ARL ACADEMY FOR TERRITORIAL DEVELOPMENT IN THE LEIBNIZ ASSOCIATION

Wolfgang Schrödter

Binding land-use plan

URN: 0156-55991564

This is a translation of the following entry:

Schrödter, Wolfgang (2018): Bebauungsplan. In: ARL – Akademie für Raumforschung und Landesplanung (Hrsg.): Handwörterbuch der Stadt- und Raumentwicklung. Hannover, 173-184.

The original version can be accessed here:
urn:nbn:de:0156-5599156

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

Recommended citation:
Schrödter, Wolfgang (2018): Binding land-use plan.
https://nbn-resolving.org/urn:nbn:de:0156-55991564.

Leibniz Association

Wolfgang Schrödter

Binding land-use plan

Contents

The binding land-use plan is the key instrument for the urban structural development of a municipality. In the binding land-use plan, stipulations laid down in graphic elements and text regulate the urban structural and other development of the municipal territory. As a rule, building projects must be approved if they are consistent with the stipulations of the binding land-use plan and are permissible in terms of building regulations.
A binding land-use plan may not violate higher-ranking laws, in particular the objectives of spatial planning. A binding land-use plan may be legally challenged by a third party affected by the plan by means of a judicial review of legislative acts pursuant to section 47(1) no. 1 of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO). In addition, parties may have the lawfulness of a binding land-use plan reviewed through (concrete or incidental) judicial review by way of an action of annulment or an action to compel a decision.

1 General

1.1 Constitutional competence of the local authorities for the preparation of binding land-use plans

In section 1(1) of the Federal Building Code *(Baugesetzbuch*, *BauGB)*, the legislator conferred the competence for ▷ *Urban land-use planning* on local authorities and thus the authority to prepare binding land-use plans in their own jurisdiction for their own territory. This planning autonomy is guaranteed in terms of constitutional law by Article 28(2) of the Basic Law *(Grundgesetz*, *GG)* as a classic function of local self-government (▷ *Local self-government*) and is the remit of any local authority, irrespective of its size, administrative abilities and financial capacity. The Federal Constitutional Court *(Bundesverfassungsgericht*, *BVerfG)* persuasively described the reasons for the transfer of planning autonomy to local authorities in an order of 9 December 1987 regarding the municipality of Saarbrücken (*BVerfG*, order of 9 December 1987, case no. 1 BvL 16/84, *BVerfGE* [Official Reports of the Federal Constitutional Court] 77, 288, 300) as follows:

'With the allocation of the competence for urban land-use planning to the local authorities as their own affair, federal building law strengthens the role of technical know-how and material proximity at the local level and protects planning decisions against interventions from more remote supervision. At the same time, it is ensured that in addition to initiating powers, the responsibility for urban land-use plans also rests firmly at the local level, in other words with the local authority and its representative body elected by the local electorate. Overall, with the allocation of urban land-use planning to the local authorities as their own affair and its more detailed design and modification, sections 2(1), 3, 4 and 147 of the Federal Building Law contain a balanced, organisational implementation concept for the material urban land-use planning rules, which the federal legislator had grounds to deem necessary in order to execute and realise the material provisions.'

1.2 Legal form of the binding land-use plan; special supervision

Pursuant to section 10(1) of the Federal Building Code, the binding land-use plan is adopted as a bye-law. Pursuant to section 10(2) sentence 1 of the Federal Building Code, only the binding land-use plans listed in this provision must be approved by the higher administrative authority. This means that binding land-use plans that have been developed on the basis of an effective ▷ *Preparatory land-use plan* do not require approval. Most binding land-use plans now satisfy this prerequisite. The binding land-use plan differs significantly from a preparatory land-use plan in that the latter always requires approval. As urban land-use plans are prepared within the local authority's jurisdiction, the competence of the higher administrative authority is limited pursuant to section 10(2) sentence 2 of the Federal Building Code in conjunction with section 6(2) of the Federal Building Code to a legal review and, accordingly, does not extend to reviewing the expediency of the planning (*BVerwG* [Federal Administrative Court], judgment of 21 November 1986, 4 C 22.83, *BVerwGE* 75, 142). Hence, the higher administrative authority is not entitled, for example, to deny approval on the basis that no analysis of needs was carried out for the planned built use, such as the designation of a residential area (*OVG* Lüneburg [Higher Administrative Court], judgment of 24 April 2007, case no. 1 KN 74/05, *ZfBR (Zeitschrift für deutsches und*

internationales Bau- und Vergaberecht) 2007, 577; for a different conclusion, however, see *VGH* Munich [Higher Administrative Court], judgment of 7 August 2012, case no. 1 N 11.1728, juris, for an over-dimensioned specific land-use area). If approval is denied, the local authority may pursue an action to compel a decision.

1.3 The binding land-use plan as the mandatory basis for urban planning or other uses of land parcels

According to the definition in section 1(1) of the Federal Building Code, the task of urban land-use planning consists of determining whether parcels within the municipal territory are to be used for building or other uses. Under the two-tier system of urban land-use planning, the preparatory land-use plan (as a preparatory step towards a binding land-use plan) serves to prepare the existing or intended use of the local authority's territory (section 5(1) of the Federal Building Code). Based on the generally non-binding representations in the preparatory land-use plan, the individual binding land-use plans are elaborated for smaller sections of the municipal territory.

As a rule, a legal right exists to build on a parcel located within the scope of a qualified binding land-use plan pursuant to section 30(1) of the Federal Building Code if the project which is the subject of the application complies with the stipulations in the binding land-use plan and if the ▷ *Provision of local public infrastructure* is ensured. Hence, the establishment of building rights are an essential function of binding land-use plans. Pursuant to section 29(2) of the Federal Building Code, a project that is permissible in terms of planning law must comply with the requirements of the building regulations and other public-law provisions. These include provisions under the Water Management Act *(Wasserhaushaltsgesetz*, *WHG)* or the Federal Nature Conservation Act *(Bundesnaturschutzgesetz*, *BNatSchG)*.

1.4 The binding land-use plan as a basis for the execution of other measures under the Federal Building Code

Binding land-use plans are, moreover, the basis for additional statutory measures that are necessary to fulfil urban design tasks under the Federal Building Code. These include the exercise of rights of pre-emption by the local authority (sections 24 et seq. of the Federal Building Code), the conduct of land assembly proceedings (sections 45 et seq. of the Federal Building Code), the compulsory purchase of parcels in the public interest (sections 85 et seq. of the Federal Building Code) as well as urban regeneration and development measures (sections 136 et seq. and 165 et seq. of the Federal Building Code).

1.5 Variants of binding land-use plans

The Federal Building Code distinguishes between the following variants of binding land-use plans:

- The qualified binding land-use plan regulated in section 30(1) of the Federal Building Code must contain at the least stipulations on the type and density of built use, permissible lot coverage and public thoroughfares.
- The simple binding land-use plan pursuant to section 30(3) of the Federal Building Code does not contain the minimum stipulations of section 30(1) of the Federal Building Code. The

permissibility of projects (▷ *Permissibility of projects in building law*) is determined – outside the scope of individual stipulations, e.g. for the built use classes – according to whether the planned area is in the inner zone pursuant to section 34 of the Federal Building Code or in the outer zone pursuant to section 35 of the Federal Building Code. The simple binding land-use plan has gained considerable importance in recent years as a means to steer the location of factory farming facilities and wind turbine generators across the municipality or for large parts of the municipal territory under planning law.

- The project-specific binding land-use plan within the meaning of section 12(1) sentence 1 of the Federal Building Code is a special type of project-based binding land-use plan as it establishes the obligation of the contracting partner of the local authority to make the investments agreed in the contract and laid down in the project and local public infrastructure plan. This is distinct from qualified binding land-use plans in that the catalogue of stipulations in section 9 of the Federal Building Code and also the Federal Land Utilisation Ordinance *(Baunutzungsverordnung*, *BauNVO)* does not necessarily apply. A further difference is that as a rule, there can be no claims for compensation pursuant to sections 39 et seq., 42 et seq. of the Federal Building Code in the event of a cancellation or modification.
- A particularly important variant of the binding land-use plan in practice is the binding land-use plan for the ▷ *Inner development* pursuant to section 13a of the Federal Building Code. This plan is prepared in expedited proceedings as the provisions on the ▷ *Environmental assessment* generally do not apply; moreover, ▷ *Public participation* is only required to a limited extent. It must also be noted in this context that simple variants of a binding land-use plan for the inner zone can also be prepared under certain circumstances by means of a simplified procedure pursuant to section 13 of the Federal Building Code.

1.6 Preparation of binding land-use plans by supra-local agencies, associations and other forms of cooperation between local authorities

In conurbations especially at risk from urban sprawl and diverse environmental issues it may be sensible from an urban planning and economic perspective to transfer the function of urban land-use planning entirely, or at least certain aspects of planning autonomy, to larger administrative units, e.g. other territorial authorities (▷ *Territorial authority*), associations or other forms of cooperation between local authorities. The legal basis required for this transfer is provided in sections 203 to 205 of the Federal Building Code, i.e. the local law of the federal states and the law relating to cooperation between local authorities. Some federal states have transferred the function of preparatory land-use planning, sometimes even against the will of the local authorities concerned, to supra-local planning agencies pursuant to these provisions. Examples include the planning association for the Frankfurt/Rhein-Main metropolitan area, the municipal associations in Rhineland-Palatinate and in Saxony-Anhalt, the administrative associations in Baden-Württemberg as well as the municipal associations in Lower Saxony.

While the prevailing view is that the transfer of the function of preparatory land-use planning to supra-local agencies against the will of the local authorities concerned under limited circumstances is permissible (*OVG* Koblenz, judgment of 18 October 2007, case no. 1 C 101381/07.OVG, *ZfBR* 2008, 67, 69 and *Hessischer Staatsgerichtshof* [State Constitutional Court of Hesse], judgment of

4 May 2004, case no. P.St. 1714, *NVwZ-RR [Neue Zeitschrift für Verwaltungsrecht-Rechtsprechungs-Report]* 2004, 516; with a stricter approach, *Verfassungsgericht des Landes Brandenburg (VfGBbg)* [Constitutional Court of the State of Brandenburg], judgment of 21 March 2002, *VfGBbg*. 19/01, *LKV [Landes- und Kommunalverwaltung]* 2002, 516), the withdrawal of the right to prepare binding land-use plans, would appear, according to the correct view, to be inconsistent with constitutionally guaranteed planning autonomy (Ernst/Zinkahn/Bielenberg et al. 2011: section 203, para. 34; Schrödter 2015: section 203, para. 10). However, if a local authority is evidently overtaxed with the task of preparing binding land-use plans, or if they are 'unwilling to plan', provided very strict prerequisites are fulfilled, binding land-use plans can potentially be drafted by way of substitution on the basis of federal state spatial planning acts or under the system of supervision of local authorities. This may the case, for example, if a local authority refuses to prepare a binding land-use plan that aims to implement objectives in the inner zone in order to manage large-scale retail trade (▷ *Retail trade*) in a region (*BVerwG*, judgment of 17 September 2003, case no. 4 V 14/01, *NVwZ [Neue Zeitschrift für Verwaltungsrecht]* 2004, 220 – *Gewerbepark Mühlheim-Kärlich*).

Pursuant to section 205(6) of the Federal Building Code, local authorities which want to jointly exercise the task of urban land-use planning can transfer also the function of binding land-use planning to associations or comparable units under the law of cooperation between local authorities. For example, when neighbouring local authorities wish to develop supra-local commercial or residential areas based on a jointly prepared binding land-use plan, they can also apportion the financial allocations that are associated with this urban structural development, such as business tax, or, in the case of residential areas, proportions of the income tax revenues between the local authorities involved on a contractual basis. Unfortunately, local authorities have as yet not made enough use of these possibilities for binding land-use planning at the supra-local level (from recent case law, e.g. *OVG* North Rhine-Westphalia, judgment of 26 June 2017, case no. 2 D 70/16.NE. *BauR* [Building Law] 2018, 199).

2 The essential content of a binding land-use plan

2.1 General

The binding provisions of a binding land-use plan are formally established in section 9 of the Federal Building Code. As a rule, a binding land-use plan consists of stipulations in graphic and text form. However, a text-only binding land-use plan is also permissible (e.g. *BVerwG*, judgment of 27 October 2011, case no. 4 CN 7.10, *ZfBR* 2012, 151: Text – binding land-use plan for a forest settlement). Pursuant to section 9(8) of the Federal Building Code, each binding land-use plan must be accompanied by an explanation of the reasons for the most important stipulations. The environmental report pursuant to section 2a sentence 3 of the Federal Building Code forms part of this.

2.2 Stipulations in the binding land-use plan

Legal basis; exhaustive catalogue of stipulations

The local authority has the right to regulate the use of parcels for building or other purposes structural in the area of the plan through stipulations relating to aspects such as the type and density of built use, permissible lot coverage, height of physical structures and for access roads. The permissible stipulations in a binding land-use plan are regulated in detail in the Federal Building Code, in particular in section 9(1) to (3) of the Federal Building Code, as well as in the Federal Land Utilisation Ordinance. The latter was first adopted in 1962 based on section 9a of the Federal Building Code and the prior provision of section 2(10) of the Federal Building Code of 1960, and was subsequently amended eight times, most recently in 2017 (▷ *Building law*). The provisions on the type and density of built use become part of the binding land-use plan without a separate stipulation, unless the local authority has specified deviations for urban development reasons pursuant to sections 1(4) to (10) of the Federal Land Utilisation Ordinance or if the generally permissible exceptions for the built use class pursuant to the Federal Land Utilisation Ordinance have been excluded or restricted (section 1(3) sentence 2 of the Federal Land Utilisation Ordinance).

The local authority is bound by the stipulations in the exhaustive catalogue of the Federal Land Utilisation Ordinance and the Federal Building Code; unlike in the case of representations in the preparatory land-use plan, the local authority also does not have the right to 'invent' its own stipulations. Pursuant to section 9(1) no. 23 of the Federal Building Code, a local authority is entitled (to name just one example) to oblige an investor to instal built structures for the generation of renewable energy, e.g. a solar plant, by means of a stipulation in the binding land-use plan. However, an obligation to use these installations cannot be established in the binding land-use plan, as neither section 9(1) no. 23b nor any other provision of the Federal Building Code or other law contains a legal basis for it.

Limitation to stipulations under urban development provisions

From the restriction of planning law to the ▷ *Land law* in the sense of Article 74(1) no. 18 of the Basic Law (▷ *Constitutional framework of spatial planning [Raumplanung]*), it follows that a local authority cannot make any stipulations that are not related to the use of land and the soil for building or other purposes. A stipulation that prohibits or restricts the cultivation of ecologically 'undesirable' plants, such as maize, would thus be unlawful. The same applies to a stipulation that is evidently intended to protect businesses that are local to the area or medium-sized businesses against undesired competition through the establishment of new businesses.

Clarity and certainty as well as time limits of stipulations

In all other respects and similar to spatial development plans, the principle of clarity and definiteness applies to all stipulations. This means that each stipulation must be defined so precisely that third parties, in particular parties affected by the plan and the approval authorities, can grasp its substance. In all other respects, stipulations are generally applicable indefinitely, unless their validity has been expressly and exceptionally limited to a certain period pursuant to section 9(2) sentence 1, no. 1 of the Federal Building Code. It is permissible, for example, to limit the duration of use of installations for a temporary major event, e.g. for a trade fair or a World Expo, to the period of this event. Under the same conditions, stipulations can be imposed subject to conditions precedent or subsequent (section 9(2) sentence 1, no. 2 of the Federal Building Code).

Stipulations issued by other planning agencies recorded for information purposes

Pursuant to section 9(6) sentence 1 of the Federal Building Code, the local authority is obliged, as part of a discretionary provision, to include final and non-appealable planning acts of other planning agencies in the binding land-use plan as reference material. These may include a railway, a road outside the local authority's planning autonomy or nature and landscape conservation areas. As specifically provided for in section 9(6a) of the Federal Building Code, another variant is record allocations for information purposes, such as flood plains pursuant to section 76(2) of the Water Management Act, potentially in conjunction with section 106(3) of the Water Management Act, as well as risk areas, areas where floods form and power line routing pursuant to the Grid Expansion Acceleration Act - Transmission Systems *(Netzausbaubeschleunigungsgesetz Übertragungsnetze, NABEG)*.

The recording of these planning acts (▷ *Spatially-relevant sectoral planning*) for information purposes serves to inform third parties affected by the plan, e.g. builder-owners and owners, as well as authorities, who are required to apply the binding land-use plan. The local authority's obligation to identify hazards for buildings in the binding land-use plan, such as those resulting from ▷ *Contaminated sites* or areas of underground mining (section 9(5) of the Federal Building Code), has a comparable function. The objectives of spatial planning pursuant to section 3(1) no. 2 of the Federal Spatial Planning Act *(Raumordnungsgesetz*, *ROG)*, on the other hand, must not to be included as reference material pursuant to section 9(6) of the Federal Building Code. The relationship of the objectives of spatial planning to binding land-use plans is regulated conclusively in section 1(4) of the Federal Building Code and the state law supplementing this provision.

2.3 Justification of the binding land-use plan; environmental report and environmental assessment

Form and function of the justification

Pursuant to section 9(8) of the Federal Building Code, each binding land-use plan must be accompanied by a justification for the purpose pursuant to section 2a sentence 2 no. 1 of the Federal Building Code to set out the aims, purposes and principal impacts of the binding land-use plan in a manner comprehensible to the parties affected by the parcel. Reasons must be provided in particular for the stipulations that are not comprehensible *per se*, or which result in a particular financial burden on the owners or other parties entitled to use the parcel. The justification also serves to duly weigh the different public and private concerns that are affected by the planning pursuant to section 1(7) of the Federal Building Code and to document this decision in a transparent and comprehensible manner (▷ *Weighing of interests*).

Environmental assessment and environmental report

Similar to the case of a regional plan pursuant to section 9 of the Federal Spatial Planning Act, since 20 July 2004 the Strategic Environmental Assessments Directive 2001 (Directive 2001/42/EC, OJ EC L 197, 30) has required an environmental assessment to also be conducted for a binding land-use plan as a standard procedure pursuant to section 2(4) sentence 1 of the Federal Building Code, when the implementation of the binding land-use plan may substantially affect

the environment, especially in the sense of sections 1(6) no. 1 and 7 and section 1a of the Federal Building Code. The result of this environmental assessment is summarised in a environmental report, which must be prepared in accordance with the specifications of section 2a sentence 2, no. 2 of the Federal Building Code and Annex 1 to the Federal Building Code, and which forms a separate part of the justification pursuant to section 2a sentence 3 of the Federal Building Code. The environmental report, which is part of the justification, is in principle an expert report, in which the main environmental concerns are determined, properly assessed and described according to the relevant statutory or sectoral specifications in each case. Examples of this are noise pollution for people resulting from building works associated with the development of the area or adverse impacts on an adjacent nature conservation area. The result of the environmental assessment must be taken into account pursuant to section 2(4) sentence 4 of the Federal Building Code outside the environmental report, and thus as part of the actual weighing of interests pursuant to section 1(7) of the Federal Building Code. In so doing, it must be ensured that there are no contradictions between the environmental report and the final planning.

3 Effects of the requirements of spatial planning on a binding land-use plan

3.1 General

It is not always easy to define the relationship between the requirements of ▷ *Spatial planning (Raumordnung)* and the binding land-use plan (Kümper, *ZfBR* 2018, 199). The requirements of spatial planning pursuant to section 3(1) no. 1 of the Federal Spatial Planning Act are understood to be ▷ *Objectives, principles and other requirements of spatial planning (Raumordnung)*. The following provisions apply in particular:

Pursuant to section 1(4) of the Federal Building Code, the urban land-use plans, and thus also each binding land-use plan, must be adapted to the objectives of spatial planning. This provision in section 1(3) of the Federal Building Law of 1960 establishes, as a planning guideline, a strict obligation on the local authority to prepare, amend or void only binding land-use plans that are consistent with the spatial planning objectives which apply to the area subject to the planning and the affected surrounding areas. Unlike the principles and other requirements of spatial planning, the local authority cannot override those spatial planning objectives in the weighing of interests.

3.2 Obligation to adapt a new binding land-use plan to existing spatial planning objectives

A binding land-use plan may be prepared only if it is consistent with an existing objective of spatial planning. If, for example, a priority area for nature and landscape pursuant to section 8(7) sentence 1, no. 1 of the Federal Spatial Planning Act has been defined as an objective of spatial planning, no built use opposing this objective, such as an industrial and commercial area, may be designated for this area. This planning prohibition under spatial planning law applies to all binding land-use plans, i.e. also to plans that do not impose any spatially relevant measures (▷ *Spatial impact*). If the local authority wants to overcome this planning prohibition, it can seek

to persuade the responsible authority, generally the authority for spatial development planning designated by state law or the spatial planning authority, to formally void or amend the spatial planning objective in question. The local authority may also apply either for an exemption from the spatial planning objective permitted in the plan (section 6(1) of the Federal Spatial Planning Act) or for a divergence from the objective under the narrow requirements of section 6(2) of the Federal Spatial Act.

3.3 Obligation to adapt a binding land-use plan to spatial planning objectives defined subsequently

The local authority is obliged to adapt a binding land-use plan prepared in accordance with section 1(4) of the Federal Building Code to a spatial planning objective which has been defined after the binding land-use plan has taken effect and which contradicts the binding land-use plan. This subsequent spatial planning objective does not, according to the prevailing view, invalidate the binding land-use plan or render it inoperable (*BVerwG*, judgment of 21 March 2013, case no. 4 C 15/11, *NVwZ* 2013, 1017; *VGH* Kassel, judgment of 10 September 2009, case no. 4 B 2068/09, *BauR* 2010, 878, 879; Schrödter 2015: section 1, para. 126; Kümper 2012: 631, 635; for a decidedly different view: Waechter 2010: 496). However, under the respective state planning laws or even under the local government codes *(Gemeindeordnungen)* of the federal states, the competent authority has the power to issue a planning order to compel the local authority to adapt the legally effective binding land-use plan to the new spatial planning objective (examples: *OVG* Koblenz, judgment of 23 March 2012, case no. 2 A 11176/11, *LKRZ [Zeitschrift für Landes- und Kommunalrecht Hessen/Rheinland-Pfalz/Saarland]* 2012, 280; *VG* Magdeburg [Administrative Court], judgment of 25 September 2012, case no. 9 B 120/12, *NVwZ-RR* 2013, 202). However, the competent spatial planning authority may not prohibit the granting of a building permit that is not consistent with the goal based on the binding land-use plan, as the spatial planning objectives do not preclude the granting of building permits pursuant to section 30(1) of the Federal Building Code and pursuant to section 34 of the Federal Building Code (Spannowsky/Runkel/Goppel 2010: section 4, para. 71; *BVerwG*, judgment of 11 February 1993, case no. 4 C 15/92, *NVwZ* 1994, 285 re section 34).

3.4 The local authority is not bound by unlawfully determined spatial planning objectives

It must be noted in this connection that the obligation to adapt the binding land-use plan is only grounded in a lawful spatial development plan (*BVerwG*, order of 25 June 2007, case no. 4 BN 17.07, *BauR* 2007, 1712; *OVG* Lüneburg, judgment of 8 December 2011, case no. 12 KN 208/09, *ZfBR* 2012, 265).However, the local authority has no power to dismiss statutory norms in the plan preparation procedure if it considers the spatial planning objective to be unlawful; in other words, the local authority is not entitled to flout an unlawful spatial planning objective. Hence, the local authority must comply with its obligation to adapt the plan. If the competent planning approval authority refuses to approve the binding land-use plan, the local authority may have lawfulness of the spatial planning objective reviewed by an incidental judicial review as part of an action to compel a decision aimed at having the approval granted. The local authority may, moreover, oppose a spatial development plan that defines a spatial planning objective considered to be

unlawful by means of abstract judicial review proceedings permitted under state law pursuant to section 47(1) no. 2 of the Code of Administrative Court Procedure filed before the competent Higher Administrative Court and have the lawfulness of the spatial planning objective reviewed as part of these proceedings. This is dependent on the objection to the legal error in the spatial development plan being reported in writing within the deadline of one year as stipulated in section 12(5) sentence 1 of the Federal Spatial Planning Act or under the state law applicable pursuant to section 28(2) sentence 2 of the Federal Spatial Planning Act (▷ *Legal remedies in planning*).

3.5 Effects of the principles and other requirements of spatial planning on a binding land-use plan

If a spatial development plan contains principles of spatial planning pursuant to section 3(1) no. 3 of the Federal Spatial Planning Act, such as the statement that nature conservation, landscape protection or of climate protection concerns must be taken into account, these concerns have to be taken into account only as part of the weighing of interests under building law. The same applies to other requirements of spatial planning for the purposes of section 3(1) no. 4 of the Federal Spatial Planning Act. The spatial planning objectives that are not yet final and non-appealable must therefore be taken into account, in a similar way as the results of a ▷ *Spatial impact assessment procedure (Raumordnungsverfahren)* or other state planning viewpoints, only as part of the weighing of interests under building law.

4 Procedure for preparing a binding land-use plan

4.1 Wider application of local regulations

Pursuant to section 10(1) of the Federal Building Code, the binding land-use plan is adopted as a bye-law of the local authority. The plan preparation procedure is governed by the provisions applicable to bye-laws under the local government codes of the federal states, provided that the Federal Building Code does not contain other specific provisions for this, e.g. on the approval of binding land-use plans (section 10(2) of the Federal Building Code) or the final official publication of the binding land-use plan pursuant to section 10(3) of the Federal Building Code. To name a few other examples, the provisions under state law about publicising the meetings, the summons, the publication of the agenda, the participation of the preparatory and finalising committees and of bodies that represent the interests and concerns of cities and municipal districts, must be applied. In practical terms, the prohibitions on participation at the level of municipal law prohibit local councillors, and as a rule also the Chief Administrative Officer, from participating in decisions on a binding land-use plan that could result in a special advantage or disadvantage for this group of people. Binding land-use plans are frequently declared to be unlawful in judicial proceedings due to a failure to comply with the regulations at the level of municipal law.

4.2 Public participation during the preparation of a binding land-use plan

The procedure for the preparation of a binding land-use plan is characterised by the comprehensive

participation of the public. As part of the early-stage public participation first introduced by section 2a(2) of the Federal Building Code of 1976, and which is now regulated in section 3(1) of the Federal Building Code, the public has the right to comment on the initial drafts of the plan. In the subsequent formal procedure, the draft of the binding land-use plan, with its justification and environmental report pursuant to section 3(2) of the Federal Building Code, must be on public display and also made available online (section 4a(4) of the Federal Building Code). Comments on this draft plan can be submitted within the deadline. The local councillors must then deliberate and decide on these comments as part of the final bye-law resolution before the binding land-use plan can take effect.

4.3 Participation of the authorities and other public interest agencies

Just like the public, the authorities and public agencies can participate in urban land-use planning in two ways. To the extent that they could be affected in their official remit, they must be informed simultaneously with the early-stage public participation and must be invited to comment in particular on the scope and level of detail of the environmental assessment pursuant to section 2(4) of the Federal Building Code (scoping procedure: section 4(1) of the Federal Building Code). Pursuant to section 4(2) of the Federal Building Code, this is followed by formal participation, after which the authorities and other public agencies can present their comments within a default deadline of one month.

4.4 Participation of neighbouring countries

Section 4a(5) of the Federal Building Code governs the participation of neighbouring countries in urban land-use planning (discussed extensively in Schrödter 2015: section 2 para. 22 to 42). If urban land-use plans could have a substantial impact on neighbouring countries, the local authorities and other authorities of the neighbouring state must be informed in accordance with the principles of reciprocity and equivalence. These principles are regularly agreed by contract. Examples of this include locating an industrial area in the immediate vicinity of the border with a neighbouring country or the designation of special areas for large-scale retail trade. If an urban land-use plan could have a substantial impact on another country, the neighbouring country, as well as its local authorities and general public, must be afforded the opportunity, subject to certain specific provisions, to participate in accordance with the provisions of the Environmental Impact Assessment Act *(Gesetz über die Umweltvertäglichkeitsprüfung, UVPG).*

4.5 Completing the proceedings

The local authority completes the urban land-use planning proceedings by adopting a bye-law or, in the case of a preparatory land-use plan, by means of the planning approval decision. While the preparatory land-use plan must always be approved by the higher administrative authority pursuant to section 6(1) of the Federal Building Code, approval must be granted for binding land-use plans pursuant to section 10(2) sentence 1 of the Federal Building Code only in the cases of sections 8(2) sentence 2, 8(3) sentence 2 and 8(4) of the Federal Building Code. The urban land-use plans take effect upon final official publication pursuant to sections 6(5) and 10(3) of the Federal Building Code, which may also be done by way of alternative promulgation.

4.6 Rights to inspection and information

These general rights to information under planning law have been expanded substantially in that a right under European Union law to environmental information has been established in terms of the Environmental Information Directive (EID 2003 – Directive 2003/4/EC, OJ EC L 41, 26), which comprises all environmental information that is related to the preparation of a binding land-use plan. The public thus has the opportunity to also inspect expert reports, contracts and other documents used in the preparation process, to the extent that they contain information about the environment in the area in question or its surroundings. In addition, the federation and most federal states have adopted freedom of information or transparency legislation, which establishes more extensive rights to information in the framework of binding land-use planning proceedings. These comprehensive rights of the public to obtain information about urban land-use planning proceedings may, however, conflict with data protection provisions (Schrödter 2015, section 3 para. 10 et seq.).

5 Legal remedies against binding land-use plans

5.1 Overview

From the legal nature of the binding land-use plan as a bye-law, it follows that parties affected, in particular owners or neighbours of parcels subject to planning, may contest a binding land-use plan before the responsible Higher Administrative Court *(Oberverwaltungsgericht)* pursuant to section 47(1) no. 1 of the Code of Administrative Court Procedure by way of an abstract judicial review. In addition, there is the right to have the lawfulness of a binding land-use plan reviewed for its lawfulness in incidental judicial proceedings. Exceptionally, a binding land-use plan may be opposed with a constitutional complaint *(Verfassungsbeschwerde)* filed with the Federal Constitutional Court or with a state constitutional complaint, provided the state constitutions provide for this.

5.2 No power to dismiss an unlawful binding land-use plan

In practice, the question often arises whether authorities, such as the approval authority or the local authority itself, may simply ignore a binding land-use plan; in other words, are they permitted to not apply the binding land-use plan if they consider the binding land-use plan to be void due to a breach of peremptory law. As discussed above, a local authority is not entitled to simply ignore a spatial planning objective if the objective is unlawful. This principle also applies to a binding land-use plan according to the prevailing view, which, however, has not yet been confirmed by the federal courts (extensively discussed in Ernst/Zinkahn/Bielenberg et al. 2014: section 10 para. 365 et seq.). However, according to the case law of the Federal Court of Justice *(Bundesgerichtshof, BGH)*, the local authorities, but also other authorities, in particular the building permit authority, must inform the parties affected by the plan, such as applicants for a project within the area in question, about any potential errors in a binding land-use plan. If they fail to do so, claims under government liability or for compensation may arise (*BGH*, judgment of 25 October 2012, case no. 3 ZR 29/12, *NVwZ* 2013, 167, 168).

If a binding land-use plan violates peremptory European Union law, the local authority is obliged to dismiss the plan and thus may not apply the terms of such a plan in breach of European Union law (Berkemann/Halama 2011: 205 et seq.).

References

Berkemann, J.; Halama, G. (2011): Handbuch zum Recht der Bau- und Umweltrichtlinien der EU. Bonn.

Ernst, W.; Zinkahn, W.; Bielenberg, W.; Krautzberger, M. (2014): Baugesetzbuch: Loose-leaf commentary. Munich.

Ernst, W.; Zinkahn, W.; Bielenberg, W.; Krautzberger, M. (2011): Baugesetzbuch: Commentary, loose-leaf. Munich.

Kümper, B. (2012): Flächennutzungsplan, Raumordnungsplan und Fachplan – Vertikale Anpassungs- und horizontale Koordinierungserfordernisse. In: ZfBR – Zeitschrift für deutsches und internationales Bau- und Vergaberecht 7, 631-641.

Kümper, B. (2018): Raumordnung und Bauleitplanung. In: ZfBR – Zeitschrift für deutsches und internationales Bau- und Vergaberecht (02), 119-128.

Schrödter, W. (Ed.) (2015): Baugesetzbuch. Commentary. Baden-Baden.

Spannowsky, W.; Runkel, P.; Goppel, K. (2010): Raumordnungsgesetz: ROG. Commentary. Munich.

Waechter, K. (2010): Raumordnungsziele als höherrangiges Recht. In: Die öffentliche Verwaltung (12), 493-503.

Last update of the references: April 2018