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## Preparatory land-use plan



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URN: 0156-55996158

*This is a translation of the following entry:*

Mitschang, Stephan (2018): Flächennutzungsplan. In: ARL – Akademie für Raumforschung und Landesplanung (Hrsg.): Handwörterbuch der Stadt- und Raumentwicklung. Hannover, 687-696.

*The original version can be accessed here:*

urn:nbn:de:0156-5599615

Typesetting and layout: ProLinguo GmbH

Translation and proofreading: ProLinguo GmbH

Recommended citation:

Mitschang, Stephan (2018): Preparatory land-use plan.

<https://nbn-resolving.org/urn:nbn:de:0156-55996158>.

# Preparatory land-use plan

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The preparatory land-use plan is the preliminary stage of the urban land-use plan and, as a land use strategy, includes the entire municipal territory. In terms of the planning hierarchy, it is given a pivotal function between supra-local spatial planning and local binding land-use planning. In terms of the representations contained within it, by definition it has a steering, developing and organising function.

# 1 The preparatory land-use plan as a preliminary urban land-use plan

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The federal legislature assumes that ▷ *Urban land-use planning* has two stages. Under section 1(2) of the Federal Building Code (*Baugesetzbuch, BauGB*), the preparatory land-use plan is a preliminary urban land-use plan. Unlike the ▷ *Binding land-use plan*, the preparatory land-use plan contains representations of the intended urban structural development, while the binding land-use plan contains the legally binding stipulations for that development and forms the legal basis for additional necessary measures. In the context of the planning system, preparatory land-use planning is part of comprehensive spatial planning, and as a general form of planning targets the design of the overall structural relationships within the municipal territory. Preparatory land-use planning is the responsibility of the local authority (section 2(1) of the Federal Building Code). Only with the preparatory land-use plan is the local authority able to document to the public its ideas for urban development in the sense of a comprehensive land-use strategy that encompasses the entire municipal territory. Not only the public is interested in urban structural development, but also investors from outside the municipality which intend to construct or operate housing, commercial, industrial, retail, health, sports, culture, leisure or recreation facilities, as well as the neighbouring local authorities, which must orient their own preparatory land-use plans (including any alterations or supplements to them) towards the urban development projects of the planning municipality (cf. section 2(2) of the Federal Building Code). Moreover, as part of the ▷ *Mutual feedback principle*, the urban development projects of one local authority are also significant for the superordinate levels of the regional and state spatial planning (▷ *Regional planning*; ▷ *Federal state spatial planning, federal state development*), through which the goals of spatial planning (▷ *Objectives, principles and other requirements of spatial planning (Raumordnung)*) are determined; the local authority must adapt its urban land-use plans to those goals (section 1(4) of the Federal Building Code). To that extent, the preparatory land-use plan has a pivotal function for coordinating and implementing the supra-local requirements of ▷ *Spatial planning (Raumordnung)* (in relation to the special form of regional planning: ▷ *Regional preparatory land-use plan*). Finally, the statements in the preparatory land-use plan establish a binding framework for the subordinate binding land-use plans, which must be developed from the representations in the preparatory land-use plan (section 8(2) sentence 1 of the Federal Building Code). However, urban development law itself disrupts this requirement to develop, which corresponds to the hierarchical structure of the German planning system (▷ *Planning systems*), for certain situations (cf. section 8(3) and section 13a(2) no. 2 of the Federal Building Code) and thereby serves a planning practice in which a preparatory land-use plan, once drawn up, can no longer be restructured, but only adjusted or corrected, especially if the impetus for the local authority's planning activity is external to the municipality itself.

## 2 Importance for urban structural development

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The importance of the preparatory land-use plan for urban structural development is characterised by constant ups and downs. The picture nationwide is very heterogenous. The factual significance of the preparatory land-use plan significantly depends on what importance local politicians of

the municipality concerned attach to this planning instrument for solving pressing problems. This rather pragmatic handling of the preparatory land-use plan stands alongside its legal upgrading by the legislature in recent years. What the individual local authority makes of it is subject to their power of discretion. From today's viewpoint, the importance of the preparatory land-use plan becomes especially clear in the following areas of activity.

## 2.1 Sustainable decisions on spatial use

With the anchoring of the principle of ▷ *Sustainability* as one of the goals of urban land-use planning (section 1(5) of the Federal Building Code), it is explicitly emphasised that, through bundling and interlinking, the fundamental decisions on the use of space which are made in the preparatory land-use plan must consider social, economic, and ecological matters in an integrated way and with full view of the principle of intergeneration responsibility.

## 2.2 Environmental protection and preservation

Environmental requirements are also primarily based on the preliminary stage of urban land-use planning. Here, precautionary environmental protection can be effectively taken into account, especially regarding land. To that end, environmental protection requirements, which are increasingly resulting from the implementation of European regulations and directives, have a special status (especially the ▷ *FFH assessment of implications*). But many environmental protection requirements on a national level – such as the planning-related impact mitigation regulation (section 1a(3) of the Federal Building Code), the soil protection clause (section 1a(2) sentence 1 of the Federal Building Code), the clause barring rezoning (section 1a(2) sentences 2 and 4 of the Federal Building Code), the agricultural clause, i.e. special protection for agricultural land under nature conservation law (section 1a(3) sentence 5 of the Federal Building Code), the climate protection clause (section 1a(5) of the Federal Building Code), the demand for stronger ▷ *Inner development* (section 1(5) sentence 3 of the Federal Building Code), the ▷ *Environmental assessment* (section 2(4) of the Federal Building Code and annexes 1 and 2 of the Federal Building Code) and, finally, the coordination and integration of environmental-protection-related sectoral planning (section 1(6) no. 7g of the Federal Building Code) – also require strategic solutions to be developed from the perspective of the entire municipality so that those requirements can be achieved.

## 2.3 Steering of projects for outer zones from a planning perspective

To steer the planning of certain privileged projects for outer zones for the purposes of section 35(1) nos. 2 to 6 of the Federal Building Code, the legislature has granted the bodies responsible for spatial planning, but also the local authorities in section 35(3) sentence 3 of the Federal Building Code, the opportunity to exert influence over the sites in the planning area through the so-called 'planning proviso'. On the municipal level, this should occur through the preparatory land-use plan or through functional or spatial partial land-use plans (cf. section 4). The planning proviso is currently also used for livestock facilities, but primarily to steer wind turbines. It is implemented in practice in individual sets of plans by identifying concentration or priority zones. For their designation and representation in the preparatory land-use plan, it is required that a

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conclusive overall urban design strategy (*BVerwG* [Federal Administrative Court], judgment of 21 October 2004, case no. 4 C 2/04, *BVerwGE* 122, 109; *BVerwG*, judgment of 17 December 2002, case no. 4 C 15/01, *BVerwGE* 117, 287) be worked out for the entire outer zone, which shows that the land to be identified is actually suitable, that substantial space is made for the use of the outer zone in question (cf. *BVerwG*, judgment of 13 December 2012, case no. 4 CN 1/11, *NVwZ* [*Neue Verwaltungszeitschrift*] 2013, 519), and that the remaining planning space can thus be kept free from such uses.

### 2.4 Steering of project-based binding land-use plans

Finally, the preparatory land-use plan is also important for cooperation with private parties, which has been increasing since the beginning of the 1990s. With the project-specific binding land-use plan (cf. section 12 of the Federal Building Code), a planning instrument is now available to private investors through which they can themselves influence the planning process and realise their interests. To that end, there is at the very least the danger that investor interests will dominate third-party and public interests, thereby leading to tensions regarding urban development. To avoid this, and especially to counter deficits in urban structures and urban design, there must be a preparatory land-use plan that takes into account the steering, organising (or coordinating) and developing functions of planning and, to that extent, is also geared towards the interest of the common good.

## 3 Content of the preparatory land-use plan

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### 3.1 Land-use strategy for the entire municipal territory

Under section 5(1) sentence 1 of the Federal Building Code, the preparatory land-use plan is tasked with ‘designating the main features of the type of land use resulting from the intended urban structural development, according to the foreseeable needs of the municipality, for the entire municipality’. As part of the preparatory land-use plan, municipal objectives are set forth and coordinated, and subsequent planning is then steered on this ordered and systematic basis. To that extent, it has a steering, developing, and organising function. Thus, the preparatory land-use plan contains the objectives of the public, the public agencies, the authorities, and the municipality itself, which are balanced out in the weighing process ▷ *Weighing of interests* of urban land-use planning. Furthermore, a longer period (approx. 10 to 15 years) is conceived for its implementation. The preparatory land-use plan presents a comprehensive land use strategy that constitutes the framework for future land use on the sites against the background of the municipal development projects for the entire municipal territory.

Because of this wide-ranging, diverse function, the preparatory land-use plan is limited to basic fundamentals. The term *fundamentals* is very vague, and it is thus difficult to grasp what it actually refers to. The graphic representation of land in the preparatory land-use plan has a precision that is redundant to some extent, since, technically speaking, it must contain exact borders that comprehensibly delineate the sites, although only the prevailing character of an area and its approximate borders should (and can) be established. Only the ▷ *Binding land-use plan*,

which is operative beyond the bounds of the municipality, defines sites precisely. This means that changes to the graphics in the preparatory land-use plan can illustrate its statements while leaving the fundamentals of the planning untouched. Therefore, the preparatory land-use plan generally has no space for detailed representations (such as the establishment of altitudes). This relative lack of definition – and therefore the tendency to leave problem details unresolved – is in fact required so that the preparatory land-use plan can cover and clarify the reciprocal relationships between a specific land-use area and the other areas within the municipality. However, what is decisive for the assumption that a representation belongs to the main features of the type of land use is not its degree of certainty or detailing, but its reference to the urban development strategy for the entire municipal territory. If there is a conflict of use that is significant for the entire space, the local authority can if necessary create very specific individual representations, such as the density of built use or emission threshold (e.g. for controlling air pollution).

### 3.2 Representations

The catalogue contained in section 5(2) of the Federal Building Code gives the municipality additional leeway for illustrating the use of land for building and other purposes in the municipality. Options for representations are listed, especially for

- land used for building, e.g.
  - the general and specific types, as well as the density of built use,
- land used for facilities, such as the installations and facilities for supplying public amenities, the facilities, institutions, and other measures to counteract climate change or to help society to adapt to climate change, and central public amenities,
- land used for infrastructure, such as
  - the supra-local transport areas and the main local transport features,
  - public utilities installations for waste disposal and sewage removal, for debris, and for mains supply and sewage lines,
- land used for environmental protection and open spaces, such as
  - green spaces,
  - areas of restricted use or for provisions to protect against harmful environmental effects,
  - areas for water, harbours and the areas intended for water management, and the areas that must be kept free in the interest in flood protection and regulating water outflow,
  - areas for earth banks, excavations, or quarrying for stone, earth, and other minerals,
  - areas for agriculture and forest and the areas and measures for the protection, maintenance and development of the soil, nature, and the landscape.

This catalogue of possible representations is not conclusive, however, as is evident from the use of the word ‘especially’ in the introductory wording. The local authority is therefore not limited to those representations provided for in the catalogue, but can also make use of more differentiated representations. The Federal Land Utilisation Ordinance (*Baunutzungsverordnung, BauNVO*) gives the local authority numerous options here regarding the type and density of built use. But

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independent differentiations are also possible, depending on the specific local requirements. In a legal respect, however, the local authority is not entirely free. The representations must be positive (rule of positive planning), specific (rule of specific planning) and definite (rule of definiteness). Moreover, the preparatory land-use plan must include the entire area of the municipality (rule of the outer planning unit).

Depending on the form, the preparatory land-use plan can consist of multiple individual sheets. However, a plan in graphic form must be present, as this is required to achieve the necessary clarity. In so doing, the scale must be chosen so that the content of the preparatory land-use plan can be clearly represented. In planning practice, this depends on the size of the municipality. For the most part, a scale of 1:10,000 will suffice to fulfil the content requirement of the Plan Notation Ordinance (*Planzeichenverordnung*), and thus to illustrate the type of land use. However, a scale of 1:15,000 for large cities and, conversely, 1:5,000 for smaller municipalities is also used. Representations can be in the form of drawings (black and white or in colour) and/or written descriptions in the signed record of the adopted plan, or can be made in writing. The Plan Notation Ordinance ensures use that is standard throughout the federation, on the legal basis of section 9a no. 4 of the Federal Building Code. It contains detailed regulations on the planning symbols to be used in drawing up, altering, supplementing and rescinding preparatory land-use plans. This ensures that a unified planning language is used throughout Germany.

### 3.3 Identification marking

Areas whose development entails special problems that must be observed must be identified as such. Those identifications reflect actual circumstances that must be considered when making plans to utilise the areas in question. The local authority does not decide on the identification markings as they do on the representations in the preparatory land-use plan. So such identifications are not considered representations, although the latter can overlap them. Under section 5(3) of the Federal Building Code, the following must be identified:

- areas whose development requires special structural precautions (e.g. improving the structural stability of buildings) against external effects (e.g. danger of a mountain slide) or special structural safety measures against natural forces (e.g. floods, avalanches, and falling rocks) (No. 1),
- areas beneath which mining occurs or which are specified for the extraction of minerals (No. 2),
- areas intended for built use whose soil is significantly encumbered with environmentally dangerous substances (e.g. contaminated sites) (No. 3).

### 3.4 Allocations recorded for information purposes

Under section 5(4) of the Federal Building Code, plans that are made in accordance with other regulations (e.g. privileged sectoral planning) and usage regulations (e.g. ▷ *Conservation areas under nature conservation law* or ▷ *Conservation areas under water law*) and ensembles of built structures that are protected as historic monuments under state law (historic areas; ▷ *Conservation of historic buildings and monuments/heritage management*) are to be recorded in the preparatory land-use plan for information purposes. Under section 5(4a) sentence 1 of the Federal Building Code, this also applies to established flood areas for the purposes of section 76(2) of the Water

Management Act (*Wasserhaushaltsgesetz, WHG*). This requires the local authority to provide information on legally binding land-use decisions that were made outside the local authority's own planning autonomy. In contrast, flood areas that have not yet been established, and risk areas for the purposes of section 76(3) of the Water Management Act (and, for logical reasons, other plans and usage regulations that have not yet been established but are intended) are merely noted in the preparatory land-use plan.

### 3.5 Justification

Under section 5(5) of the Federal Building Code, a statement of justification must be attached to the preparatory land-use plan along with the information in accordance with section 2a of the Federal Building Code. This consists of statements on objectives, purposes and the essential effects of the preparatory land-use plan, as well as the environmental report, which forms a separate part of the justification, especially regarding the main features of land use. If the local authority utilises its option to exclude areas or other representations from the preparatory land-use plan, under section 5(1) sentence 2 subsentence 2 of the Federal Building Code it must present the reasons for doing so in the justification. However, the justification is not a component of the preparatory land-use plan.

## 4 Functional and spatial partial preparatory land-use plan

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Under section 5(2b) of the Federal Building Code, the municipalities, in supplement to section 15(3) of the Federal Building Code, can draw up functional and spatial partial preparatory land-use plans. With such partial plans, the local authority can also target the intended spatial steering effects in accordance with section 35(3)sentence 3 of the Federal Building Code. The representations in the partial preparatory land-use plan may not contradict those of the (normal) preparatory land-use plan. The partial preparatory land-use plan has the same legal nature as the preparatory land-use plan. The decisive advantage of drawing up such a partial preparatory land-use plan, as opposed to merely altering the preparatory land-use plan, is that its effectiveness does not depend on that of the actual preparatory land-use plan. The partial preparatory land-use plan can be judicially contested on its own (*BVerwG*, judgment of 15 September 2009, case no. 4 BN 25/09, *ZfBR [Zeitschrift für deutsches und internationales Bau- und Vergaberecht]* 2010, 65).

## 5 Processes

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A basic distinction must be made between the standard procedure (cf. sections 2(2), (3) to (4c) and 6 of the Federal Building Code) for drawing up, altering, supplementing, and rescinding a preparatory land-use plan, and a simplified procedure in accordance with section 13 of the Federal Building Code for altering or supplementing a preparatory land-use plan in which the fundamentals of the planning remain untouched.

### 5.1 Standard procedure

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The local authority is responsible for drawing up the preparatory land-use plan. The procedure consists of multiple steps, the most essential ones of which are listed below. The process normally begins with the local authority announcing a resolution to draw up, alter, supplement, or rescind a preparatory land-use plan (section 2(1) of the Federal Building Code). The plan preparation procedure consists of at least a two-stage participation process involving the authorities as well as other public agencies (section 3 of the Federal Building Code) and the public (section 4 of the Federal Building Code). The ‘public’ includes everyone interested in the planning; the ‘authorities’ and other ‘public agencies’ especially include the neighbouring local authorities, the authority responsible for road construction, the chambers of industry and commerce, and all sectoral authorities, especially from the environmental area. Whenever an ▷ *Environmental assessment* (regarding exceptions, cf. section 5.2) must be carried out, it will be integrated into the planning process. For these purposes, the comments communicated by the authorities and other public agencies as part of the early (first) stage of participation also serve to convey the scope of the environmental assessment and its level of detail to the local authority. The ▷ *Public participation* process aims to determine what additional material is relevant for the weighing of interests and, in particular, to allow the public to participate in the planning process, thereby increasing their acceptance of the planning. The local authority, as the body responsible for the planning, must specify the type and manner of the early public participation, its spatial area, and its time frame. This information must be made public. In planning practice, the second stage, in which the plan is publicly displayed and in which the authorities and other public agencies participate once more, usually happens in parallel to the second stage of public participation and normally requires a period of one month. The public display out of the plan refers to the draft of the preparatory land-use plan, the draft of the justification, and normally the environmental report as well (for exceptions, cf. section 5.2). If the draft of the preparatory land-use plan is to be altered or supplemented because of comments made in the participation procedure, a new (possibly abbreviated) public display process is made with the altered or supplemented draft of the preparatory land-use plan, the draft of the justification, and the updated environmental report. This can be repeated numerous times. After the ▷ *Weighing of interests* process, in which private and public interests are weighed against each other, the local authority comes to a decision about the preparatory land-use plan as an administrative programme (on the legal nature, cf. section 6.2). This is followed by the approval procedure by the higher administrative authorities. If the preparatory land-use plan is approved, the approval is announced publicly. The preparatory land-use plan takes effect when that announcement is made.

The essential procedural steps listed here are supplemented by extensive additional provisions on deadlines to be followed, requirements for the official announcement, cross-sectoral participation, requirements for the use of electronic information technologies, on precluding written comments, on bringing in third parties, and on ▷ *Monitoring* in accordance with an environmental assessment, and they form the legal basis for the standard procedure for drawing up a preparatory land-use plan.

## 5.2 Alterations and supplements in the simplified procedure

The simplified procedure is regulated in section 13 of the Federal Building Code. It may be used if

a preparatory land-use plan is altered or supplemented by the municipalities and if the following requirements are met:

- The permissibility of projects that are subject to an obligation to carry out an environmental impact assessment in accordance with annex 1 to the Environmental Impact Assessment Act (*Umweltverträglichkeitsprüfungsgesetz, UVPG*) or under state law, may not be prepared or justified.
- There must be no indications of adverse effects on the protected assets named in section 1(6) no. 7b of the Federal Building Code.

The strong influence of environmental protection expressed here must be observed against the background of an obligatory  $\triangleright$  *Environmental assessment*. Therefore, the simplified procedure has been further developed so that it may be used only if considerable environmental effects are not to be expected, in which case the environmental assessment may be omitted. That is the most important simplification granted to the local authorities under section 13(3) of the Federal Building Code. Additional procedural simplifications are listed under consideration of specific information obligations (section 13(2) sentence 2 and section 13(3) sentence 2 of the Federal Building Code) in section 13(2) sentence 1 of the Federal Building Code. Accordingly,

- the early information and discussion in accordance with section 3(1) of the Federal Building Code and section 4(1) of the Federal Building Code can be dispensed with,
- the public concerned can be given the opportunity to comment within a reasonable period or, optionally, the plan can be displayed publicly in accordance with section 3(2) of the Federal Building Code,
- the public agencies concerned, and other public agencies, can be given the opportunity to comment within a reasonable period or, optionally, they may participate in accordance with section 4(2) of the Federal Building Code.

## 6 Legal effect, legal nature and legal remedies

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### 6.1 Legal effect

The preparatory land-use plan has factual and legal effects of considerable scope. The following are important:

- Under section 5(2) of the Ordinance on the Principles for Determining the Market Values of Property (*Immobilienwertermittlungsverordnung, ImmoWertV*), the property market assesses the designation of land as a building site to be a quality enhancement.
- The adaptation obligations for public planning agencies under section 7 of the Federal Building Code
- The notification and approval exemption for binding land-use plans under section 10(2) of the Federal Building Code that were developed from a legally binding preparatory land-use plan

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- The representations in the preparatory land-use plan constitute a public interest under section 35(3) sentence 1 no. 1 of the Federal Building Code that can lead to the impermissibility of other projects, both with and without privileged status.
- The planning proviso under section 35(3) sentence 3 of the Federal Building Code for steering locations of projects with privileged status under section 35(1) nos. 2 to 6 of the Federal Building Code
- The deferral of building applications under section 15(3) of the Federal Building Code if the local authority wishes to make use of the planning proviso in section 35(3) sentence 3

## 6.2 Legal nature

Direct legal remedies by filing an application for judicial review against the representations in the preparatory land-use plan are generally not available, since the preparatory land-use plan does not have the quality of a legal norm (*BVerwG*, judgment of 18 September 2002, case no. 4 C 10/01, 117, *BVerwGE* 117, 44) (cf. section 6.3). The prevailing opinion is that the preparatory land-use plan merely has internal, administrative significance within the local authority as a preliminary plan for the subsequent binding land-use planning that will take wider effect. The preparatory land-use plan is, therefore, a type of plan that is non-binding at the external level, which as a rule does not entail any direct legal effects vis-à-vis third parties. Instead, it is a sovereign measure of a separate type that can most accurately be described with the term ‘administrative programme’.

## 6.3 Legal remedies

Unlike the binding land-use plan, the preparatory land-use plan is not adopted as a bye-law, but it does have a direct external impact in the case of planned location control under section 35(3) sentence 3 of the Federal Building Code. In applying this rule, the preparatory land-use plan therefore fulfils a function comparable to that of the binding land-use plan. Therefore, (only) in these cases, a judicial review in accordance with section 47(1) no. 2 of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung, VwGO*) is permissible (*BVerwG*, judgment of 26 April 2007, case no. 4 CN 6/03 119, *BVerwGE* 119, 217). There is always the option of adding the representations made in a preparatory land-use plan to an incidental review (▷ *Legal remedies in planning*).

## Additional literature

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Last update of the references: November 2016