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EUROPÄISCHE UNION



17	Public building law	4
17.1	Introduction to public building law.....	4
17.2	Permissibility in terms of planning law	6
17.2.1	Planned inner zone, unplanned inner zone, outer zone.....	6
17.2.2	Delineation of inner and outer zones	7
17.2.3	Preparatory land-use plan	9
17.2.4	The situation of the former pig fattening facility with regard to planning law.....	9
17.3	Proposals within the territory covered by a land-use plan.....	10
17.3.1	Inspection of land-use plans.....	10
17.3.2	Components of a land-use plan.....	11
17.3.3	Type of building and land use.....	11
17.3.4	Degree of building and land use, plus areas that can be built on...13	
17.3.5	Stipulations that have environmental objectives.....	14
17.3.6	Consideration of adjacent uses.....	14
17.3.7	Infrastructure.....	16
17.3.8	What should be done if the proposal contravenes the stipulations of the land-use plan?	17
17.3.9	Exemptions from the stipulations of a land-use plan.....	18
17.4	Preconditions for approval in accordance with building regulations law..19	
17.5	Proposals within the unplanned inner zone	20
17.5.1	Surrounding development.....	21
17.5.2	Permissibility according to one of the land-use areas in the Federal Land Use Ordinance / blending in with the surrounding development	22
17.6	Proposals within the outer zone	25
17.6.1	The framework provided by Section 35 FBC.....	25
17.6.2	Preferential proposals.....	26
17.6.3	Other proposals within the outer zone	28
17.7	Preparation of – and alterations to – a land-use plan during an approval procedure in order to prevent a proposal	28
17.8	The procedure when preparing a land-use plan	29
17.8.1	The resolution to prepare a land-use plan.....	30
17.8.2	Timely public consultation.....	30
17.8.3	Consultation with bodies that represent public interests.....	30
17.8.4	Public display of the draft plan	31
17.8.5	Repeated public display and participation of the relevant authorities and agencies	32
17.8.6	Enactment as a statute.....	32
17.8.7	Approval procedure	32
17.8.8	When the land-use plan comes into force.....	33

17.8.9	Special features of the simplified and fast-track procedures	33
17.9	Regional planning	34
17.10	Environmental impact	35
17.11	Weighing up	36
17.11.1	Prohibition of prior commitment	37
17.11.2	Gathering of all the interests and concerns that are relevant to the weighing-up process	37
17.11.3	Requirements to resolve conflicts and demonstrate planning restraint	38
17.11.4	Evaluation and weighing-up process	38
17.12	Building permit and Federal Immission Control Act procedures: preliminary considerations from the standpoint of procedural law; types of procedure	40
17.12.1	Building permit procedure or Federal Immission Control Act procedure	41
17.12.2	Proposals that are exempted from approval procedures	42
17.12.3	Exemption from approval plus simplified building permit procedures	43
17.12.4	Changes of use	43
17.12.5	Procedures with and without public consultation	44
17.12.6	New approval, approval of alterations, notification	44
17.12.7	Outline planning permission	45
17.12.8	Partial permits	45
17.12.9	Authorisation of premature commencement	45
17.13	Building permit procedure	46
17.13.1	Scope of the assessment	46
17.13.2	Consultation with other authorities, the local municipality, and neighbours	47
17.13.3	Assumption that approval has been granted	48
17.13.4	Suspensive effect	48
17.13.5	Building without a permit	49
17.13.6	Expiry of building permits	49
17.14	Federal Immission Control Act procedure	50
17.14.1	Scope of the assessment	50
17.14.2	The course of the procedure	51
17.14.3	Suspensive effect	53
17.14.4	Construction and operation of a FICA facility without approval	54
17.15	Legal redress	54
17.15.1	The correct legal remedy	55

17.15.2	Time limits	56
17.15.3	Preclusion.....	56
17.15.4	Legal redress against approval.....	57
17.15.5	Legal redress for the applicant.....	60
17.15.6	Special features of proposals that are exempted from approval	62
17.15.7	What happens during objection and legal proceedings.....	62
17.15.8	Expedited proceedings	63
17.16	Alterations to the application for approval	65
17.16.1	Alterations during the administrative procedure.....	65
17.16.2	Alterations during legal proceedings	66
17.17	Judicial review proceedings.....	67

17 Public building law

17.1 Introduction to public building law

“Any architect who undertakes to draw up a strategy whose purpose is to obtain planning permission is contractually obliged – as an outcome – to produce a plan which will always be likely to receive approval.”¹ They might otherwise be liable to pay compensation for any subsequent loss or damage. Public building law is therefore a vital tool in the hands of architects and engineers.

Subject

The legal relationships between the state (and the building authorities in particular) on the one hand and builders/developers and/or the relevant landowners on the other form the subject of public building law, whereas private building law regulates the legal relationships between the parties involved in the given construction project (client, contractor, subcontractor, architect, specialist engineer, etc.).

Amongst other things, public building law answers the question of whether a construction scheme is permitted on a specific piece of land. The assessment of permissibility is divided into three large sub-areas: planning law, building regulations law, and other specialist legislation in public law (e.g. nature conservation, immission control).

*Construction
planning law*

Amongst other things, planning law regulates:

- whether a physical structure is actually permissible / what type of use is allowed (type of building and land use)
- the permissible scale/magnitude of a structure, its permissible location on the construction site (degree of building and land use, areas that can be built on)
- the preparation and content of land-use plans
- reallocation and expropriation
- the law relating to charges made to offset the development of public infrastructure
- special urban planning law (e.g. redevelopment law).

Planning law is regulated in the Federal Building Code (*Baugesetzbuch*) [2], which was comprehensively revised via the 1998 Construction and Regional Planning Act (*Bau- und Raumordnungsgesetz*), which is why older literature and case law cannot automatically be used in every instance. Further amendments to the Federal Building Code (FBC) include the 2004 European Law Adaptation Act for the Construction Sector (*Europarechtsanpassungsgesetz Bau*), the 2007 Act to Facilitate Planning Proposals for Inner Urban Development (*Gesetz zur Erleichterung von Planungsvorhaben für die Innenentwicklung der Städte*), the 2011 amendment whose purpose was to reinforce climate protection, and most recently the 2013 Act to Promote Development in the Centres of Towns and Municipalities and Further Develop Urban Planning Law (*Gesetz zur Stärkung der Innenentwicklung in den Städten und Gemeinden und weiteren Fortentwicklung des Städtebaurechts*). In addition to the FBC, the Federal Land Use

¹ Federal Court of Justice, judgement dated 26.9.2002, VII ZR 290/01

Ordinance (*Baunutzungsverordnung*) [3] is important in terms of planning law: amongst other things, it contains regulations concerning the various land-use areas, areas of land that can be built on, the degree of building and land use, and the method of construction.

Amongst other things, building regulations law contains provisions relating to the approval procedure as well as technical and design-related building regulations. Unlike planning law, building regulations law is enacted by the federal states (*Länder*), and each federal state duly has its own State Building Code. However, the latter is based on a model building code that was approved by the relevant Ministerial Conference, so its principal features are identical in every federal state. However, there are some differences in the detail, and they are relevant in practice. For example, they concern the various approval procedures and the regulation of distances between buildings.

*Building
Regulations
Law*

From the perspective of planning law, federal state planning legislation as well as the regional/ federal state development plans that are based on it are ultimately important for any project that is of regional significance, since these provisions to some extent determine the locations for projects of regional importance and simultaneously rule out other sites. Designations of sites for wind energy plants in regional plans² as well as the management of large-scale retail development by means of regional planning³ are the subject of numerous legal rulings.

There is no shortage of literature or compilations of legal judgements relating to public building law, and the following is merely a selection: [24], [30], [16], [14], [18], [1], [15], [25]. For example, the most important judgements are reproduced in the magazines *Baurecht* and *Zeitschrift für Baurecht* as well as in the *Neue Zeitschrift für Verwaltungsrecht* and/or the *NVwZ-Rechtsprechungsreport*. Moreover, a compilation of the most important judgements appears annually as an omnibus volume in the *Baurechtsammlung*. In practice, the most widespread commentaries are those by Battis/Krautzberger/Löhr (regarding the Federal Building Code) and Fickert/Fiesseler (regarding the Federal Land Use Ordinance).

*Further
literature*

Example

There is a plan to convert a former pig fattening facility into a fattening facility for chickens; its use for pigs came to an end shortly after the fall of the Berlin Wall. The facility was then empty for a while, and was used for the interim storage and sorting of waste materials. When the company running it became insolvent, the land was purchased by the *Goldene Flur* agricultural cooperative, which wants to establish and operate the chicken fattening facility. The cooperative also farms areas of arable land, some of which it owns itself while the remainder is on a long-term lease. The areas are big enough to grow the feed that is required for the planned facility.

² One spectacular case in Thuringia concerns the construction of several wind energy plants within sight of the Wartburg; they would have been permissible in accordance with the relevant regional planning policy. Nevertheless, the local municipality had raised an objection, and the Administrative Court in Meiningen ordered that work should be suspended (Administrative Court in Meiningen, ruling dated 25.1.2006, 5 E 386/05 Me).

³ cf. the decision of the Higher Administrative Court in Koblenz (judgement dated 15.11.2010, 1 C 10320/09.OV) concerning the permissibility of a factory outlet centre with a retail area of 10,000m² in the vicinity of the ICE railway station at Montabaur.

The site of the old fattening facility has an area of 40,000m², and lies to the north of the nearest settlement; there is a railway line in between. To the east, at a distance of a few hundred metres, are some residential properties (see *Fig. 17.1*). There is no land-use plan for the former fattening facility, although there is for the piece of land that lies to the west of it, which likewise belongs to the agricultural cooperative.

Figure 17.1: Location of the chicken fattening facility

17.2 Permissibility in terms of planning law

If a new project is being planned, the first question is whether this kind of proposal can actually be built – and used – on the respective plot of land. In other words: is the project permissible in terms of planning law? Permissibility in terms of planning law essentially regulates the following issues:

- Whether one is actually allowed to build
- What use is permissible
- What the physical structure can/must look like

With regard to the third point, planning law principally regulates the exterior design (height, number of floors/storeys, footprint, etc.), whereas the structural engineering requirements are primarily derived from the respective State Building Code and the relevant guidelines. Based on the State Building Code, municipalities can also issue design-related directives for physical structures. Particularly in the case of commercial and industrial facilities, additional requirements stem from provisions laid down in environmental and employment protection legislation. If a land-use plan has been drawn up, it often contains very detailed specifications which must be observed by planners and developers.

Permissibility in terms of planning law is regulated in Section 29 ff. Federal Building Code, and the Federal Land Use Ordinance also has an important role to play. Regional plans (whose designation can vary slightly from state to state) are particularly important when it comes to proposals in outer zones as well as large-scale projects, i.e. ones that are relevant in terms of regional planning.

17.2.1 Planned inner zone, unplanned inner zone, outer zone

The location of the plot of land is crucial for assessments made under planning law. The Federal Building Code (FBC) recognises three planning law categories to which each plot of land can be allocated:

- Planned inner zones, i.e. areas covered by legally binding land-use plans (Section 30 FBC).
- Unplanned inner zones (Section 34 FBC)
- (Undesignated) outer zones (Section 35 FBC)

It is relatively easy to determine whether a building plot lies within an area covered by a legally binding land-use plan, because the boundaries originate from the land-use plan