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Building law

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Contents

Building law comprises both private and public legal regulations governing the type and density of built use, the municipal structure of building and development, and the legal relationships between the parties involved in preparing a project.

1 Public and private building law

In building law, a distinction must be made between the legal spheres of public and private law, which are largely independent of each other but can also overlap (*BGH* [Federal Court of Justice], judgment of 26 February 1993, case no. V ZR 74/92, BGHZ [Decisions of the Federal Court of Justice in Civil Matters] 122, 1; Finkelnburg/Ortloff/Kment 2011: section 1, para. 9 et seq.; Stollmann 2015: section 1, para. 1, 8 et seq.).

1.1 Private building law

Private building law governs civil-law relationships between citizens, primarily regarding the construction process, and regarding the use of land. It also addresses questions relating to the limits of private use of a plot or parcel (Battis/Krautzberger/Löhr 2014: introduction, para. 2). Accordingly, provisions of the German Civil Code *(Bürgerliches Gesetzbuch, BGB)* (▷ *Land law*), especially sections 903 et seq. concerning the freedom to build under civil law, are to be assigned to private building law. Thus, the owner of an object can freely dispose of it at their discretion, unless this conflicts with a law or third-party rights. This means that they may develop or use their plot or parcel as they wish. However, civil law provisions also limit that freedom to build; for example, erecting dangerous constructions is normally forbidden (section 907 of the German Civil Code). Private building law also includes the laws of federal states on neighbouring rights governing the balancing of interests between private parties, which contain provisions on light, window, and drainage rights, boundary walls, ground elevations, enclosures, and distances from the border for planting (Battis 2014: para. 8). Furthermore, construction contract law, which governs the contractual claims of the parties participating in the construction process and those of the builder-owner, the building contractor or the architects, is also allocated to private building law, especially through the provisions of the Fee Structure for Architects *(Honorarordnung für Architekten, HOAI)*, the Procurement Law on Awarding Construction Projects for Public Authorities and Liability for Construction Defects (now Contracting Rules for Awarding Public Works, VOB/B; formerly VOB/A, now in sections 97 et seq. of the German Act against Restraints on Competition *(Gesetz gegen Wettbewerbsbeschränkungen, GWB)* and therefore under public law) or the German Civil Code on contracts to produce a work (sections 631 et seq. of the German Civil Code) (Battis 2014: para. 9).

Finally, land development stipulations can be supported with the help of agreements under private law. However, ▷ *Planning law* cannot be circumvented through an 'escape into private law' (Finkelnburg/Ortloff/Kment 2011: section 1, para. 6 et seq. with further references). The distinction between private and public building law can be especially problematic when it comes to preventive claims to protect rights (between neighbours, for example). However, those areas must be clearly separated with a view to the different legal recourses to the civil court or Administrative Court (Stollmann 2015: section 1, para. 4, 12). Preventive claims to protect rights can be asserted via two different paths. Public law provisions are mostly meaningless in private building law. Even if a plan is permissible under public law provisions, it might be forbidden on civil law grounds (*BGH*, judgment of 6 July 2001, case no. VZR 246/00, UPR [Environmental and Planning Law] 2001, 440 et seq.; Stollmann 2015: section 1, para. 9). The building permit is issued 'without prejudice to the private rights of third parties' (e.g. section 75(3) sentence 1 of the Building Regulations

of North Rhine-Westfalia *[Bauordnung Nordrhein-Westfalen, BauO NRW]*). To that end, only the compatibility with public law, not with private law, is examined (Finkelnburg/Ortloff/Kment 2011: section 1, para. 9; for denying a building permit on civil law grounds, however, cf. *BVerwG* [Federal Administrative Court], judgment of 23 March 1973, case no. IV C 49.71, *BVerwGE* [Official Reports of the Federal Administrative Court] 42, 115). This applies equally to the examination of legality within the scope of the powers of intervention under state building regulations. Furthermore, the building supervision authorities cannot force compliance with private law (through an administrative act, for example).

1.2 Public building law

Public building law encompasses the provisions on permissibility and restrictions and on structuring and facilitating the use of land through built structures, primarily regarding their construction, intended use, significant modifications, and removal (Battis/Krautzberger/Löhr 2014: introduction, para. 1; Hoppe/Bönker/Grotefels 2010: section 1, para. 1). It helps to balance the site owner's freedom to build with the general public's interests in a socially acceptable use of the land. Essentially, therefore, public building law encompasses provisions on the content and limits of property for the purposes of Article 14(1) and (2) of Germany's Basic Law *(Grundgesetz, GG)* and a few regulations on compulsory purchases for the purposes of Article 14(3) of the Basic Law (▷ *Constitutional framework of spatial planning (Raumplanung)*; ▷ *Constitutional guarantee of property*).

According to section 2(1) sentence 1 of the Federal Building Code *(Baugesetzbuch, BauGB),* local authorities are responsible for drawing up the urban land-use plans that are centrally regulated in public building law. This regulation puts into concrete terms the local authorities' planning autonomy as an expression of the guarantee of self-government for local authorities under Article 28(2) sentence 1 of the Basic Law.

In public building law, which can be allocated to special administrative law, a distinction is drawn between two fields of law: urban development law and building regulations. The reason for this is that legislative power under the Basic Law is divided between the Federal Government and the federal states. Urban development law or planning law relates to a given area and establishes the legal quality of the land and soil and its usability within a local authority (Hoppe/Bönker/Grotefels 2010: section 1, para. 5 et seq.). It is allocated to the legal framework for land use, for which the Federal Government is given concurrent legislative power under Article 72, 74(1) no. 18 of the Basic Law. The federal legislature has made comprehensive use of that power with the Federal Building Code (Battis/Krautzberger/Löhr 2014: introduction, para. 10; Battis 2014: para. 3). The building regulations of the federal states contain requirements specific to each building, and are therefore related to specific sites (Hoppe/Bönker/Grotefels 2010: section 1, para. 9 et seq.). In the absence of relevant powers on the part of the Federal Government, the federal states' power to legislate in this area is based on the general regulations of Article 30, 70(1) of the Basic Law.

Besides urban development law and building regulations, there are other federal and state provisions relevant to building law, such as those under highway law, immission control law (▷ *Immission control*), energy law, water conservation legislation, aviation legislation (▷ *Air traffic*), soil conservation law (▷ *Soil conservation*), nature conservation law (▷ *Nature conservation*), the law on environmental impact assessments (▷ *Environmental assessment*) or the conservation of

historic buildings and monuments (▷ *Conservation of historic buildings and monuments/heritage management*).

2 Development of public building law

Public building law has its roots in Prussian building law of the 19th century (▷ *History of urban planning*), which already contained a principle on the freedom to build (Finkelnburg/Ortloff/Kment 2011: section 2, para. 3; Battis 2014: para. 12 et seq.). The Prussian Building Line Act *(Preußisches Fluchtliniengesetz)* of 1875 (Prussian Code of Laws *[Preußische Gesetzessammlung]* 1875: 561) also offered approaches to urban planning for the first time. The famous Kreuzberg judgment handed down by the Prussian Higher Administrative Court *(Preußisches Oberverwaltungsgericht)* (14 June 1882, case no. II.B.23/82, PrOVG 9, 353, reprinted in the journal *Deutsches Verwaltungsblatt* 1985: 216 et seq.) commented on the responsibilities of the building inspectorate, among other things. Many years later, the Building Line Act was expanded in the Prussian Housing Act *(Preußisches Wohnungsgesetz)* of 1918 (Prussian Code of Laws no. 9) with possibilities for determining the type and density of built use, among other things. There was a uniform urban development law in the Third Reich, although it was distributed among many individual legal sources of law; it remained in use after the end of the Second World War. Thereafter, laws for rebuilding the destroyed cities and resolving the housing shortage were passed in most federal states of the Federal Republic of Germany and in the German Democratic Republic. In the German Democratic Republic, the Reconstruction Act formed the most significant basis for building law (German Building Code *[Deutsche Bauordnung, DBO]* of 2 October 1958, *GBl* [Law Gazette] Special Edition No. 287; Battis 2014: para. 27).

After the division of legislative powers was clarified in a legal opinion of the Federal Constitutional Court of 16 June 1954 (case no. 1 PBvV 9/92, *BVerfGE* [Federal Constitutional Court Decisions] 3, 407), the Federal Building Law *(Bundesbaugesetz, BBauG)* (*BGBl.* [Federal Law Gazette] I, page 341; Battis/Krautzberger/Löhr 2014: introduction, para. 11 et seq.) was passed in the Federal Republic of Germany on the federal level in 1960, and state building regulations were gradually introduced in the federal states based on a Model Building Regulation worked out by the Federal Government and the federal states. In 1971, the Federal Building Law was supplemented by an Urban Development Promotion Law *(Städtebauförderungsgesetz, StBauFG)* on 27 July 1971, *BGBl.* I, page 1125) covering urban regeneration and development measures (Battis/Krautzberger/Löhr 2014: introduction, para. 15 et seq.). After multiple amendments, the Federal Building Law and the Urban Development Promotion Law *(Städtebauförderungsgesetz)* were finally consolidated in 1986 in the Federal Building Code *(Baugesetzbuch, BauGB)* (*BGBl.* I, page 2191, 2253) with significant changes, in particular those meant to strengthen local authorities (Battis/Krautzberger/Löhr 2014: introduction, para. 20 et seq. with further references), whereby the Urban Development Promotion Law (▷ *Urban development promotion*) was reflected in the second chapter (▷ *Special urban development law*).

In the German Democratic Republic, the Ordinance on Construction Planning and Authorisation *(Bauplanungs- und Zulassungsverordnung, BauZVO*, *GBl* DDR I no. 45 page 739*)* was passed on the basis of the treaty between East and West Germany of 18 May 1990. In parallel, an Act on Planning Measures pursuant to the Federal Building Code *(Maßnahmegesetz zum Baugesetzbuch,*

BauGB-MaßnG) of 17 May 1990 (*BauGB-MaßnG*, Article 2 of the Housing Development Facilitation Act *(Wohnungsbau-Erleichterungsgesetz)*, *BGBl.* I page 926) was required – only for the old federal states at first – with a view to procedural simplifications. After Germany unity was restored, the Act on Investment Facilitation and Residential Land *(Investitionserleichterungs- und Wohnbaulandgesetz)* (of 22 April 1993, *BGBl.* I page 466) was passed. In 1998, a unified urban development law was finally established with significant changes (such as cooperation with private parties and largely eliminating permission to subdivide land) through the Federal Building and Spatial Planning Act (*Bau- und Raumordnungsgesetz, BauROG* of 18 August 1997, *BGBl.* I page 2081).

Incidentally, urban development law had been strongly influenced by the European law on environmental protection since the 1980s (EU; ▷ *European Union*). In this respect, the directive on environmental impact assessments for certain public and private projects (85/337/EEC, OJ no. L 175, page 40), the EIA amending directive of 3 March 1997 (97/11/EC, OJ no. 73, page 5), the 'Directive on the assessment of the effects of certain plans and programmes on the environment' of 27 June 2001 (2001/42/EC, OJ no. L 197, page 30), the Habitats Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (92/43/EEC, OJ no. L 206, page 7) and the Directive on the Conservation of Wild Birds (directive of 2 April 1979 on the conservation of wild birds 79/409/EEC, OJ no. L 103, page 1) must be emphasised, all of which have necessitated significant amendments to urban development law. This became especially clear in 2004 with the European Amending Act for the Construction Sector (*Europarechtsanpassungsgesetz, EAG Bau*, *BGBl.* I page 1359), which, moreover, brought in regulations for planning safeguards, for ▷ *Urban redevelopment* and for the Socially Integrative City (▷ *Socially Integrative City*).

The amendments in 2007 (Law on Facilitating Project Planning for the Inner Development of Cities of 21 December 2006, *BGBl.* I page 3316) and 11 June 2013 (Law on Strengthening Inner Development in the Cities and Municipalities and Further Development of the Urban Development Law, *BGBl.* I page 1548; see also Uechtritz 2013: 1354 et seq.; Krautzberger/Stüer 2013: 805 et seq.) served through various regulations (e.g. accelerated procedure for development plans, section 13a Federal Building Code; Securing central public amenities, section 5(2d) and section 9(2a) of the Federal Building Code; Dismantling order for Junk Real Estate) to promote the ▷ *Inner development* of cities. In the meantime, in 2011 urban development law was amended in relation to ▷ *Climate protection* and ▷ *Climate change adaptation*, for example, by expanding the range of stipulations for the binding land-use plan (law of 22 July 2011, *BGBl.* I page 1509; see also Kment 2012: 1125 et seq.; Mitschang 2012: 134 et seq.; Söfker 2011: 541 et seq.). Urban development law was then amended twice with a view to facilitating the accommodation of refugees; for example, the regulations on relief were expanded and temporary regulations were introduced in section 246 of the Federal Building Code (law of 20 November 2014, *BGBl.* I page 1748; see also Kment 2015: 211 et seq.; Scheidler 2015: 1406 et seq.; law of 20 October 2015, *BGBl* I 1722; see also Battis/Mitschang/Reidt 2015: 1633 et seq.; Krautzberger/Stüer 2015: 73 et seq.; Krautzberger/Stüer 2016: 95 et seq.). The most recent amendment provided through the 'Law on implementing directive 2014/52/EU in urban development law and on strengthening the new cohabitation in the city (German Federal Parliament *[Deutscher Bundestag]* 2017)' should serve to implement an amending directive for environmental impact assessments and introduce a new 'urban area' territorial category, as well as supporting the municipal steering options for holiday flats, the supporting regulations on amending the Immission Control Act, and incorporating spaces in outlying areas into the accelerated procedure for drawing up binding land-use plans.

3 Urban development law

The area-related urban development law is essentially shaped by the Federal Building Code, the objective of which is controlled, sustainable urban development and structure and a balance between public and private interests.

Based on the Federal Building Code, the Federal Land Utilisation Ordinance *(Baunetzungsverordnung, BauNVO)*, the Plan Notation Ordinance *(Planzeichenverordnung, PlanZV)* and the Property Valuation Ordinance *(Immobilienwertermittlungsverordnung, ImmoWertV)* have been passed (Hoppe/Bönker/Grotefels 2010: section 1, para. 6 et seq.). Moreover, the Federal Building Code empowers the states to enact additional implementation laws or ordinances (such as those under section 9(4) or section 246 of the Federal Building Code). Local authorities can issue bye-laws based on the Federal Building Code, such as in relation to design. Urban development law can be subdivided into general and special urban development law, in accordance with the division in the Federal Building Code (structural overview: Schmidt-Eichstaedt/Weyrauch/Zemke 2014: 101).

3.1 General Urban Development Law

The general urban development law in the first chapter of the Federal Building Code is also referred to as urban development law and planning law.

According to the groundbreaking legal opinion on planning law from the Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*, order of 16 June 1954, case no. 1 PBvV 9/92, *BVerfGE* 3, 407, 425), planning law serves to establish the legal quality of the land and its usability. Accordingly, it helps in preparing, managing, and realising the use of sites for building and other purposes. To that end, the legal quality of the land is established particularly through urban land-use plans. Thus, the key instrument of planning law is ▷ *Urban land-use planning*. Accordingly, the provisions on planning in the first part of the General Urban Development Law (sections 1 et seq. of the Federal Building Code) regulate the preparation and management of uses of sites for building and other purposes through plans that establish the legal quality of the land, thus essentially through the ▷ *Preparatory land-use plan* and the ▷ *Binding land-use plan*. In particular, provisions on environmental protection, climate protection and climate change adaptation are found here as well. In addition to this, the cooperation with private parties is regulated through urban development contracts (sections 11 et seq. Federal Building Code).

The provisions on the type and density of built use, type of construction and design and permissible lot coverage which may be stipulated in the urban land-use plans (section 5(2) nos. 1, 9(1) nos. 1 and 2 of the Federal Building Code) are specified and differentiated in greater detail in the Federal Land Utilisation Ordinance. For older plans, the Federal Land Utilisation Ordinance that was valid when those plans were issued applies (Hoppe/Bönker/Grotefels 2010: section 1, para. 6 and section 6, para. 1 et seq.; Erbguth/Schubert 2015: section 1, para. 6).

In addition, there are the planning safeguards (second part: sections 14 et seq. of the Federal Building Code; ▷ *Planning safeguards in urban design*) and provisions on the realisation of plans (third to sixth parts: sections 29 et seq. of the Federal Building Code; ▷ *Realisation of plans in urban design*), which support urban land-use planning. Central standards in this area

include sections 29 et seq. of the Federal Building Code (third part) on the permissibility of projects within the scope of application of a binding land-use plan (▷ *Permissibility of projects in building law*). In areas for which there is no binding land-use plan, regulated urban structural development is guaranteed through the substitute standards of sections 34, 35 of the Federal Building Code. Regulations for realising plans include regulations on reimbursement in relation to plans (sections 39 et seq. of the Federal Building Code), on land reallocation or land assembly (fourth part: sections 45 et seq. of the Federal Building Code), on compulsory purchase (fifth part: sections 85 et seq. of the Federal Building Code) and on the ▷ *Provision of local public infrastructure* (sixth part: sections 123 et seq. of the Federal Building Code). The seventh part of the General Urban Development Law on measures for nature conservation serves to dovetail the ▷ *Impact mitigation regulation* under nature conservation law with urban development law (Jarass/Kment 2013: section 135a, para. 1).

3.2 Special Urban Development Law

The Special Urban Development Law contains special regulations for managing specific urban development problems (Erbguth/Schubert 2015: section 1, para. 5). Thus, it primarily regulates urban regeneration and urban development promotion (first part: section 136 et seq. of the Federal Building Code) and development (second part: section 165 et seq. of the Federal Building Code; ▷ *Urban development*; ▷ *Urban development planning*) to improve or reconfigure an area in the municipality, urban redevelopment (third part: section 171a et seq. of the Federal Building Code) to procedural measures in this area that are easier and more flexible (Jarass/Kment 2013: section 171a, para. 3 et seq.) as well as measures for the Socially Integrative City (fourth part: section 171e of the Federal Building Code) for supporting social and economic measures and conservation (sixth part: section 172 et seq. of the Federal Building Code).

In addition to the General and Special Urban Development Law, the Federal Building Code contains provisions on valuation, responsibilities and procedures, planning safeguards, judicial proceedings in relation to building land, and transitional and final provisions.

3.3 Urban development law as part of spatial planning law

Urban development law or planning law is part of spatial planning law (Erbguth/Schubert 2015: section 3, para. 1 et seq.). The umbrella term ▷ *Spatial planning (Raumplanung)* applies to spatial planning under public law on all levels and for all matters (Hoppe/Bönker/Grotefels 2010: section 1, para. 2). To that end, a distinction is drawn between those aspects of comprehensive planning and of sectoral planning that have spatial relevance (▷ *Spatially-relevant sectoral planning*; Durner 2005: 33 with further references; Erbguth/Schubert 2015: section 3, para. 1). The aspects of comprehensive planning that are spatially relevant coordinate all the space-related requirements and concerns that arise there, in an integrated and cross-sectoral manner, for the purposes of a comprehensive approach to overall development. Sectoral planning, on the other hand, serves to formulate plans to manage sectoral functions and problem areas (Hoppe/Bönker/Grotefels 2010: section 1, para. 3 et seq.) that are regulated in sectoral laws. These include street planning, air traffic, power lines, or nature conservation, for example.

Comprehensive planning encompasses ▷ *Spatial planning (Raumordnung)*, which is primarily regulated through the Federal Spatial Planning Act *(Raumordnungsgesetz, ROG)* and state spatial

planning acts *(Landesplanungsgesetze)*, and urban land-use planning, the legal bases of which lie in urban development law, as explained above. If spatial planning is integrated, cross-sectoral planning on a supra-local level, urban land-use planning is comprehensive planning on the municipal level. The relationship between spatial planning and urban land-use planning is not hierarchical, but is determined through the ▷ *Mutual feedback principle* (section 1(3) of the Federal Spatial Planning Act), through the obligation to adapt the urban land-use plans to ▷ *Goals, principles and other requirements of spatial planning (Raumordnung)* (section 1(4) of the Federal Building Code) or other special spatial planning clauses (section 35(3) sentences 2, 3 of the Federal Building Code), but also, significantly, through regulations on participation in the Federal Spatial Planning Act and the Federal Building code. Specialist planning as sectoral planning, however, is not confined to a local level, but exists on every planning level. The relationship between sectoral and urban land-use planning is also shaped by provisions on participation as laid out in the Federal Building Code and in the sectoral laws, and through the privileged status of sectoral planning in sections 37, 38 of the Federal Building Code or the adaptation obligation to which sectoral planning is subject in section 7 of the Federal Building Code (Kümper 2012: 631 et seq.; Kauch/Roer 1997: 37 et seq.).

4 Building regulations

In demarcation from urban development law, which relates to specific areas, building regulations govern the requirements of the specific built structure or building materials in relation to a specific property. It therefore primarily serves to avert dangers that built structures might pose for public safety and order, especially life and health (*BVerfG*, order of 16 June 1954, case no. 1 PBvV 9/92, *BVerfGE* 3, 407, 415). Moreover, it contains regulations to ensure that new buildings do not detract from the appearance of the area and to ensure social and ecological standards for ▷ *Housing* and working (Battis/Krautzberger/Löhr 2014: introduction, para. 6; Battis 2014: para. 4; Hoppe/Bönker/Grotefels 2010: section 1, para. 9 and section 15, para. 1). All 16 federal states have made use of their legislative powers by enacting state building regulations. The model for this, the Model Building Regulation, was passed by the Conference of Construction Ministers and is reworked periodically. It is meant to help standardise laws but, unlike the state building regulations, is not legally binding.

Moreover, due to state laws, additional ordinances (such as those governing parking places) or municipal bye-laws are passed. Furthermore, technical standards such as DIN or VDI directives in building regulations play a major role in planning and executing construction projects (Battis 2014: para. 7).

There is a difference between substantive and formal building regulations.

4.1 Substantive building regulations

Substantive building regulations contain, in the first parts of the state building regulations, the requirements for built structures under substantive law. The provisions on erecting, maintaining, modifying, using, repairing, and demolishing built structures are mainly found in the first part of the state building regulations. For example, there are regulations on the requirements for the site

and its development (such as clearance space), the built structure and its components (such as walls or stairs) or its facilities (such as parking spaces or stables).

4.2 Formal building regulations

Formal building regulations, which are found in the latter sections of the state building regulations, regulate governmental responsibilities and the powers of the supervisory authorities, mainly the lower-level building supervision authorities, and the rights and duties of the parties participating in the construction (such as builder-owners, architects, and construction firms). They also contain regulations on procedures under building supervision law, especially for preventive controls before construction begins (mainly regarding the building permit) and administrative measures aimed at elimination in connection with a built structure, such as termination of construction, prohibitions on types of use, or its removal. The procedures support the enforcement of substantive building regulations and the construction regulations of the Federal Building Code, as well as further public law provisions such as the laws on immission control, nature conservation, the protection of historical buildings and monuments, and water resources. This leads to a concentration of processes that avoids parallel processes for granting permission a construction project. However, for quite some time there has been a tendency toward deregulation that has led to an exemption from the obligation to seek permission for a number of projects, and to the simplification and acceleration of processes. Furthermore, there are also many regulations on building encumbrances.

4.3 Link between building regulations and urban development law

The building permit process constitutes the essential link between planning law and building regulations (Hoppe/Bönker/Grotefels 2010: section 1, para. 10; Battis 2014: para. 4). For example, under the state building regulations, a building permit must be issued unless the project conflicts with public law provisions. 'Public law provisions' primarily means the substantive building regulations and sections 29 et seq. of the Federal Building Code on the permissibility of projects under planning law, but also other provisions, especially those named above. Even if a project is exempt from seeking permission, both the substantive building regulations and urban development law still apply to the project (Erbguth/Schubert 2015: section 1, para. 12 et seq.). Furthermore, there are also overlaps between substantive law requirements in building regulations and urban development law, such as those governing the provision of local public infrastructure or on clearance distances.

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