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Public participation



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URN: 0156-559915208

This is a translation of the following entry:

Sinning, Heidi (2018): Öffentlichkeitsbeteiligung. In: ARL – Akademie für Raumforschung und Landesplanung (Hrsg.): Handwörterbuch der Stadt- und Raumentwicklung. Hannover, 1655-1664.

The original version can be accessed here:
[urn:nbn:de:0156-55991520](https://nbn-resolving.org/urn:nbn:de:0156-55991520)

Typesetting and layout: ProLinguo GmbH
Translation and proofreading: ProLinguo GmbH

Recommended citation:
Sinning, Heidi (2018): Public participation.
<https://nbn-resolving.org/urn:nbn:de:0156-559915208>.

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References

Public participation provides for participation ‘by anybody’ in spatially relevant planning and projects. It is anchored in various laws and public programmes. Public participation has become a key procedural element of urban and spatial planning. Recent conflicts in connection with large-scale infrastructure projects and as part of Germany’s energy transition have underscored its importance.

1 Clarification of the term

The term ‘public participation’ is closely associated with the synonymous terms ▷ *Participation*, *civic participation* and the *involvement of citizens (Partizipation)*. Likewise, the reasons for public participation in regard to its information, acceptance, and protection of rights function as well as the importance for planning processes are similar. In 2005, the term *Public participation* replaced the previously used term *participation* in the Federal Building Code (*Baugesetzbuch, BauGB*) (cf. section 3 of the Federal Building Code). The reason for the change in terminology results from an adaptation to the Directive on the assessment of the effects of certain plans and programmes on the environment (SEA Directive 2001/42/EC) of the EU (▷ *European Union*). Even though there is a general understanding that participation primarily concerns the parties directly affected, it has in fact been a right of participation for ‘everyone’ for some time. This means that their involvement is not dependent on a party being able to show that they are personally or spatially affected; the right to participate in a planning process is not subject any such conditions. The ‘public’ accordingly means both natural and legal persons whose interests may be affected or who have any other interest in the ▷ *Planning*. This also includes their joint activities in associations, groups, non-governmental organisations and other organisations (cf. Danielzyk/Knieling/Hanebeck et al. 2003: 17).

The Aarhus Convention, which provides the legal framework for the environmental field, draws a distinction in this regard (cf. UNECE [United Nations Economic Commission for Europe] 1998). A distinction is made between the ‘public’ as ‘one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups’ on the one hand, and ‘the public concerned’ as ‘the public affected or likely to be affected by, or having an interest in, the decision-making related to the environment’ on the other hand (Article 2 of the Aarhus Convention).

2 The legal framework for public participation

Public participation is anchored in various laws and public programmes. In urban and spatial planning, these include (▷ *Urban planning*; ▷ *Spatial planning [Raumplanung]*), the Administrative Procedure Act (*Verwaltungsverfahrensgesetz, VwVfG*), the Federal Building Code, the Federal Spatial Planning Act (*Raumordnungsgesetz, ROG*) and environmental legislation, as well as the programmes of ▷ *Urban development promotion*.

2.1 Public participation under the Federal Building Code and the Federal Spatial Planning Act

At the level of spatial development planning, public participation is still a fairly recent development. The recast Federal Spatial Planning Act of 2008 makes public participation mandatory for spatial development plans and regional plans. The law now stipulates that comments submitted in the participation process must be taken into account in the ▷ *Weighing of interests* (section 7(2) of the Federal Spatial Planning Act), that the public must be informed that the spatial development plan is being prepared and that an opportunity to comment must be provided (section 9(1) and (2)

of the Federal Spatial Planning Act). The EU Directive on the assessment of the effects of certain plans and programmes on the environment (SEA Directive 2001/42/EC) also imposes an obligation to involve the public in the preparation of spatial development plans, which emphasises the increased significance of participation. In addition, section 15(3) of the Federal Spatial Planning Act stipulates that the public must have an opportunity to get involved in spatial planning processes (▷ *Spatial planning process [Raumordnungsverfahren]*).

The public display of plans as well as opportunities for the public to express suggestions and concerns have been mandatory under the Federal Building Code in the ‘old’ (Western German) federal states since 1960, and in the ‘new’ (Eastern German) federal states since the end of 1990. In 1976, mandatory ‘early civic participation’ was introduced in general urban development law. Accordingly, the Federal Building Code contains a number of legal provisions on (public) participation. They entail providing early information to the public, which includes children and youths (section 3(1) of the Federal Building Code), public display (section 3(2) of the Federal Building Code), the participation of the authorities and public agencies, the rationale for the need for participation and the additional use of digital media (section 4 of the Federal Building Code), a description of the outcome of the participation of the authorities and the public, which has been taken into account (section 6a(1) and 10a(1) of the Federal Building Code), timely public participation in the preparation of plans and drafting of bye-laws and as part of regeneration projects (sections 33(1); 34(6); 35(6); 137 of the Federal Building Code), and the effect of violations of procedural and formal requirements for public participation in relation to the legal force of a ▷ *Preparatory land-use plan* and bye-laws (section 214(1) no. 2 of the Federal Building Code). Here, the focus is on the goal to fully identify all concerns affected by the planning and to assess them correctly (section 4a(1) of the Federal Building Code).

The 1980s and 1990s, as well as the 2000s (as part of disputes concerning infrastructure projects), have seen an increased importance of public participation. Apart from the formal anchoring of public participation, informal means of participation have gained importance as well.

2.2 Public participation in environmental law

▷ *Environmental law* has provided crucial impulses for public participation in recent years. The Aarhus Convention, which was signed in 1998, is an international ‘convention on the access to information, public participation in decision-making and access to justice in environmental matters’, which was ratified by Germany and 42 other countries, as well as by the EU (cf. UNECE 1998). The Aarhus Convention imposes broad requirements for participation in connection with environmentally relevant planning and projects. It is the first international treaty to accord rights in environmental protection to each individual. Article 6 of the Aarhus Convention regulates participation in decision-making processes in regard to the ‘if’ and ‘how’. In substantive terms, the Aarhus Convention rests on three pillars:

- 1) access of the public to information about the environment
- 2) participation of the public in specific decisions related to the environment
- 3) access to courts and/or other tribunals in environmental matters.

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In the wake of the Aarhus Convention, public participation in environmental matters was introduced by the European Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment ('Public Participation Directive') and transposed into German law (the 'Public Participation Act' – Act on public participation in environmental matters in accordance with EC Directive 2003/35/EC [*Öffentlichkeitsbeteiligungsgesetz, ÖffBetG*]). These specifications also played a role in other European environmental directives. The provisions enabled the public to take part in approval processes in relation to environmental law and in the adoption of certain environmental plans and programmes. The participation rights relate to information via public notification about planned projects and to submitting comments in approval processes, especially in the case of industrial facilities and infrastructure measures that are covered by the EU Directives concerning integrated pollution prevention and control (IPPC Directive 2008/1/EC of 15 January 2008) and on environmental impact assessments (Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment – EIA Directive) (▷ *Environmental assessment*). Likewise, the EU's SEA Directive (Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment) provides for the obligation of public participation. The same is true for spatial planning, sectoral planning and urban planning law (▷ *Planning law*). In all instances, the submitted comments must be taken into account in the decision-making process. Nevertheless, the German environmental movement has voiced criticism and points out that deregulation and accelerated procedures have had a rather adverse effect on civic participation in environmental matters in recent years (cf. Zschiesche 2011). For example, due to the adaptation of the German legal framework to European specifications, environmental and nature conservation organisations are now required to obtain information and planning documents about the planning process themselves from the Official Journal or the internet; they are no longer provided automatically with this information. The deadline for organisations to comment has been shortened as well. On the other hand, the Court of Justice of the European Union (CJEU) has declared a fundamental principle of German environmental law, the time-based preclusion of objections (*Einwendungsausschluss*), to be unlawful. 'Accordingly, environmental organisations and other third parties can base lawsuits against approvals under environmental law and planning approval decisions also on defects in the application documents to which they have not objected in time or not at all during the approval or planning approval procedure'¹ (Steinkemper 2015; cf. Bruckert 2015).

2.3 Public participation in the Administrative Procedure Act (VwVfG)

With the Act for the enhancement of public participation and harmonisation of planning approval procedures (Planning Harmonisation Act) (*Planvereinheitlichungsgesetz, PlVereinHG*), which entered into force on 7 June 2013, the legislator hopes to make the planning approval procedure (▷ *Planning approval*) more accessible for citizens and to strengthen its political legitimacy. Early public participation is intended for this purpose. The Administrative Procedure Act was amended for this purpose (section 25(3) of the Administrative Procedure Act). The Administrative Procedure Act also specifies the parties which are entitled to participate (section 11 of the

1 "Umweltverbände und sonstige Dritte können demzufolge Klagen gegen umweltrechtliche Genehmigungen und Planfeststellungsverfahren nicht oder nicht rechtzeitig gerügt haben"

Administrative Procedure Act). At the same time, the Act aims to expedite planning processes, an objective that rather runs counter to the notion of public participation.

3 Public participation in select practical fields

Public participation has now become a key procedural element in all fields of action relating to urban and spatial planning. In recent years, however, some areas, especially large-scale projects and infrastructure projects as part of the energy transition, have been closely observed in the debate on public participation. Some examples will be discussed below. In addition, an overview of integrated urban (borough) development will be provided, as it looks back on a longstanding practice of participation.

3.1 Practical field of large-scale projects

Large-scale infrastructure projects (▷ *Infrastructure*), in particular, are increasingly a subject of public debate, as there is limited acceptance of political decisions in this area. Large-scale projects mean spatially relevant projects that have an impact on a large number of affected parties. These include airports, train stations, high-speed train routes or power lines. This leads increasingly to a discrepancy between the assessment of risks and consequences by experts and those perceived by the public. The population feels unable to influence the risks and is therefore unwilling to accept the projects. This often leads to protests, as exemplified particularly prominently in recent years by the Stuttgart 21 project² (cf. Brettschneider/Schuster 2013). In the field of planning law, this gave rise to a discussion, which is reflected, among other things, in the Planning Harmonisation Act (cf. Seibert-Fohr 2013). Studies and handbooks on the role of public participation in large-scale public projects refer to the significance of this subject (cf. *BMVI* [Federal Ministry of Transport and Digital Infrastructure] 2014 on the planning of large-scale projects in the transport sector).

Against this background, legal certainty and the reliability of adopted planning decisions are increasingly under pressure. Whether the Planning Harmonisation Act will lead to improvements is yet to be seen; the expectation is that it will only lead to increased acceptance in isolated instances. For example, ‘information is provided about the goals, means and impacts of the project, but not about potential alternatives, when in fact there is a frequent demand for being included in the weighing of alternatives’³ (Seibert-Fohr 2013: 322).

3.2 Practical field of energy transition – wind turbine generators and expansion of power lines

One of the largest infrastructure projects in Germany is the discussed expansion and new routing of the power grid infrastructure as part of the energy supply transition to renewable energies. The German Federal Government’s (*Bundesregierung*) grid upgrade plan created the statutory provisions for expediting the construction of the power line routings deemed to be necessary (▷ *Network expansion planning*). In addition, the energy transition has also brought about

² Major reconstruction of Stuttgart’s central train station. (Note added by editor/translator)

³ “[...] über die Ziele, Mittel und Auswirkungen des Vorhabens informiert, nicht aber über mögliche Alternativen. Gerade eine Einbeziehung in die Alternativabwägung wird aber immer wieder angemahnt“

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investment in renewable energies, such as in the construction of wind and solar farms, biogas plants and storage facilities (▷ *Renewable energies*).

In connection with the expansion of the grid infrastructure and other facilities related to the energy transition, the affected local population, or those along the route, fear risks and disadvantages (sometimes referred to as ‘NIMBYs’, an acronym for ‘not in my backyard’). In addition, there is a debate on whether the power line routes are even necessary in the first place. Against this backdrop, various formal and informal participation procedures are in place, which allow for the early participation of the public in planning and decision-making processes to seek out possible compromises and find commonly supported solutions. The corresponding provisions in the Grid Expansion Acceleration Act (Transmission Networks) (*Netzausbaubeschleunigungsgesetz Übertragungsnetz, NABEG*) aims to achieve greater acceptance in the regions earmarked for grid expansion and at the same time accelerate the expansion of the electricity transmission network. The planning responsibility for networks across state borders, so-called ‘electricity motorways’, which are to be expanded as a matter of priority, was transferred from the state to the federal level. This falls within the remit of the Federal Network Agency (*Bundesnetzagentur, BNetzA*); for other power line routes, the federal states remain responsible (with the traditional procedural model). The new procedure entails the following steps:

- 1) Scenario framework – definition of the necessary prerequisites for further planning
- 2) National grid development plan (which eventually becomes the federal requirements plan) – determination of routes
- 3) Federal sectoral planning (which eventually becomes the federal grid plan) – determination of the routing corridors
- 4) Planning approval in the corresponding corridors – planning approval decision and determination of the routing

The *BNetzA* must involve the public in each of these four planning steps. Citizens personally affected may also demand a public application conference, in which the scope of the assessment is defined, so that alternative routings can be examined. The responsible authority (in most cases the *BNetzA*) also publishes the planning documents online. In the federal sectoral planning (▷ *Spatial planning [Raumordnung]* level) and planning approval steps of the process, an application conference must allow for the participation not only of the citizens affected, but also of associations and public agencies, and must define the framework of the assessment. After all documents have been checked, the public is involved once again, before the competent authority takes a final decision. Even though the planning process pursuant to the Energy Industry Act (*Energiewirtschaftsgesetz, EnWG*) and the Grid Expansion Acceleration Act (Transmission Networks) is to be expedited, citizens are now able, compared to previous processes, to participate and raise objections in the early planning stages. The participation of authorities and the public also provides for an obligation to display information on the internet (section 9 of the Grid Expansion Acceleration Act [Transmission Networks]). Comments submitted electronically must be taken into consideration in the same way as those submitted in writing.

The early civic participation, higher transparency thanks to a public debate on the scenario framework and the grid development plan, as well as integrated network planning are deemed to be procedural improvements; yet, at the same time, concerns are voiced that there is no clear

procedure for dealing with the objections of citizens, or if and how they are taken into account, and that the process is not sufficiently transparent.

3.3 Practical field of integrated urban (borough) development

Civic or public participation is an established method in integrated urban (borough) development, with which there is longstanding practical experience. Both informal planning and concepts, such as urban development framework plans or integrated urban development strategies, as well as statutory regulated and binding processes, such as the drawing up of preparatory and binding land-use plans (▷ *Binding land-use plan*), make use of tried and tested participation procedures and methods (▷ *Integrated urban development*). A mix of formal and informal instruments of participation is used in this regard.

Civic participation, the involvement and engagement of residents, play a key role ever since the launch of the urban development promotion programme ‘Urban Boroughs with Special Development Needs – the Socially Integrative City’ (*Stadtteile mit besonderem Entwicklungsbedarf – Soziale Stadt*) in 1999, which was renamed ‘The Socially Integrative City Programme – Investing in Neighbourhoods’ (*Programm Soziale Stadt – Investitionen im Quartier*) in 2012 (▷ *Socially Integrative City*). The programme aims to contribute to comprehensively improving living conditions in disadvantaged urban districts. This means in the first place that the specific interests and needs of the various population groups, whether families with children, seniors, migrants or young people, must be adequately taken into account. A differentiated and diverse approach, which encompasses communication specific to each target group and corresponding processes and methods of participation, has been proven through longstanding practice. At the same time, special challenges arise, such as handling conflicting interests and finding ways to integrate the results into local authority political processes (cf. *BMVBS* [Federal Ministry of Transport, Building and Urban Development] 2008; Kast 2006).

Civic participation as part of the ‘Socially Integrative City’ programme has helped in recent years to achieve the following positive effects in particular (cf. Sinning 2013: 15):

- Cohabitation of residents, neighbourhood image and identification with the neighbourhood (▷ *Neighbourhood/neighbourhood development*)
- Initiating and expanding civic participation, improving ways of participation and strengthening local residents’ own initiative
- Benefitting from the networks and resources of stakeholders in society to advance participation (▷ *Networks, social and organisational*)
- Strengthening tenants’ own initiative and self-organisation skills through the housing sector

The Association of German Cities (*Deutscher Städtetag, DST*) points out that ▷ *Urban development* has provided diverse, positive examples of public participation (cf. *DST* 2013). However, there is frequently no shared culture of participation or agreement on binding rules for participation and quality standards.

4 Reflection and outlook

Further expansion of the culture of participation: In particular for the newer roles of participation, such as in (large-scale) infrastructure projects, a distinct participation culture is frequently lacking. Such a culture must come from a corresponding awareness among all the stakeholders and other parties taking part. Just as in established fields of action, for example in urban (borough) development, positive experiences with public participation can contribute towards advancing quality standards.

Formal, legally anchored public participation serves to protect the legal interests of stakeholders (▷ *Legal remedies in planning*). However, in order for a participation process to be successful, it must be based on a comprehensive communication strategy, which enhances the formal participation process through informal offers, and the relevant quality criteria must be met.

Further development of public participation: In addition to a participation culture, the quality of public participation depends on whether a series of key points are adhered to, which guarantee fairness and transparency. This includes, among other things, offering early participation, an open-ended discussion of the ‘no-action’ option and taking the results of the participation into account in the further planning process (cf. *BfR [Advisory Board for Spatial Development] 2012; Wulfhorst 2011*). In view of these challenges, existing rules and processes should be subject to expert review and constant further development.

‘Smart Planning’ – virtual public participation: Previous experience with virtual public participation indicates both opportunities and risks. Smart Planning uses new instruments and technologies which are expected to innovate public participation. Spatial planning should address these developments at an early stage, on the one hand, to reach new target groups, such as young people (digital natives), and, on the other hand, to prevent potential risks, e.g. selectivity in participation (the digital divide).

Drawing on international experience: There is a broad body of experience with public participation internationally, which could provide valuable stimuli for spatial planning in Germany. For example, the United Kingdom, the Netherlands and Switzerland have each developed their own procedural methods for using public participation to resolve conflicts in the context of infrastructure projects. Evaluating these international experiences and reflecting them against the background of the respective ▷ *Planning culture* can be profitable for the professional discussions in Germany.

Embedding public participation in education and further training: One of the core competencies of urban and spatial planners nowadays is to shape public participation and communicative planning processes. This involves moderating and mediating planning and development processes, working in a manner oriented towards dialogue and effective processes and deploying not only professional but also communication and process-related know-how and skills (▷ *Moderation, mediation*). Know-how must be expanded in connection with the appropriate tools of planning methodology to be able to effectively fulfil this role. The relevant qualifications are now part of the standard curriculum of almost all urban and spatial planning study courses in Germany. These skills are also conveyed in further training and specialist events. In addition to planners, these skills are also helpful for other parties involved, such as policymakers, administrative bodies

and associations. The 7001 Series of Standards of the *VDI* (Association of German Engineers) entitled 'Communication and public participation in planning and building of infrastructure projects' for engineers is a valuable resource in this regard (cf. *VDI* 2014a, 2014b). The overarching objective in this connection for all communication and participation efforts during the planning and construction of infrastructure projects is to get local citizens, as well as local associations, non-governmental organisations and citizen action groups on board as partners. Information on communication and civic participation in the execution of infrastructure projects are provided in accordance with the performance phases in engineering planning (*HOAI* [Fee ordinance for architects and engineers]).

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Last update of the references: January 2021