

Hendrik Schoen

## Weighing of interests



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# Weighing of interests

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The required weighing of interests is the principal limitation on the planning authority's freedom of discretion. It is applicable across all forms of spatial planning and requires each decision-maker concerned to include all interests in the weighing process that are relevant under the circumstances, to not underestimate the relevance and significance of the interests concerned and, finally, to reconcile the respective interests in a manner that is not disproportionate to the weight of individual concerns.

# 1 Basic principles

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The weighing of various conflicting legal interests is common practice in the application of law (cf. Larenz/Canaris 1995: 223 et seq.). The weighing of interests is of particular importance in the field of ▷ *Spatial planning (Raumplanung)*, as the broadly drafted binding legal principles in this area compel those entrusted with applying the law to largely resolve conflicts of interest on their own.

## 1.1 Weighing of interests as a requirement under the rule of law

According to the case law of the federal courts, the required weighing of interests embodies the principle of proportionality in a very specific form for planning decisions and is in this sense directly anchored in constitutional law as a ‘constitutionally required balancing of interests’ (*BVerfG* [Federal Constitutional Court], order of 11 November 2002, case no. 1 BvR 218/99, *DVBl* [*Deutsches Verwaltungsblatt*] 2003, 192/193; *BVerwG* [Federal Administrative Court], judgment of 14 February 1975, case no. IV C 21.74, *BVerwGE* [Official Reports of the Federal Administrative Court] 48, 56/63). Due to its roots in constitutional law, the principle must be observed even in the absence of an express incorporation in ordinary legislation (Stelkens/Bonk/Sachs 2014: section 74, para. 54). However, currently all sectoral laws in the field of ▷ *Spatial planning (Raumplanung)* contain weighing provisions, which - in varying detail in the wording - require the decision-maker to fairly weigh public and private interests against each other when drawing up plans. For spatial development planning (▷ *Spatial planning (Raumordnung)*), the individual, specific weighing provisions are found in section 7(2) sentence 1, subsentence 1 of the Federal Spatial Planning Act (*Raumordnungsgesetz, ROG*), for ▷ *Urban land-use planning* in section 1(7) of the Federal Building Code (*Baugesetzbuch, BauGB*) and for sectoral planning (▷ *Spatially-relevant sectoral planning*; cf. also ▷ *Planning approval*), e.g. in section 17 sentence 2 of the Federal Highways Act (*Fernstraßengesetz, FStrG*) or section 18 sentence 2 of the General Railway Act (*Allgemeines Eisenbahngesetz, AEG*). For preparatory sectoral planning, in particular for routing procedures, there are also express weighing provisions in place (section 16(2) sentence 1 of the Federal Highways Act; section 13(1) sentence 2 of the Federal Waterways Act (*Wasserstraßengesetz, WaStrG*), limited, however, to the requirement of weighing of public interests.

## 1.2 Required weighing of interests as a limitation on the planning authority’s freedom of discretion

The function of the weighing of interests as a constitutional requirement becomes clear when examining the nature of ▷ *Planning* and the structure of statutory planning provisions. The German Federal Administrative Court (*Bundesverwaltungsgericht, BVerwG*) assumes that the granting of planning powers is necessarily associated with a freedom of discretion on the part of planning authorities (*BVerwG*, judgment of 12 December 1969, case no. IV C 105.66, *BVerwGE* 34, 301/304; *BVerwGE* 48, 56/59). Unlike in the case of regulatory administration and the administration of public services, which are typically characterised by a conditional structure of the statutory provision to be implemented, i.e. a subdivision into a factual qualification and an ensuing legal consequence (‘if ... then ...’), statutory provisions in the field of comprehensive spatial planning

(spatial development planning, ▷ *Urban land-use planning*) generally have an objective-oriented structure (critical in regard to ▷ *Planning approval*, cf. Schoen 2003). In this case, the legislator (merely) formulates essential objectives (cf. e.g. section 1(5) of the Federal Building Code) and leaves the implementation and achievement of these objectives to the planners' freedom of discretion. This type of planning is primarily a productive, creative act, which produces law. It is an application of law only in the second instance.

In this context, the required weighing of interests serves to limit the planning authority's freedom of discretion in order to achieve a balanced and thus constitutionally proportionate resolution of conflict. Planners should neither focus on unilaterally defined interests nor neglect them.

### 1.3 Other limitations on the planning authority's freedom of discretion

The required weighing of interests is not the only limitation on the planning authority's freedom of discretion. It is flanked by the requirement to demonstrate the necessity of the plan and to justify the plan, on the one hand, and the need to comply with the peremptory norms on the other hand.

For ▷ *Urban land-use planning*, the requirement to demonstrate the necessity of the plan is anchored in section 1(3) sentence 1 of the Federal Building Code. It is satisfied if the local authority's planning strategy requires an urban land-use plan to be established (*BVerwG*, judgment of 7 May 1971, case no. IV C 76.68, *NJW [Neue Juristische Wochenschrift]* 1971, 1626; Battis/Krautzberger/Löhr 2016: section 1, para. 26). From the binding nature of the local authority's planning strategy it follows that the requirement to demonstrate the necessity of the plan is only a rather weak limitation of the planning authority's freedom of discretion. In fact, only 'negative planning' or 'planning undertaken purely to inhibit certain types of development', which is not supported by any planning strategy, is prohibited.

As far as spatial development planning (▷ *Spatial planning (Raumordnung)*) is concerned, the requirement to demonstrate the necessity of the plan is established in section 2(1) of the Federal Spatial Planning Act. Accordingly, the principles of spatial planning must be implemented in specific terms by determinations made in spatial development plans where this is necessary to ensure the development, structuring and securing of the space concerned. Just as in the case of urban land-use planning, the requirement to demonstrate the necessity of the plan in spatial development planning is only a comparatively minor limitation on the planning authority's freedom of discretion. Accordingly, an objective of spatial planning as determined in a spatial development plan cannot be demonstrated as necessary only if its realisation is obstructed for the foreseeable future by legal or factual obstacles (*BVerwG*, order of 16 March 2006, case no. 4 BN 38/05, *ZfBR [Zeitschrift für deutsches und internationales Bau- und Vergaberecht]* 2006, 468 et seq.; Spannowsky/Runkel/Goppel 2010: section 7, para. 8).

For sectoral planning, the requirement to demonstrate the necessity of the plan is mostly referred to as the *plan justification* (settled case law since *BVerwGE* 48, 56/60). Even without an express statutory basis, this requirement applies in particular in the context of ▷ *Planning approval*, as the planning approval decision intervenes in and materially changes the individual legal positions of third parties and thus also requires justification in view of the constitutional guarantee of property under Article 14 of the Basic Law (*Grundgesetz, GG*) (*BVerwGE* 48, 56/59;

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*BVerwG*, judgment of 7 July 1978, case no. IV C 79.76, *BVerwGE* 56, 110/118). The plan justification requirement is taken into account if the plan serves to achieve the objectives of the sectoral planning law and the public interests pursued with the specific project are generally appropriate to prevail over any conflicting property rights (*BVerwG*, judgment of 22 March 1985, case no. 4 C 15/83, *BVerwGE* 71, 166/168). The plan justification requirement also amounts to a merely minor limitation on the planning authority's freedom of discretion.

The notion of peremptory norms means that requirements or specifications established by a higher ranking statutory norm or preceding planning level may not be overridden in a (subsequent) planning act as part of the weighing of interests (*BVerwGE* 71, 163/165; Dreier 1995: 125). Hence, peremptory norms guarantee a minimum legal standard for the relevant planning level. Typical peremptory norms in this sense are e.g. the requirements to adapt the urban land-use plans to the objectives of spatial planning (section 1(4) of the Federal Building Code) and to comply with the objectives of spatial development planning in the case of other spatial planning acts (section 4(1) sentence 1 of the Federal Spatial Planning Act), the requirement to develop the binding land-use plan from the preparatory land-use plan (section 8(2) sentence 1 of the Federal Building Code) and the regional plan from the spatial development plan for the state territory (section 8(2) sentence 1 of the Federal Spatial Planning Act), the binding nature of the catalogue of stipulations of section 9(1) of the Federal Building Code for binding land-use plans or the prohibition of highway crossings at the same height for the building of federal motorways (*Bundesautobahnen*) (section 1(3) sentence 1 of the Federal Highways Act).

If it cannot be demonstrated that a plan is necessary or justified or if the plan is incompatible with peremptory norms, the limits of the planning authority's freedom of discretion have been exceeded and the plan is held to be impermissible. In such a case, a weighing of interests is no longer required.

### 1.4 Required weighing of interests and procedural law

The required weighing of interests is a substantive legal act in all areas of ▷ *Spatial planning (Raumplanung)*. This means primarily that the plan ultimately taking effect as the result of the planning must be balanced. The plan must reflect a permissible outcome of the weighing of interests. At the same time, the required weighing of interests also has a procedural character, as it includes not only specifications for the content of the plan, but also structures the nature and manner of the decision-making process. The planner must follow the various phases of the weighing process by means of an 'internal' procedure, so to speak.

The weighing of interests process as an 'internal' process must be distinguished from the 'external' process (cf. Erbguth 2006: 489; Schoen 2010: 85) in the form of ▷ *Participation* of the public (cf., e.g. section 3 of the Federal Building Code; section 10(1) sentence 1, subsentence 1 of the Federal Spatial Planning Act; section 73(4) of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz, VwVfG*)) and the public agency (cf., e.g. section 4 of the Federal Building Code; section 10(1) sentence 1, subsentence 2 of the Federal Spatial Planning Act; section 73(3a) of the Administrative Procedure Act). While the provisions on participation are related to the weighing of interests process to the extent that they serve to obtain the material considerations to be weighed, they do not provide any actual response to the question of how those considerations should be dealt with. For the analysis and application of the insights gained from the participation

procedure, the substantive required weighing of interests remains relevant; hence, section 2(3) of the Federal Building Code, which formally allocates the determination and evaluation of the weighing material to the ‘external’ process (i.e. a ‘fundamental procedural norm’; cf. German Federal Parliament [*Deutscher Bundestag*] (2003: 42) must be considered as mere legal fiction (Schoen 2010: 87 et seq.).

## 2 Elements of the required weighing of interests and errors in weighing interests

The sectoral laws are limited to the statement that a weighing of interests must take place. For example, section 1(7) of the Federal Building Code requires that ‘when preparing the urban land-use plans [...], the public and private interests must be fairly weighed against and among each other’. This formulation appears to be hardly meaningful as a limit on the planning authority’s freedom of discretion, because while the object of the weighing (‘interests’) is mentioned, the nature and manner of the weighing are described merely by the term ‘fairly’.

In the face of the legislator’s reticence, it was up to case law to provide the structure and content for the required weighing of interests. The Federal Administrative Court initially specified the scope of the required weighing of interests for ▷ *Urban land-use planning* such that (1) a weighing of interests must take place, (2) the weighing of interests must include everything that is relevant under the circumstances, (3) the significance and relevance of the public and private interests or concerns must not be underestimated, and (4) the public and private interests must be weighed such that the balancing is proportionate to the objective weight of individual interests or concerns (*BVerwGE* 34, 301/309). This case law was later applied to sectoral planning (*BVerwGE* 48, 56/63 f.; *BVerwGE* 56, 110/122 et seq.) and is now also applicable to spatial development planning (cf. *BVerwG*, order of 20 August 1992, case no. 4 NB 20/91, *BVerwGE* 90, 329/333).

### 2.1 Interests as the object of the weighing

The term *concern* is generally held to be synonymous with ‘interest’ and is therefore wide in scope (Hoppe/Bönker/Grotefels 2010: section 7, para. 5). Thus, the term ‘private interest/concern’ comprises not only interests resulting from property or other constitutionally protected positions, but extends beyond the scope of constitutionally guaranteed rights and interests (cf. *BVerwG*, order of 9 November 1979, case no. 4 N 1/78 et al., *BVerwGE* 59, 87/101). Accordingly, the interest in maintaining a given residential or traffic situation can be taken into account as much as the desire of a trader to expand or convert their business (cf. Battis/Krautzberger/Löhr 2016: section 1, para. 109).

The term ‘public interests/concerns’ comprises all the general public interest that may be affected by the planning. Non-exhaustive enumerations of essentially public interests are contained in section 1(5) and (6) of the Federal Building Code (planning objectives and planning guidelines) for ▷ *Urban land-use planning* and in section 2(2) of the Federal Spatial Planning Act (principles of spatial planning) for spatial development planning. Corresponding catalogues do not exist for sectoral planning.

### 2.2 Required weighing of interests and failure to perform weighing

The entity obliged to perform the weighing may not be aware of or intentionally ignore its freedom of discretion. If this leads to a failure to perform the required weighing of interests, this amounts to a weighing failure. This is conceivable e.g. if the planning agency wants a given project to be realised at all costs and, therefore, fails to identify or even ignores opposing concerns (cf. *BVerwG*, judgment of 5 July 1974, case no. IV C 50.72, *BVerwGE* 45, 309/315 et seq.).

### 2.3 Mandatory inclusion in weighing and shortcomings in the weighing process

To avoid any shortcomings in the weighing process, the planning agency is obliged to include all interests in the weighing process that should be taken into account in accordance with the circumstances. The question of whether an interest is relevant for the weighing in this sense has both a legal and factual component in principle.

In a legal sense, the interest must be shown to be generally worthy of protection and not merely minor in extent under the specific circumstances (*BVerwGE* 59, 87/99). The criterion of worthiness of protection leads to the elimination of all interests that are in themselves tainted by a legal defect (Schoen 2010: 98). By requiring that a certain threshold of significance be exceeded, the planning agency is freed from having to deal with interests that are in objective terms of only marginal importance.

In determining the relevance of an interest for the weighing of interests, the level-specific legal effects of the plan in question must be taken into account as well. As the spatial development plan generally does not contain any provisions regarding the permissible land use at the level of the land parcel, private interests are frequently not taken into account at this stage. The weighing provisions applicable to routing procedures (section 16(2) sentence 1 of the Federal Highways Act; section 13(1) sentence 2 of the Federal Waterways Act) even limit the required weighing of interests to public interests from the outset.

From a factual perspective, the relevance of an interest for the weighing of interests means that the party in question must be affected. This is to be presumed if the realisation of the plan impacts the interest not merely marginally in a positive or negative manner and if this impact can be recognised at the time of the decision on the plan.

The need for forecasting decisions (▷ *Forecasting*) follows from the fact that the future impacts of the plan are decisive for assessing the extent to which such interests are affected. However, the mere deviation of the actual development from the projected development does not amount to a forecast error and thus to a shortcoming in the weighing process in regard to the necessary inclusion of the interest in the weighing. A forecasting error is to be presumed only if the basis for the forecast was incomplete, or if the result of the forecast was not elaborated appropriately for the issue in question and in a methodically impeccable manner (*BVerwGE* 56, 110/121).

In all other respects, the rule applies that ‘the planning authority does not have to or is unable to take into account in the weighing process anything it does not “see” and is not required to “see” under the circumstances’ (*BVerwGE* 59, 87/103). Any adverse impacts which result from

overlooking public or private interests that were not duly recognised when the decision on the plan was made are justified by the provisions on participation, which afford the concerned party not only the opportunity to participate but also impose a duty to participate.

When compiling the material to be weighed, not only must the impact of the preferred planning be taken into consideration, but the planning alternatives must also be identified and included in the weighing process if they appear likely to have a less restrictive impact on public and private interests (*BVerwG*, judgment of 22 March 1985, case no. 4 C 15/83, *BVerwGE* 71, 166/172) or if they are obvious (*BVerwG*, order of 14 May 1996, case no. 7 NB 3/95, *BVerwGE* 101, 166/174). No examination of alternatives is required if corresponding considerations were taken into account at a preceding planning level and thus have a binding effect for the subsequent planning level (cf. Schoen 2003: 280 et seq.).

### 2.4 Mandatory weighting and incorrect weighing of interests

The planning authority is also required to be aware of the importance of the interest identified as relevant for the weighing. It must assign the objectively appropriate weight to each interest in accordance with legal requirements and actual circumstances (Hoppe/Bönker/Grotefels 2010: section 7, para. 60). Disregarding this mandatory weighting leads to an incorrect assessment when weighing interests.

The determination of the objective weight of the various interests can be extremely difficult. While the value of a property or building can be expressed quite easily by means of the material standardised market value, a corresponding clear reference value is lacking in regard to interests relating to environmental protection (cf. section 1(6) no. 7 of the Federal Building Code and section 2(2) no. 6 of the Federal Spatial Planning Act) or the social and cultural needs of the population (cf. section 1(6) no. 3 of the Federal Building Code). Ultimately, the weight of an interest can be assessed only on a case-by-case analysis.

The starting point for the assessment must be a presumption of equivalence of public and private interests (*BVerwG*, judgment of 1 November 1974, case no. IV C 38.71, *DVBl* 1975, 492). However, the legislator has provided occasional statutory weighting specifications that elevate the general importance of certain interests by force of law. Examples are the separation principle established in section 50 sentence 1 of the Federal Immission Control Act (*Bundes-Immissionsschutzgesetz, BImSchG*) and the priority of inner development in section 1a(2) subsentence 2 of the Federal Building Code. However, unlike the peremptory norms, these statutory weighting specifications do not provide the interest in question with absolute protection that is independent of the individual case. On the contrary, an interest, even though reinforced by a statutory weighting specification, may be overridden in the weighing process in the presence of other opposing interests of great weight (*BVerwG*, judgment of 28 January 1999, case no. 4 NB 5/98, *BVerwGE* 108, 248/253). Ultimately, these constellations (only) increase the burdens of argumentation and justification placed on the planning agency (Jarass 2015: section 50, para. 30a; Wahl/Dreier 1999: 617).

In addition to the weight of the interest, as part of the mandatory weighting the planning authorities are also required to determine the degree of impact. In this case, too, there is a lack of generalisable standards that could render the intensity of impact measurable. Hence, these cases likewise require an extensive case-by-case assessment.



### 2.5 Mandatory balancing and disproportionate weighing of interests

Ultimately, a balance must be achieved between the various interests, which is not disproportionate to the objective weight of the individual interests. In the event of a conflict of interests, it is unavoidable and quite legitimate for the planning agency to prefer one interest over the other and thus to necessarily dismiss the other interest. A disproportionality in the weighing is to be assumed only 'if one of the interests concerned is disregarded in a virtually indefensible manner, [...] and if the proportionality of the interest in relation to the substance of the plan is no longer achieved even in consideration of the planning authority's freedom of discretion and all other circumstances' (*BVerwGE* 45, 309/317).

The principle of conflict resolution through planning must be observed in the balancing of the interests. This principle requires that conflicts attributable to a plan must be resolved through the actual planning and may not be passed down to a subsequent planning or approval process, unless the planning agency transparently outlines by means of a forward-looking analysis that a later, appropriate solution is ensured and that the unresolved conflict will ultimately be settled (cf. *BVerwG*, judgment of 26 May 2004, case no. 9 A 6.03, *BVerwGE* 121, 57/66 et seq.). However, the hierarchical decision-making powers must be observed in resolving the conflict. However, because they lack own competencies under  $\triangleright$  *Land law*, the authorities responsible for spatial development planning must leave sufficient room for discretionary planning during subsequent urban land use and sectoral planning processes (*BVerwGE* 90, 329/334). The spatial development planning authorities may resolve superordinate and supra-local conflicts only through stipulations at the level of the area concerned; they are generally prohibited, however, from making determinations at the level of the land parcel itself.

## 3 Consequences of errors

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The complexity of the required weighing of interests makes it to some extent vulnerable to errors. At the same time, for the sake of legally secure planning, it is evident that not every flaw in the weighing process should lead to the cancellation or even nullity of the plan concerned. Accordingly, the legislator and case law have developed a rather complex system of rules and regulations that seeks to do justice to both the interest in maintaining the effectiveness of the flawed plan and the legal interests of the party affected by the plan.

### 3.1 Planning safeguards in the event of flaws in weighing interests

In the event of plans which are binding regulatory acts, a violation of procedural or substantive requirements generally leads to the nullity of the plan; planning decisions of an administrative nature, e.g. a planning approval decision, are generally contestable. However, in spatial planning, these generally established consequences of a violation have been reversed as far as flaws in the weighing of interests are concerned by declaring such flaws in the weighing process to be entirely irrelevant (section 12(3) sentence 2 of the Federal Spatial Planning Act; section 214(3) sentence 2 of the Federal Building Code; section 75(1a) sentence 1 of the Administrative Procedure Act),

by requiring an objection based on them to be submitted within a set deadline (section 12(5) sentence 1 no. 3 of the Federal Spatial Planning Act; section 215(1)(3) of the Federal Building Code) or by providing for the possibility of remedying the flaws in supplementary proceedings (section 12(6) of the Federal Spatial Planning Act; section 214(4) of the Federal Building Code; section 75(1) sentence 2, alternative 2 of the Administrative Procedure Act).

### 3.2 Legal remedies against flaws in weighing interests

In spatial development plans, the problem arises in the context of legal remedies (▷ *Legal remedies in planning*) that the specifications in the plans as a rule do not have any direct legal effect vis-à-vis private individuals. Accordingly, direct legal remedies against the federal states' spatial development plans (for the federation's spatial development plans, see Spannowsky/Runkel/Goppel 2010: section 4, para. 98 et seq.) is primarily available to local authorities and other public bodies, which are bound by the objectives and principles of spatial planning (▷ *Objectives, principles and other requirements of spatial planning [Raumordnung]*). This is possible, for example, through an application for a judicial review pursuant to section 47(1) no. 2 of the Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung, VwGO*) if the spatial development plan has been adopted as an ordinance, bye-law or *sui generis* regulation and if the state law provides for a judicial review of regulations that rank below state legislation (Spannowsky/Runkel/Goppel 2010: section 4, para. 83 et seq.). If the spatial development plan is adopted as a formal act, the principal legal remedy available is only a municipal constitutional complaint to the Federal or State Constitutional Court (Spannowsky/Runkel/Goppel 2010: section 4, para. 93 et seq.).

However, the principle that planning determinations do not have an immediately binding legal effect vis-à-vis private individuals is subject to exceptions. For example, private projects are specifically affected in particular when the planning determination of a priority area, e.g. for use for wind power or gravel extraction, precludes those uses outside the priority area pursuant to section 35(3) sentence 3, subsentence 2, alternative 2 of the Federal Building Code (Munich *VGH* [Higher Administrative Court], judgment of 8 December 2003, case no. 20 N 01.2612, *ZfBR* 2004, 276 et seq.). In these cases, a request for a judicial review is admissible against a federal state's spatial development plans ranking below the level of state legislation, provided state law allows for such remedy, in application *mutatis mutandis* of section 47(1) no. 2 of the Code of Administrative Court Procedure. To have the necessary standing required pursuant to section 47(2) sentence 1, subsentence 1 of the Code of Administrative Court Procedure such case, the applicant must present sufficiently substantiated facts that make it appear at least possible that the applicant is affected in their right to a proper weighing of their interests by certain objectives of the spatial development plan or its implementation. This is in turn conditional on the applicant indicating an interest of their own, which should have been included in the weighing (*BVerwG*, order of 13 November 2006, case no. 4 BN 18/06, *NVwZ* [Neue Verwaltungszeitschrift] 2007, 229, para. 6).

A distinction must be made in regard to the direct legal remedies available against urban land-use plans (▷ *Urban land-use planning*). A ▷ *Binding land-use plan* can be attacked without further qualification with an application for judicial review pursuant to section 47(1) no. 1 of the Code of Administrative Court Procedure, as the binding land-use plan is adopted by the local authority in the form of a bye-law pursuant to section 10(1) of the Federal Building Code. In this case, the private applicant has – as in the case of legal remedies against spatial development plans – standing to file the application pursuant to section 47(2) sentence 1, subsentence 1 of the Code

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of Administrative Court Procedure if it appears at least possible from the applicant's submission that the applicant's rights are violated by the stipulations in the binding land-use plan. Hence, the sole consideration is whether a violation of the required weighing of interests is evident and clear from any point of view (*BVerwG*, judgment of 24 September 1998, case no. 4 CN 2/98, *BVerwGE* 107, 215/217).

The issue of legal remedies is more complex in the case of a ▷ *Preparatory land-use plan*, as it has neither a specific legal form nor direct external legal effects in principle; the preparatory land-use plan primarily serves as a self-limitation on the local authority (section 8(2) sentence 1 of the Federal Building Code). Case law nevertheless now recognises that the application of section 47(1) no. 1 of the Code of Administrative Court Procedure is appropriate if the preparatory land-use plan reflects concentration zones for specific uses that produce an effect through section 35(3) sentence 3, subsentence 2, alternative 1 of the Federal Building Code in the same way as determinations of a binding land-use plan and in this way directly affect the permissibility of construction projects (*BVerwG*, judgment of 26 April 2007, case no. 4 CN 3/06, *BVerwGE* 128, 382/para. 10 et seq.).

In regard to sectoral planning, legal remedies play a role in particular in connection with planning approval decisions (▷ *Planning approval*). Planning approval decisions are administrative acts; accordingly, their cancellation pursuant to section 42(1) subsentence 1 of the Code of Administrative Court Procedure can be requested with an action of annulment. There is standing to sue, presumed to this extent by section 42(2) of the Code of Administrative Court Procedure, if it appears possible from the applicant's submissions that the applicant's right to a fair weighing of their own interests is impaired by the planning approval decision (*BVerwGE* 107, 313/322 et seq.). However, it should be noted that the provisions on planning safeguards largely preclude any claim to cancellation of the planning approval decision. The operative part of the judicial decision will, therefore, frequently be limited to obliging the project entity to remedy the flawed weighing of interests through mandatory additional safeguards or in an additional proceeding or process.

In view of the required weighing of interests, judicial review is limited in all areas of ▷ *Spatial planning (Raumplanung)* to the flaws outlined in the weighing of interests. Hence, the courts must respect the planning agency's freedom of discretion and may under no circumstances engage in their own considerations of expediency.

## References

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Battis, U.; Krautzberger, M.; Löhr, R.-P. (2016): *Baugesetzbuch. Commentary*. Munich.

Deutscher Bundestag (Ed.) (2003): *Gesetzesentwurf der Bundesregierung: Entwurf eines Gesetzes zur Anpassung des Baugesetzbuches an EU-Richtlinien (Europarechtsanpassungsgesetz Bau – EAG Bau)*. Document 15/2250. Berlin.

Dreier, J. (1995): *Die normative Steuerung der planerischen Abwägung: Strikte Normen, generelle Planungsleitbegriffe, Planungsleitlinien und Optimierungsgebote*. Berlin.

Erbguth, W. (2006): *Abwägung auf Abwegen? Allgemeines und Aktuelles*. In: *JZ – JuristenZeitung* (10), 484-492.

- Hoppe, W.; Bönker, C.; Grotefels, S. (2010): Öffentliches Baurecht: Raumordnungsrecht, Städtebaurecht, Bauordnungsrecht. Munich.
- Jarass, H. D. (2015): Bundes-Immissionsschutzgesetz. Commentary. Munich.
- Kopp, F. O.; Schenke, W.-R. (2013): Verwaltungsgerichtsordnung. Commentary. Munich.
- Larenz, K.; Canaris, C.-W. (1995): Methodenlehre der Rechtswissenschaft. Heidelberg.
- Schoen, H. (2003): Die Planfeststellung zwischen Kontrollerlaubnis und Planungsentscheidung: Zur Dogmatik eines janusköpfigen Rechtsinstituts. Münster.
- Schoen, H. (2010): Interkommunale Abstimmung in der Bauleitplanung. Berlin.
- Spannowsky, W.; Runkel, P.; Goppel, K. (2010): Raumordnungsgesetz (ROG). Commentary. Munich.
- Stelkens, P.; Bonk, H. J.; Sachs, M. (2014): Verwaltungsverfahrensgesetz. Commentary. Munich.
- Wahl, R.; Dreier, J. (1999): Entwicklung des Fachplanungsrechts. In: NVwZ – Neue Zeitschrift für Verwaltungsrecht (6), 606-620.

## Additional literature

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- Durner, W. (2005): Konflikte räumlicher Planungen: Verfassungs-, verwaltungs- und gemeinschaftsrechtliche Regeln für das Zusammentreffen konkurrierender planerischer Raumansprüche. Tübingen.
- Hoppe, W.; Just, J.-D. (1997): Zur Ausübung der planerischen Gestaltungsfreiheit bei der Planfeststellung und Plangenehmigung. In: DVBl – Deutsches Verwaltungsblatt (13), 789-802.
- Ibler, M. (1989): Die Schranken planerischer Gestaltungsfreiheit im Planfeststellungsrecht. Berlin.
- Jarass, H. D. (1999): Die materiellen Voraussetzungen der Planfeststellung in neuerer Sicht: Dogmatische Grundlagen und praktische Folgen, insb. im Verkehrswegebereich. In: DVBl – Deutsches Verwaltungsblatt (22), 1202-1211.
- Kment, M. (2002): Rechtsschutz im Hinblick auf Raumordnungspläne. Münster.
- Steinberg, R.; Wickel, M.; Müller, H. (2012): Fachplanung. Baden-Baden.
- Wiggers, C. (2003): Planerhaltung im Recht der Raumordnung: Zur Auslegung und Umsetzung von § 10 ROG. Münster.

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