ARL ACADEMY FOR TERRITORIAL DEVELOPMENT IN THE LEIBNIZ ASSOCIATION

Gerd Schmidt-Eichstaedt

Urban land-use planning

URN: 0156-559913639

This is a translation of the following entry:

Schmidt-Eichstaedt, Gerd (2018): Bauleitplanung. In: ARL – Akademie für Raumforschung und Landesplanung (Hrsg.): Handwörterbuch der Stadt- und Raumentwicklung. Hannover, 139-160.

The original version can be accessed here:
urn:nbn:de:0156-55991363

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

Recommended citation:
Schmidt-Eichstaedt, Gerd (2018): Urban land-use planning.
https://nbn-resolving.org/urn:nbn:de:0156-559913639

Leibniz Association

Gerd Schmidt-Eichstaedt

Urban land-use planning

Contents

The term 'urban land-use planning' is defined in the Federal Building Code *(Baugesetzbuch, BauGB)*. It includes preliminary urban land-use planning by means of preparatory land-use plans and final, binding planning through binding land-use plans. Together, both types of plan serve to prepare and steer the built use within each municipality. They are adopted by the local councillors or town council in accordance with a procedure prescribed by the Federal Building Code. Both landowners and the building permission authorities are bound by the binding land-use plan, which is adopted as a bye-law. The preparatory land-use plan only has effect within the local authority; binding land-use plans must be developed from the preparatory land-use plan.

1 Concept, functions and demarcation to other planning

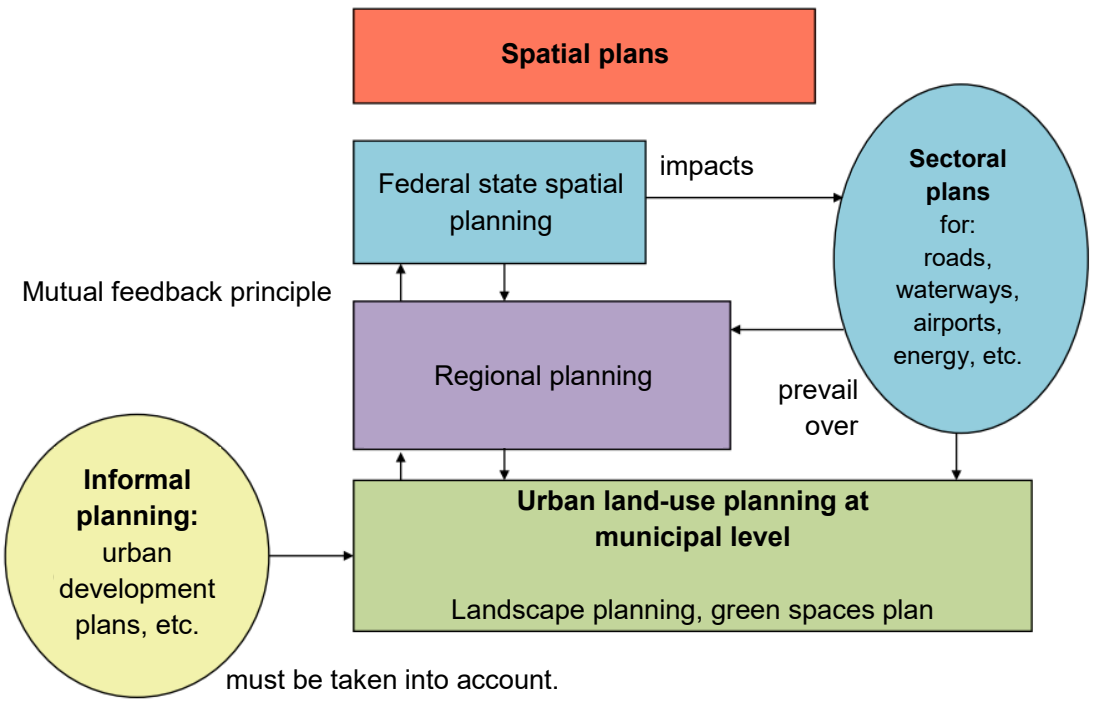
The term 'urban land-use planning' comes from the Federal Building Code, the fundamental law for spatial planning at the level of cities and local authorities in Germany. Sections 1(1) and (2) read: 'The objective of urban land-use planning is to establish and guide the use, including built use, of the sites within the municipal for building and other purposes in accordance with this Act. Urban land-use plans comprise the preparatory land-use plan (preliminary urban land-use plan – *F-Plan*) and the binding land-use plan *(B-Plan).*' The following questions can and must be answered (selected and enumerated by way of example) by urban land-use planning based on a fair ▷ *Weighing of interests* of potentially conflicting interests:

- How should an area be used (for building purposes or non-building purposes)? For ▷ *Housing development*? As an industrial area? As a city park? Or continued use as agricultural land? Is there a risk of flooding?
- Which limits on use are required according to the type and size of the site? For example: How high are buildings allowed to be built? Should mobile phone masts be allowed in residential areas? How far should commercial businesses be from ▷ *Housing*? Should amusement arcades be allowed?
- How are traffic flows managed? For example: How wide should the roads in the specific land-use area be? Where are vehicular entry and exit points permitted? Is a traffic-calmed zone justified? Where is a parking space required?
- How are the impacts compensated which are prepared in the urban land-use plan? For example: Where can trees and shrubs be planted in a specific land-use area? What external compensatory measures are offered? How can they be secured?
- When can building work begin? Who is responsible for the ▷ *Provision of local public infrastructure*? Who is to assume responsibility for associated facilities such as kindergartens, schools, or new traffic lights?

Urban land-use planning must be 'upwardly' consistent with the higher-level spatial development plans of the federal state concerned (▷ *Regional planning*) and adapted to the spatially relevant sectoral planning (▷ *Spatially-relevant sectoral planning*), e.g. the planning of trunk roads, railways, waterways, the routing of energy lines, each requiring its own respective ▷ *Planning approval* (see Fig. 1). At the 'lower' level, the planning of built use continues with building planning, which is submitted in the form of building permission documentation to the building permission authorities or building supervision authorities by an architect licensed to submit such building applications. The urban land-use plans – which embody the urban land-use planning concept – are prepared in a procedure prescribed by the Federal Building Code and ultimately adopted by the responsible local councillors in the form of master plans. They usually consist of a large-format signed record of the adopted plan *(Planurkunde)* (plan drawing) with a legend, representations in text form *(F-Plan)* or stipulations in text form *(B-Plan)* and the justification with an environmental report. The urban planners (protected professional designation) and spatial planners (designation for spatial planning, particularly in Austria and Switzerland) are experts in drawing up urban land-use plans. In the Federal Republic of Germany, there are specific degree programmes (urban and regional planning, spatial and environmental

planning). In terms of content, urban land-use planning is complemented by urban development plans (▷ *Urban development planning*). These are not regulated by law and the plan preparation procedure and contents are thus freer than the urban land-use plans envisaged in the Federal Building Code with applicable procedural rules and specifications for the content. ▷ *Landscape planning* is an important complement of urban land-use planning.

Figure 1: Planning types and planning stages



Source: The authors

2 History

Urban land-use planning, as a standard task of local authorities, is relatively young (▷ *History of urban planning*). Preparatory land-use plans (▷ *Preparatory land-use plan*) as provisional sets of plans for an entire local authority have only existed in Germany since the 'economic plans' of the Act on the Development of Residential Settlements *(Gesetz über die Aufschließung von Wohnsiedlungsgebieten*, *WSG)* of 22 September 1933, developed from the preparations for a Reich Urban Design Act *(Reichsstädtebaugesetz)*. The precursors of binding land-use plans (▷ *Binding land-use plan*) are the building line plans according to the Baden Building Line Act *(Badisches Fluchtliniengesetz)* of 1868 and the Prussian Building Line Act *(Preussisches Fluchtliniengesetz)* of 1875. The responsibility for organising land use across the entire municipal territory with a special focus on built use only arose with the urban expansions and population growth of the 19th century; it was initially understood to be a responsibility of the police. Previously (and still

today), building regulations existed not only as a set of rules for buildings, but also to establish an urban planning and development regime. Tanneries were allowed only on the river; gaps between buildings within cities constricted by walls and ramparts had to be built up. In addition, preparatory land-use plans or land allocation plans in a general sense existed already, especially for agriculture and forestry, and binding land-use plans for cities and fortresses – but no urban land-use planning at the local level as an integrated responsibility as yet. This was only able to develop together with ▷ *Local self-government* as urban land-use planning is a genuine municipal responsibility. It is part of the core of local self-government, and as a matter of principle must not be taken away from local authorities.

3 Urban land-use planning processes

The procedures for urban land-use planning are regulated in detail by the Federal Building Code (see Fig. 2). It is characterised by efforts to publicly debate and discuss the planning objectives and to obtain a complete clarification of facts and interests, followed by a weighing of interests among and against each other. The process ends with a decision on the plan made by the elected municipal body, which has discretionary planning power in the sense of freedom to decide between the available, legitimate planning variants. Prior to the recast Federal Building Code in 1998, all urban land-use plans had to be submitted to an approval authority (the county administration *(Landratsamt)*, the district authority *(Regierungspräsidium)* or state ministry *(Landesministerium)*) after their adoption by the local authority. Since 1998, only preparatory land-use plans and binding land-use plans that have not been developed from the preparatory land-use plan are subject to approval. All urban land-use plans are subject to judicial scrutiny.

The following section explains the individual steps of the process.

3.1 Plan preparation decision

The plan preparation decision is the formal launch of the process, although usually considerations of the planning strategy will have been going on for some time already. Yet the order and its official announcement are a prerequisite for a freeze on development if inappropriate building and other measures during the plan preparation procedure need to be prevented. Moreover, no building permits may be granted based on a binding land-use plan being effective pursuant to section 33 of the Federal Building Code without an officially published plan preparation decision. An binding land-use plan is considered effective if

- the ▷ *Participation* process involving the public and the authorities has been completed,
- it can be expected that the draft plan will be approved by the local councillors,
- the building applicant in turn has recognised the plan as legally binding on themselves and their legal successors,
- the provision of local public infrastructure is secured.

Figure 2: Urban land-use planning processes in accordance with the Federal Building Code

Step	Description	Legal basis in the Federal Building Code
1	Preparation order	Section 2(1) [1]The local authority is responsible for preparing urban land-use plans. [2]**The decision to draw up an urban land-use plan** must be officially notified in the locally customary manner.
2	Early participation of the public and of authorities and other public agencies	Section 3 (1) [1]The **public** shall be informed as early as possible of the general objectives and purposes of planning, of substantially different solutions that may be considered as alternatives for the redesign or development of an area and of the likely effects of the planning; the public shall be given the opportunity for comments and discussion. Section 4(1) [1]The **authorities and other public agencies**, whose remit may be affected by the planning, must be informed in accordance with section 3(1) sentence 1, subsentence 1 and invited to comment, including with regard to the required scope and level of detail of the environmental assessment pursuant to section 2(4).
3	Environmental assessment	Section 2(4) [1]To accommodate environmental protection concerns pursuant to section 1(6) no. 7 and section 1a, an **environmental assessment** is undertaken in which the expected significant environmental impacts are identified, described and evaluated in an **environmental report**; Annex 1 to this Code shall apply. [2]To this end, for each urban land-use plan the local authority shall stipulate to what extent and what level of detail the determination of interests is required for the weighing of interests. [3]The environmental assessment covers that which can be reasonably required in the light of current knowledge and generally accepted testing methods, as well as according to the content and level of detail of the urban land-use plan. [4]The result of the environmental assessment must be taken into account in the weighing of interests.
4	Public display of the draft plan with justification	Section 3(2) [1]The **drafts of the urban land-use plans** must be displayed publicly for a period of one month together with the justification and the available environment-related comments deemed to be essential by the local authority. [2]The place and duration of the public display, as well as information on the types of environmental information available, shall be officially announced in the locally customary manner at least one week in advance.

Step	Description	Legal basis in the Federal Building Code
5	Formal participation of the authorities and other public agencies	Section 4(2) [1]The local authority affords **the public authorities** and other public agencies whose remit may be affected by the planning the **opportunity to comment** on the draft plan and plan justification. [2]Their comments must be submitted within one month.
6	Weighing of interests	Section 1(7) When preparing the urban land-use plans, the public and private interests must be **fairly weighed** against and among each other.
7	Decision-making	Section 10(1) The local authority adopts the binding land-use plan as a bye-law. (The preparatory land-use plan is passed by means of a resolution).
8	Approval, promulgation, entry into effect	Section 10(2) [1]Binding land-use plans pursuant to section 8(2) sentence 2, section 8(3) sentence 2, and section 8(4) require the **approval** of the higher administrative authority. … (3) [1]The granting of the approval or – in the absence of a need for approval – the resolution adopting the binding land-use plan by the local authority must be announced **in the locally customary manner**. [2]The binding land-use plan, together with its justification and the summary explanation pursuant to subsection (4), must be made available for inspection by the general public; information about its contents shall be provided upon request. … [4]**The final land-use plan takes effect** upon publication.

Source: The authors

3.2 Early participation

The public announcement of the plan preparation decision, prescribed in section 2(1) sentence 2 of the Federal Building Code, is usually combined with the announcement of the nature, form and dates for the early participation of the public pursuant to section 3(1) of the Federal Building Code. Participation takes place through the public display of preliminary drafts (or even more advanced drafts, although this is not really the purpose of early participation), through information events, through discussions on the internet, etc.

Parallel to the early participation of the public, the early participation of the authorities and other public agencies takes place pursuant to section 4(1) of the Federal Building Code. This also includes determining the envisaged scope and level of detail of the investigations required for the ▷ *Environmental assessment* ('scoping'). The necessary surveys and investigations must then be carried out in good time to ensure that the environmental report can be displayed publicly together with the draft plan.

3.3 Environmental assessment

The obligation to draw up an environmental report as part of the plan preparation procedure for the urban land-use plan is laid down in European law (Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (EIA Directive) and amending Directive 97/11/EC). The environmental assessment of the plan (Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment – also known as a Strategic Environmental Assessment) serves to ensure that projects which are in turn subject to an Environmental Impact Assessment (EIA) developed afterwards from the plan and authorised on its basis have not already been defined in advance in essential general terms without such an environmental assessment having taken place, for example when choosing the site. The environmental report is a separate component of the justification of an urban land-use plan. An urban land-use plan, which is prepared in the vicinity or even within areas of the Natura 2000 system protected under European law, must also undergo an ▷ *FFH assessment of implications* (Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [Habitats Directive]). The assessment of implications serves to determine if the execution of the plan will lead to significant impairment of the area (FFH area, bird sanctuary) (▷ *Conservation areas under nature conservation law*; ▷ *Conservation areas under water law*).

3.4 Public display

If the plan has progressed to the draft stage, it must be publicly displayed for a period of one month. Any environment-related comments already available must also be displayed if they are deemed essential by the local authority. In the official announcement of the upcoming public display of the plan, the local authority must outline in key terms which types of environmental information are available in relation to the plan. This also applies to information that is not to be publicly displayed (*BVerwG* [Federal Administrative Court], judgment of 18 July 2013, 4 CN 3.12, *ZfBR [Zeitschrift für deutsches und internationales Bau- und Vergaberecht]* 2013, 675-678). The public display of the plan and its announcement is subject to strict formal requirements. The announcement must be suitable for reaching citizens, it must have an 'incentivising effect' by clearly informing the public of the area which is being planned. The draft plan must always be publicly displayed in its most recent version. This often leads to several consecutive public displays.

3.5 Formal participation of public authorities

The formal participation of public authorities and other public agencies (including neighbouring local authorities) takes place in parallel with the public display, and often even before. This serves to gather the expertise of the authorities. The list of addressees generally includes 30 to 60 authorities – from those responsible for the conservation of historical buildings and monuments, the police, environmental protection authorities, forestry and fisheries authorities, the Chamber of Trades, the Chamber of Industry and Commerce, etc. Comments from the authorities often lead to the plan, or at least its justification and the environmental report, being supplemented.

3.6 Weighing of interests

After the public display, all comments are evaluated and provided with proposals for the weighing of interests. Not every suggestion can be accepted, and some will be discarded from the weighing. This decision is made by the elected municipal body according to the rules for the required weighing of interests: there must have been no prior, inadmissible agreements, and the facts must have been correctly established and correctly assessed in terms of their relevance and significance. Finally, from several possible solutions, the elected municipal body may choose the one it considers to be best. Reasons for the choice must be provided. The reasoning must show that all aspects have been considered and that there have been no improper preferences or disadvantages. If the decision leads to a change in the draft plan, the processes for the public display and the participation of the public authorities must be repeated.

3.7 Adoption as bye-law/Approval decision

The outcome of this process is the adoption of a binding land-use plan as a bye-law; preparatory land-use plans are only approved, as they are not regarded as a legal norm, but merely as plans with affect for the authorities.

3.8 Approval, execution and entry into force

Preparatory land-use plans and their amendments must be approved by the higher administrative authority after a legal review before they can be put into effect (this is done by announcing the approval and indicating where the signed record of the adopted plan can be inspected). Binding land-use plans developed from the preparatory land-use plan can be put into effect by officially announcing the adoption of the bye-law. Prior to this, the respective plans must be executed by the signature of the Chief Administrative Officer; with their signature, the Chief Administrative Officer confirms that the original plan signed by them corresponds to the version approved by the local councillors and has been duly adopted. Binding land-use plans become legally binding upon entry into force (not final and unappealable – this is reserved for judgments); preparatory land-use plans become legally effective, administrative acts become enforceable.

4 Scope of urban land-use planning

The preliminary urban land-use plans and the binding land-use plans differ significantly from each other, yet their contents correspond, as the preparatory land-use plan must serve as the basis for developing binding land-use plans (section 8(2) of the Federal Building Code; see Fig. 3). The preparatory land-use plans should reflect the type of land use resulting from the intended urban structural development in broad lines for the entire municipal territory. As a rule, binding land-use plans only cover small parts of the municipal territory (neighbourhoods, often only a few plots). The preparatory land-use plan necessarily outlines not only building sites, but also arable land, woodland, expanses of water, etc., although its purpose is to establish an urban planning and development regime. The Berlin Planning Act *(Berliner Planungsgesetz)* of 1952 still included an intermediate stage

Figure 3: Comparison of the contents of the preparatory land-use plan and binding land-use plan

Representations in the preparatory land-use plan Section 5 of Federal Building Code: The preparatory land-use plan may include, in particular, the following designations:	**Corresponding stipulations in the binding land-use plan** Section 9 of Federal Building Code: For urban planning reasons, the binding land-use plan may stipulate:
1. areas intended for buildings according to the general nature of their built use (building sites), according to the specific nature of their built use (specific land-use area), as well as according to the general density of built use; general land-use areas which are not earmarked for central wastewater disposal must be identified;	1. the type and density of built use; 2. the building design, permissible and impermissible lot coverage and the position of the built structures; *2a. dimensions of the depth of the setback areas deviating from building regulations;* 3. the minimum size, width and length of the building plots as well as the maximum dimensions of residential building plots for reasons of economical and careful use of land and soil; 6. the maximum number of dwellings in residential buildings; 7. areas on which, in whole or in part, only residential buildings that are eligible for social housing funding may be erected; 8. individual areas on which, in whole or in part, only residential buildings intended for groups with special housing needs may be erected; 19. areas for the construction of small livestock facilities, such as display and breeding facilities, kennels, paddocks and the like;
2. the infrastructure of the municipal territory a) with installations and facilities for the supply of goods and services in the public and private sectors, in particular public buildings and amenities serving the general public, such as schools and churches and other buildings and facilities serving church, social, health and cultural purposes, as well as areas for sports and play facilities;	4. areas for ancillary facilities required by other regulations for the use of sites, such as playgrounds, leisure and recreational areas, and areas for parking spaces and garages with their driveways; 5. areas for public amenities as well as sports and play facilities; 22. areas for communal facilities for certain spatial areas, such as children’s playgrounds, recreational facilities, parking spaces and garages;

Representations in the preparatory land-use plan Section 5 of Federal Building Code: The preparatory land-use plan may include, in particular, the following designations:	**Corresponding stipulations in the binding land-use plan** Section 9 of Federal Building Code: For urban planning reasons, the binding land-use plan may stipulate:
b) installations, facilities and other measures to mitigate climate change, in particular for the decentralised and centralised generation, distribution, use or storage of electricity, heat or cold from renewable energy sources or the cogeneration of heat and electricity;	12) the supply areas, including areas for installations and facilities for the decentralised and centralised generation, distribution, use or storage of electricity, heat or cold from renewable energy sources or the cogeneration of heat and electricity;
c) installations, facilities and other measures designed to adapt to climate change;	9. the specific intended use of areas; 10. the areas to be kept free from development and their use;
d) central public amenities;	
3. areas for supra-local transport and for the main local railway services;	11. public thoroughfares, as well as special-purpose public thoroughfares, such as pedestrian areas, areas for parking vehicles, areas for parking bicycles, as well as the connection of other areas to the public thoroughfares; the areas may also be stipulated to be public or private areas; 26. areas for earth banks, excavation and retaining walls, to the extent that they are necessary to construct the road system.
4. areas for public utilities installations for waste disposal and sewage removal, for landfills, and for mains supply and sewage lines;	13. the routing of surface or underground supply systems and lines; 14. areas for waste and wastewater disposal, including for the retention and seepage of precipitated water and for debris; 21. the areas to be encumbered with pedestrian, driving and pipeline easements for the benefit of the general public, a property developer or of a restricted group;

Representations in the preparatory land-use plan Section 5 of Federal Building Code: The preparatory land-use plan may include, in particular, the following designations:	**Corresponding stipulations in the binding land-use plan** Section 9 of Federal Building Code: For urban planning reasons, the binding land-use plan may stipulate:
5. green spaces, such as recreational parks, permanent allotments, areas for sports, playgrounds, camping and swimming areas, cemeteries;	15. public and private green spaces, such as recreational parks, permanent allotments, areas for sports, playgrounds, camping and swimming areas, cemeteries; 25. for individual areas or for areas governed by a binding land-use or part thereof, or for parts of built structures, with the exception of areas designated for agricultural use or forests a) the planting of trees, shrubs and bushes or other types of vegetation, b) compounds for vegetation and for the preservation of trees, shrubs and bushes and other vegetation, as well as of bodies of water;
6. areas of restricted use or for provisions to protect against harmful environmental effects within the meaning of the Federal Immission Control Act *(Bundes-Immissionsschutzgesetz)*;	23. areas where a) certain air-polluting substances may not be used, or only to a limited extent, as a protection against harmful environmental impacts within the meaning of the Federal Immission Control Act *(Bundes-Immissionsschutzgesetz),* b) certain structural and other technical measures must be taken for the generation, use or storage of electricity, heat or cold from renewable energy sources or from co-generation during the erection of buildings or certain other types of built structures; 24. the protected areas that must be kept clear of buildings or built structures and their use, the areas for special facilities and precautions to protect against harmful environmental impacts and other hazards within the meaning of the Federal Immission Control Act as well as the structural and other technical precautions to be adopted as a protection against such impacts or to prevent or mitigate such impacts;
7. areas for water, harbours and the areas intended for water management, and the areas that must be kept free in the interest of flood protection and regulating water outflow;	16. the areas for water, and the areas intended for water management, flood protection systems and for the regulation of water outflow;

Representations in the preparatory land-use plan Section 5 of Federal Building Code: The pr eparatory land-use plan may include, in particular, the following designations:	**Corresponding stipulations in the binding land-use plan** Section 9 of Federal Building Code: For urban planning reasons, the binding land-use plan may stipu late:
8. areas for earth banks, excavations, or quarrying for stone, earth, and other minerals;	17. areas for earth banks, excavations, or quarrying for stone, earths, and other minerals;
9. a) areas for agriculture and b) forestry;	18: areas for agriculture and forests;
10. areas for measures to protect, maintain and develop the soil, nature, and the landscape.	20. areas for measures to protect, maintain and develop the soil, nature, and the landscape;
(2a) compensation areas pursuant to section 1a(3) within the scope of the preparatory land-use plan may be allocated, in whole or in part, to those areas where encroachments in nature or the landscape are to be expected.	(1a) [1]compensation areas or measures pursuant to section 1a(3) may be specified for plots where encroachments in nature or the landscape are to be expected, or in any other location, both within the scope of the binding land-use plan or in any other binding land-use plan. [2]Compensation areas or measures at other locations may be allocated, in whole or in part, to the plots where encroachments are to be expected; this also applies to measures for areas provided by the local authority.

Source: The authors

between the large preparatory land-use plan and the small binding land-use plans, known as the general binding land-use plan. This plan concerned only the building sites and their subdivisions into land for housing, industrial and commercial building sites, areas for public amenities, etc. This stage illustrated particularly clearly the step-by-step process from large-scale abstract planning to small-scale specific planning, which characterises every type of spatial planning. In modern-day urban land-use planning, this correlation is sometimes reversed, when sometimes the planning first takes place at the specific spatial level, and the related abstract planning is later adapted to it (for example, in the case of the binding land-use plan for ▷ *Inner development*, which subsequently leads to an adjustment of the preparatory land-use plan). If a preparatory land-use plan has been adopted, subsequent changes are mostly executed in connection with the parallel preparation of the binding land-use plan pursuant to section 8(3) of the Federal Building Code. The focus is then on the binding land-use plan; the amendment of the preparatory land-use plan is merely a by-product.

4.1 Preparatory land-use planning

The preliminary stage of urban land-use planning by virtue of preparatory land-use plans has changed in character and focal points over time. In times of a marked increase in areas set aside for developing land for building, the preparatory land-use plan was an essential instrument for managing the growth of settlements (▷ *Settlement/Settlement structure*). After the introduction of the Federal Building Code *(Bundesbaugesetz*, *BBauG)* on 23 June 1960, preparatory land-use plans were prepared and continuously updated to direct the development of settlements with new specific land-use areas in the outer zone of the municipality. Saving space and limiting soil sealing were not an issue at the time. The majority of the cities and local authorities in the Federal Republic of Germany now have a preparatory land-use plan, which has been frequently amended.

However, now (2017) the principle of *inner development before outer development* prevails. The principal instrument of urban land-use planning for the inner development is the binding land-use plan for the inner development pursuant to section 13a of the Federal Building Code, which merely requires a correction to the preparatory land-use plan. The preparatory land-use plan no longer has any direct steering effect in this regard. However, urban land-use planning is still an essential instrument to protect the outer zone of the municipality against urban sprawl, to structure the inner zone and to allocate the building sites.

A new responsibility for the outer zone has been added to preparatory land-use planning: functional partial preparatory land-use planning to manage the use of wind power. Pursuant to section 35(3) sentence 3 of the Federal Building Code, concentration areas for the use of wind power by installing wind turbines can be represented in the preparatory land-use plan; this means that public interests generally oppose the erection of these fundamentally privileged installations pursuant to section 35(1) no. 5 of the Federal Building Code in the remaining outer zone.

4.2 Binding land-use plans

Binding land-use plans are often prepared in connection with a specific event at the instigation of companies or for public facilities projects. The Federal Building Code generally assumes that the local authorities have to prepare the urban land-use plans ‘if and to the extent that it is necessary for the urban planning and development regime’ (section 1(3) of the Federal Building Code). Local authorities have broad degree of discretion in this regard. Binding land-use plans are mandatory instruments for locating large-surface retail businesses (▷ *Retail trade*). According to section 11(3) of the Federal Land Utilisation Ordinance *(Baunutzungsverordnung*, *BauNVO)*, shopping malls and large-surface retail businesses that have an impact on spatial planning, urban development and the environment may only establish themselves in core areas and in designated special areas. This provision serves, among other things, to protect the central public amenities in cities and municipalities – in particular urban centres – against vacancies and desertification. Likewise, the location of entertainment facilities, specifically amusement arcades, can be managed through urban land-use planning.

The content of urban land-use plans, especially those of binding land-use plans, is formally standardised by the Federal Land Utilisation Ordinance and the Federal Plan Notation Ordinance *(Planzeichenverordnung*, *PlanZV)*. The Land Utilisation Ordinance offers various types of module for specific land-use areas to regulate the type of use; it lists the instruments to regulate the density of built use (site occupancy ratio, floor-space index, cubing ratio, height of physical structures,

number of full storeys) as well as the building design (open or closed) and the permissible lot coverage (with set-back lines or building lines). The respective state law may provide that the binding land-use plan should also include local building regulations, in particular on the design of the buildings and their roofing. The Federal Land Utilisation Ordinance offers the following zoning types, to which the Federal Plan Notation Ordinance assigns official colours and abbreviations:

- Smallholding areas (WS) are nowadays rarely designated; they were intended for 'a small house with a fruit and vegetable garden for the property's own use'.
- Purely residential areas (WR) are intended exclusively for housing, e.g. in a quiet upmarket suburb. The legislator had cause to clarify that care homes for the elderly as well as day care centres and nursery schools for children with children's noise are permissible in these zones.
- General residential areas (WA) are classic city centre residential neighbourhoods with multi-storey apartment blocks, shops, restaurants and offices.
- Special residential areas (WB) are areas that are preferred for businesses, in which housing is at risk of being pushed out. Designating an area as a residential area with permanent residential use thus aims to prevent this.
- Village areas (MD) consist of a mixture of agricultural operations, housing, the trades or shops.
- Mixed used areas (MI) are intended for housing as well as for enterprises that are not substantially intrusive.
- Core areas (MK) form the centre of larger cities with shopping streets, large-scale stores, banks, office buildings, theatres, opera houses, bars, restaurants.
- Industrial and commercial areas (GE) are intended for not significantly intrusive commercial operations; housing is permitted by way of exception for stand-by staff and site managers.
- Industrial areas (GI) are also open to heavy industry.
- Special areas (SO) for recreational purposes are envisaged in the Federal Land Utilisation Ordinance as areas for weekend houses, holiday homes and camping grounds.
- Other special areas are areas not covered by the above list, e.g. port areas, hospital areas, spa areas, and in particular shopping malls and areas earmarked for the large-scale retail trade.

This typology is broken down by the project-specific binding land-use plan, which is not bound by the Federal Land Utilisation Ordinance. This concerns a plan at the instigation of an investor, who is willing and able to implement a project – ranging from care homes for the elderly to an industrial power plant – on a plot controlled by them. In this case, the investor concludes a development agreement with the local authority. In this agreement, the investor undertakes to bear any costs for the provision of local public infrastructure as well as follow-up costs and to execute the project within a period stipulated in the agreement (▷ *Urban development contract*).

In the context of residential use, the correlation of urban land-use planning and immission control law is of particular significance (▷ *Immission control*). The orientation, guideline, and limit values established in the applicable rules and regulations of immission control law (Technical guidance for noise control, Ordinance for the control of traffic noise (16th Federal Immission Control Ordinance) *[Verkehrslärmschutzverordnung*, 16. *BImSchV]* and the Ordinance for the control of noise from sports facilities (18th Federal Immission Control Ordinance)

[Sportanlagenlärmschutzverordnung, 18. BImSchV]) tie in with the ▷ *Territorial categories* of the Federal Land Utilisation Ordinance. However, these categories are devised as types in a modular system; the specific aspects of each individual case cannot yet be taken into account at this level. In particular in the case of established structures with different but closely interwoven types of use, conflicts may arise that cannot be resolved solely on the basis of the abstract (sometimes unachievable) guideline values of immission control law. In this regard, the priority of the individual weighing of interests must be emphasised.

The initial expectation of the legislator of the Federal Building Code *(BBauG)* on its adoption in 1960 (*BGBI.* [Federal Law Gazette] I, page 341) that it would be possible within a reasonable period to establish binding land-use plans for all settled areas and thus to provide a legally secure framework has not come to pass. Many new projects within already built-up areas are still managed without a binding land-use plan. Section 34 of the Federal Building Code applies in this regard, which determines that projects are permissible if they 'fit into' the immediate surroundings in view of the nature, dimensions, design and permissible lot coverage (▷ *Permissibility of projects in building law*). The preparatory land-use plan has no effect in this regard; it has effect merely in the outer zone pursuant to section 35 of the Federal Building Code or as a specification for the binding land-use plans to be developed based on them.

5 Implementation of urban land-use planning: a comparison of systems

The Federal Building Code contains a number of instruments for implementing the existing urban land-use plans, in particular binding land-use plans. The core of the implementation consists of binding all building projects, excavations and earth banks to the stipulations of a binding land-use plan (sections 29, 30 of the Federal Building Code). The binding land-use plan in force has the quality of a legal norm: as a bye-law, it is binding on and against everyone. Therein lies an essential difference from the Anglo-Saxon system of spatial planning. In the UK (as well as in Ireland), 'development plans' and 'local plans' merely have the character of a recommendation: they neither ultimately prohibit nor allow anything in the manner of a German binding land-use plan. It always depends on the individual case, which is decided by means of 'development permission'. The structure-oriented 'building permit' then follows later. The German system gains its case-by-case flexibility only through the possibility of exemption from the stipulations in the plan (section 31 of the Federal Building Code) and through modifications to the plan by the simplified procedure pursuant to section 13 of the Federal Building Code. Germany's continental neighbours have binding planning systems similar to the German one; however their binding effect and implementation are very different. In the North, the tendency to abide with the elaborated plans is stronger than in southern Europe (Schmidt-Eichstaedt 1995: 22 et seq.).

In addition to this binding effect of the binding land-use plan as a bye-law, there are also supplemental instruments (▷ *Planning safeguards in urban design*), which can be used to safeguard, then implement and support urban land-use planning from the outset, such as a freeze on development, urban development enforcement orders, the municipal right of pre-emption, land reallocation through land assembly, compulsory purchase, the rules on the provision of local public infrastructure and compensation for encroachments into the soil, nature and landscape

and – limited to areas specifically designated for this purpose – the ▷ *Special Urban Development Law* with urban regeneration areas, development areas, urban redevelopment areas (▷ *Urban redevelopment*) and areas of the ▷ *Socially Integrative City*, i.e. areas designated for special measures.

5.1 Freeze on development and deferral of applications for planning permission

As soon as a plan preparation decision for a binding land-use plan is taken and officially announced, ensuing applications for planning permission may be deferred at the request of the local authority and subsequently dismissed, after a freeze on development is ordered. The effect of the freeze on development initially remains in effect for two years, and can be extended twice by one year each time for a total period of four years. After a plan preparation decision has been made for a preparatory land-use plan with concentration areas, e.g. for wind turbines, a deferral of applications for planning permission can also be requested and imposed – initially for a period of one year, and for a maximum of two years.

5.2 Urban development enforcement orders (sections 175 to 179 of the Federal Building Code)

The classic binding land-use plan is, in a sense, an 'offer'; it allows landowners to use the land in a certain way, but does not compel them to do so. With the help of urban development enforcement orders, landowners can be compelled to accept the offer of the binding land-use plan – in other words, to build (building order, section 176 of the Federal Building Code) or also to tolerate the removal of built structures (dismantling and desealing order *[Rückbau- und Entsiegelungsgebot]*, section 79 of the Federal Building Code). Likewise, green areas designated in the binding land-use plan must be executed by the owner if a corresponding planting order pursuant to section 178 of the Federal Building Code has been issued.

5.3 Rights of pre-emption (sections 24 to 28a of the Federal Building Code)

The stipulations in the plan under public law must always be seen in correlation with land ownership. If a plan designates an area to be used for the benefit of public amenities or for roads, the plan can only be implemented if the local authority becomes the owner of the relevant areas of land. This can be achieved through the instrument of the municipal right of pre-emption. If the owner of a parcel of land earmarked for public use wishes to sell it, the local authority may exercise a statutory right of pre-emption. It then becomes the contracting partner of the seller instead of the buyer, and in principle to the terms of the sale contract negotiated with the initial buyer. In the case of a clearly excessive purchase price, the local authority may reduce the purchase price to the standardised market value (i.e. a price-limited right of pre-emption); however, this is always associated with the risk that the seller may withdraw from the contract. The local authority may extend the scope of its right of pre-emption by a special bye-law to areas where it will want to undertake actions only at a later stage (statutory right of pre-emption).

5.4 Compulsory purchase (sections 85 to 122 of the Federal Building Code)

Not every owner whose land is needed by the local authority for its urban land-use planning will sell their land voluntarily. In such cases, the Federal Building Code provides a very exhaustive provision for compulsory purchase against pecuniary compensation, or in certain cases also against land. The provisions on compulsory purchase apply not only to complete and full compulsory purchase, but they can also serve to create rights of way or the pipeline easements for the local authority.

5.5 Land reallocation by land assembly (sections 45 to 84 of the Federal Building Code)

The built use requires a different type of plot than for agriculture or viniculture. In addition, a new specific land-use area requires other routing of roads through the area than the previously unpaved tracks. The proper way to reorganise the plots is through land reallocation by land assembly (which is also possible on a voluntary basis). This is achieved by eliminating all boundaries that have existed so far in the area to form a uniform 'reallocation mass'. Based on a binding land-use plan implemented at the same time, all areas required for the provision of local public infrastructure, in particular land for roads, are withdrawn and allocated to the local authority (also referred to as a 'withdrawal in advance'). In the next step, all owners involved are allocated new plots that are suitable for the intended building purpose. Excess allocations or allocation shortfalls must be compensated in money. Ideally, all parties are then satisfied with the outcome – if not, the land assembly plan can be contested in a court of law.

5.6 Provision of local public infrastructure

Building plots cannot be used without the provision of local public infrastructure. The Federal Building Code requires that the provision of local public infrastructure for building plots must be generally consistent with a binding land-use plan. The costs for the provision of local public infrastructure can be recovered from the owners in the form of service connection charges.

5.7 Impact mitigation regulation

Urban land-use planning prepares for the impacts on the soil, nature and landscape, in particular through the erection of buildings and the resulting sealing of the soil, the accompanying roads and the traffic or emissions of odours, e.g. from a bakery, associated with the use of the buildings and roads. The ▷ *Impact mitigation regulation* in nature conservation law ensures that the impact of interventions must be mitigated on the actual site or elsewhere at the expense of the party causing the impact. The impact mitigation regulation must be taken into account in urban land-use planning through appropriate designations and stipulations or through contractual arrangements. Unlike in nature conservation law, full compensation is not compulsory; if necessary, this can be done by means of a compensation payment. It is permissible merely to determine specific measures, which must be combined with a financing obligation. The local authority should execute mitigation measures outside the building plots at the expense of the

party causing the intervention and then have those costs reimbursed by that party (sections 135a to 135c of the Federal Building Code).

5.8 Areas designated for special measures under Special Urban Development Law

By a special bye-law or order, the local authority may designate areas for special measures where special approval requirements apply and where, as a rule, public funding is offered for urban structural measures, such as regeneration, development or rebuilding. Urban land-use planning prepares these measures under Special Urban Development Law and provides support for them.

6 Judicial scrutiny of urban land-use planning

Urban land-use planning is subject to strict judicial scrutiny (▷ *Legal remedies in planning*). The strict scrutiny by the courts is a specifically German particularity. The courts will respect a certain degree of planning discretion in the adoption of the urban land-use plans. However, they will thoroughly review compliance with all procedural steps, whether the facts have been fully clarified prior to the weighing of interests by planners, and the decision itself. The courts in neighbouring countries focus more on compliance with procedural regulations, including participation. They will not address the substance of the plan itself (or only in the event of an evidently incorrect decision), as lawyers lack the necessary training to take such decisions. The German legislator has repeatedly sought to reduce the intensity of the judicial scrutiny of urban land-use plans. With the 'remedy provisions' of sections 214 and 215 of the Federal Building Code, they have partially achieved this goal. Under section 214 of the Federal Building Code, certain errors in the procedure are 'immaterial' as such. The courts may not rely on them to hold the plan invalid; this includes errors in the early participation of the public (▷ *Public participation*). The public administration must be notified of almost all formal and procedural errors within one year, otherwise they become immaterial. Errors in the weighing process should be evident and have an impact on the outcome if they are to be considered relevant. In the interests of private citizens, the Federal Administrative Court has ruled that a matter is evident if it is on record (*BVerwG*, judgment of 21 August 1981, case no. 4 C 57.80, *ZfBR* 1981, 286) and has had an impact, which may be deduced subsequently, by establishing that it would or could have had an impact on the decision with a certain degree of likelihood (*BVerwG*, order of 29 January 1992, case no. 4 NB 22.90, *ZfBR* 1992, 139-141).

In order for an urban land-use plan to come before the court, one of the parties concerned must have launched a legal action. All legal and natural persons who can assert *prima facie* that the established plan infringes or will infringe their rights, as well as public authorities, have standing to file an application in court. There are various pathways to the courts (cf. Fig. 4):

- abstract judicial review [of bye-laws issued under the provisions of the Federal Building Code and of ordinances issued on the basis of section 246(2) of the Federal Building Code, or other legal provisions ranking below the laws of a federal state if so provided for by the law of the federal state] pursuant to section 47 of the Code of Administrative Court Procedure *(Verwaltungsgerichtsordnung*, *VwGO)*;

- an action of annulment or an action to compel a decision pursuant to section 42 of the Code of Administrative Court Procedure, supplemented by an action for performance (e.g. based on a claim to remove consequences of an act);
- a request for a judicial ruling pursuant to section 217 of the Federal Building Code.

6.1 Abstract judicial review

An application for abstract judicial review serves to request a comprehensive review of the plan for its lawfulness. In principle, such an application can be filed only in regard to binding land-use plans as bye-laws, and thus as legal norms. Preparatory land-use plans are not bye-laws and are therefore generally not subject to judicial review for their lawfulness. However, preparatory land-use plans that serve to determine concentration areas - with the result that the concentrated projects (especially wind turbines) are by default impermissible at other locations - can be contested by the excluded landowners with an application for judicial review (*BVerwG*, judgment on 26 April 2007, case no. 4 CN 3/06, *BauR* 2007, 1536-1540).

The courts responsible in the first instance for the judicial review are the Higher Administrative Courts *(Oberverwaltungsgerichte/Verwaltungsgerichtshöfe)* of the federal states. Appeals on points of law against their rulings, to the extent that they are allowed, it will be decided by the Federal Administrative Court *(Bundesverwaltungsgericht)*. Due to the comprehensive nature of the examination, an abstract judicial review offers a good opportunity for the courts to develop general rules for urban land-use planning and to issue general instructions for procedures (e.g. on the determination of deadlines) and on what urban land-use planning may (permissibly or impermissibly) encompass.

Examples:

- If the advance notice period of one week, prescribed in section 3(2) sentence 2 of the Federal Building Code is not satisfied, it is possible to extend the period of public display, which is stipulated by law at a minimum term of one month, accordingly (*BVerwG*, order of 23 July 2003, case no. 4 BN 36.03, *ZfBR* 2004, 64-65).
- The room number where the plan is made available for the public to consult must not be indicated in the announcement; the inspection may be restricted to the administrative office's public hours (*BVerwG*, judgment of 4 July 1980, case no. 4 C 25.78, *DVBl [Deutsches Verwaltungsblatt]* 1981, 99-100).
- Planning undertaken purely to inhibit certain types of development without a positive strategy is not permitted (*BVerwG*, judgment of 13 March 2003, case no. 4 C 4.02, *ZfBR* 2003, 464-468).
- The weighing process must be logically and transparently documented (*BVerwG*, judgment of 12 December 1969, case no. 4 C 105/66, *DVBl*. 1970, 414).
- Each urban land-use plan record must be executed by the signature of the Chief Administrative Officer, and in particular before the official announcement the entry into force (most recently, *BVerwG*, order of 4 September 2014, case no. 4 B 30.14, JurionRS 2014, 22071).

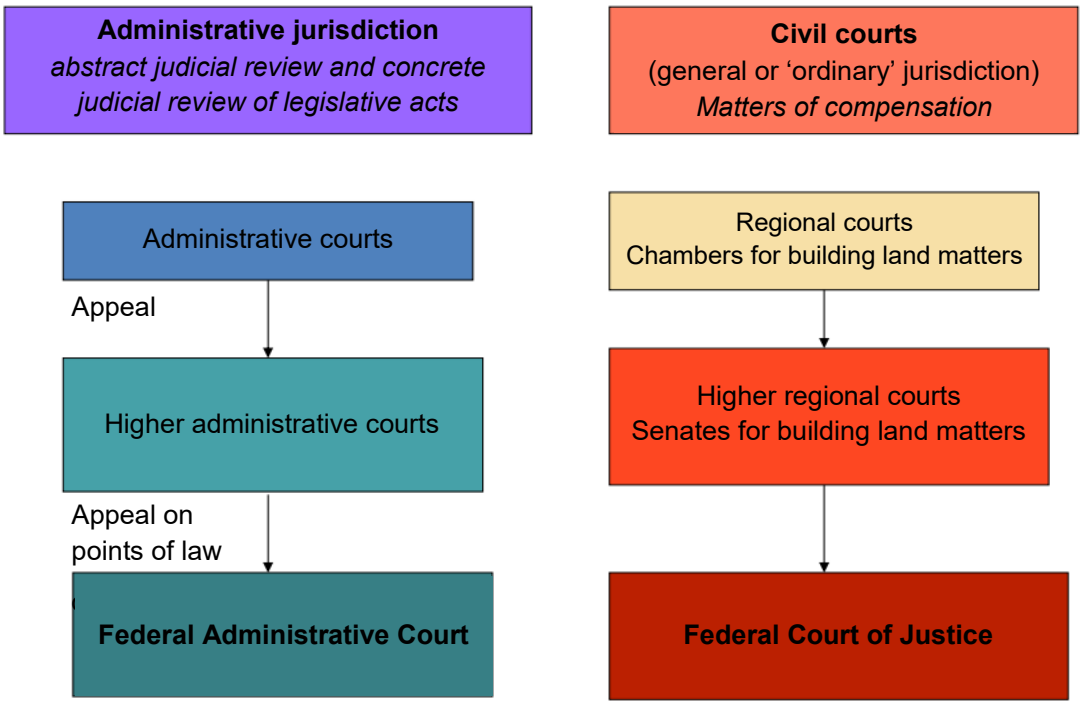
6.2 Actions of annulment and to compel a decision

Actions of annulment may be directed against administrative acts that have been issued based on the Federal Building Code in conjunction with a binding land-use plan – for example, a building order pursuant to section 176 of the Federal Building Code, based on a binding land-use plan. Actions to compel a decision are aimed to compel the issue of a requested but rejected administrative act, for example a building permit within the scope of application of a binding land-use plan pursuant to section 30(1) of the Federal Building Code. In the course of such a process, the legal validity of the binding land-use plan on which the administrative decision is based is examined at the same time – thus, this examination is also referred to as an 'incidental' review. If the binding land-use plan is found to be flawed, this finding – unlike in the case of the abstract judicial review – has no generally binding effect, as the plan is examined only incidentally, i.e. not as the main issue, but in connection with something else.

6.3 Requests for a judicial ruling according to section 217 of the Federal Building Code

According to Article 14(3) of the Basic Law *(Grundgesetz*, *GG)*, recourse to the 'ordinary' (default) jurisdiction is available for all actions related to compulsory purchase and compensation for compulsory purchase. This constitutional guarantee is a consequence of historical legal developments. Prior to the introduction of administrative jurisdiction in Germany (around 1875), citizens could at most only lodge a complaint in regard to decisions of the sovereign, but not commence legal proceedings – with the exception of compulsory purchases. Citizens could have the appropriateness of the compensation for the compulsory purchase reviewed by the ordinary courts even in the days of absolutism. At the time of the adoption of the Basic Law after the Second World War, in 1949, the administrative jurisdiction had not yet been re-established in Germany. Hence, it was an obvious choice to assign the guarantee of recourse to the courts to the ordinary courts. It is now a moot consideration whether the administrative courts should also not be considered as 'ordinary' courts within the meaning of Article 14(3) of the Basic Law. Based on section 217 of the Federal Building Code, all decisions resulting from urban land-use plans, which relate to compensation or compulsory purchase are assigned to the jurisdiction of the ordinary courts – the civil courts – in the event of a dispute. Within the civil judiciary, special benches – the divisions and senates for disputes relating to land for building – are competent for the judicial proceedings. In these processes, the underlying urban land-use plan is again reviewed only 'incidentally'.

Figure 4: Judicial scrutiny of urban land-use planning – Stages of appeal



Source: The authors

7 Problems and conflicts, means of conflict resolution, outlook

Urban land-use plans serve to prepare and guide the built use of areas and plots within a broad range of possibilities. At the same time there is the matter of civil-law ownership and the landowners. If their intentions do not coincide with the urban land-use planning, the planning may be meaningful on paper only despite an offer to compensate for any damages resulting from the planning (cf. sections 39 to 44 of the Federal Building Code). Through skilful negotiations, moderators and mediators (▷ *Moderation, mediation*) may assist in the planning process and can contribute to the eventual conclusion of urban development contracts that serve to reach compromises and an allocation of the resulting costs and responsibilities. The federation and the federal states promote certain developments through funding programmes that create material incentives for changes, repairs, modernisations (▷ *Urban development promotion*; ▷ *Urban development measure*). However, the complaints of parties affected can only rarely dispelled through contracts or funding. The parties concerned will particularly oppose changes they deem disadvantageous to them. If a binding land-use plan is prepared for a new school or sports hall (noise), a biomass facility, a poultry abattoir close to a town (odours) or a new factory (emissions),

protests by directly affected parties are to be expected. The parties benefitting indirectly, i.e. the parents, persons seeking work, sports fans, etc. will only rarely respond. The elected municipal body is then called upon to decide as rationally as possible after a fairly conducted process.

References

Schmidt-Eichstaedt, G. (Ed.) (1995): Bauleitplanung und Baugenehmigung in der Europäischen Union. Cologne. = Aufgaben der Kommunalpolitik 12.

Additional literature

Battis, U. (2014): Öffentliches Baurecht und Raumordnungsrecht. Stuttgart.

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

Bracher, C.-D.; Reidt, O.; Schiller, G. (2014): Bauplanungsrecht. Cologne.

Finkelnburg, K.; Ortloff, K.-M.; Kment, M. (2011): Öffentliches Baurecht: Bauplanungsrecht. Munich. = Publication Series of the Juristische Schulung 107.

Hoppe, W.; Bönker, C.; Grotefels, S. (2010): Öffentliches Baurecht: Raumordnungsrecht, Städtebaurecht, Bauordnungsrecht. Munich.

Schmidt-Eichstaedt, G.; Weyrauch, B.; Zemke, R. (2014): Städtebaurecht: Einführung und Handbuch. Stuttgart.

Schrödter, H. (Ed.) (2014): Baugesetzbuch: BauGB. Commentary. Munich.

Last update of the references: November 2016