding land-use plan is not limited in time.²³⁰ However, under certain circumstances, time limits or conditions may be imposed (Section 9 (2) of the Building Code).

The scale employed for binding land-use plans usually ranges from 1:500 to 1:2000. The binding land-use plan is to be accompanied by an explanatory memorandum (Section 9 (8) of the Building Code). It sets out the aims, purposes and most significant effects of the plan.²³¹ It also includes the environmental report (Section 2a of the Building Code), which describes and assesses substantial environmental impacts.

²²⁷ Cf. Schmidt-Eichstaedt, Städtebaurecht, 204.

²²⁸ For detailed treatment see: Kuschnerus, Der sachgerechte Bebauungsplan, Stürer, Der Bebauungsplan.

²²⁹ Cf. Löhr, in: Battis/Krautzberger/Löhr, BauGB, § 8 Rn. 2.

²³⁰ Löhr, in: Battis/Krautzberger/Löhr, BauGB, § 9 Rn. 7, 241.

²³¹ Cf. Schrödter, in: BauGB, § 9 Rn. 183 ff.

There are *various types* of binding land-use plan. The admissibility of a project can be decided on the basis of a *qualified binding land-use plan*, but it must contain the minimum specifications listed in Section 30 (1) of the Building Code on the category of use and degree of building coverage, lot coverage, and traffic areas. A project is accordingly permissible if it does not contravene these specifications and if the provision of local public infrastructure is ensured.

A plan that does not contain these minimum specifications is termed a *simple binding land-use plan*. In areas covered by a simple binding land-use plan, the admissibility of projects is governed by Section 24 of the Building Code (built-up areas/inner zone) and Section 35 (undesignated outlying areas/outer zone) (Section 30 (3) of the Building Code).

In the case of *project-based binding land-use plans* (Section 30 (2) of the Building Code), the admissibility of projects can also be definitively decided. A project is permissible if it does not contravene the binding land-use plan and if the provision of local public infrastructure is ensured.

The project-based binding land-use plan is part of the project and infrastructure plan under Section 12 of the Building Code. This instrument is used principally to satisfy the planning-law conditions for obtaining authorisation for a specific project. In this instance, the investor takes the initiative to establish a right to build. On the basis of a plan for realising the project and improving the land (project and infrastructure plan) prepared in consultation with the local authority, the developer must be willing and able to implement the project within a fixed period and to bear either wholly or in part the costs of planning and land improvement prior to adoption of the pertinent bye-law (implementation contract) (Section 12 (1) of the Building Code).

3.2.4 Land-Use Planning Procedure²³²

The procedure for preparing land-use plans is laid down in Sections 2 ff. of the Building Code. Procedure for the preparatory and the binding land-use plan is identical up to the adoption stage. It begins formally with a *plan preparation decision* (*Aufstellungsbeschluss*).²³³ Depending on the applicable state and local law, this decision is general made by the local council, by a committee, or by the municipal executive board.²³⁴ The decision is to be published in the manner customary in the municipality under Section 2 (1) sentence 2 of the Building Code.

In practice, this decision is preceded by a *run-up phase*, during which the need for the plan is examined. In this context, urban development plans and district development plans are often also elaborated or evaluated. In accordance with Section 1 (6) no. 11 of the Building Code, these informal plans are to be taken into account in deliberations on the land-use plan if they have been adopted by the local authority.²³⁵

At an early stage in proceedings, generally before the preparation decision has been adopted, the local authority has to submit a state spatial planning query to the competent state spatial planning authority as to any aims of comprehensive spatial planning and state spatial planning that cannot be dealt with by the process of weighing interests.²³⁶ This step in the procedure is pursuant not to the Building Code but to the relevant state spatial planning legislation.

²³² For general treatment see: Rothe/Müller, Die Aufstellung von Bauleitplänen.

²³³ Cf. Schrödter, in: BauGB, § 2 Rn. 1 ff.

²³⁴ Cf. Battis, in: Battis/Krautzberger/Löhr, BauGB, § 2 Rn. 4.

²³⁵ Cf. Schmidt-Eichstaedt, Städtebaurecht, 124 ff.

²³⁶ Cf. Schmidt-Eichstaedt, Städtebaurecht, 127.

In urban land-use planning procedures, the *involvement of the public and of public authorities and other public agencies* is provided for in two stages. The Building Code distinguishes between early and formal participation.

Early public participation under Section 3 (1) of the Building Code serves to inform the general public about the general aims and purposes of planning and to hear their views. Members of the public can put forward their proposals and arguments at an early stage in proceedings, before planning has taken on too definite contours.²³⁷ In addition, the municipality is required under Section 4 (1) of the Building Code to inform public authorities and other public agencies at the earliest possible date of the general aims and purposes of planning and to invite them to state their views, not least of all about the necessary extent and granularity of environmental impact assessment under Section 2 (4). For this purpose, public authorities and public agencies include all public authorities, offices, and public associations that could be affected by the planning (e.g., nature conservation offices, chambers of industry and commerce, utilities, churches). If the envisaged plans affected the development intentions of other local authorities, they must also be informed and consulted.²³⁸ Notification pursuant to Section 3 (1) and Section 4 (1) can be carried out simultaneously (Section 4a (2) of the Building Code).

Once all comments have been collected, private and public interests (Section 1 of the Building Code) are to be duly weighed.

The competent local body adopts a *decision on public display* (*Auslegungsbeschluss*). The draft plan is to be put on public display for a period of one month with the explanatory memorandum and the already available comments on environmental aspects considered important by the local authority (Section 3 (2) of the Building Code). The public have the opportunity to offer recommendations and make objections regarding the plan, which are then to be taken into account in the ensuing weighing of interests. The place and duration of public display are to be published at least one week in advance in the manner customary in the municipality (Section 3 (2) of Building Code). The announcement must also state what types of environmental information are available and that overdue comments cannot be taken into account, and that an application for judicial review is inadmissible if the applicant lodges objections that were not raised, or not raised in due time, in the context of public display, but which could have been put forward on this occasion (Section 3 (2) sentence 2 of the Building Code).

The public authorities and other public agencies affected are also to be given opportunity to state their views (Section 4 (2)). There is a one-month deadline, which can be reasonably extended for good cause. Participation under Sections 3 (2) and 4 (2) of the Building Code can take place at the same time. In the case of land-use plans capable of a substantial impact on neighbouring countries, municipalities and public authorities in those countries are to be notified in accordance with the principles of reciprocity and equivalence (Section 4a (5)). If cross-border participation is necessary, attention must be drawn to the fact in the announcement (Section 4a (5) sentence 3). Participation by the public of the neighbouring countries takes place pursuant to Section 3 of the Building Code.

If, in the ensuing weighing of interests, it transpires that the draft plan has to be revised and adapted, the process of public display is to be repeated.²³⁹

The binding land-use plan is finally *adopted* by the municipality in the form of a by-law or municipal statute (Section 10 (1) of the Federal Building Code). Under Section

²³⁷ Cf. Battis, in: Battis/Krautzberger/Löhr, § 3 Rn. 7. ff.

²³⁸ Cf. Schmidt-Eichstaedt, Städtebaurecht, 130 ff.

²³⁹ For details see § 4a Abs. 3 BauGB.

10 (2), certain binding land-use plans (Section 8 (2), (3) sentence 2, and (4) of the Building Code) require authorisation by the superior administrative authority. The states can introduce a duty of notification by virtue of Section 246 (1a) with respect to the superior administrative authority, for example for binding land-use plans not requiring authorisation. Some states (like Brandenburg and Mecklenburg-West Pomerania) have done so for a limited period which has now expired everywhere).

The granting of permission or, where this is not required, the adoption of the binding land-use plan is to be published in the customary manner. The binding land-use plan and supporting documentation are to be made available for inspection by the general public; explanations and information on the content are to be supplied on request. Upon *publication*, the binding land-use plan comes into force (Section 10 (3) of the Building Code).

The preparatory land-use plan must be submitted to the superior administrative authority for approval (Section 6 (1)). This authorisation must be published in the customary manner. Upon publication, the preparatory land-use plan comes into force (Section 6 (5) of the Building Code).

Both the preparatory and the binding land-use plan are to be accompanied by an explanatory memorandum. The content is laid down in Section 6 (5) sentence 3 and Section 10 (4) of the Building Code.

The length of proceedings for preparing land-use plans is difficult to generalise, since it depends on many factors like the size of the municipal territory, the number of conflicts, and the type of plan.

Divergence from the procedures described above is possible; a simplified procedure can be employed pursuant to Section 13 of the Building Code if the alteration or supplementation of a land-use plan does not affect planning essentials or where, in an area under Section 34, the admissibility criteria deriving from the specific nature of the immediate surroundings are not essentially altered through the land-use plan.

Instead of the procedure described, an accelerated procedure under Section 13a of the Building Code can be used if a binding land-use plan for the recycling of land, for densification, or for other inner development measures is prepared and the specified or actual surface area under Section 19 (2) of the Land Utilisation Ordinance is less than 20,000 m² or between 20,000 m² and 70,000 m², and no significant effects on the environment are revealed by preliminary examination of the specific case.

This simplified and accelerated procedure is to be used only if projects that are being prepared or justified are not subject to environmental impact assessment and there is no reason to expect any adverse impact on protected areas for flora and fauna or bird sanctuaries.

If all the conditions are met, Section 13 and 13a allow certain steps in procedure and the environmental assessment to be omitted.²⁴⁰

3.3 Informal Planning at the Local Level

3.3.1 Introduction

Informal planning is not definitively regulated by law. Only its integration into formal urban land-use planning is laid down by the Building Code. According to Section 1 (6) no. 1, development concepts and other urban development plans adopted by the local authority are to be taken into account in preparing land-use plans.

²⁴⁰ For details see §§ 13 and 13a BauGB.

Informal plans are adopted by the local council in the form of master plans. They can be binding only within the administration.

Nor is there any formal procedure for their preparation. Most informal planning is rather to be seen as a continuous process in which procedural stages are not strictly chronological. The facilitation of subsequent modification, adaptation, and feedback is stressed. This informal type of planning is strongly oriented in both substance and procedure on local conditions.²⁴¹

Although procedure is not formally regulated, the voluntary involvement of the public and public authorities has become the normal practice.

Informal plans are useful in preparing and giving concrete form to land-use plans.

3.3.2 Sectoral Development Planning

Urban development planning (*Stadtentwicklungsplanung*) is part of informal planning. It deals with social, cultural, and economic demands on the settlement area. Urban development plans are usually elaborated for the entire community, and are often composed of thematic subplans addressing, for instance:

- work,
- housing,
- social infrastructure,
- utilities,
- transport.

This produces outline objectives for city-wide development and the required investment.

Urban development planning helps prepare political and administrative decisions, and constitutes a tool for coordinating subsequent urban land-use planning and municipal sectoral planning. It permits many a conflict to be recognised and eliminated at an early stage before formal planning gets under way. The advantage of such informal planning is great flexibility and scope.²⁴² One of the main tasks of urban development planning is to give more concrete form to preparatory land-use planning by setting spatial and temporal priorities in space utilization. It can also elaborate functional space models, types of measure and areas for specific measures, and determine their implementation in terms of importance and sequence. This informal planning is undertaken for the entire territory of the municipality. Single sectoral sub-areas are usually treated separately and, depending on the size of the community, depicted with a scale ranging between 1:5,000 and 1:25,000. Urban development planning is not limited to master plans. Urban development concepts are often filled in by means of detailed texts and programmes.

Sectoral development planning is medium to long term.

3.3.3 Sub-Area Development Planning

In recent decades, the notion of urban development planning has been evolving. Instead of elaborating abstract programmes aiming to influence economic and societal forces for development as a whole, planners now take a far more relative view. Projects addressing single tasks to obtain partial improvements are becoming more and more important. This new approach to planning concentrates on small

²⁴¹ Danielzyk, Informelle Planung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 466.

²⁴² Danielzyk, Informelle Planung, in: Akademie für Raumordnung und Landesplanung (ed.), Handwörterbuch der Raumordnung, 466.

steps and reasonably short periods (perspective incrementalism). This has also meant priority setting rather than all-embracing realisation.

As a result of this new approach, many local authority preparatory land-use plans and sectoral, specialised and development plans have dealt with sub-areas.

Master plans for sub-area development planning present differentiated proposals on the distribution of land use, urban design, and the type and priority of planning measures for limited areas.

Being a non-formalised planning tool, sub-area development planning is not subject to any formal procedure. The spatial characteristics involved depend strongly on the planning purpose and local authority planning practice, and are therefore difficult to compare. A medium scale is used for these informal plans for sub-areas of the municipality (1:10:000 to 1:5,000).

Sub-area development planning is medium to long term.

3.3.4 Framework Development Planning

The framework development plan, like the urban development plan, is an informal tool. In contrast to urban development planning, framework planning concentrates on spatially and substantively limited urban development tasks. The focus is on elaborating the specifications of the preparatory land-use plan at the neighbourhood level to provide a basis for the binding land-use plan. Being an informal tool, framework planning is much more flexible²⁴³ than formal urban land-use planning. This allows it to concentrate on select aspects and problems. The framework plan is used primarily for urban extensions, but also in developing existing urban areas suffering from deficiencies and shortcomings. The framework plan is a differentiated plan of action, which can be seen both as a pointer for the administration and a source of information for the public and investors. Framework plans are often prepared in connection with urban design competitions.

At the spatial level, the framework plan comes between the preparatory land-use plan and the binding land-use plan (scale 1:5.000 to 1:1.000). It deals with urban sub-areas or neighbourhoods.²⁴⁴

The framework plan generally presents both the categories of land use laid down by the preparatory land-use plan and the physical structures determined by binding land-use plans. Usually, structures are identified in far more concrete form than in binding land-use plans. It can also address a range of other aspects:

- spatio-structural,
- functional,
- urban design,
- socio-economic,
- ecological.

Objectives can thus be detailed in many different ways, although they remain informal in nature. Framework planning is medium term.

²⁴³ Cf. Danielzyk, *Informelle Planung*, in: Akademie für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 466.

²⁴⁴ Cf. Albers, in: Akademie Für Raumordnung und Landesplanung (ed.), *Handwörterbuch der Raumordnung*, 1087 f.

3.4 Building Permission Procedure²⁴⁵

State building regulations are essentially similar in content and structure from state to state, although some arrangements differ considerably. The Standard Building Regulations 2002 (*Musterbauordnung – MBO*) provide an overview of existing rules.²⁴⁶ Erecting, altering and changing the use of physical structures require a permit unless otherwise provided by Sections 60 to 62, 76, and 77 of the Standard Building Regulations (Section 59). Whether the following provisions apply must be ascertained for each project:

- Priority of other permit proceedings (Section 60 of the Standard Building Regulations),
- building projects not subject to permit procedures, demolition of physical structures (Section 61),
- exemption from permission (Section 62),
- authorisation of moveable structures (Section 76),
- building authority authorisation (Section 77).

If none of these provisions is relevant, building permission proceedings are required. Depending on preconditions, the Standard Building Regulations differentiates between simple building permission procedure (Section 63) and building permission procedure proper (Section 64).²⁴⁷

Building permission is granted by the lower building authorities in the given state. Lower building authorities are the lower-tier administrative authorities, counties, country-free cities, or municipalities forming part of a county, provided that this competence has been vested in them. The planning application and the material needed to assess the building project and for processing the application (building documents) (Section 68 of the Standard Building Regulations) are to be submitted to the appropriate authority. The building documents are to be prepared and signed by authorised parties (Section 54). What documents and drawings (site plan, ground plan, elevations, sections) with what scale have to be submitted depends on the relevant state ordinance pertaining to building documents (*Bauvorlagenverordnung*). The building authority obtains the consent of the municipality²⁴⁸ and consults all the bodies and agencies required to be heard and without whose stated opinion it cannot be decided whether approval can be granted (Section 69 of the Standard Building Regulations).

Building permission is to be granted if the building project does not conflict with any provisions of public law which are to be considered in the authorisation procedure (Section 72 (1) of the Standard Building Regulations). Building permission is a so-called tied decision, in which the authority has no margin of discretion. This safeguards the constitutional right to build under Article 14 of the Basic Law.²⁴⁹ The granting of *building permission* is an administrative act.

Building permission expires if the building project is not commenced within three years (sometimes four or six years) after permission has been granted, or if

²⁴⁵ Cf. Hoppe/Bönke/Grotefels, *Öffentliches Baurecht*, § 15 Rn. 10 ff.

²⁴⁶ *Musterbauordnung 2002 (MBO 2002)*; available, for instance, at www.is-argebau.de/lbo/VTMB100.pdf.

²⁴⁷ Since building control law is governed by state law, whether and what procedures have to be followed has to be ascertained for every project with reference to the relevant state building regulations.

²⁴⁸ The granting of consent is regulated by Section 36 of the Building Code. Where the municipality denies its consent contrary to the law, this consent is to be replaced (Section 71 of the Standard Building Regulations).

²⁴⁹ Cf. Krautzberger, in: Battis/Krautzberger/Löhr, *BauGB*, § 1 Rn. 7.

execution of the works is interrupted for longer than one year. On application, it can be extended for a year (Section 73 of the Standard Building Regulations). In order to clarify particular issues relating to the project (e.g., building setbacks) the developer can submit an outline planning application before the application for building permission proper. The lower building authority then issues an outline or preliminary permit (*Bauvorbescheid*) by which it is bound in the subsequent building permission procedure unless the material and legal situation underlying the preliminary permit changes. Preliminary building permission is valid for the same period as building permission proper.

4. Sectoral Planning

4.1 Introduction

Apart from cross-sectional, comprehensive planning (urban land-use planning, regional planning, state spatial planning), there is sectoral planning for specialised, long-life, and long-term projects. *Sectoral planning* is concerned with linear planning and certain infrastructural facilities. Nature conservation and landscape planning occupy an ambiguous position. They are both cross-sectional comprehensive plans (landscape programme, landscape outline plans, green structures plans) and sectoral plans (e.g., protection area ordinances).

Sectoral planning is divided into *supra-local and local* sectoral planning. On the one hand, it deals with linear, cross-community infrastructures, generally at the federal and state levels (e.g., highways, railways, tramways, magnetic levitation railways, airports, mining, waterways, protection areas, tipping sites, and waste incineration plants), and, on the other, with the local level (e.g., roads), where local authorities are responsible for sectoral planning.²⁵⁰

A further distinction is made between *privileged and non-privileged sectoral planning*. Privileged sectoral planning addresses supra-local projects subject to planning approval or permission. It deals with highways, railways, and magnetic levitation railways, with air transport, telecommunications, energy supply, passenger transport, and experimental facilities for rail-bound transport, waterways and water management, as well as mining projects. Privileged sectoral planning also includes projects for building and operating publicly accessible waste disposal facilities with the participation of the municipality subject to procedures under the Federal Immission Control Act (*Bundes-Immissionsschutzgesetz*) (Section 38 of the Building Code).

Different planning bodies are responsible for the preparation of formal and strictly binding spatial planning and sectoral planning.²⁵¹ Because they address the same areas, conflicts can arise. A spatially significant measure or plan governed by sectoral planning law can conflict with the goals, principles, and other requirements laid down in spatial structure plans, as well as the representations of preparatory land-use plans and the specifications of a binding land-use plan.²⁵² Building and spatial planning law offer a range of solutions. The aims of spatial planning set out in

²⁵⁰ Cf. Runkel, Fachplanungen, raumwirksame, in: Akademie für Raumforschung und Landesplanung (ed.), *Handbuch der Raumplanung*, 283 f.

²⁵¹ Cf. Runkel, Fachplanungen, raumwirksame, in: Akademie für Raumforschung und Landesplanung (ed.), *Handbuch der Raumplanung*, 282.

²⁵² Cf. Runkel, Fachplanungen, raumwirksame, in: Akademie für Raumforschung und Landesplanung (ed.), *Handbuch der Raumplanung*, 282.

spatial structure plans are strictly binding on sectoral planning (Section 4 of the Federal Spatial Planning Act) provided that the specification in question falls within the remit of spatial planning under Section 1 (1) of the Federal Spatial Planning Act and is in the nature of an aim or goal. Local urban land-use planning (preparatory and binding land-use plans) and sectoral planning, in contrast, are on the same hierarchical level. Section 7 of the Building Code provides a solution for the preparatory land-use plan. Public planning agencies involved in preparing the preparatory land-use plan under Sections 4, 13, and 13a of the Building Code are required to adapt their planning proposals to the preparatory land-use plan provided they have not objected to this plan. For the binding land-use plan, Section 38 of the Building Code offers an indirect solution to conflicts in that the provisions relating to the admissibility of projects under Sections 29 to 37 do not apply with respect to privileged sectoral planning.^{253 254} One solution for planning conflicts is that in some fields sectoral planning can be carried out by means of binding land-use plans instead of planning approval procedure (e.g., Section 17 (3) of the Federal Highways Act).

For certain sectoral plans, a graduated procedure is provided from broad concept planning to specific planning of the measure in question. In these cases sectoral plans for a specific project are then preceded by requirements plans. This is particularly the case with the building of federal highways. The Bundestag adopts a Federal Transport Infrastructure Plan for highway construction pursuant to the Federal Street Building Act.²⁵⁵ This requirements plan justifies investment, which is then no longer subject to judicial review.²⁵⁶ The states, too, can determine their sectoral planning needs in the framework of their overall spatial planning, and, where necessary, concretise them by means of the spatial planning procedure set forth in Section 15 of the Federal Spatial Planning Act or the derogation procedure under Section 11. The same applies with respect to local authorities, which can prepare their local sectoral planning requirements by means of land-use planning.

Comprehensive planning and sectoral planning, despite their differences in content, have much in common, especially procedural and substantive demands on planning governed by law.²⁵⁷

Legislative competence in spatial planning and sectoral planning is dealt with in chapter II.2.1. The Federation has exercised its legislative powers in all fields of sectoral planning. The implementation of sectoral planning in specific projects is entrusted directly to federal higher, intermediate, and lower authorities only in the fields of conventional and magnetic levitation railways (Federal Railways Authority – *Eisenbahnbundesamt*), waterways and water management (Federal Office for Shipping and Hydrography – *Bundesamt für Schifffahrt und Hydrographie*), and defence (Federal Defence Administration – *Bundeswehrverwaltung*). See also chapter II.2.1. In all other fields, sectoral planning is carried out by the states.

In turn, the states transfer some of their sectoral planning powers to lower tiers of state administration and to local authorities. Requirements assessment in the context of comprehensive planning, sectoral requirements planning, and participation by

²⁵³ Cf. Runkel, in: Fachplanungen, raumwirksame, in: Akademie für Raumforschung und Landesplanung (ed.), Handbuch der Raumplanung, 282.

²⁵⁴ For more detailed treatment see Stüer, Handbuch des Bau- und Planungsrechts, Rn. 2983 ff.

²⁵⁵ Gesetz über den Ausbau der Bundesfernstraßen, 30 June 1971, BGBl. I, 873, amended as promulgated on 20 January 2005, BGBl. I 201, as last amended by Art. 12 of the Act of 09 December 2006, BGBl. I, 2833.

²⁵⁶ On requirement planning see Stüer/Probstfeld, Die Planfeststellung, 84.

²⁵⁷ On the commonalities between building and sectoral planning law see: Stüer/Probst, Die Planfeststellung, 459.

higher federal or state administrative authorities in specific sectoral planning proceedings provides feedback between the tiers involved.

4.2 Types of Procedure in Sectoral Planning Law

Sectoral planning law distinguishes between three types of procedure. They are:

- planning approval (*Planfeststellung*),
- planning permission (*Plangenehmigung*),
- measures not requiring permission (*genehmigungsfreie Maßnahmen*).

They are described in the coming section.

4.2.1 Planning Approval Procedure

The procedural and substantive demands on planning approval procedures are the same on all levels of planning, regardless of whether a street or an airport is involved at the federal, state, or local level. There are differences only in the competence for carrying out the procedure, for planning permission, and legal procedure.

The obligation to carry out planning proceedings is imposed on all levels of planning by the relevant sectoral law. If planning approval procedure is required by law, they are governed by the Administrative Procedures Act (*Verwaltungsverfahrensgesetz – VwVfG*). If the relevant sectoral law provides for special arrangements, they are to be applied.

The *purpose of planning approval proceedings* is to determine whether a particular development project with spatial impacts is to be authorised. This procedure involves weighing and balancing both the interests of the developer and any public or private interests which might be affected by the development project. It concludes with a legally binding decision. Planning approval includes all other decisions required from public authorities (e.g., permits, concessions, consent), and regulates all public-law relationships between the project developer and those affected by the plan. Planning approval is therefore a comprehensive process of concentration and development. The outcome of planning approval procedure is the planning approval decision.²⁵⁸

Planning Approval Procedure under Sections 72 ff of the Administrative Procedures Act

Application and Planning Documents Section 73 (1) of the Administrative Procedures Act

The project developer submits the plan to the relevant authority (e.g., the Federal Railways Authority) for the hearing procedure. The plan consists of drawings (e.g., project plans, environmental impact assessment, landscape management support plan) and explanations presenting the project, its purpose, and the sites and structures affected by it.

Public Authority Comments Section 73 (2) of the Administrative Procedures Act

The authority responsible for the hearing calls on public authorities whose remit is affected by the project to submit its comments within a month of receipt of the complete plan. Public authorities are to supply their comments by a deadline set by the responsible authority, which may not exceed more than three months. Comments received thereafter are no longer taken into account unless the issues addressed are already known or should have been known to the

Public Display of Plans Section 73 (2), (3), and (4) of the Administrative Procedures Act

The responsible authority sends the planning documents to the local authorities affected by the project. Local authorities are required to put the plan on public display within three weeks of receipt for a period of one month, and to announce this public display beforehand by the usual local means (content of announcement – Section 73 (5)). For a period of two weeks after public display, affected parties may file

²⁵⁸ Akademie für Raumordnung und Landesplanung (ed.), *Handbücher der Planungsbegriffe*.

planning approval authority, or if they are important for the lawfulness of the decision.

objections. Public display can be renounced if the circle of those affected is known and they are given an opportunity within a reasonable period to inspect the plan. In this case the responsible authority sets the deadline. All objections not founded on special titles under private law are ruled out upon expiration of the period for entering objections. This is to be pointed out in the announcement of public display or of the objection period.

Deliberation Section 73 (6) of the Administrative Procedures Act

After expiration of the deadline for participation by public agencies and the general public, the procedure for discussion of the objections entered takes place after due notice has been given in the customary manner (requirements are set out in Section 73 (6) of the Administrative Procedures Act). The aim of this discussion is to reach the greatest possible consensus with all objectors. If the plan is fundamentally modified, public display must be repeated. If changes are slight, the parties affected are to be invited to comment.

Comments by the Responsible Authority Section 73 (9) of the Administrative Procedures Act

The authority responsible for the hearing procedure gives its opinion and, where possible within a month after completion of the discussion procedure, submits this opinion together with the plan, the comments of public authorities, and objections that have not been settled to the planning approval authority.

Planning Approval Decision Section 74 (1), (2), and (3) of the Administrative Procedures Act

The planning approval authority (e.g., district administration) approves the plan (planning approval decision). The planning approval decision also deals with objections on which agreement was not reached during the discussion procedure.

Effect of Planning Approval Section 75 of the Administrative Procedures Act

The planning approval decision has far-reaching legal effects.

Approval: the planning approval decision gives the project developer approval for carrying out the project. The plan becomes ineffective if implementation of the plan does not begin within five years of permission becoming final.

Concentration: a concentration effect is attained in that the decision includes the other public authority decisions required pursuant to other provisions. The formal concentration effect means that any authorisation required under other provisions is not needed (e.g., permits under state building regulations, the Federal Water Act, or the Federal Immission Control Act). The material concentration effect limits material examination requirements with regard to other legal rules.

Regulatory effect: the planning approval decision definitively regulates all relations under public-law between the project developer and the parties affected by the plan.

Exclusion effect: once the planning approval decision has become final, any action to cease and desist from using the plan is excluded.

Compensatory effect: the planning approval authority is required under certain circumstances to oblige the project developer to take protective measures or to pay appropriate monetary compensation to parties affected by the project.²⁵⁹

Invalidity of Planning Approval (Administrative Act) Section 44 of the Administrative Procedures Act

Under Section 44 of the Administrative Procedures Act, the planning approval decision as an administrative act is invalid if it suffers from particularly serious defects and this becomes evident

²⁵⁹ On the legal effects of the planning approval decision see: Hoppe/Schlarmann, Die planerische Vorhabensgenehmigung, 87. ff.

upon due and reasonable consideration of all the relevant circumstances. The invalidity of a planning approval decision can be established by an action for declaratory judgment pursuant to Section 43 (1) of the Code of Administrative Court Procedure.

In a few cases, sectoral planning can be carried out by means of a binding land-use plan in lieu of planning approval (e.g., Section 17 (3) Federal Highways Act). However, the binding land-use plan deals only with the admissibility of the sectoral plan under planning law. Since the binding land-use plan has not concentration effect, all further authorisations, such as building permission, procedures under water management law, or permits under pollution control law have to be applied for separately.

4.2.2 Planning Permission

Under certain circumstances planning permission (*Plangenehmigung*)²⁶⁰ can replace planning approval (*Planfeststellung*). This is the case where the rights of third parties are not adversely affected or if the affected parties have given their written consent to the use of their property or the exercise of another right, and agreement has been reached with public agencies whose areas of responsibility are affected. Planning permission requires no participation by the general public with procedures for the public display of plans, the entering and discussion of objections. Planning permission is not admissible in accordance with sectoral legislation if it encroaches upon or substantially affects the rights of others, expropriation is necessary, or public participation is required, for instance because an environmental impact assessment²⁶¹ is required.²⁶²

Planning Permission Section 74 (6) of the Administrative Procedures Act

Planning permission can be granted in lieu of a planning approval decision where:

1. third party rights are not adversely affected
2. where the affected parties have given their written consent to the use of their property or the exercise of another right, and agreement has been reached with public agencies whose areas of responsibility are affected.

Not admissible for projects requiring an environmental impact assessment.

No formal procedure for public participation

Legal effect and defence as for the planning approval decision, but no blight due to proposed compulsory purchase

4.2.3 Genehmigungsfreie Maßnahmen

Under Section 74 (7) of the Administrative Procedures Act, planning approval and planning permission can be renounced in cases of minor importance. This can apply where:

²⁶⁰ It was introduced in 1993 by the Planning Simplification Act (*Planungsvereinfachungsgesetz – PIVereinfG*).

²⁶¹ If a project requires an environmental impact assessment is determined by the Act on Environmental Impact Assessment (*Gesetz über die Umweltverträglichkeitsprüfung*) of 12 February 1990, BGBl. I, 205, as amended on 25 June 2005, BGBl. I, 2407, last amended by Art 2 of the Act of 21 December 2006, BGBl. I, 3316.

²⁶² On planning permission see Stüer/Probstfeld, *Die Planfeststellung*, 9.

1. other public interests are not affected or the required public authority decisions have been issued and they do stand in the way of the plan,
2. the rights of third parties are not affected or appropriate agreement has been reached with the parties affected by the plan.²⁶³

Measures not Requiring Permission (genehmigungsfreie Maßnahmen).

Section 74 (7) of the Administrative Procedures Act (Cases of Minor Importance)

If other public interests are not affected *or* the required public authority decisions have been issued and they do not stand in the way of the plan *and* third party rights are not affected or appropriated agreement has been reached with the parties affected by the plan.

Legal status: internal administrative matter

²⁶³ For details see Stürer/Probstfeld, Die Planfeststellung, 14.

4.3 General Description of Sectoral Planning

4.3.1 Transport and Communications

4.3.1.1 Federal Railways

The Federation provides railway services for the passenger and goods transport using railway infrastructure facilities. These services include the building, altering, and extension, as well as maintenance of railway lines, including command and control systems and safety systems. The legal basis on which these services are provided is Article 73 no. 6 of the Basic Law, under which the Federation has exclusive legislative powers for the operation of railways wholly or predominantly owned by the Federation (federal railways), the construction, maintenance, and operation of lines belonging to federal railways as well as the imposition of charges for the use of such lines; According to Article 87e of the Basic Law, rail transport with respect to federal railways is to be administered by federal authorities. Responsibilities for rail transport administration may be delegated by a federal law to the states acting in their own right. Under Article 87 (2) of the Basic Law, the Federation discharges rail transport administration responsibilities assigned to it by a federal law, above and beyond those respecting federal railways.

The basis for developing the railway network is a Federal Railway Investment Plan (*Bundesschienenwegebedarfsplan*)²⁶⁴ and a transmodal concept of 9th April 1991, which comprised 17 Transport Projects for German Unification, including 9 railway projects.²⁶⁵ Planning and licensing federal railway infrastructural facilities is the responsibility of the Federal Railways Authority. In the General Railway Act (*Allgemeines Eisenbahngesetz – AEG*)²⁶⁶ the Federation has definitively regulated planning approval for all railways including state railways (Sections 18 ff.). According to Section 18 of the General Railway Act, a railway including power lines may be built or altered only if planning approval has been granted beforehand. In granting planning approval, all public and private interests, including environmental compatibility are to be weighed. In accordance with this act, planning procedure is governed by Sections 72 to 78 of the Administrative Procedures Act. The General Railway Act deals with the hearing procedure (Section 18a), the planning approval decision and planning permission (Section 18b), modifications to the plan before completion of the project (Section 18d), legal remedies (Section 18e), and compensation procedure (Section 22a).²⁶⁷ In order to safeguard planning, Section 19 (1) and (2) of the General Railway Act provides for a development freeze, and Section 19 (3) for a right of pre-emption. To ensure that construction work can begin as quickly as possible, Section 21 of the General Railway Act provides for early putting into possession.

4.3.1.2 State Railways

²⁶⁴ Annex to *Gesetz über den Ausbau der Schienenwege des Bundes* of 25 November 1993, last amended by Art 309 V of 31 October 2006, BGBl. I, 2407.

²⁶⁵ The Act on the Acceleration of Railway Infrastructure Planning (*Verkehrswegeplanungsbeschleunigungsgesetz*) of 16 December 1991, BGBl. I, 2174, provided the legal basis for implementing this concept.

²⁶⁶ *Allgemeines Eisenbahngesetz* of 27 December 1993, BGBl. I 2378, 2396, BGBl. I (1994) 2439, last amended by Art 1 of the act of 09 December 2006, BGBl. I, 2833 and by Art 1 of the act of 13 December 2006, BGBl. I, 2919.

²⁶⁷ Cf. Stürer/Probstfeld, *Die Planfeststellung*, 245 ff. See also Stürer, *Handbuch des Bau- und Fachplanungsrechts*, mns. 3094 to 3149; the latest amendments to the General Railway Act are not taken into consideration.

Responsibility for rail transport administration may be delegated by a federal law to the states to act in their own right. Where the states or private persons operate railways of their own, the same requirements apply in principle for planning, licensing, construction, and operation as for railways belonging to the Federation. There is no sectoral planning at the local government level for railways.

4.3.1.3 Magnetic Levitation Railways at the Federal Level²⁶⁸

For the planned magnetic levitation railway between Berlin and Hamburg, the Act Regulating Planning Procedure for Magnetic Levitation Railways (*Gesetz zur Regelung des Planverfahrens für Magnetschwebbahnen*) was passed. It deals with the planning, licensing, and operation of magnetic levitation railways. The Berlin-Hamburg project has meanwhile been abandoned.

Magnetic levitation railways, like conventional railways, are linear, long-life infrastructural facilities for interconnecting high-order centres with the function of supra-local development. The planning, licensing, and operation of magnetic levitation railways are subject to planning approval. In simple cases, planning permission suffices. The supervisory, licensing, and planning approval authority is the Federal Railways Authority. Regional and local authorities have no planning powers relative to magnetic levitation railways.²⁶⁹ Other requirements regarding magnetic levitation railways are set out in the General Magnetic Levitation Railways Act.²⁷⁰

4.3.1.4 Federal Trunk Roads

The Federation plans supra-local, linear road infrastructure projects for federal highways in accordance with the Federal Highways Act.²⁷¹ National trunk roads are federal motorways (*Bundesautobahn*) and federal highways (*Bundesstraße*) as required by the Trunk Road Extension Act,²⁷² which are approved in a multi-stage procedure – investment plan, spatial planning, routing procedure, plan approval procedure, or, in simple case, planning permission. The Trunk Road Extension Act lays down the traffic requirements for the construction of new federal trunk roads. The Act of the Acceleration of Transport Infrastructure Planning (*Verkehrswegeplanungsbeschleunigungsgesetz*) provides the basis for speeding up seven trunk road projects. Trunk road planning, being spatially significant, is to be harmonized as well as coordinated with spatial planning requirements under a special procedure. In the ensuing routing procedure under Section 16 of the Federal Highways Act,²⁷³ a corridor is agreed by the Federation and the states within which future, specific road planning (planning approval) is to be situated.

The construction, alteration, or extension, and operation of federal trunk roads are subject to planning approval, or, in simple cases, to planning permission pursuant to the Federal Highways Act. Under Article 90 of the Basic Law, federal motorways and federal highways are built and administered by the states (state highway department)

²⁶⁸ *Allgemeines Magnetschwebbahngesetz* of 23.11.94, BGBl. I, 3486, last amended by Art 237 of the ordinance of 25.11.03, BGBl. I, 2304.

²⁶⁹ Cf. Stürer/Probstfeld, *Die Planfeststellung*, 399 ff. See also Stürer, *Handbuch des Bau- und Fachplanungsrechts*, mns. 3509 to 3514.

²⁷⁰ *Allgemeines Magnetschwebbahngesetz* of 19 July 1996, BGBl. I, 1019, last amended by Art 303 of the ordinance of 31 October 2006, BGBl. I, 2407.

²⁷¹ *Bundesfernstraßengesetz (FStrG)* as promulgated on 19.4.1994 (BGBl. I 854), amended by *Viertes ÄnderungsG (4. FStrÄnG)* of 18.6.1997 (BGBl. I 1452).

²⁷² *Gesetz über den Ausbau der Bundesfernstraßen (Fernstraßenausbaugesetz - FStrAG)* of 30 June 1971, as promulgated on 20 January 2005, BGBl. I, 201, last amended by Art. 286 of the ordinance of 31 October 2006, BGBl. I, 2407.

²⁷³ *Bundesfernstraßengesetz* of 06 August 1953, BGBl. I, 903, as promulgated on 20 February 2003, BGBl. I, 286, last amended by Art. 2 of the act of 09 December 2006, BGBl. I, 2833.

on behalf of the Federation. Planning approval procedure and planning permission is regulated by Section 17 of the Federal Highways Act.²⁷⁴

4.3.1.5 State and County Roads

With respect to planning, construction, alteration, and extension, state and country roads built in accordance with state law are subject to the same requirements and the same planning approval or permission instruments as federal trunk roads.

4.3.1.6 Local Roads

This is also the case for local roads built in accordance with state law outside the purview of local urban land-use planning. Under Section 17 (3) of the Federal Highways Act, the binding land-use plan can replace planning approval. However, this generally applies only with regard to cross-town links for trunk roads.

4.3.1.7 Federal Waterways Construction

The law relating to water covers water management law and waterways and water transport law. The law relating to waterways construction regulates the nation-wide, long-term construction, extension, maintenance, and utilisation of federal waterways. The statutory basis is provided by the Federal Waterways Act.²⁷⁵ The extension, construction, or demolition of federal waterways requires prior planning approval (Section 14 of the Federal Waterways Act). In certain cases, planning permission may be possible (Section 14b of the Federal Waterways Act).

The waterways and shipping directorates (*Wasser- und Schifffahrtsdirektionen*) are responsible for federal waterways. They are the competent authorities for planning approval, licensing, and hearings. Federal waterways planning is undertaken only in consultation with the states.²⁷⁶

Federal waterways, like federal trunk roads, are subject to a multi-stage approval procedure. Spatially significant sectoral planning is coordinated with the aims of comprehensive spatial planning by means of spatial planning procedures and preliminary routing procedures. The planning approval procedure ensues.

4.3.1.8 Regional and Local Waterways Construction

The states have not used their concurrent legislative powers under Article 74 of the Basic Law. Competence for waterways therefore lies exclusively with the Federation in consultation with the states.

4.3.1.9 Civil Aviation

Civil aviation planning is concerned with the construction, extension, and alteration of civil aviation airports and airfields with all the necessary facilities. The statutory basis for planning is the Federal Air Traffic Act.²⁷⁷ It regulates the use of air space in the Federal Republic of Germany, the licensing of aircraft, aviation personnel, and the design and operation of airports and airfields with restricted building protection areas. In accordance with Section 17 of the Federal Air Traffic Act, airports and airfields with restricted building protection areas may be constructed and altered only on the basis of planning approval or planning permission (Section 8 (1) and (2) of the Federal Air

²⁷⁴ On federal trunk road planning see Stüer/Probstfeld, *Die Planfeststellung*, München 2003, 176 ff. See also Stüer, *Handbuch des Bau- und Fachplanungsrechts*, mns. 2997 to 3093.

²⁷⁵ *Bundeswasserstraßengesetz – WaStrG* of 02 April 1968, BGBl. II, 173, as promulgated on 04 November 1998, BGBl. I, 3294, last amended by statute on 09 Dezember 2006, BGBl. I, 2833.

²⁷⁶ On federal waterways planning see Stüer/Probstfeld, *Die Planfeststellung*, 317 ff. See also Stüer, *Handbuch des Bau- und Fachplanungsrechts*, Rn 3482 to 3508.

²⁷⁷ *Luftverkehrsgesetz* as promulgated on 14 January 1981, last amended by Art 5 of the act of 09 December 2006, BGBl. I, 2833.

Traffic Act). Licensing under Section 8 (6) of the Federal Air Traffic Act is not a precondition for planning approval or planning permission procedures.

Special arrangements apply with respect to military airfields under Section 30 of the Federal Air Traffic Act.²⁷⁸ The Federal Armed Forces, the Federal Border Guard (now Federal Police), the police, and troops stationed in the Federal Republic of Germany under international treaties (e.g., American forces) may derogate from the general provisions of the Federal Air Traffic Act provided that this is necessary in the performance of their specific functions and taking due account of public safety and order. The planning approval procedure under Section 8 of the Federal Air Traffic Act is not required where military airfields are to be constructed or altered. In the event of expropriation proceedings for military airfields, the Land Procurement Act (*Landbeschaffungsgesetz – LBG*) applies.

4.3.1.10 Passenger Transport

The Federation itself engages in no planning with respect to public transport. The Passenger Transport Act (*Personenbeförderungsgesetz – PBefG*)²⁷⁹ supplies the statutory basis for planning tramways and trolley bus systems as long-term infrastructural facilities. The act applies with respect to the conveyance of persons against payment or commercially by tramway, trolley bus, and motor vehicle, and the construction of facilities for tramways. As far as tramway and trolley bus facilities are concerned, planning approval procedure is required for construction, operation, and routing. In special cases, planning permission suffices.²⁸⁰ The licensing authority is the body appointed by the states. In many non-city states the intermediate-tier administrative districts are entrusted with this function. Competence for planning approval under the Passenger Transport Act is vested in the states.²⁸¹ Projects under the Act can, however, also be prepared by local authorities by means of binding land-use plans.²⁸²

4.3.1.11 Telecommunications Facilities at the Federal, Regional and Local Levels

The planning of telecommunications facilities pursuant to the Telecommunications Act²⁸³ includes the laying and use of transmission lines by licensees such as the Deutsche Telekom AG on public and private land. The legal basis for telecommunications facilities is the Telecommunications Act. Under the act, telecommunications facilities are approved without formal procedures in consultation with the licensee and the local authority.²⁸⁴ The Federation is authorised to use public roads free of charge unless this constitutes a lasting encroachment on the normal use of infrastructure (public paths, squares, and bridges) (Section 68 (1) of the Telecommunications Act). The laying of new transmission lines and alterations to existing lines require the written consent of the authority responsible for constructing and maintaining public ways (Section 68 (3) of the Telecommunications Act). If this authority is itself an operator or there is cross-ownership between authority and operator, authorisation must be entrusted to an independent administrative unit (details in Section 68 (4) of the Telecommunications Act). Through the regulatory

²⁷⁸ Cf. Stürer/Probstfeld, *Die Planfeststellung*, Verlag C.H. Beck, München 2004, *Militärisch genutzte Flugplätze*, Rn. 485 ff.

²⁷⁹ *Personenbeförderungsgesetz* of 08 August 1990, BGBl. I, 1690, last amended by Art 292 of the ordinance of 31 October 2006, BGBl. I, 2407.

²⁸⁰ Cf. Stürer/Probstfeld, *Die Planfeststellung*, 2004, 303 ff.

²⁸¹ Cf. Stürer, *Handbuch für Bau- und Fachplanungsrecht*, Rn. 3266 to 3271.

²⁸² For instance, reservation of land for public thoroughfare (Section 9 (1) no. 11 of the Building Code) to secure routing.

²⁸³ *Telekommunikationsgesetz* of 22 June 2004, BGBl. I, 1190.

²⁸⁴ Löhr, in: *Battis/Krautzberger/Löhr, BauGB*, § 38 Rn. 19.

authority, the Federation transfers authorisation for use on written application to the operators of public telecommunications networks (Section 69 (1) of the Telecommunications Act).²⁸⁵

4.3.2 Utilities

4.3.2.1 Energy Facilities

In the case of energy facilities, it is a question of authorising lines for public electricity and gas supply in accordance with the Act on Electricity and Gas Supply.²⁸⁶ Energy lines serve the provision of essential public services in the public interest. Energy supply lines are needed at all planning levels. The Electricity and Gas Act aims to ensure the secure, inexpensive, consumer-friendly, efficient, and environmentally compatible supply of electricity and gas to the general public, the regulation of competition, and the safeguarding of the efficient and reliable operation of energy supply networks, as well as the transposition and implementation of European Community law (Section 1 (1) to (3) of the Act of the Supply of Energy and Gas). It deals, in particular, with deconcentration, network operation, functions, powers, and competencies of public authorities, including the regulatory authority, network access, and energy delivery to the end consumer. According to Section 43 (1) of the Act on the Supply of Electricity and Gas, planning approval by the authority responsible under state law is required for high voltage transmission lines, with the exception of railway power transmission lines, of 110 kV or more, as well as for gas supply line with a diameter of more than 300 mm, provided that an EIA is to be carried out pursuant to the Act on Environmental Impact Assessment. Otherwise, planning permission suffices. In case of minor importance, planning permission is not required; no formal authorisation procedure is demanded (Section 43 (1) of the Act on the Supply of Electricity and Gas).

Energy supply utilities assess supply infrastructure needs. Under state law, the competent planning approval authority decides on authorising projects. The preparation of projects under the Act on the Supply of Electricity and Gas can be accompanied by binding land-use plans adopted by the local authority to secure infrastructure sites.²⁸⁷

4.3.2.2 Waste Avoidance, Recycling and Disposal at the State, District, and County Levels

At issue in the field of waste avoidance, recycling, and disposal, are the planning, licensing, and operation of waste avoidance and recycling plants, as well as waste facilities and dumpsites.

The statutory basis for planning is provided by the Waste Avoidance, Recycling and Disposal Act.²⁸⁸ State waste management plans are the basis on which waste avoidance and recycling goals are set and waste facilities and dumpsites planned. Waste management plans can be prepared at the state, district, or county level. The public is to be involved in the preparation of waste management plans unless the plan in question requires a strategic environmental assessment pursuant to the Act on Environmental Impact Assessment (Section 29a of the Waste Avoidance, Recycling and Disposal Act). The states, administrative districts, or counties are

²⁸⁵ See the Telecommunications Act for details.

²⁸⁶ *Gesetz über die Elektrizitäts- und Gasversorgung – Energiewirtschaftsgesetz – EnWG* -of 07 July 2005, BGBl. I, 1970 (3621), amended by Art. 7 of the act of 09 December 2006, BGBl. I, 2833.

²⁸⁷ Pursuant to Section 9 (1) nos. 12, 13, 21.

²⁸⁸ *Gesetz zur Förderung der Kreislaufwirtschaft und zur Sicherung der umweltverträglichen Beseitigung von Abfällen - Kreislaufwirtschafts- und Abfallgesetz* - of 27 September 1994 (BGBl. I, 2705, last amended by Art 7 of the act of 09 December 2006, BGBl. I, 2819.

responsible for requirements assessment in waste management planning at the various levels.²⁸⁹ The instrument for authorising land disposal sites is planning approval under Section 31 (2) of the Waste Avoidance, Recycling and Disposal Act or planning permission. Waste incineration plants require authorisation in accordance with the Federal Immission Control Act²⁹⁰ (Section 31 (1) of the Waste Avoidance, Recycling and Disposal Act), while other facilities are subject to licensing procedure under waste legislation. Responsibility lies with the state authorities in charge of planning approval and permission procedures with respect to the Waste Avoidance, Recycling and Disposal Act or state pollution control authorities. Projects under the Act on the Supply of Electricity and Gas can be prepared by local authorities by means of binding land-use plans (location safeguarding).^{291 292}

4.3.2.3 Nuclear Facilities

With regard to nuclear facilities, the planning, authorisation, and operation of nuclear power plants under the Atomic Energy Act are at issue.²⁹³ The Act on the Phase-Out of Nuclear Power²⁹⁴ bans the construction of new, commercial nuclear power stations and restricts the residual operating life of existing nuclear power plants to 32 years from start up. This reduces planning in Germany to the building and operation of interim and final storage facilities. The statutory basis for nuclear power facilities is the Act on the Peaceful Use of Nuclear Power and Protection against its Hazards (*Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren*). Planning is nowadays concerned with the research, development, and use of nuclear power for peaceful purposes and the planning and licensing of interim and final storage facilities. The construction and operation of facilities for the interim storage, safeguarding, and final storage of radioactive waste pursuant to Section 9a (3) of the Atomic Energy Act, as well as major alterations to such facilities or their operation require planning approval (Section 9b of the Atomic Energy Act). The planning of nuclear facilities is carried out in consultation between the Federation and the states.²⁹⁵ Owing to public opposition to final and interim storage facilities, planning approval proceedings are extremely protracted. Functions and tasks under the Atomic Energy Act are performed by the Federation and the states (delegated administration).

4.3.2.4 Federal Framework Competence in Water Management: Implementation by the States

Public law relating to water includes water management law and waterways and water transport law (cf. chapter II.4.5.1.7 and II.4.5.1.8). Water management is chiefly regulated by the Federal Water Act,²⁹⁶ which deals with the use of waterbodies and flood control in conformity with the principle of managing water resources in the

²⁸⁹ Cf. Stürer/Probstfeld, Die Planfeststellung, 308.

²⁹⁰ *Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge – Bundes-Immissionsschutzgesetz – BImSchG* – of 15 March 1974, BGBl. I, 721, 1193, last amended by Art 3 of the act of 18 December 2006, BGBl. I, 3180.

²⁹¹ e.g., by designation under Section 9 (1) no 12 or 14 of the Building Code.

²⁹² For details see Stürer, Handbuch des Bau- und Fachplanungsrechts, Rn. 3272 to 3372.

²⁹³ *Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren, Atomgesetz (AtG)* as promulgated on 15 July 1985, BGBl. I, 1565, last amended by Art 161 of the ordinance of 31 October 2006, BGBl. I, 2407.

²⁹⁴ *Gesetz zur geordneten Beendigung der Kernenergienutzung zur gewerblichen Erzeugung von Elektrizität* of 22 April 2002 (BGBl. I 1351).

²⁹⁵ Cf. Stürer/Probstfeld, Die Planfeststellung, 403.

²⁹⁶ *Gesetz zur Ordnung des Wasserhaushalts (Wasserhaushaltsgesetz – WHG)* as promulgated on 19 August 2002, BGBl. I, 3245, last amended by Art 2 of the act of 25 June 2005, BGBl. I, 1746.

public interest, as well as with the necessary administrative procedures. Water management deals with the making and construction, removal, and substantial redesign of bodies of water, banks and shores, dike-building, and flood control. Waterbodies are divided into first-order waterbodies (federal waterways), second-order waterbodies (major stretches of natural and artificial watercourses), and third-order waterbodies (all other watercourses). The statutory basis is the Federal Water Act (*Wasserhaushaltsgesetz*) and state water acts.

Water management is concerned with the use of waterbodies, flood control, surface waters, coastal waters, and groundwater. Under the Federal Water Act, projects are authorised by non-profit or private planning approval (Section 31 (2) of the Federal Water Act), planning permission (Section 31 (2)), permit (Section 7), or concession (Section 8).

Water management planning is subject to a multi-stage decision-making process: from state water management framework plans to assess requirements and coordinate spatial planning to planning approval or planning permission procedures. Projects can be publicly or privately initiated. Specific projects are decided by the planning approval and permission authority competent under state law.²⁹⁷

Following devastating floods on the rivers Oder and Elbe at the beginning of the 21st century, flood control arrangements under the Federal Water Act²⁹⁸ were improved to allow rivers more space and to eliminate the shortcomings in regulation and implementation that had become apparent.²⁹⁹ These improvements were backed by amendments to the Federal Spatial Planning Act, the Federal Building Code, the Federal Waterways Act, and the Act on the German Meteorological Service (*Gesetz über den Deutschen Wetterdienst*). Key provisions are general principles for flood control (Section 31a of the Federal Water Act), the designation of flood hazard areas by the states (Section 31b) based on 100 years of flood history.³⁰⁰

4.3.2.5 Water Management at the Local Level

Local authorities or special purpose associations of local authorities are responsible for third-order waterbodies. At the local level, the same formal and material requirements apply for water management planning as at the federal and state levels.³⁰¹

4.3.2.6 Mining at the Federal and State Levels

Mining and quarrying projects involve the prospecting, extraction and processing of resources open to prospecting and mining under permit and those belonging to the owner of the land, including loading, transport, unloading, storage, and deposition, as well the rehabilitation of pits and quarries. The statutory basis is provided by the Federal Mining Act.³⁰² The extraction of underground mineral resources is authorised in accordance with the Federal Mining Act. Special rules apply with respect to open-cast lignite mining.³⁰³ A multistage preliminary procedure at the state level is required

²⁹⁷ Cf. Stüer/Probstfeld, *Die Planfeststellung*, 344 ff. See also Stüer, *Handbuch des Bau- und Fachplanungsrechts*, mns. 3373 to 3449.

²⁹⁸ Art 2 of the Act to Improve Preventive Flood Control (*Gesetz zur Verbesserung des vorbeugenden Hochwasserschutzes*) of 25 June 2005, BGBl. I, 1746.

²⁹⁹ Cf. Stüer, *Handbuch des Bau- und Fachplanungsrechts*, Rn. 3451.

³⁰⁰ For details see Stüer, *Handbuch des Bau- und Fachplanungsrechts*, Rn. 3450 to 3461.

³⁰¹ For a general treatment of water and urban development see: Fickert/Fieseler, *Umweltschutz im Städtebau*, vhw-Verlag, 459 ff.

³⁰² *Bundesberggesetz (BBergG)* of 13 August 1980, BGBl. I, 1310, last amended by Art 159 of the ordinance of 31 October 2006, BGBl. I, 2407.

³⁰³ On lignite planning see Stüer/Probstfeld, *Die Planfeststellung*, Verlag C.H. beck München 2004, 432.

for state development plans pertaining to mining and open-cast lignite mining. Projects are subject to planning approval where environmental impact assessment is required pursuant to the EIA Ordinance on Mining Projects (*UVP-V Berbau*) (outline working plan procedure) with the appropriate mining-law plans (main working plans, outline working plans, special working plans, final working plan). If planning necessitates the clearance of localities, parliamentary regulation is reserved. Mining requirements are assessed indirectly through prior state spatial planning on spatial planning coordination regarding proposed extraction sites. On this basis, a project developer, for instance a commercial mining company, can apply to the competent federal or state authority for planning approval or permission.³⁰⁴

Land under which mining is being carried on and which is designated for the extraction of minerals are, pursuant to Section 5 (3) of the Building Code, to be shown in the preparatory land-use plan, and pursuant to Section 9 (5) in the binding land-use plan.

4.3.3 Defence

4.3.3.1 Land Procurement for Defence Purposes at the Federal Level

The Federation has exclusive competence with respect to defence. Under the Land Procurement Act,³⁰⁵ the Federation may procure sites for the purposes of defence, of fulfilling international treaties, of installing or constructing defence facilities. The state government is to be involved, which expresses its views on the project after consulting the local authorities (associations of local authorities) affected and taking due account of spatial planning requirements, especially landscape, economic interests, urban development interests, as well as nature conservation and landscape management. In general, land is to be acquired by private contract (Section 2 of the Land Procurement Act). If this is not possible, expropriation (compulsory purchase) is permitted (Sections 10 ff of the Land Procurement Act). On the request of the Federation, the competent federal minister or the federal authority determined by him institutes expropriation proceedings before the competent state expropriation authority (Section 28).

4.3.3.2 Restricted Areas for Military Defence

Restricted area planning for military defence is concerned with restricting the use of sites in the protection area for defence purposes. The statutory basis is the Act on Restrictions on Real Property for Purposes of Military Defence.³⁰⁶

A restricted area is one in which the use of land is restricted in accordance with the Restricted Areas Act (Section 1) by special order of the competent federal authority for purposes of defence, and especially to fulfil the obligations of the Federation under international treaties on the stationing and legal status of foreign states in the Federal Republic. If an area is to be declared a restricted area, the state government is to be involved, which expresses its views on the project after consulting the local authorities (associations of local authorities) affected and taking due account of spatial planning requirements, especially the interests of urban development and nature conservation and landscape management, as well as agricultural and

³⁰⁴ For general treatment see: Stüer/Probstfeld, Die Planfeststellung, 422ff. See also Stüer, Handbuch des Bau- und Fachplanungsrechts, Rn 3556 to 3615.

³⁰⁵ *Landbeschaffungsgesetz* of 23 February 1957, BGBl. I 1957, 134, last amended by statute on 31 October 2006, BGBl. I, 2407.

³⁰⁶ *Gesetz über die Beschränkung von Grundeigentum für die militärische Verteidigung (SchBerG)* of 07 December 1956, BGBl. I, 899, last amended by Art 2 of the act of 12. August 2005, BGBl. I, 2345.

economic interests (Section 1 (3) of the Restricted Areas Act). A restricted area is declared by order of the federal minister for defence (Section 2 (1) of the Restricted Areas Act). The declaration of a restricted area is to be notified to the property owners, authorised users, and other parties with property rights or published in the customary manner (Section 2 (1) of the Restricted Areas Act). The competent public authority must ascertain proprio motu at least every 5 years whether the conditions requiring declaration of the restricted area still pertain (Section 2 (4)). Certain measures within a restricted area require authorisation (Section 3 of the Restricted Areas Act) by the restricted area authorities (Section 9 (2)). Any property losses due the imposition of the restricted area are to be compensated (Sections 9 ff of the Restricted Areas Act).

See chapter II.4.5.1.9. with regard to the military use of airports.³⁰⁷

4.3.4 Environmental Protection and Nature Conservation³⁰⁸

4.3.4.1 Protection Area Ordinances pursuant to the Federal Nature Conservation Act

Under Section 22 (1) of the Federal Nature Conservation Act,³⁰⁹ the states provide that parts and components of nature and landscapes may be designated as nature conservation areas, national parks, biosphere reserves, landscape conservation areas, nature parks, or natural monuments or protected components of landscapes. This designation defines the area or object to be protected, the purpose of protection, the required orders and prohibitions and, the necessary measures for care, development and restoration (Section 22 (2) of the Federal Nature Conservation Act). Pursuant to Section 22 (3) of the Federal Nature Conservation Act, the states have, in particular, adopted provisions on the interim protection and registration of protected parts and components of nature and landscapes and well as those under interim protection, and on their identification. Competence for designation, protected status procedure, and the legal forms of particular protection areas is regulated by the respective state nature conservation act.

The designation of protection areas is of particular importance for urban land-use planning because the provisions of the Federal Nature Conservation Act, of state nature conservation acts, and the legislation adopted could conflict with urban land-use planning. Planning in violation of higher ranking (nature conservation) law is forbidden. The possible consequences for land-use planning or for the designation of protection areas differ. They range from exemptions from bans to partial repeal of a protection area ordinance or partial abandonment of the land-use planning.³¹⁰

4.3.4.2 Nature Conservation Areas

The statutory basis for nature conservation areas is provided by Section 23 of the Federal Nature Conservation Act and the provisions of the respective state nature conservation acts. Nature conservation areas aim to conserve the biotic communities or habitats of certain species of wild fauna and flora. Nature conservation areas are

³⁰⁷ See also Stürer, Handbuch des Bau- und Fachplanungsrechts, Rn. 3232 to 3242.

³⁰⁸ For a general treatment of nature and landscape conservation see: Fickert/Fieseler, Umweltschutz im Städtebau, vhw-Verlag, 71 ff.

³⁰⁹ *Gesetz über Naturschutz und Landschaftspflege (Bundesnaturschutzgesetz – BNatSchG)* as amended by Art 1 of the *Gesetz zur Neuregelung des Rechts des Naturschutzes und der Landschaftspflege und zur Anpassung anderer Rechtsvorschriften* of 25 March 2002, BGBl. I, 1193, last amended by Art 8 of the act of 09 December 2006, BGBl. I, 2833.

³¹⁰ Cf. Bundesministerium für Verkehr, Bau- und Wohnungswesen (ed.), Leitfaden zur Handhabung der naturschutzrechtlichen Eingriffsregelung in der Bauleitplanung, Bearbeiter: Schäfer/Lau/Specovius,

designed to provide particularly intensive protection for nature and landscape. To justify this purpose, it must be demonstrated that particular protection is needed for at least one of the reasons enumerated under Section 2 of the Federal Nature Conservation Act. An entire area of nature and landscape can be placed under protection – for example, certain ecosystems – or single areas, like migratory bird refuges. The restoration of ecosystems can also be a ground for protection. Changes in protected appearance, for example by the removal of vegetation and the construction of building are generally not permitted, nor is it allowed to stray from marked paths or to pick flowers, and the like. This strict protection is apparent in the extent and number of protection areas in this category: nature conservation areas occupy only a tiny percentage of the total national territory and are usually relatively small. Nature conservation areas are designated with binding effect by way of ordinance.

4.3.4.3 National Parks

The statutory basis for national parks is provided by Section 24 of the Federal Nature Conservation Act and the provisions of the respective state nature conservation acts. National parks are extensive areas specifically designated and granted protected status because of their distinctive character, and which for most of their territory meet the requirements for designation as a nature conservation area. National parks are directly comparable with nature conservation areas, but they are larger and mostly accessible to the general public. Their purpose is to conserve the biotic communities or habitats of certain species of wild fauna and flora. National parks do not rank lower than nature conservation areas in their protective function. They are extensive areas not or little influenced by human beings, which largely have to meet the standards of a nature conservation area. Their dimensions permit a land management policy that enables the juxtaposition of non-accessible total protection zones and areas open to tourism. In Germany there are currently 6 national parks. A national park ordinance determines protected areas. Owing to their size, national parks play a role in spatial planning and are designated in consultation with the competent federal authorities.

4.3.4.4 Biosphere Reserves

The statutory basis is provided by Section 25 of the Federal Nature Conservation Act and the provisions of the respective state nature conservation acts. Biosphere reserves are intended to protect and develop certain large-scale types of landscape that essentially meet the criteria for nature conservation areas. In size, biosphere reserves resemble national parks, but they take into account that there are no intact natural landscapes left in Central Europe, only specific, man-made landscapes (cultural landscapes). These cultural landscapes are to be preserved. For this reason, Section 25 (1) nos. 2 and 3 of the Federal Nature Conservation Act also refers to modes of cultivation and management. Biosphere reserves are composed of zones of differing intensity in protection, management, and economic activity, and of settled areas. Under Section 25 (2) of the Federal Nature Conservation Act, the states, while allowing for the exemptions required by settlements, etc., are required to ensure the same level of protection for biosphere reserves as that afforded to nature and landscape conservation areas. Biosphere reserves are large protection areas within the remit of state ministries designated by way of ordinance.

4.3.4.5 Landscape Conservation Areas

The statutory basis for landscape conservations areas is provided by Section 26 of the Federal Nature Conservation Act and the provisions of the respective state nature conservation acts. The status of landscape conservation areas ensures protection and development in areas requiring to maintain and restore the efficient

functioning of natural systems or the viable use of natural resources. The protective purpose of landscape conservation areas can be both to maintain, develop or restore elements of nature or landscape, conservation on the grounds of diversity, characteristic features, and beauty, or of the particular historical and cultural significance of the area concerned, or in view of its special importance for recreation (Section 26 (2) of the Federal Nature Conservation Act). They differ from nature conservation areas in that designation as a landscape conservation area also affords protection for special characteristics and functions, for example recreation, whereas the nature conservation area is designed for the direct protection of nature and landscape. Although, for example, the construction of buildings is generally not compatible with the purpose of a landscape conservation area, the rules on protection are weaker (e.g., no ban on paths). Landscape conservation areas are areas designated by way of ordinance for the protection of nature and landscape.

4.3.4.6 Nature Parks

The statutory basis for nature parks is provided by Section 27 of the Federal Nature Conservation Act and the provisions of the respective state nature conservation acts. Nature parks are large areas particularly suitable for recreation owing to their landscape assets. Nature parks are areas to be developed and managed on a uniform basis, largely parts of landscape and nature conservation areas, which are destined for recreation and tourism in accordance with the aims of spatial planning (Section 27 (1) of the Federal Nature Conservation Act).

Nature parks are intended to combine nature conservation with landscape-related recreation. The focus is on recreation. As a rule, they encompass nature and landscape conservation areas and are divided into zones of various use intensity. The advantage is that larger areas can be uniformly developed by one body regardless of municipal or counties boundaries and borders. In practice, this is to some extent limited to uniform signposting and furnishing.

4.3.4.7 Natural Monuments

The statutory basis for natural monuments is provided by Section 28 of the Federal Nature Conservation Act and the provisions of the respective state nature conservation acts. Individual creations of nature can be protected by given them the status of natural monuments (Section 28 (1) of the Federal Nature Conservation Act). This requires a specific protection ordinance, and in some state a local bye-law suffices. The objects in question can include rocks, geological outcrops, erratic blocks, glacier traces, sources, and, in particular, old and rare trees. Since amendment of the Federal Nature Conservation Act in 2002, "extensive natural monuments" up to 5 ha in size can be listed. Causing damage or lasting disturbance or disruption to a natural monument is forbidden and will be prosecuted as an administrative offence. The owner cannot be required to maintain natural monuments. The owner must, however, accept maintenance by the nature conservation authority.

4.3.4.8 Protected Components Of Landscapes

The statutory basis for protected components of landscapes is provided by Section 29 of the Federal Nature Conservation Act and the provisions of the respective state nature conservation acts. This status can provide individual protection for specific groves or thickets, smaller waterbodies, or generic protection for certain plant species in defined areas, e.g. reeds, xeric grasslands. Unlike natural monuments, where protection is afforded to an object because of its nature as a monument, with components of landscapes the object as such is protected. The Federal Nature Conservation Act 2002 extended the purpose of protecting components of

landscapes to development and restoration (Section 29 (1)). The municipality or county usually initiates designation.

4.3.4.9 Protected Biotopes

The statutory basis for protected biotopes is provided by Section 30 of the Federal Nature Conservation Act and the provisions of the respective state nature conservation acts. Protected biotopes include many types of biotopes enjoying particular protection throughout the country. Pursuant to Section 20 (1) of the Federal Nature Conservation Act, state legislation has prohibited measures that may lead to the destruction or any other significant or lasting adverse impact on biotopes, placed further biotopes of state-wide importance under protection, and taken measures to safeguard the spatial extent and the ecological features of the biotopes concerned. By virtue of Section 30 (2) of the Federal Nature Conservation Act, the states may grant exceptions if adverse impacts on the biotopes can be offset or if the measures concerned are necessary for reasons of overriding public interest. The amendments to the Federal Nature Conservation Act in 2002 provide for further exceptions regarded biotopes that, for instance, have developed on land within the scope of extensivisation programmes. Statutory protection is afforded protected biotopes without a formal designation procedure being required.³¹¹

4.3.4.10 European Network "Nature 2000"

The European Bird Directive and Habitat Directive required the Federal Republic of Germany as a member state of the European Union to designate special protection areas. The aim was to create a coherent network of protection areas at the European level (Natura 2000).^{312 313} Member states of the European Union were required to report on such areas. Since the competent German authorities failed to report when required, the Federal Administrative Court ruled with reference to a decision of the European Court of Justice that areas worthy of protection are to be neither destroyed nor impaired in any other way, and has in effect recognised bird sanctuaries and potential habitat protection areas without formal designation.³¹⁴ As soon as each area is included in the Commission list and announced by publication in the Federal Gazette, the recognised protected status is no longer of importance. The prohibition of deterioration under Section 33 (5) of the Federal Nature Conservation Act then takes effect. Plans³¹⁵ (including urban land-use plans) and projects which could have a very adverse impact on protected areas must be subjected to impact assessment pursuant to Section 34 of the Federal Nature Conservation Act. Assessment of projects in the area covered by a binding land-use plan (Section 30 of the Federal Building Code) and during planning approval proceedings (Section 33 of the Federal Building Code) is not required. The yardstick to be applied is the purpose for designating the protected area. If the assessment shows that the project may give rise to significant adverse effects on a protected site, affecting the components of the site that are of a critical interest for relevant conservation objectives or the protection purpose concerned, the plan or project is deemed inadmissible (Section 34 (2) of the Federal Nature Conservation Act). In derogation therefrom, a plan or project can be authorised under Section 34 (3) of the Federal Nature Conservation Act if this project

³¹¹ Cf. Louis, Bundesnaturschutzgesetz Kommentar, § 19a Rn. 1 ff.

³¹² Cf. Kuschnerus, Der sachgerechte Bebauungsplan, Rn. 422.

³¹³ For comprehensive treatment see Louis/Engelke, BNatSchG, § 19a Rn. 10 – 26, § 19b Rn. 2 – 6, 29 – 31; Messerschmidt, Bundesnaturschutzgesetz, §§ 34 ff.; Stürer, Handbuch des Bau- und Fachplanungsrechts, Rn. 2823 to 2873.

³¹⁴ Cf. Kuschnerus, Der sachgerechte Bebauungsplan, Rn. 422 with further references.

³¹⁵ Section 35 of the Federal Nature Conservation Act enumerates the plans for which Section 34 applies.

is necessary for *imperative reasons of overriding public interest*, including those of a social or economic nature (no. 1), and if there are *no other reasonable alternatives* for achieving the project's purpose at a different location without any or with less serious adverse effects (no. 2). Other reasons within the meaning of Section 34 (3) no. 1 can be considered only if the competent authority has obtained a relevant prior opinion from the EU Commission, via the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (Section 34 (4) of the Federal Nature Conservation Act). If the site affected by the plan or project contains *priority biotopes* or hosts *priority species*, the only *imperative reasons of overriding public interest* eligible are reasons relating to *human health, public safety including national defence and protection of the civilian population*, or the plan or project's *beneficial consequences of primary importance for the environment* (Section 34 (4) of the Federal Nature Conservation Act). If a project under Section 34 (3) or (4) of the Federal Nature Conservation Act is to be approved or carried out, the necessary measures to safeguard coherence of the "Natura 2000" European ecological network are to be provided for. The competent authority is to inform the EU Commission, via the Federal Ministry for Nature Conservation and Nuclear Safety, of the measures taken.

4.3.4.11 Habitat Network Systems at the State and Local Levels

The statutory basis for habitat network systems is provided by Section 3 of the Federal Nature Conservation Act and the provisions of the respective state nature conservation acts. The purpose of habitat network systems is to create interlinked biotopes on at least 10 % of the area of each state in order to interconnect protection areas (Section 3 (1) of the Federal Nature Conservation Act) A habitat network system consists of core areas, connecting areas, and connecting elements, with components of national parks, nature conservation areas, and biosphere reserves. Connecting areas are not secured by protective legislation. Habitat network areas can be secured by means of green structures plans or binding land-use plans, or by contractual nature conservation.

Planning competence lies with local authorities or counties. Such network systems can attain binding effect through binding land-use plans or green structures plans in bye-law form.

4.3.5 Forests

According to Section 1 of the Federal Forest Act,³¹⁶ forest is to be preserved, increased, safeguarded, and sustainably managed because of its economic utility and because of its significance for the environment, the efficient functioning of natural systems, climate, the water balance, clean air, soil fertility, the visual quality of landscape, the agrarian infrastructure, and recreation (Section 1 (1) of the Federal Forest Act). Forest is an area covered by forest flora. It is protected by law without prior designation. It is divided into the categories protective forest (Section 12 of the Federal Forest Act) and recreational forest (Section 13). Apart from the Federal Forest Act, the states have their own forest acts, adopted particularly for implementing forestry framework planning arrangements and to safeguard the functions of forests in planning and measures for public projects, for forest conservation and management, and for afforestation. For the management and development of forests, forestry framework plans are prepared that take account of

³¹⁶ *Gesetz zur Erhaltung des Waldes und zur Förderung der Forstwirtschaft (Bundeswaldgesetz)* of 2 May 1975, BGBl. I, 1037, last amended by Art 213 of the ordinance of 31 October 2006, BGBl. I, 2407.

the aims and principles of spatial planning. The competent planning authorities are the forestry offices (*Forstamt*).³¹⁷

4.3.6 Agriculture

Agricultural planning is concerned with the realignment of rural holdings to improve production and working conditions in farming and forestry, and with land improvement and development. The statutory basis is provided by the Land Consolidation Act.³¹⁸

For the reorganisation of rural real property, plans of pathway networks and waterbodies and watercourses are prepared with landscape management support plans.³¹⁹ This is followed by planning approval proceedings or the simplified procedure for implementing planning. A special form is project realignment and consolidation (*Unternehmensbereinigung*), usually used in connection with the building of trunk roads. The Land Consolidation Act is carried out by the states. Implementation is the responsibility of land consolidation authorities, usually at the district or county level.

³¹⁷ On the treatment of forest in building law see: Fickert/Fieseler; *Der Umweltschutz im Städtebau*, VHW-Verlag, 1. Auflage 2002, 191-209

³¹⁸ *Flurbereinigungsgesetz* as promulgated on 16 March 1976, BGBl. I, 546, last amended by Art 2 (23) of the act of 12 August 2005, BGB. I, 2354.

³¹⁹ Cf. Louis, *Bundesnaturschutzgesetz Kommentar*, § 8 Rn. 129.

5. Appendix

5.1 List of Abbreviations

5.2 Sources

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