

Synoptic Overview of Spatial Planning in Germany

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Abstract

This article provides a synoptic overview of the German spatial planning system. The spatial planning system in federal Germany is differentiated along vertical, horizontal and sectoral lines. Planning authorities in Germany operate at four levels: federal spatial planning, state spatial planning, regional planning and local authority planning.

The article first presents the legal and institutional framework of spatial planning, looks at the various plans and procedures and names the main instruments for putting spatial planning into effect. The view is then directed at the local authority level. The legal framework for urban development is addressed alongside formal and informal urban development instruments. Climate protection and energy efficiency are then touched upon as recent challenges in spatial and urban planning. Finally, the regulatory capabilities of spatial planning and urban development are illustrated by the examples of wind power and refugees.

1. Introduction

Germany is a federal state in which three levels – the municipal level, the state level and the federal level – work together on the basis of shared responsibility enshrined in law. Under the German constitution, referred to as the Basic Law (*Grundgesetz*), powers to legislate are fundamentally vested in the country's constituent states (*Länder* or *Bundesländer*). The Federation (*Bund*) can only legislate in areas expressly assigned to it by the Basic Law. The Federation thus has powers to legislate on spatial planning, land reallocation, landlord and tenant law, housing benefit law and parts of tax law. It lays down the conditions, tasks and guidelines for spatial planning in the Federal Spatial Planning Act (*Raumordnungsgesetz – ROG*). The Federal Building Code (*Baugesetzbuch*), in which planning law is codified, lays down the guidelines and instruments of planning in the area of land reallocation. The states may enact laws at variance with this.

The spatial planning system in Germany is differentiated along vertical, horizontal and sectoral lines. Planning authorities in Germany operate at four levels: federal spatial planning, state spatial planning, regional planning and local authority planning. The term spatial planning (*Raumplanung*) encompasses all public overall planning at federal, state, regional and local authority level, together with sectoral spatial planning (Brohm 2002, 627).

Spatial planning includes a superordinate level (*Raumordnung*) that stands alongside local urban land-use planning and sectoral planning. As “planning for planning” (Runkel 11/2006, K § 3, at 236), spatial planning in this capacity lays down stipulations for subordinate spatially relevant public planning activities (including local urban land-use planning). It has a cross-cutting function in the planning system as “over-

all spatial planning” (Schink 1994, 105). In the classic definition given by the Federal Constitutional Court in an advisory opinion on building law, spatial planning in this sense is the “comprehensive, superordinate planning and structuring of space. It is superordinate because it is supra-local planning and because it brings together and coordinates the diverse types of sectoral planning” (BVerfGE 3: 407/425).

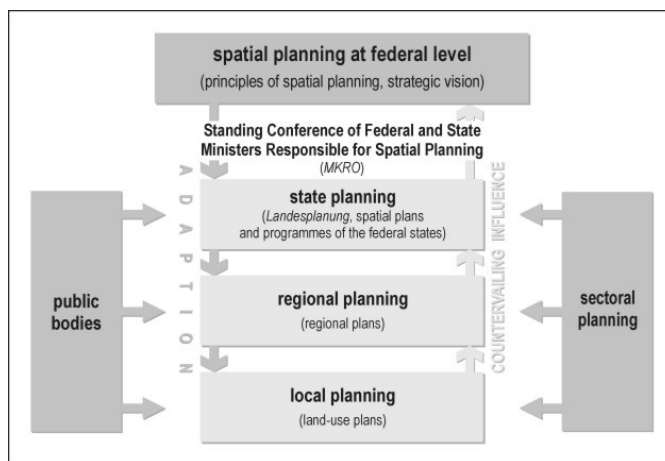


Figure 1 – The organization of spatial planning in Germany (Hoyler/Freytag/Mager 2006).

In contrast to supra-sectoral, supra-local spatial planning, urban land-use planning consists of supra-sectoral, local planning (Schink 1994, 106). It is solely through urban land-use planning that spatial planning acts upon urban development and planning (Battis/Krautzberger/Löhr 2014, § 1, at 39) and is translated into stipulations under land law that are binding on the individual subject (Runkel 12/2008, K § 4, at 283).

This article first presents the legal and institutional framework of spatial planning, looks at the various plans and procedures and names the main instruments for putting spatial planning into effect. The view is then directed at the local authority level. The legal framework for urban development is addressed alongside formal and informal urban development instruments. Climate protection and energy efficiency are then touched upon as recent challenges in spatial and urban planning. Finally, the regulatory capabilities of spatial planning and urban development are illustrated by the examples of wind power and refugees.

2. Spatial planning

2.1. Division of legislative powers between federal and state level

The main legal basis for spatial planning at federal, state and regional level in Germany consists of the Federal Spatial Planning Act and state spatial planning acts.

The most recent major revision of the Federal Spatial Planning Act (ROG) was in 2008. This was made necessary by the impacts of the 2006 federalism reform. While by the nature of the matter the Federation retains exclusive legislative powers for federal spatial planning (Durner, Greivin and Reitzig 2011, 380), the legislative remit for spatial planning in the states was transferred as a result of the reform from framework legislation to concurrent legislation. The effect of this change in legislative remit was an expansion of federal powers. In principle, the Federation now has the scope to legislate comprehensively on spatial planning law in the states. If the Federation exercises its powers to legislate under the concurrent legislative remit, any conflicting state law ceases to be applicable (Söfker 2009, 167). However, the federalism reform also gave the states an unrestricted right to enact laws at variance with such legislation in the area of spatial planning (Article 72 (3), sentence 1, no. 4 of the Basic Law). The provisions of the Federal Spatial Planning Act only apply for state spatial planning as long as the states do not enact state spatial planning acts at variance with it. This modification compensates to a certain extent for the new federal powers.

The purpose of the new Federal Spatial Planning Act 2008 was to provide the greatest possible level of legal certainty throughout the country while leaving the states sufficient leeway so that derogations remain the exception.¹

Whereas the Federal Spatial Planning Act primarily lays down responsibilities, rules of procedure and the basic substance of spatial structure plans and makes stipulations on the in-

struments of spatial planning, state spatial planning acts govern the substance, organisation and procedures of state spatial planning for the entire territory of the state concerned and for regional planning at subdivision level. Due to the leeway granted to states under the Federal Spatial Planning Act, state and regional planning varies both substantively and organisationally from state to state.

2.2. Guiding principles for spatial development

The Conference of Ministers for Spatial Planning – a joint body that brings together the federal and state ministers responsible for spatial planning – formulates guiding principles for spatial development as a joint development strategy for German cities and regions. These provide important guidance for joint federal and state action with regard to spatial planning.

The informal guiding principles provide an overarching conceptual framework for spatial policy objectives and for stipulations made in the Federal Spatial Planning Act and spatial structure plans together with specific implementing measures. They thus supplement the law and identify priorities in spatial planning for the years ahead. They are intended to be implemented both via spatial planning instruments such as spatial structure plans and spatial planning procedures and via cooperation in spatial planning with spatially relevant sectoral policy areas and local stakeholders such as municipalities, associations, businesses and private individuals (BMVI 2013). The guiding principles are therefore directed not just at spatial planning practitioners at federal and state level, but also at decision makers in spatially relevant sectoral policy areas. They can also serve as guidance for private sector investment decisions.

The current guiding principles dating from 2006 are divided into three equal-ranking thematic areas: ‘Growth and Innovation’, ‘Securing the Provision of Essential Public Services’, and ‘Conserving Resources, Developing Cultural Landscapes’.

The conditions for spatial planning have changed in various areas since 2006. Issues such as demographic change have become increasingly important. Climate change and the transition to renewable energy have so far not been touched upon in the guiding principles. Increasing budgetary pressures and ongoing globalisation also have an impact on spatial policy objectives. Against this backdrop, the guiding principles are currently being further elaborated and revised. As well as revising the existing guiding principles, it is planned to add a fourth guiding principle on climate change and the energy transition.

2.3. Spatial planning guidelines

The Federal Spatial Planning Act lays down general guidelines for spatial planning under which it aims to achieve sustainable spatial development that “will bring the social and

1. <http://www.bmvbs.de/artikel-302.1029638/Novellierung-des-Raumordnungs-g.htm>, 11.6.2009.

economic demands made on an area into line with its ecological functions and result in a stable order which will be well-balanced on a large scale”, including the establishment of equivalent living conditions in all regions (Section 1 (2) of the Federal Spatial Planning Act).

Sustainable development aims to safeguard the natural foundations of our common existence for future generations. This entails reducing pressures on the natural environment and human health as a result of land take, transportation and pollution (BBR 2001). Implementing this is one of the central challenges of spatial planning. The sustainability approach requires in principle that every binding stipulation in a spatial structure plan must be evaluated against all three pillars of sustainability – economic, environmental and social sustainability (Danielczyk, Goppel, Knieling, Konze and Schmidt, 2011, 445). Economic sustainability is the most important of these for spatial planning (Benzel et al. 2011, 226). In particular, land use for development must be coordinated with open space land uses in order to create sustainable land-use patterns (Benzel et al. 2011, 234). The Academy for Spatial Research and Planning has identified a number of key areas for sustainable spatial development: decentralised concentration; functional mix of housing, workplaces and amenities; improvement of locational potential; creation and development of large-scale open space networks; land resource policy; concentration of housing development around local rail transport stops; and networking and cooperation for resource efficiency (ARL 2003, 2).

The central guidelines for sustainable spatial development are further elaborated by the principles of spatial planning in the Federal Spatial Planning Act (see section 2.4).

Alongside sustainable spatial development, the central guidelines for federal and state spatial planning policy under Section 1 (2) of the Act also include the establishment of equivalent living conditions. The establishment of equivalent living conditions is also enshrined in the Basic Law (Article 72 (2), sentence 3 of the Basic Law). The guidelines go hand in hand with the objective of establishing or maintaining standards of living that are equivalent in value taking into account regional differences.

Equivalence must not be equated in this connection with uniformity. The objective is to establish equivalent access to living space, jobs, education and training, goods and services, good environmental conditions and recreational opportunities (BBR 2001, 5).

2.4. Subject matter of spatial planning (under the Federal Spatial Planning Act)

Under Section 1 (1) of the Federal Spatial Planning Act, the task of spatial planning is to develop, organise and protect the entire territory of the Federal Republic of Germany and

its regions by means of comprehensive, supra-local and supra-sectoral spatial structure plans, cooperation in spatial planning, and coordination of spatially relevant planning and activities.

Higher levels in the prevailing planning hierarchy do not have absolute priority over lower levels. A key part in governing the relationship between planning levels is played by the mutual feedback principle enshrined in Section 1 (3) of the Federal Spatial Planning Act. The mutual feedback principle can be considered the fundamental principle of the federal German spatial planning system (Brohm 2002, 624). It is a principle of countervailing influence under which the development, organisation and protection of the territory as a whole is required to make allowance for the conditions and needs of its constituent regions, while the development, organisation and protection of the regions is required to be consistent with the conditions and needs of the territory as a whole. There is no direct hierarchical line of authority between planning levels.

Spatial planning assumes a coordinating role in the reconciliation of differing spatial demands and the resolution of any conflicts. It also has the task of making provision for specific land uses and functions (Section 1 (1) of the Federal Spatial Planning Act). In this connection, the Federal Spatial Planning Act lays down a number of principles of spatial planning (Section 2 (2)) that are to be “applied in the interests of sustainable spatial development within the meaning of Section 1 (2) and further elaborated by stipulations in spatial structure plans” (Section 2 (1)). The principles relate to topics such as spatial and settlement structure, infrastructure and transportation, the economy, cultural landscapes, and environmental and climate protection.

With a view to the further elaboration of these principles in spatial structure plans, the Federal Spatial Planning Act also lays down the main substantive content of such plans. These are thus required to include stipulations on spatial structure, notably on the settlement structure to be aimed for (including spatial order categories/area types, central places and axes), open space structure (including supra-local open spaces and open space protection) and locations and routes to be secured for infrastructure (such as utilities) (Section 8 (5) of the Federal Spatial Planning Act).

2.5. Addressees and relationship with land law and sectoral planning law

As superordinate, integrated overall planning, spatial planning is distinguished from land law and from sectoral planning.

The main regulatory objects of spatial planning in its capacity as “planning for planning” (Runkel 11/2006, K § 3, at 236) are spatially relevant planning activities and other activities of public planning authorities together with public bodies that

approve relevant plans and works. It does not have direct binding effect on private subjects except where private law subjects carry out spatially relevant planning in the execution of public duties, where public bodies have a controlling interest in a private law legal entity, or where plans and works are chiefly publicly funded (Section 4 (1) of the Federal Spatial Planning Act).

Provisions concerning the local level and directly relating to land come under land law. This is restricted to urban building and planning law, which is fully codified in Germany in the Federal Building Code (Durner, Greiving and Reitzig 2011, 382).

In addition, spatial planning cannot stipulate on matters that come under sectoral planning law. This includes nature conservation law, highway law, and also for example railway law. Spatial planning thus generally affects land use indirectly through its influence on local land-use plans and sectoral plans and on the decisions of approval authorities. In this way, spatial planning can exercise influence over the nature of land use without having to address land users directly. Successful implementation of spatial planning stipulations therefore requires direct influence on the activities of public planning and approval authorities and direct influence on the activities of land users.

2.6. Binding effect of spatial planning requirements

If state and regional planning stipulations are to be implemented, urban land-use planning has to be harmonised with state planning and regional planning (Moench 2005, 683). Uniform planning across the various planning levels can only be achieved by the application of binding effect and obligatory requirements for subordinate levels. Successful implementation is therefore contingent on the regulatory influence of spatial planning and the legal effectiveness of its instruments.

The extent to which those instruments bindingly constrain the addressees of planning in their actions depends on whether the instruments qualify as legal norms. The most important binding instruments in spatial structure planning are spatial planning requirements. These are the only such instruments with binding effect. Since 1998, the Federal Spatial Planning Act has included a statutory definition of spatial planning requirements (Section 3, no. 1 of the Act). By that definition, they include goals and principles together with other spatial planning requirements. Stipulations of a spatial structure plan are only binding if they satisfy the criteria of a goal or principle. 'Other' requirements mostly consist of the outcomes of administrative acts (spatial planning goals in the process of formulation, outcomes of formal state planning procedures such as spatial planning procedures, and state spatial planning reports) (Runkel 9/2008, K § 4, at 41). The three types of requirements each have different legal con-

sequences for addressees. These are set out in what is referred to as the general spatial planning clause (Section 4 of the Federal Spatial Planning Act).

Thus, goals of spatial planning impose on addressees a strict duty to comply and they demand mandatory adherence to the stipulations of the spatial structure plan. This greatly limits the scope for adaptation and further elaboration by addressees and leaves no room to overrule the stipulations with own decisions based on a weighing of interests.

In contrast, principles of spatial planning and other spatial planning requirements can indeed be overruled by such decisions. The duty they impose is thus less strict and comprises a duty to give due consideration.

When it comes to the binding effect of spatial planning requirements in sectoral planning, an important part is played by special spatial planning clauses in sectoral planning legislation (Stüer, Hönig 2002, 333). Such special spatial planning clauses must at least correspond in substance to Section 4 (1) to (4) of the Federal Spatial Planning Act. Use may nonetheless be made of enhanced spatial planning clauses that go beyond the substance of Section 4 of the Federal Spatial Planning Act (Runkel 12/2008, K § 4, at 259 onwards). Such clauses may not however put the principles beyond the reach of decisions based on a weighing of interests or discretionary authority (Runkel 12/2008, K § 4, at 273). One of the most important pieces of sectoral legislation with regard to spatial planning is the Federal Building Code. This provides the legal framework for local urban land-use planning and contains an enhanced spatial planning clause (Section 1 (4) of the Federal Building Code). In connection with spatially relevant works by private subjects, Section 35 (3), second sentence, of the Federal Building Code additionally constitutes an enhanced spatial planning clause that must be complied with when building in undesignated outlying areas. This clause makes the goals of spatial planning a constituent requirement in the building law approval procedure.

2.7. Spatial planning authorities, spatial structure planning authorities and their responsibilities

In line with the federal structure and the general administrative structure at federal and state level, the tasks of spatial planning – compiling spatial structure plans, working to effect their implementation and other supervisory and coordinating tasks – are carried out by various different authorities.

As supreme spatial planning authority, the Federal Ministry of Transport and Digital Infrastructure (BMVI) is responsible for spatial planning tasks at federal level. The Ministry has coordinating and advisory responsibilities in the field of cooperation between the Federal Government and the states (Section 26 of the Federal Spatial Planning Act), notably un-

der the framework of the Conference of Ministers for Spatial Planning. Under Section 17 of the Federal Spatial Planning Act, the Ministry is additionally able to compile federal spatial structure plans. In connection with such plans, it is also responsible for any prohibition of spatially relevant plans and works (Section 22 of the Federal Spatial Planning Act).

At state level, responsibility for state-wide spatial structure planning lies with the supreme state spatial planning authorities. These are part of a state ministry and can come under a variety of ministerial portfolios (state chancellery, transport ministry, finance ministry, etc.). An exception is the Joint Spatial Planning Department (GL), which is part of both the Berlin Senate Administration for Urban Development and the Environment and the Brandenburg Ministry of Infrastructure and Agriculture.

The state spatial planning authorities compile state spatial structure plans and have advisory and supervisory responsibilities. It is thus they who approve regional plans. In specific instances, the supreme state spatial planning authorities are also responsible for carrying out spatial planning procedures. Below the supreme state spatial planning authorities, depending on whether there are two or three tiers of administration, the states additionally have higher and/or lower state spatial planning authorities. A small number of states with three-tier administration do without one of these two levels, however. Depending on the legal arrangements in the state concerned, the higher and lower spatial planning authorities are responsible for contributing in the compilation of regional plans, issuing decisions in procedures for derogation from spatial planning goals and for the prohibition of plans and works conflicting with spatial planning goals, carrying out spatial planning procedures, submitting state spatial planning reports and carrying out spatial monitoring (Durner, Greiving, Reitzig 2011, 415).

Alongside the spatial planning authorities just mentioned there are also regional planning authorities. As the Federal Spatial Planning Act does not specifically designate the regional planning authorities, regional planning is organised differently from state to state. Regional planning may take place at state level or at the level of local authority associations. In regional planning at the level of local authority associations, local authorities and associations of local authorities join forces in regional planning communities. This organisational form is found in the states of Baden-Württemberg (regional associations), Bavaria (regional planning associations), Brandenburg (regional planning communities), Mecklenburg-Western Pomerania (regional planning association), Rhineland-Palatinate (planning communities), Saxony (regional planning associations), Saxony-Anhalt (regional planning communities) and Thuringia (regional planning community). In Lower Saxony, regional planning is carried out by the counties (*Kreise*). The

state model, where local authorities merely contribute to regional planning, is applied in Schleswig-Holstein. A hybrid form is used in Hesse (regional assembly) and North Rhine-Westphalia (regional council). Regional planning here is located at the middle tier in the state hierarchy.

The main task of regional planning is the compilation of regional plans. Under Section 13 of the Federal Spatial Planning Act, regional planning is also required as part of cooperation on spatial planning to work towards effecting the implementation of spatial structure plans.

2.8. Spatial planning programmes, plans and procedures

Under Section 1 (1), first sentence, of the Federal Spatial Planning Act, the task of spatial planning is to develop, organise and protect the entire territory of the Federal Republic of Germany and its regions by means of comprehensive, supra-local and supra-sectoral spatial structure plans, cooperation in spatial planning, and coordination of spatially relevant planning and activities. Comprehensive, superordinate spatial structure plans provide the foundation for coordinating the various spatial demands giving due consideration to the principles of the Federal Spatial Planning Act.

Spatial structure plans are generally compiled as integrated plans covering all subject matter under the purview of state or regional planning and applying to the entire territory of a planning region. However, special-purpose sub-plans may also be compiled with stipulations limited to specific issues (such as securing mineral deposits or the use of wind power).

Since 2004, the Federal Government has had the power to compile federal spatial structure plans of its own for the North Sea and Baltic Sea Exclusive Economic Zone (EEZ) outside of German territorial waters. This power was further augmented in 2008. Since then, Section 17 of the Federal Spatial Planning Act has permitted the federal spatial structure plans to further elaborate on the principles of spatial planning. Although the federal spatial structure plans for the EEZ have had binding effect since 2009, a nationwide spatial structure plan that elaborates on the principles in this way is yet to be compiled.

The Federal Spatial Planning Act requires the states to perform spatial planning at state level in the form of spatial structure plans. For this purpose, under Section 8 (1) of the Act, a spatial structure plan (state-wide spatial structure plan) must be compiled for the territory of the state concerned. In the city states of Berlin, Bremen and Hamburg, the function of the state-wide spatial structure plan is fulfilled by a preparatory land-use plan.

State-wide spatial structure plans are generally designated state development plans or programmes. The Federal Spatial Planning Act does not stipulate on the legal form of spatial structure plans. They are mostly enacted as ordinances (*Verordnungen*, i.e. secondary legislation) and in some cases

as acts of parliament (*Gesetze*, i.e. primary legislation). The only instance in Germany where state spatial planning is organised in two legislative levels is state spatial planning for Berlin-Brandenburg. This consists of a state development programme adopted as an act of parliament and state development plans enacted as ordinances.

State plans vary greatly in recency (see figure 2). This is partly because they usually apply for a 15 to 20-year period.

State-wide spatial structure plans make fundamental stipulations on state development and planning, giving due consideration to the spatial planning guidelines (sustainable spatial development; equivalent living conditions) and core instruments (central places, development axes, spatial order categories/area types, etc.) and the principles of spatial planning laid down in the Federal Spatial Planning Act. Spatial planning and activities of sectoral planning authorities need to be coordinated in the process (Danielzyk, Goppel, Knieling, Konze and Schmidt 2011, 442).

Supplementary to the spatial structure plan for their respec-

Germany. All states with the exception of the city states and Saarland have divided their territory into regional planning regions. Saarland has refrained from introducing regional planning of its own on account of its small size. In the city states of Bremen, Hamburg and Berlin and in *kreisfreie Städte* – cities that do not come under a county – in Lower Saxony, regional plans are replaced by preparatory land-use plans.

In the ideal case according to planning theory, a regional planning region should encompass a higher-order centre and its service area. As well as the catchment areas of higher-order or middle-order centres, however, other criteria are also important in defining the spatial boundaries of planning regions, such as regional identity or historical, local or state development policy considerations. The redrawing of planning region boundaries is a relatively rare occurrence, taking place for reasons such as municipal or county boundary reforms or territorial mergers.

Regional planning has special importance as a connecting link between state and local authority planning. Its task is

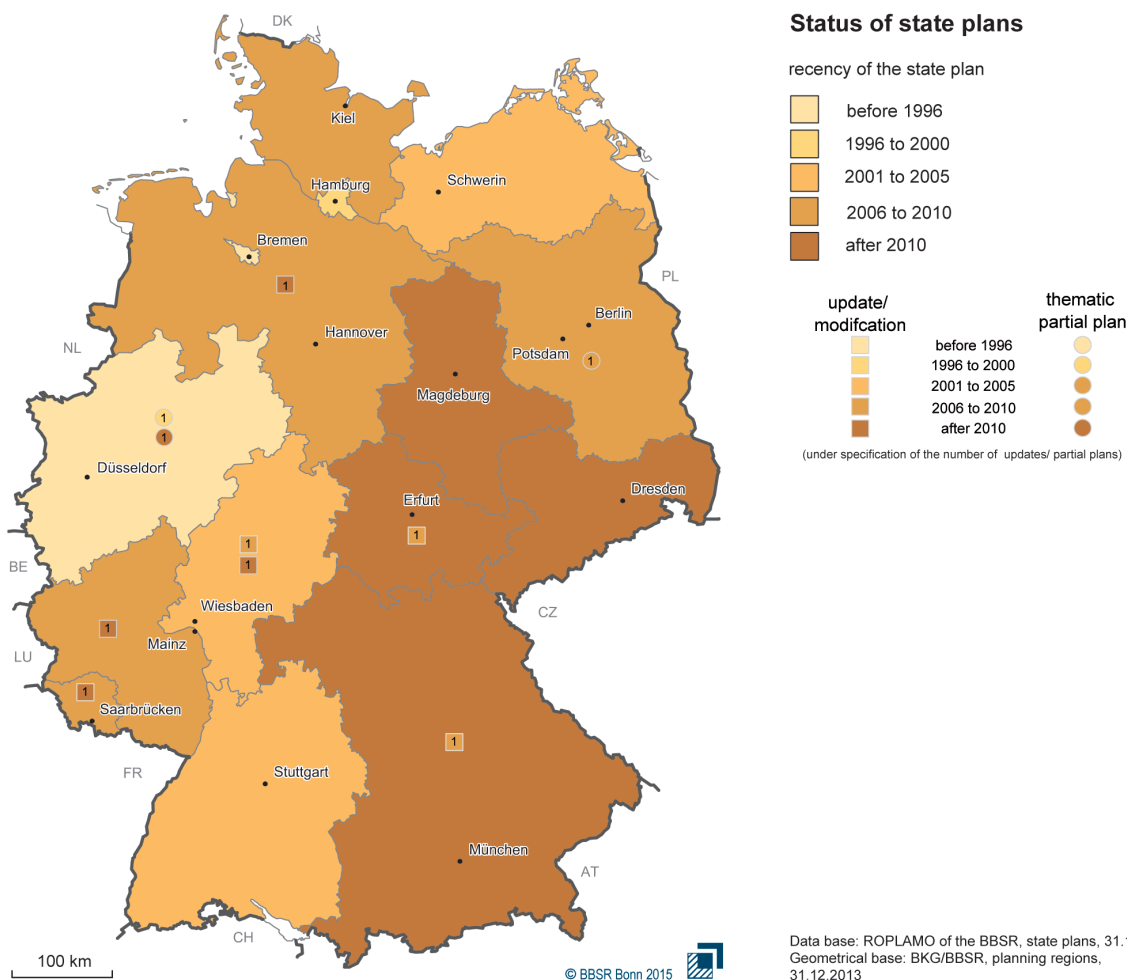


Figure 2 – Status of state plans in Germany.

tive state territory, the states are also required under Section 8 (1) of the Federal Spatial Planning Act to compile spatial structure plans for their regions (regional plans). As a result of this, regional planning is carried out almost nationwide in

to further elaborate the stipulations of state plans for the regions concerned (Brohm 2002, 642). Under the rule in Section 8 (2), first sentence, of the Federal Spatial Planning Act, regional plans must be developed from the overall conceptu-

al framework provided by state-wide spatial structure plans (Runkel 11/2006, K § 3, at 150).

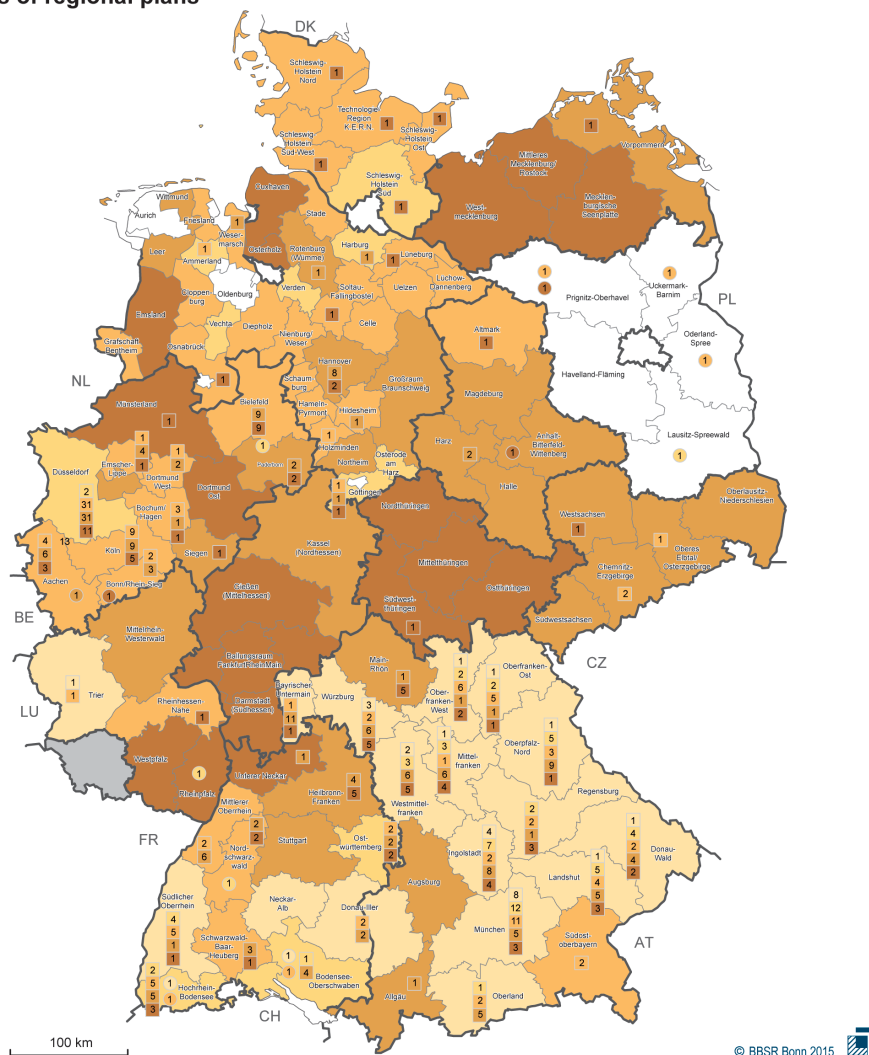
Giving due consideration to the stipulations in state-wide spatial structure plans, regional plans therefore include a goal system for future regional structure and development. They also specify instruments to aid the attainment of the specified spatial planning goals. The amount of leeway left here for regional planning is contingent on whether the state plan predominantly falls back on spatial planning goals or principles and the scope of its framework stipulations (Mößle 2000, 77). In line with the mutual feedback principle, preparatory land-use plans and the outcomes of other municipal urban development planning activities must also be included in the

weighing of interests as part of regional planning (Section 8 (2), second sentence, of the Federal Spatial Planning Act).

Regional plans generally have a 10 to 15-year planning horizon. From a national perspective, however, they are in a state of constant flux due to updating, modification, and regional differences in planning cycles. Map 7 provides an overview of the current status of regional planning in Germany.

A recent type of regional plan is the regional preparatory land-use plan. Under Section 8 (4) of the Federal Spatial Planning Act 2008, a regional preparatory land-use plan can serve simultaneously as a regional plan and a joint preparatory land-use plan under Section 204 of the Federal Building Code, which means it must comply both with the Federal

Status of regional plans



recency of plans and modifications

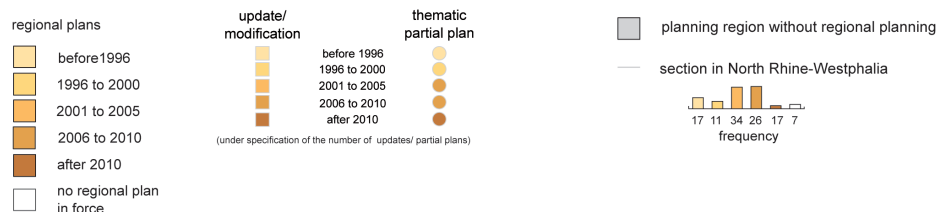


Figure 3 - Status of regional plans in Germany.

Spatial Planning Act and the Federal Building Code.

2.9. Instruments for the implementation of spatial planning

Besides the compilation of spatial structure plans, an important role for planning authorities is also played by plan implementation and enforcement. Supplementary to the duty of compliance and alignment with spatial planning goals and the duty to give due consideration in relation to spatial planning principles (see section on requirements), notable instruments available to planning authorities include the spatial planning procedure, state spatial planning reports, prohibition of spatially relevant plans, and procedures for derogation from spatial planning goals.

The spatial planning procedure and state spatial planning reports are both formal procedures to assess spatial compatibility, meaning the spatially relevant impacts of spatially relevant plans or works.

The spatial planning procedure serves to coordinate spatially relevant plans or works with one another and with spatial planning requirements. The spatial planning procedure is carried out in advance of a final decision in an approval procedure under sectoral law. The outcome of a spatial planning procedure is a state spatial planning assessment stating whether a project complies with spatial planning requirements, does not comply with them or complies subject to certain stipulations (Höhnberg, Jacoby 2011, 509). A state spatial planning assessment comes under the 'other' requirements of spatial planning under Section 3 of the Federal Spatial Planning Act. It must therefore be given due consideration in the official decision on a project's admissibility.

State spatial planning reports come into play where only the goals of spatial planning are germane to the legal assessment of spatially relevant plans or works (Höhnberg, Jacoby 2011, 514). As with state spatial planning assessments, state spatial planning reports come under the 'other' requirements of spatial planning.

3. Urban development and urban planning

3.1. Planning law

Legislative powers with regard to planning law are shared between the federal and state levels. Planning and building law is divided into urban development law and building control law. Urban development law stipulates land use within a municipality, is site-focused and is federal law. Building control law lays down the requirements for specific structures, it is building or structure-focused and it is state law (Battis/Krautzberger/Löhr 2014, Introduction, at 4).

The Federation's powers to legislate on urban development law follow from Article 74 of the Basic Law (Article 74 (1) No. 18 of the Basic Law). This gives the Federation the powers

to legislate on land law, which includes urban development planning law. It is on this legal basis that the Federation enacted the Federal Building Act in 1960 – today's Federal Building Code – creating for the first time a uniform legislative framework for local urban land-use planning. Alongside the Federal Building Code, federal secondary legislation has additionally been enacted, such as the Land Utilisation Ordinance (*Baunutzungsverordnung/BauNVO*) and the Plan Notation Ordinance (*Planzeichenverordnung/PlanZVO*).

There are formulated several urban planning models that reflect contemporary trends (such as conservation of the 'European city', the city of short distances, the compact city, the climate-friendly city, the smart city, critical reconstruction, and so on). The Federal Building Code, on the other hand, formulates urban development goals that are further elaborated by cities, towns and municipalities under their own responsibility according to local needs. The instruments of urban development and land law are thus essentially neutral in terms of goals. They can be used to prepare, stipulate and implement almost all goal-determining elements of urban planning (BBR 2000).

For the general public, planning law comes into effect through the granting of building permission. The building authority examines the admissibility of building plans under planning law, meaning to what extent they conform with a binding municipal land-use plan. Building plans are also examined for conformity with building control law (building regulations). The granting of approval under building control law for members of the public therefore splices together federal planning law with state building regulations. Building can only start when building permission has been granted.

3.2. Local planning autonomy

Under the subsidiarity principle, the Federal Government and the states only assume responsibilities that cannot be provided for and dealt with at local authority level, meaning by cities, towns and municipalities. Under Article 28 of the Basic Law, municipalities have the right to regulate all local affairs under their own responsibility, within the limits prescribed by laws (partial fiscal autonomy) and under consultation of a democratically elected body representing the people (local authority autonomy). Autonomy is split down into a number of policy areas: Staffing, organisational, financial, planning and regulatory autonomy (Haury 2015).

The responsibilities of urban development and urban planning are thus included in the guarantee of local authority autonomy. An implication of this constitutional status granted to municipalities is local planning autonomy. Municipalities are thus largely autonomous in planning. Accordingly, local authorities stipulate on how cities, towns and villages are to develop by compiling preparatory and binding land-use

plans – subject to reciprocal consideration of superordinate planning levels (the mutual feedback principle). Cities, towns and municipalities thus examine local circumstances and determine in plans under their own responsibility what is appropriate to local problems and circumstances. In doing so they are required to ensure sustainable urban and housing development that reconciles social, economic and environmental needs, including with respect to future generations, along with socially compatible allocation of space and land in the common interest.

Municipalities perform this task under their own responsibility for their municipal territory and thus stipulate autonomously on land use. In the process, a very varied range of policy areas – the natural environment, economic activities, housing, transport, etc. – all impinge on the shaping of land use. Each municipality is required to coordinate the interests of these policy areas and to bring them together in supra-sectoral, cross-cutting overall planning for their municipal territory (BBR, 2000). This approach ensures that planning safeguards the public interest.

An overarching framework for urban development is provided at federal and state level through legislation and the allocation of funding.

3.3. Tasks and objectives of urban land-use planning

The main policy instrument at local authority level is urban land-use planning. This governs the legal relations between people and land use. Under the basic definition in Section 1 (1) of the Federal Building Code, “the function of urban land-use planning (*Bauleitplanung*) is to prepare and control the use of land within a municipality, for buildings or for other purposes, in accordance with this Act.” Urban land-use planning is thus directed at controlling permissible land reallocation in locational and procedural terms (Kuschnerus 2001).

The development and organisational function of urban land-use planning also follows from this. It thus serves to providing the organising framework for the use of sites for building or other purposes. It is also intended to help prepare and direct the development of building and other land uses aimed for in a municipality’s urban development strategy (Krautzberger, Stürer 2014).

Urban land-use planning has a general aim of serving the public interest and is expected to reconcile diverging land use interests. The public interest is incorporated at general level in the principles of land-use planning set out in the first sentence of Section 1 (5) of the Federal Building Code. This states that land-use plans must safeguard sustainable urban development and a socially equitable utilisation of land for the general good of the community, and contribute to securing a more humane environment and to protecting and developing the basic conditions for natural life.

3.4. Planning requirements

A characteristic feature of urban planning is freedom of scope. It is also a feature of sovereign planning under the rule of law, however, that it is bound by legal constraints, compliance with which in the case of urban land-use planning is subject to regulatory and judicial oversight. The Federal Building Code lays down the function of urban land-use planning (Section 1 (1) of the Federal Building Code), prescribes general objectives for it (Section 1 (5), first sentence), further elaborates on those objectives with a list of specific guidelines (Section 1 (5), second sentence), and requires municipal planners to duly weigh public and private interests affected by urban land-use planning (Section 1 (6)). The following requirements and principles must be observed in the preparation of binding land-use plans:

- Necessity requirement (Section 1 (3) of the Federal Building Code):
Land-use plans must be prepared to the extent that they are required for urban development and regional policy planning.
- Alignment requirement (Section 1 (4) of the Federal Building Code):
Land-use plans must be brought into line with spatial planning goals.
- Coordination requirement (Section 2 (2) of the Federal Building Code):
Land-use plans for neighbouring municipalities must be co-ordinated.
- Binding effect of sectoral planning stipulations (Section 9 (6) and Section 38 of the Federal Building Code):
Stipulations under other state-level legislation must be included as a matter of course.
- Planning principles (Section 1 (5) of the Federal Building Code):
Safeguarding of sustainable urban development, the socially equitable utilisation of land, a humane environment and the natural foundations of life; sparing use of land.
- Requirement to weigh interests (Section 1 (6) of the Federal Building Code):
Public and private interests must be duly weighed in the preparation of land-use plans.

3.5. Formal urban development instruments

Land-use plans comprise preparatory land-use plans (*Flächennutzungspläne*) representing land-use types for the entire municipal territory and binding land-use plans (*Bebauungspläne*) containing legally binding stipulations for urban development in spatial subdivisions of the municipal territory.

Under the Federal Building Code, municipalities must prepare land-use plans as soon as and to the extent that they

are required for urban development and regional policy planning. They must be aligned with spatial planning goals and are required to ensure sustainable urban development and reconcile social, economic and environmental interests. Attention must be paid in their preparation to the requirements of environmental protection including nature conservation and the preservation of the countryside, the outcomes of any urban development strategy adopted by the municipality and those of any other urban development planning adopted by the municipality. Land is to be used sparingly and with due consideration. To reduce land take for built development, use is to be made of the scope for development offered by the utilisation of brownfield sites, infill development and other urban regeneration measures.

Interests that are material to the weighing of interests must be identified and assessed in the preparation of land-use plans. An environmental assessment is carried out with regard to environmental interests. The public is to be publicly informed at an early stage about the objectives of plans, differing solutions and the probable impact of plans. The public must be given suitable opportunity for comment and discussion. The authorities and other public agencies whose activities are affected by plans must likewise be informed and invited to comment, including with a view to the required scope and detail level of any environmental assessment.

There are other urban development instruments alongside land-use plans such as by-laws (inner zone and outer zone by-laws), other forms of land-use plan such as the project and infrastructure plan or the inner urban development plan inserted in the major revision of the Federal Building Code in 2013. The project and infrastructure plan is a special case of the binding land-use plan whose main distinguishing feature is that the plan is prepared and implemented by an (external) developer (Söfker 2012). The initiative for creating building rights thus lies with a private investor. The investor draws up the urban development plan and commits by contract to its implementation and to bear the costs of planning and of the provision of public infrastructure (Battis/Krautzberger/Löhr 2014, § 12, at 3). The project and infrastructure plan is thus an instrument enabling municipalities to enter into collaboration and contracts with third parties.

3.6. Special urban planning law and financial support for urban development

Special urban planning law, covered by Sections 136-191 in Chapter Two of the Federal Building Code, focuses on the treatment of the urban building stock in municipalities and notably urban deficits that have developed in specific neighbourhoods and how to remedy them. Special urban planning law has its own set of formal instruments and procedures:

- Urban rehabilitation measures;

- Urban development measures;
- Urban redevelopment;
- The socially integrative city;
- The preservation statute and urban development enforcement orders.

The provisions on urban redevelopment were inserted into the Federal Building Code by a 2004 act revising German building law in line with European law (*Europarechtsanpassungsgesetz Bau*). They are the legislative response to profound structural changes, most of all in demographics and the economy, and the attendant implications for urban development. An immediate factor in this was empty housing notably in the eastern German states from the late 1990s onwards (Battis/Krautzberger/Löhr 2014, *Vorbemerkungen* §§ 171a-171d, at 1). The 2004 act also inserted the provisions on socially integrative city measures. These represent a further development on state-level programmes on socially integrative urban development launched back in the 1990s, laying the basis for a uniform national framework.

So that towns and cities can master the tasks and challenges of urban development, the Federal Government supports the establishment of sustainable urban structures with programmes of financial assistance for urban development. The Federal Government grants such financial assistance to the states under Article 104b of the Basic Law; it is supplemented with state and municipal funding. The federal financial assistance is made available to the states on the basis of an administrative agreement on financial support for urban development (*Verwaltungsvereinbarung Städtebauförderung*) (BMUB 2015).

The objectives of financial support for urban development are as follows:

- Strengthening the urban function of city centres and local sub-centres, paying special attention to the preservation and conservation of buildings of historic interest
- Establishing sustainable urban structures in areas affected by severe loss of urban function; indicators of such loss of function include most of all a sustained surplus of built structures such as empty housing and derelict inner city sites and notably industrial land, conversion land (disused military sites) and railway land
- Urban planning measures to mitigate social deficits.

3.7. Informal urban development instruments

'Informal' planning instruments and processes for the preparation and implementation of land-use plans play an increasingly important part at the local planning level just as they do at supra-local levels. Unlike their formal counterparts, informal planning instruments have no binding force. They nonetheless rank highly in the urban planning process as a continuous process of urban development whose program-

matic substance cannot be usefully administered through formal plans. The strength of informal planning is that it allows programmatic, conceptual and design solutions to be formulated in accordance with the primary question or task at hand and incorporated into municipal planning. The advantage of such instruments is thus their versatility.

Informal planning is often used as a complementary instrument to formal planning. A wide range of decision-making aids can be incorporated. For example, informal planning instruments can be used to identify or measure the need for planning. They are also a suitable means of illustrating plan alternatives or the likely impact of plans. Informal planning can thus help to integrate and elaborate. It can serve as a visualisation aid and so facilitate public consultation and participation. Informal planning instruments can consequently also take on a communication and coordinating role.

Informal planning ranges from draft urban development plans to urban development framework plans and general development plans, from special reports to urban development and architectural competitions, and from transport development plans to architectural designs and models.

3.8. Parties involved in urban development

Municipalities have planning autonomy and must prepare land-use plans when required for urban development and regional policy planning. The obligation to carry out planning follows for municipalities directly from Section 1 (1) of the Federal Building Code ('positive' planning requirement). This allocation of responsibility for urban land-use planning does not however mean that planned development cannot be undertaken by other means than on the basis of urban land-use planning (Battis/Krautzberger/Löhr 2014, §1, at 17). Municipalities are also free to cooperate with neighbouring municipalities, industry or civil society.

Urban development in Germany has always been a community effort involving local or regional industry and civil society to varying degrees alongside the public sector. Collaborative approaches are already used in public-private partnership models and in binding land-use plans implemented by developers.

Many innovative new forms of private initiative in urban development have emerged in recent years. These include civic trusts, participatory budgeting, citizens' boards, pop-up amenities, energy cooperatives and crowdfunding initiatives. Business improvement districts (BIDs) and housing improvement districts (HIDs) have been called into being in some places to promote cooperation between individual owners in a neighbourhood. Both of these are based on the use of public statutes under which, subject to minimum consent, all owners affected can be called upon for the private funding of a private sector project (Jakubowski 2015).

In future, municipalities face the task of organising strategic alliances and communities that share responsibility and are centred around the goals of sustainable, integrated urban development. In this way, they can gain valuable new partners in urban development.

4. Climate protection and energy efficiency

The Federal Government has identified climate change mitigation and adaptation as growing challenges for states, regions, cities, towns and municipalities.

Climate and energy issues are important priorities in spatial planning, and not only when it comes to the review of guiding principles. Also, numerous spatial structure plans have been updated in recent years with regard to flood prevention and renewable energy. In particular, spatial planning stipulations play a key part in directing the expansion of wind power in spatial terms as there is no sectoral planning for this purpose (see Section 7). In light of this, in connection with decisions to accelerate the transition to renewable energy (the *Energiewende*), the Federal Government called in 2011 for increased designation of spatial planning areas for wind power. The Federal Government and the states established a joint initiative on wind power, the *Bund-Länder Initiative Windenergie*, to improve exchange between them on the issue.

With a view to the municipal level, an act promoting climate protection in cities, towns and municipalities likewise came into force in 2011. To accelerate the *Energiewende*, climate policy aspects and a climate protection clause were incorporated in the Federal Building Code. The aim of this legislation is to create targeted arrangements to the benefit of climate protection that support practitioners and provide greater scope for action by municipalities.

To aid the ongoing substitution of conventional energy sources with renewable energy, improvements were made to the planning law instruments for repowering, meaning the replacement of old wind turbines with new ones predominantly in wind farms. It is stipulated that municipalities should indicate renewable energy or combined heat and power installations in preparatory land-use plans and can designate sites for such installations in binding land-use plans. Informal municipal climate change and energy strategies can also be given greater legal force by being incorporated in formal urban land-use planning. Municipalities have also gained the scope to make stipulations in binding land-use plans that provide for and facilitate the use of renewable energy and combined heat and power installations in new buildings. The use of solar energy on roof and exterior surfaces was also made possible in undesignated outlying areas. With a view

to built areas, climate change mitigation and adaptation concerns have also been incorporated into special urban planning law (Goderbauer, Haury 2015).

In the building sector, the Energy Saving Ordinance (*Energiesparverordnung/EnEV*) has been an important element of energy efficiency policy for many years. Among other things, it requires energy certificates to be issued for new buildings and on the modification or extension of existing buildings. A major revision of the Energy Saving Ordinance in 2013 implemented a key part of the Federal Government's resolutions on the *Energiewende*. The energy efficiency requirements for new buildings have been made 25 percent more stringent from January 2016. From 2021 there is a fundamental obligation for new buildings to be constructed to the highest energy efficiency building standard.

5. Examples: Wind power and refugees

In the following, the regulatory capabilities of the various planning levels and the links between levels are illustrated with reference to two topical examples.

As examples, two topics were chosen which currently have a high political priority: Wind energy and refugees. In addition, the examples illustrate the regulatory capabilities of the various planning levels.

With regard to the expansion of onshore wind power, the location of new wind turbines is especially determined by instruments of state and regional planning. These binding stipulations must be observed by the local authority planning. Another topical subject of the spatial planning is the supply of the accommodation of refugees. The "Königsteiner Schlüssel" regulates nationwide how many accommodations must be provided per federal state. The states regulate subsequently after own distribution mechanisms the number of accommodations of refugees which local authority districts must establish. For local authority districts the supply of lodgings, the integration of refugees in the job market and in the neighborhoods shows a great challenge that must be overcome in a short time.

5.1. Wind power

Implementation of the *Energiewende*, the transition to renewable energy planned by the Federal Government and the states in Germany, requires a substantial expansion of onshore wind power. 1,766 onshore wind turbines were erected in Germany in 2014 alone, with a capacity of some 4,750 MW. The total number of wind turbines nationwide came to 24,867 at the end of 2014 with a capacity of approximately 38 GW. The Federal Network Agency expects that installed capacity will continue growing to as much as 63.8 GW (Sce-

nario B) by 2025 (BNetzA 2014). The expansion of wind power means that significant amounts of land will be needed to build wind turbines.

Various factors determine where wind turbines can be put up. A key point first of all is the privileged use of wind power under the Federal Building Code (BauGB). Under Section 35 (1) No. 5 of the Federal Building Code, the use of wind power is permissible in undesignated outlying areas where there are no conflicting public interests.

A project conflicts with public interests if it contradicts spatial planning goals or representations in a preparatory land-use plan (Section 35 (3) of the Federal Building Code). The Federal Building Code also permits state, regional and municipal planning, by positively designating locations for privileged projects in undesignated outlying areas, to exclude such projects in the remaining planning area.

Various state and regional planning instruments enable the designation of specific locations for spatially relevant functions and land uses. A distinction is made between 'positive' and 'negative' planning designations (Einig 2005, 51; Domhardt, Spannowsky 2002). With regard to wind power, a positive planning designation comprises the designation of spatial planning areas for wind power. These locations are actively secured for wind power. At the same time, safeguarding a site for a different use, such as spatial planning areas for nature and the countryside or for flood prevention, can have the effect of restricting the use of the land for wind power (negative planning control).

The Federal Spatial Planning Act (Section 8) distinguishes between four types of spatial planning area: Priority areas, reserve areas or sites, areas suitable for development, and priority areas with the effect of areas suitable for development. The highest level of protection for a land use is attached to priority areas. These have the legal status of spatial planning goals and exclude all uses that contradict the priority land use. Priority designations cannot be weighed against other interests. Reserve areas or sites, on the other hand, have the status of principles of spatial planning and hence the effect of setting a parameter for a subordinate weighing of interests (Heemeyer 2006, 266). They are far weaker in terms of spatial regulation than priority areas. When it comes to the spatial regulation of wind power through regional planning, an important part is played by areas suitable for development and priority areas with the effect of areas suitable for development. Both of these area types have the effect of excluding the land use outside of the designated area, meaning that no wind turbines can be approved in the remainder of the planning area.

The designation of spatial planning areas is done in regional plans. Regional planning authorities are not free to decide what type of spatial planning area they use to regulate the building of wind turbines. Instead, plan notation ordinances,

state spatial planning acts and the stipulations of state development plans determine what spatial planning area types are available for regional planning. As a result of this, very varied regulatory regimes have developed from state to state (see

concentration zones' for wind power installations in a preparatory land-use plan and consequently preclude the erection of wind turbines outside of such zones. There is no obligation to designate concentration zones, however.

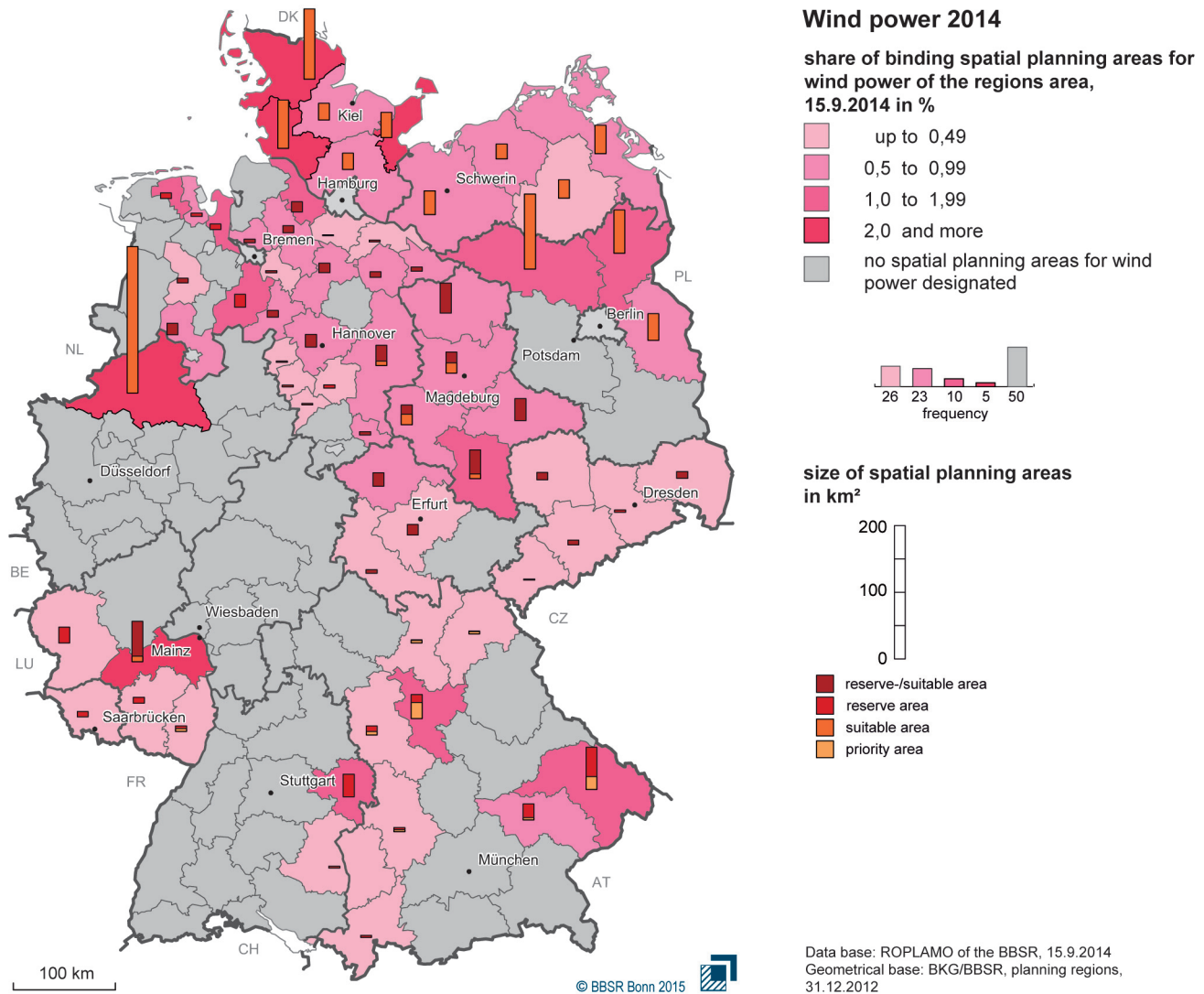


Figure 4 – Binding spatial planning areas for wind power 2014.

Map 2) (Einig, Zaspel-Heisters 2014; Zaspel-Heisters 2015). Under Section 1 (4) of the Federal Building Code, land-use plans must be aligned with spatial planning goals. Municipalities are not therefore allowed to adopt plans at variance with spatial planning goals. If wind power is regulated in spatial terms at regional level with final effect by the designation of areas suitable for development, of priority areas with the effect of areas suitable for development or of exclusion areas, then the municipalities must heed such designations. If on the other hand regional plans make use of priority areas or reserve areas or sites, or if no use is made of regional planning for the regulation of wind power, then scope remains for regulation at municipal level. Under Section 5 read in conjunction with Section 35 (3) of the Federal Building Code, municipalities can designate 'con-

Especially in states and regions where wind power is not regulated in spatial terms through regional planning or where such regulation does not have final effect, stipulations in preparatory land-use plans can significantly limit the amount of land available for wind power.

5.2. Refugee issues

A new act concerning planning law measures to facilitate the accommodation of refugees entered into force on 26 November 2014. Its adoption was prompted by sharply rising refugee numbers and the resulting difficulties for municipalities in providing accommodation and coping with the rapidly growing influx of refugees into Germany. Current migration statistics from the Federal Office for Migration and Refugees suggest at least 800,000 refugees per

year coming to Germany. Providing accommodation for these people, many of whom come from crisis zones, poses a major problem for large cities where the housing market is already stretched. There is a general shortage of land needed to provide broad segments of the population with space for housing. Short-run use of other sites is often ruled out by planning law. Legislative action was therefore urgently needed in the form of a limited-term administrative measures act relating to urban land-use planning law and planning law permission for facilities to accommodate refugees and asylum seekers in order to enable and secure the rapid creation of public accommodation centres to meet demand (Deutscher Bundestag 2014).

The revision to the Federal Building Code modifies the Code in five points. These relate to urban land-use planning and planning law permission. A number of the provisions are permanent, while others are time-limited to the end of 2019 in order to test their effectiveness.

In Section 1 (6) of the Federal Building Code, "refugees or asylum seekers and their accommodation" is added to the list of urban development concerns. These aspects must thus be given due consideration and duly weighed in accordance with the requirement to weigh interests in urban development planning. Alongside further provisions supporting the accommodation of refugees in the planned and unplanned inner city zone, provision was also made for accommodation in commercial areas. Towns and cities are allowed to locate refugee accommodation in commercial areas for a limited period up to the end of 2019. Whether accommodating asylum seekers in commercial areas is a helpful solution or leads to their lasting exclusion is something that towns and cities must monitor critically through to 2019. Other possibilities for coping with the large inflows of refugees continue to be explored in the meantime.

6. Conclusion

The federal system in Germany provides for responsibility sharing in all areas. Germany consequently also has a multi-tier planning system, with responsibilities assigned at federal, state, regional and municipal level. This multi-tier sys-

tem incorporates horizontal and vertical coordination at all times (the mutual feedback principle). In other words, there is countervailing influence in spatial planning between local, regional and supra-regional planning. Additionally, in all planning, the requirement to weigh interests must be observed to ensure that for spatial planning and land reallocation is as equitable and as socially accountable as possible while taking into account the largest possible array of interests.

Sustainable spatial development with its two levels comprising spatial planning and urban development is governed by various federal and state legislation. Under the subsidiarity principle, the Federal Government and the states only assume responsibilities that cannot be provided for and dealt with at local authority level, meaning by cities, towns and municipalities. Subsidiarity is a social policy principle that was also adopted for the European Union in the 1992 Treaty of Maastricht.

By way of this principle, the municipalities gain considerable scope for action (planning, staffing and financial autonomy). It assures them the right to regulate all local affairs under their own responsibility, within the limits prescribed by laws and under consultation of a democratically elected body representing the people (local authority autonomy). A principle of intensive public and industry consultation and participation (the multi-stakeholder approach) has been followed for many years in Germany. This is reflected in various collaborative planning instruments such as project and infrastructure plans and the establishment of business improvement districts (BIDs) and housing improvement districts (HIDs).

The high value placed on innovation and knowledge transfer or exchange of experience in Germany is an important factor in spatial development and a prerequisite for the ongoing substantive and procedural refinement of sustainable spatial development. Pilot trials in model projects and also experimental legislative provisions (as in the accommodation of refugees) enable key experience to be acquired and new lessons to be learned. For these purposes, the Federal Building Ministry set up the Federal Institute for Research on Building, Urban Affairs and Spatial Development (BBSR), which alongside ongoing spatial and urban development monitoring conducts research into new approaches and methods of spatial development under programmes on Demonstration Projects of Spatial Planning (MORO) and Experimental Housing and Urban Development (ExWoSt).

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