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Land law



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The term and concept of land law is very broad, encompassing all civil law and public law provisions on the use of land. The issue is dealt with in numerous sets of legislation. In addition to provisions regulating the use of land, the term also covers regulations on the protection of soil.

1 Definition

There is no statutory definition of land law. For the purposes of this article, land law is understood to mean all civil law and public law provisions regulating legal relationships regarding land. Accordingly, the provisions and regulations of land law are not embodied in a single piece of legislation, but are scattered across numerous sets of legislation.

Land law includes the civil law provisions on the use of land (including the relevant provisions on public service easements), the law of spatial planning and urban development law. In addition, other provisions affecting the use of land are covered by this term, such as the corresponding legal provisions concerning the respective interests of occupiers of adjoining properties, mining law, nature and landscape conservation as well as water and \triangleright *Soil conservation*.

The use of the land is covered by the guarantee of Article 14(1) of the Basic Law (*Grundgesetz, GG*). The fundamental \triangleright *Constitutional guarantee of property* is shaped by the civil law provisions of the German Civil Code (*Bürgerliches Gesetzbuch, BGB*) on the content and scope of the ownership of land. However, the rights resulting from property ownership are not unlimited, but are to be used for the benefit of the public good in accordance with Article 14(2) sentence 2 of the Basic Law. This social obligations associated with property ownership are expressed in particular in the public law provisions on the use of land (Hoppe/Bönker/Grotefels 2010: 25 et seq.).

Land law is almost entirely subject to the legislative power of the federation (\triangleright *Constitutional framework of spatial planning (Raumplanung)*). For the public-law aspects of land law, this results from Article 74(1) no. 18 of the Basic Law, which expressly subordinates such matters to the concurrent legislative powers of the federation (*BVerfG* [Federal Constitutional Court], legal opinion of 16 June 1954, case no. 1 PBvV 2/52, *BVerfGE* [Federal Constitutional Court Decisions] 3, 407). The same applies to real estate law in accordance with Article 74(1) no. 1 Basic Law. This means that the power to legislate lies with the federal states only insofar as and to the extent that the federation does not exercise its right to legislate. In fact, however, the federation has made extensive use of this regulatory priority granted by the Basic Law, meaning that land law is regulated almost uniformly throughout Germany.

2 Elements of land law in civil law

From a civil law point of view, land law comprises in particular the real estate law (section 873 et seq. of the German Civil Code (BGB)), which contains the relevant provisions on legal transactions in relation to real estate. In this context, a distinction must be made between the full right in rem (property ownership) and other rights in rem that are limited in scope. Property ownership grants owners the unrestricted authority to deal with the plot of land belonging to them at will and to exclude third parties from any influence (cf. section 903 German Civil Code). Real estate law, on the other hand, features numerous other legal positions that are limited by comparison to the comprehensive right. These include, for example, easements, usufruct rights and limited personal easements, which grant a certain group of people the right to use a plot of land in a certain way (for example, in the context of a pedestrian and vehicular

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right of way). Furthermore, real estate law recognises pre-emption rights in rem, real burdens and, finally, mortgages, real estate and annuity obligations, which reflect the importance of real estate as an asset.

As in other parts of civil law, the transfer of rights in rem to real estate occurs in several steps. In addition to an agreement ('declaration of conveyance'), it also requires a corresponding act of publicity. Since the act of transfer typically associated with movable property is not possible in the case of real estate, it is replaced by the registration of the change of rights and title in the land register (section 873 German Civil Code). The land register is therefore the essential instrument of civil real estate law, since it forms the basis of legal relationships relating to individual plots of land. The land register serves to ensure the security and ease of legal transactions relating to individual plots of land. Therefore, there is a presumption of public faith in the accuracy of the land register, such that the content of the land register is deemed to be correct in favour of an acquirer of the right to the property (section 891 German Civil Code).

Real estate law is based on the principle that anyone who actually wants to use a plot of land, e.g. for residential purposes, must acquire ownership of it. In deviation from the above, the law of obligations permits the granting of rights of use to a plot of land based on rental or lease agreements (sections 535 et seq. German Civil Code as well as sections 581 et seq. German Civil Code) against regular payment of remuneration for that use. The owner's (in principle) unrestricted power of disposal is thus considerably limited by the provisions on tenant protection. This is true in particular for the protection of residential tenants.

Finally, the law concerning the respective interests of occupiers of adjoining properties, regulated at the state level, serves as an interface with public law. It grants owners of a property rights of defence against impairments emanating from neighbouring properties, but also imposes duties to tolerate on the owner of an adjacent property, for example in the form of the land owner's right to make use of a neighbour's property to carry out construction works on the land owner's own building or to set up ladders or scaffolding on a neighbouring property as part of such construction works. Accordingly, entering a neighbouring property for the purpose of carrying out construction work on one's own building as well as setting up scaffolding and swinging over with cranes are permitted under certain conditions (Schäfer/Fink-Jamann/Peter 2012: 117 et seq.).

3 Spatial planning

From a public law point of view, *Spatial planning (Raumordnung)* is of fundamental importance for the use of land in Germany. It is true that the provisions made in spatial development plans generally have a direct binding effect only for spatially-relevant planning and measures on the part of public authorities. However, the instruments of spatial planning law (*Raumordnungsrecht*) have an important indirect effect. This becomes particularly clear with regard to the so-called adaptation requirement of section 1(4) of the Federal Building Code (*Baugesetzbuch, BauGB*), according to which urban land-use plans (preparatory and binding land-use plans) must be adapted to the objectives of spatial planning (*Objectives, principles and other requirements of spatial planning (Raumordnung)*). Through this vehicle, spatial planning also affects the use of land

by private individuals. This also applies to a lesser extent to the use of land in the undesignated outlying area for planning law purposes, which according to section 35(3) Federal Building Code (▷ *Permissibility of projects in building law*) must be consistent with the requirements of spatial planning law (Battis/Krautzberger/Löhr 2022: section 1, para. 32 et seq.).

4 Urban development law

The core of land law in terms of public law is the urban development law regulated in the Federal Building Code (▷ *Building law*). This includes, in particular, urban planning law. It determines whether and how buildings may be erected on a plot of land. This is done by means of ▷ *Urban land-use planning* – i.e. by drawing up preparatory and binding land-use plans – which falls within the ambit of local authority sovereignty in accordance with Article 28(2) Basic Law. The preparatory land-use plan as a preliminary urban land-use plan contains a comprehensive strategy for the use of the land in the local authority’s territory, but in principle does not have a direct external effect vis-à-vis landowners. This effect is only achieved by the ▷ *Binding land-use plan* to be developed based on the preparatory land-use plan. The binding land-use plan contains the legally binding stipulations for the use of land and thus forms the standard for examining the permissibility of a construction project under urban planning law (cf. section 30 Federal Building Code). Section 9 of the Federal Building Code lists a catalogue of stipulations permitted in binding land-use plans, which is further differentiated in the Federal Land Utilisation Ordinance (*Baunutzungsverordnung, BauNVO*).

While preparatory land-use plans cover the entire territory of a local authority, the elaboration of binding land-use plans is in principle down to the free discretion of the local authority and is subject to the limitations imposed by the notion of planning necessity in accordance with section 1(3) Federal Building Code. Therefore, binding land-use plans are in effect only for parts of the local authority’s territory. The assessment of the permissibility under planning law in such unplanned areas is based on sections 34 or 35 of the Federal Building Code. According to section 34 of the Federal Building Code, a project in the so-called unplanned inner zone, i.e. a contiguously built-up area, is only permissible if it fits into the specific character of the surrounding area. Outside this development context, in the so-called undesignated outlying area, the permissibility of a building project under planning law is determined by reference to section 35 of the Federal Building Code (Hoppenberg/de Witt 2021: 36 et seq.).

The determination of the legal quality of the land within the framework of urban land-use planning has a significant impact on legal transactions relating to land under civil law. The value of the land depends largely on the question of whether and to what extent a plot of land is eligible for building. The price per square metre for building land is therefore considerably higher than for non-buildable areas. Due to the considerable importance of this question, the Federal Building Code contains special provisions on the valuation of land (sections 192 et seq. Federal Building Code).

The provisions on urban land-use planning as a fundamental instrument of urban development law are flanked by the requirements of Special Urban Development Law (▷ *Special Urban Development Law*), which contains provisions on urban regeneration or development

measures (sections 139 and/or 165 et seq. Federal Building Code) that serve to improve or redesign an area defined by a city or municipality. These measures have a significant impact on land use, for example by barring changes and disposals or facilitating compulsory purchase measures in the area concerned.

Other (not exhaustive) provisions of urban development law that affect land use concern the division of land (section 19 Federal Building Code), the reorganisation of land holdings (sections 45 et seq. Federal Building Code) and compulsory purchase (sections 85 et seq. Federal Building Code).

5 Nature conservation law

Restrictions on the use of land also result from nature conservation law (▷ *Nature conservation*). Pursuant to section 1 of the Federal Nature Conservation Act (*Bundesnaturschutzgesetz, BNatSchG*), this serves in particular to protect biological diversity, the effective functioning of the natural balance as well as the preservation of nature and the ▷ *Landscape*. This is achieved primarily through the designation of various categories of protected areas (e.g. nature conservation and landscape conservation areas) which are subject to considerable restrictions on how owned land can be used. In addition to the national conservation areas, there are areas designated under European law.

Even outside of designated conservation areas, the requirements of the ▷ *Impact mitigation regulation* under nature conservation law (section 14 et seq. Federal Nature Conservation Act) apply, according to which interventions in the natural balance are to be avoided as far as possible and, where they are unavoidable, are to be compensated (i.e. subject to a fee).

6 Soil conservation law

Another important aspect of land law is soil conservation law as regulated in the Federal Soil Protection Act (*Bundesbodenschutzgesetz, BBodSchG*). This law aims not so much to regulate the use of land and soil, but rather to protect the soil and its special functions as part of the earth's crust (section 1 Federal Soil Protection Act). First and foremost, the aim is to avoid harmful changes to the soil and to rectify damage that has already occurred. For this purpose, it is possible to impose demands not only on the party causing the contamination, but also on the owner of the contaminated area as far as investigations and hazard prevention are concerned.

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