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Planning law



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Planning law spans a broad and versatile spectrum of public tasks with diverse reciprocal impacts. The law fulfils guiding, content-defining, stabilising as well as controlling tasks, and planning serves development-oriented design, concretising and coordinating functions. To the extent that spatial plans contain normative regulations, they have a legally constitutive effect.

1 The interfaces between correlated public tasks

1.1 Public tasks assigned by statute

Planning law describes the regulatory framework shaped by public law as well as the structure of relationships and the interdependencies that exist between the public tasks of planning and the law (Schmidt-Aßmann 2004: 332, 2005: 784). In the range of tasks performed by the state, there are a number of plans that serve to pursue various kinds of public tasks, e.g. the financial and budget plans, the framework plans for the Joint Task for the ‘Improvement of Agricultural Structures and Coastal Protection’ as well as the planning coordination framework for the Joint Task for the ‘Improvement of Regional Economic Structures’. The structure of the underlying relationships encompassed by the term ‘planning law’ has so far mainly focused on the areas of responsibility of spatial planning law. However, the structure of these relationships has undergone a shift in emphasis as the dimension of environmental planning (▷ *Environmental planning*) has gained more weight as a result of legal developments in the field of environmental law and energy law (▷ *Energy policy*). In addition, specialised environmental planning, which pursues the task assigned by European law of specifying ecological concerns and requirements concerning environmental precautions, has become increasingly important in recent times. Their steering effects within spatial planning aimed at guiding the weighing of interests have been intensified in relation to comprehensive spatial planning and infrastructure planning (▷ *Spatially-relevant sectoral planning*) based on the requirements of European law in accordance with the specifications of various directives, e.g. the spatial requirements of Directive 2007/60/EC on the assessment and management of flood risks (▷ *Flood protection*), Directive 2008/50/EC on ambient air quality and cleaner air for Europe and Directive 2002/49/EC relating to the assessment and management of environmental noise (▷ *Air pollution control and noise abatement planning*).

What the various types of planning encompassed by the term ▷ *Spatial planning* have in common is that, unlike other forms of state planning, they do not merely focus on establishing binding parameters for how planners can act in future (Roellecke 1994: 1024) or on defining the decision-making premises for future decisions (Luhmann 1975: 67). Rather, in essence, spatial plans themselves fulfil legislative and legally constitutive functions or at least trigger legal consequences by the legal steering function assigned to them. The legal assignment of spatial planning tasks (▷ *Public space*) no longer takes place only at the state level, but increasingly also at the intergovernmental level and in the law of the ▷ *European Union*, where different types of European joint planning (Rung 2013) have emerged in the form of a networked European ecosystem which has developed on the basis of a division of specialised tasks, tiered programme planning in EU Structural Funds policy and a funding contribution to the development of trans-European networks (Spannowsky 2013a: 59).

1.2 Spatial planning between public responsibility and legal obligation

Spatial development planning (*Raumordnungsplanung*) (▷ *Spatial planning*) encompasses developing (▷ *Spatial development*), securing and ordering the overall space and individual spaces within it as a public task (section 1(1) of the Federal Spatial Planning Act [*Raumordnungsgesetz, ROG*]), while city planning covers steering the use of land for building and other purposes within a municipality for each plot (section 1(1) and (2) of the Federal Building Code [*Baugesetzbuch, BauGB*]). Therefore, the principle of planning consistency expressed therein and legally enshrined for spatial planning and urban development law (▷ *Spatial planning law*; ▷ *Building law*) correlates with the responsibility for comprehensive spatial planning (at the federal level for spatial development planning, cf. section 1(1) in conjunction with section 17(1) to (3) of the Federal Spatial Planning Act) and under certain circumstances also with planning obligations (with regard to the spatial planning of the federal states pursuant to section 8(1) sentence 1 and with regard to regional plans (*Regionalpläne*) pursuant to section 8(2) sentence 1 of the Federal Spatial Planning Act (▷ *Regional planning*) as well as with regard to the urban land-use plans (*Bauleitpläne*) pursuant to section 1(3) of the Federal Building Code (▷ *Urban land-use planning*)).

1.3 Tasks inherent in the legally designated specifying, coordinating and integrating functions of comprehensive spatial plans

Among the elements inherent in the legal designation of the tasks of spatial planning (*Raumordnung*) and urban land-use planning (*Bauleitplanung*) as comprehensive spatial plans is the progressive specification and consolidation of spatial planning statements related to development and land use – from a broad comprehensive level down to smaller spaces such as the municipality, more prominent sites and smaller plots – as well as planning statements relating to (specific) projects. This is supplemented by coordinating and integrating functions, which the comprehensive spatial plans must fulfil with regard to competing interests in terms of spatial development and land use. The capacity of the hierarchically-structured spatial planning system, which has been designed to have an integral, coordinating and sustainable character, to function properly presupposes that all planning authorities involved in comprehensive spatial planning perform the public task assigned to them in a functionally adequate manner in accordance with the norms of the respective tasks assigned to them by statute.

1.4 Potential friction between various types of spatial planning and the legal solutions

Potential incompatibility between various types and levels of spatial planning is avoided or resolved in a legally controlled manner: in the vertical hierarchical relationship between spatial planning (*Raumordnung*) and urban planning (*städtebauliche Planung*) according to the ▷ *Mutual feedback principle* (section 1(3) of the Federal Spatial Planning Act), in the relationship between city planning and sectoral planning with the legal effects of ▷ *Planning approval* based on regulatory conflict-of-law rules (sections 38 and 7 of the Federal Building Code), at the level of

regional planning (*Regionalplanung*) partly on the basis of differentiated priority determinations to establish an order of precedence (e.g. section 15(1) sentence 2 of the Grid Expansion Acceleration Act [*Netzausbaubeschleunigungsgesetz, NABEG*]) and partly guided by the required weighing of interests (section 16(2) sentence 1 of the Federal Highways Act [*Bundesfernstraßengesetz, FStrG*] and section 7(2) in conjunction with section 8(5) no. 3, para. 7 Federal Spatial Planning Act; ▷ *Weighing of interests*), in the horizontal relationships between the urban planning (*städtebauliche Planung*) of neighbouring municipalities based on the intermunicipal coordination rule (section 2(2) sentence 1 of the Federal Building Code) as well as in the relationship between comprehensive spatial plans and infrastructure planning on the one hand and environmental planning on the other hand, in principle based on the required weighing of interests (cf. section 1(6) no. 7g of the Federal Building Code and section 7(2) and section 8(5) no. 3 of the Federal Spatial Planning Act).

2 Law in the German spatial planning system

2.1 The legally established regulatory, organisational, procedural and control framework for spatial planning

As an administrative form of action, spatial planning is shaped by the regulatory function of administrative law. The assignment of tasks, the organisational framework and the framework of instruments and procedures are determined by law. Against the background of the protection of fundamental rights (Article 1(3) of the Basic Law [*Grundgesetz, GG*]) and given that all administrative action is bound by law and justice (Article 20(3) of the Basic Law), the law also establishes the scope of the binding nature and formative effect with regard to spatial plans, which themselves have a legal steering effect, and establishes the permissible content of the plans and legal planning limits as well as the control framework (▷ *Constitutional framework of spatial planning (Raumplanung)*).

In pursuit of environmental planning objectives, European law directly influences the procedural and substantive aspects of the spatial planning systems of member states in the form of standardisations and requirements regarding distances to be kept and actions to be taken, both through environmental planning and risk-preventing requirements (▷ *Risk management*) (Spannowsky 1998: 161; Jarass 1999: 661). European law also has an indirect effect in this regard, both within the framework of European Structural Fund policy (▷ *Regional economic policy*) in the pursuit of structural policy objectives with a regional, urban and project-related development perspective (such as funding for regional policy measures) as well as within the framework of the supervision of European state aid to pursue competition policy objectives.

2.2 The principle of planning consistency and statutory regulations for planning substitutions

To the extent that preliminary or final planning decisions which steer land use are required for the approval of projects, spatial development is based on tiered spatial planning, which is intended to control land use in a way that ensures that it is rational and situation-appropriate. When realising spatially significant plans or measures, such as infrastructure projects managed

by specialist planners or urban development projects, which are being pursued on the basis of urban development plans (*städtebauliche Pläne*), the principle of planning consistency must be ensured through the spatial compatibility of the measures and the avoidance of arbitrariness for a large number of individual decisions by public planners in a tiered planning system. Where this is the case, section 1(1) of the Federal Spatial Planning Act and section 1(1) and (2) of the Federal Building Code as well as the various sectoral planning laws applicable to projects requiring planning approval are based on the assumption that the principle of planning consistency applies (e.g. section 18 et seq. of the General Railway Act [*Allgemeines Eisenbahngesetz, AEG*]; section 8 of the Civil Aviation Act [*Luftverkehrsgesetz, LuftVG*]; section 14(1) of the Federal Waterways Act [*Bundeswasserstraßengesetz, WaStrG*]; section 17 of the Federal Highways Act; section 31(2) sentence 1 of the Circular Economy and Waste Management Act [*Kreislaufwirtschafts- und Abfallgesetz, KrW-/AbfG*]; section 11a of the Energy Industry Act [*Energiewirtschaftsgesetz, EnWG*]; section 20 of the Act on the Assessment of Environmental Impacts [*Gesetz über die Umweltverträglichkeitsprüfung, UVPG*] and other federal and state regulations). This means that the approval decision on such spatially significant projects is prepared by means of a planning decision and any conflicts in land use that arise are balanced out in the process.

Where the permissibility of projects (*> Permissibility of projects in building law*) can be assessed based on the existing situation for an indeterminate number of similar cases without the need for any refinement of the planning, the assessment of the permissibility of each project can deviate from the principle of planning consistency and be guided by differentiated statutory permissibility criteria that serve to effectively replace plans or are similar to plans and in which the assessment of permissibility is made dependent on certain legal requirements (cf. section 34(1) to (3) and section 35(1) to (4) of the Federal Building Code). Extensions of the scope of application of section 34 and section 35 of the Federal Building Code tend to lead to a deviation from the principle of planning consistency.

2.3 Mechanisms to achieve legal certainty

To ensure that the subsequent realisation of a plan is not already thwarted in the process of developing the plan, planning law provides for the following mechanisms to achieve legal certainty: spatial planning law offers an advance, limited binding effect through the objectives of spatial planning as concerns to be taken into account in the weighing of interests and the possibility of a prohibition of spatially significant planning and measures in accordance with section 14(2) sentence 1 of the Federal Spatial Planning Act (*> Prohibitions in spatial planning (Raumordnung)*); urban development law provides for a development freeze in section 14 of the Federal Building Code and a deferral of building applications pursuant to section 15 of the Federal Building Code (*> Realisation of plans in urban design*), while sectoral planning law provides for corresponding, specifically regulated prohibitions on changes (cf. for example section 9a of the Federal Highways Act; section 15 of the Federal Waterways Act and section 19 of the General Railway Act). In the case of formal urban regeneration redevelopment (*städtebauliche Sanierungsmaßnahme*) and urban development measures (*städtebauliche Entwicklungsmaßnahme*), no separate bye-laws within the meaning of section 14 of the Federal Building Code are required to achieve legal certainty. Rather, the legal effects are triggered by law in formally defined regeneration (*Sanierungsgebiet*) or development areas (*Entwicklungsgebiet*) (cf. section 144(1) no. 1 in conjunction with section 169(1) no. 3 of the Federal Building Code).

3 Spatial planning in the German legal system

3.1 Spatial plans and their legislative/legally constitutive functions and legal consequences

The legal character of the various plans in the field of spatial planning depends on whether and to what extent they are binding with regard to the definition of objectives, and whether and to what extent they have been legally designated the function of reshaping legal relationships that affect third parties or that have a multi-pole external impact.

In legal terms, spatial plans are administrative forms of action with the assigned task of shaping law with regard to specific spaces and situations in either preparatory or binding terms with steering effect for various purposes. As planning acts, they have a legally constitutive effect insofar as they define the nature and limits of property, reconcile conflicts of use and concretise social obligations and potentially imposing encumbrances on third parties.

In principle, sectoral environmental planning (*Umweltfachplanung*) that serves to substantiate environmental precautions and protection obligations incumbent on the state is only reflected in the subsequent formal planning as concerns that are to be taken into account in the weighing of interests, each with a different weight (cf. section 1(6) no. 7b and g of the Federal Building Code as well as section 7(2) and section 9(4) of the Federal Spatial Planning Act). An exception is flood protection planning (*Hochwasserschutzplanung*), which, in combination with the designation of a flood area, triggers the far-reaching legal consequence of a limited ban on planning and construction subject to obtaining permission under water law (cf. section 78 of the Federal Water Act [*Wasserhaushaltsgesetz, WHG*]). For infrastructure plans for which a planning approval procedure (*Planfeststellungsverfahren*) or planning approval (*Plangenehmigung*) is provided for in accordance with the procedural requirements of sections 73 et seq. of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz, VwVfG*) or relevant sectoral laws (cf. e.g. section 17 of the Federal Highways Act; sections 18 et seq. of the General Railway Act; sections 11a of the Energy Industry Act; section 8 of the Civil Aviation Act; section 31(2) sentence 1 of the Circular Economy and Waste Management Act; section 14(1) of the Federal Waterways Act; section 20 of the Act on the Assessment of Environmental Impacts and similar federal and state regulations), this is provided for in the legal form of an administrative act tailored for the assessment of individual cases because it concerns the planning of spatially significant individual projects. On the other hand, binding land-use plans (*Bebauungspläne*) (> *Binding land-use plan*) and urban development bye-laws (*städtebauliche Satzungen*) take effect as legal planning norms, because these plans determine the framework for assessing the permissibility of a large number of cases. Spatial development plans (*Raumordnungspläne*) have the character of legal norms in the form of spatial planning objectives (*Ziele der Raumordnung*), regardless of whether they have a formally designated normative character (Federal Administrative Court [*Bundesverfassungsgericht, BVerwG*], judgment of 20 November 2003, case no. 4 CN 6.03, *BVerwGE* [Official Reports of the Federal Administrative Court] 119, 217 et seq.). Although spatial development plans (*Raumordnungspläne*) in principle have a direct binding effect only as far as plans affecting spatial structures are concerned, this follows from the fact that, insofar as they relate to preliminary decisions regarding various possibilities for the use of the spatial structure, they indirectly affect the urban development plans

via spatial planning clauses (*Raumordnungsklauseln*) (cf. section 35(3) sentence 3 of the Federal Building Code) or ownership via the urban development plans preceding the project approval decisions or via infrastructure plans requiring planning approval or another type of permission. Concerning the normative legal effect within the scope of section 35(3) sentence 3 of the Federal Building Code, this also applies to preparatory land-use plans (▷ *Preparatory land-use plan*).

The legal protection against spatial planning depends on the legal nature of the respective plans (▷ *Legal remedies in planning*).

3.2 Planning norms and their normative control function

Where plans contain normative specifications, the legal and planning control functions coincide in the outcome of the legally guided planning process, a legally constitutive plan. Any planning measure cast in the form of a legal norm establishes a normative claim to observance with regard to compliance with the binding stipulations or determinations. In this case, the concretisation, coordination, design, flexibility and situational differentiation functions allocated to planning merge with the normative function of the law to steer, determine the content of and stabilise planning standards. However, planning standards are limited in their claim to validity and in their steering and binding effect compared to legal norms. In the hierarchically-structured spatial planning system which is designed to have capacity for differentiation (Federal Administrative Court [*Bundesverfassungsgericht, BVerwG*], judgment of 20 August 1992, case no. 4 NB 20.91, *BVerwGE* 90, 329 et seq.), conformity is not required as it is in the relationship between legal norms. Instead, requirements to develop (cf. section 8(2) sentence 1 of the Federal Spatial Planning Act and section 8(2) sentence 1 of the Federal Building Code) or adaptation obligations (section 1(4) of the Federal Building Code) ensure the compatibility of plans with plans at a higher level. The conflict between consistency and flexibility that may occur in planning that is legally constitutive (Breuer 1976: 189; Spannowsky 1996: 1022), and between reliability that continues to hold in the future and the need to consider changes in real circumstances, is taken into account through both greater revisability and through flexibility mechanisms established by law (Schmidt-Aßmann 1995: 17). Thus, concerning planning norms of higher-level planning, compatibility requirements (cf. section 1(4) of the Federal Building Code) replace conformity requirements that determine the relationship between higher-ranking law and subordinate law (Lebreton 1991: 491). In addition, the legislature grants planning flexibility and scope for change to a greater extent (see the procedural simplifications in the case of plan changes in accordance with sections 13, 13a of the Federal Building Code and the approval of limited deviation possibilities in accordance with sections 21, 6(2) of the Federal Spatial Planning Act and corresponding state spatial planning acts as well as in accordance with section 31 of the Federal Building Code).

3.3 Spatial planning processes within the legal framework

Depending on the extent to which the plans have constitutive legal effect, the more or less intensive participation of the public and public authorities (▷ *Public participation*) is required during the planning processes (cf. with regard to urban land-use planning (Bauleitplanung) pursuant to sections 3 to 4a of the Federal Building Code, with regard to spatial development planning (*Raumordnungsplanung*) pursuant to sections 10, 11 of the Federal Spatial Planning Act, with regard to sectoral plans requiring planning approval (*planfeststellungsbedürftige*

Fachpläne) pursuant to section 73 of the Administrative Procedure Act in conjunction with the corresponding sectoral special provisions and the corresponding provisions regarding various forms of sectoral environmental planning (*Umweltfachplanungen*), e.g. section 46a, 51 of the Federal Immission Control Act [*Bundes-Immissionsschutzgesetz, BImSchG*]). The planning processes for comprehensive spatial planning and sectoral plans requiring planning approval (*planfeststellungsbedürftige Fachpläne*) ensure the procedural protection of fundamental rights (Schmidt-Preuß 1992: 37 et seq.) and that planning proceeds in accordance with the rule of law (cf. Erbguth 2005: 241, 2010: 1 et seq.).

3.4 Plan justification and weighing of interests – interfaces between planning and the law

In addition to the requirement that plans must be justified, the required weighing of interests plays a central role in the context of judicial review and with regard to the validity of the plans, especially due to the associated norms of action that regulate the process for the weighing of interests, and the control norms that serve to ensure that the relevant legal limits are observed. The required weighing of interests itself is guided by planning objectives, planning guidelines, planning principles and optimisation requirements as well as the statutory allocation of functions and weighting specifications (for the required weighing of interests, cf. Hoppe 2010: section 7). The weighing of interests is the core element of legally compliant planning; moreover, it influences the content and outcome of the planning (cf. Spannowsky 2006: 89 et seq.; Söfker 2010: 53 et seq.) and therefore is at the interface between planning and the law.

3.5 Plan justification and the significance of the weighing of interests of informal planning

Informal plans (*informelle Pläne*) differ from the binding legal norms, which themselves have a legally binding steering effect. Informal plans (> *Informal planning*) are not subject to the constraints of a normatively regulated procedural framework. However, they require justification by a public purpose and, under certain conditions, can become significant for the weighing of interests for subsequent planning and may influence their scope. If informal planning is to generate legally binding effects, these effects only arise under certain conditions regulated by law. According to section 26 of the Federal Spatial Planning Act, guiding principles adopted by the Conference of Ministers for Spatial Planning (*Ministerkonferenz für Raumordnung, MKRO*) only have legal effects if these strategic-programmatic and cooperatively generated plan statements are either reflected in subsequent formal spatial development plans (*Raumordnungspläne*) of the Federal Government and the federal states or are taken into account in the implementation of spatially-relevant measures, especially since they are not even among the other requirements of spatial planning to be taken into account in the weighing of interests (cf. section 3(1) no. 1 in conjunction with section 4(1) sentence 1 of the Federal Spatial Planning Act). In subsequent city planning, on the other hand, informal plans pursuant to section 1(6) no. 11 of the Federal Building Code must be taken into account in the weighing of interests once the municipal council has decided on the results. This means that, if ignored, informal city planning (*informelle städtebauliche Planungen*) can lead to deficiencies in the weighing of interests and call into question the conclusiveness of the overall planning strategy. Such informal plans can therefore acquire indirect significance in the context of a legal review (Uechtritz 2010: 69 et seq.).

3.6 Planning errors and their consequences in the legal remedy system

The statutory system for addressing the consequences of errors (▷ *Planning error*) distinguishes between breaches of law that conflict with the planning, between significant and insignificant procedural errors, curable breaches of law concerning the process for the weighing of interests and incurable breaches of law affecting the outcome of the weighing of interests (cf. sections 214, 215 of the Federal Building Code and section 12 of the Federal Spatial Planning Act). This system aims to balance any tension between the review of the legality of plans and the need for legal certainty, and to limit reviews by the administrative courts. However, in practice, it leads to a ramified system of legal reviews and complex legal remedy processes in the administrative courts and constitutional courts. This takes into account the various demands for legal remedies that result from the guaranteed protection of subjective and public interests. In addition to the avenues available to pursue legal remedies to protect the fundamental rights of private individuals (owners and third parties) and to municipalities affected by the planning as holders of the constitutionally guaranteed right of ▷ *Local self-government* as well as other sovereign bodies (the federal government and the federal states), the avenues available to environmental organisations to pursue legal remedies have become increasingly important in recent years based on the extended legal protection provided under EU law.

4 The realisation of plans

Planning law in the broader sense relates not only to the structuring of the public debate but the procedural, regulating, controlling, steering and regulatory functions associated with the preparation of plans in the various reciprocal impacts between planning and the law. Since planning is designed to focus on the ultimate realisation of the plans, it is also oriented toward the interfaces that arise between planning and the law concerning the realisation of plans in urban design. These include above all development strategies and contractual arrangements according to section 13 of the Federal Spatial Planning Act (▷ *Spatial planning contract (Raumordnerischer Vertrag)*), urban development contracts (*städtebauliche Verträge*) within the meaning of section 11 of the Federal Building Code (▷ *Urban development contract*), land assembly (*Umlegung*) according to sections 45 et seq. of the Federal Building Code (▷ *Land law*), the ▷ *Provision of local public infrastructure (Erschließung)* according to sections 123 et seq. of the Federal Building Code, the urban development requirements according to sections 175 et seq. and compulsory purchase pursuant to section 85 et seq. Furthermore, in the comprehensive urban development measures (*städtebauliche Gesamtmaßnahmen*) of formal urban regeneration activities (*städtebauliche Sanierungsmaßnahmen*) according to sections 136 et seq. of the Federal Building Code and the urban development measures (*städtebauliche Entwicklungsmaßnahmen*) according to sections 165 et seq. of the Federal Building Code (▷ *Special Urban Development Law [Besonderes Städtebaurecht]*), all functions of planning in the broader sense as well as the full spectrum of significant steering instruments are interlinked. These instruments range from a normative framework for a given area to bye-laws through to the informal process of determining objectives, the drawing up of binding urban development plans, the triggering of legal certainty functions

through to realisation measures, such as those for land reallocation and the provision of local public infrastructure, as well as tasks in connection with the financing of such comprehensive urban development measures (Spannowsky 2013b: 754).

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