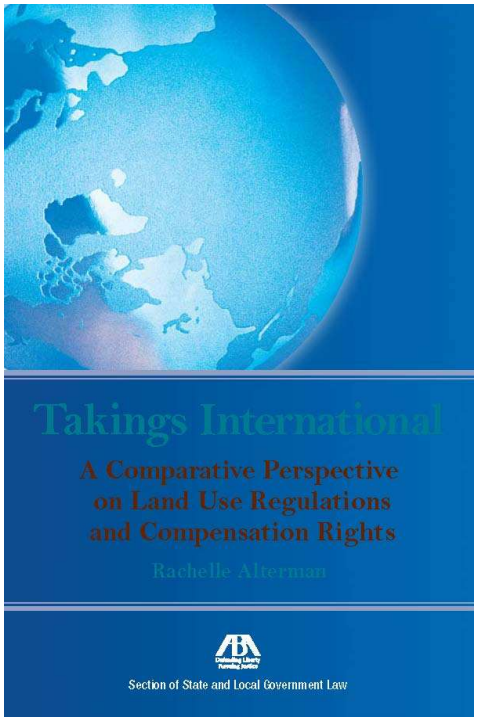

Takings International

A Comparative Perspective on Land Use Regulations and Compensation Rights

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Chapter 14

PRE-PUBLICATION VERSION

CHAPTER 14

THE FEDERAL REPUBLIC OF GERMANY

German planning law provides clear answers to almost every conceivable situation where an injury to property values may arise. The law does grant compensation rights, including for "partial takings" of any magnitude, but these is a time limit. The balance struck is widely accepted.

GERD SCHMIDT-EICHSTAEDT*

The rights to compensation for reduced property values caused by planning decisions have been part of German federal law since 1960. The only important amendment came in 1976, when the time period for compensation rights, which previously had no time limit, was restricted. By contrast, the financial benefits of planning usually remain with the landowners.

There are two major questions in German law concerning injuries caused by planning decisions. First, what rights does a landowner have when private property, zoned by a binding land-use plan for a private-type land-use, is subsequently designated for public purposes? Second, what rights does a landowner have when a planning authority revises a private-type land-use category to a less valuable category? This chapter first looks at these two main questions. It then proceeds to analyze the law regarding other types of planning decisions that may also have negative effects on property values, such as temporary moratoria.

H1I. CONSTITUTIONAL ASPECTS

The right to property ownership in Germany is guaranteed in article 14 of the Basic Law (*Grundgesetz*), which states:

> (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
>
> (2) Property entails obligations. Its use shall also serve the public good.
>
> (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.[1]

Thus, expropriation is only possible when the corresponding compensation is regulated in

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[1] Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, Bundesgesetzblatt, Teil I [BGBl. I] at 1, as amended, art. 14 (F.R.G.).

the same law that enables the expropriation. Not every encroachment on property is classified as expropriation. The content and limits of property rights may be determined by law, and in that case, the Basic Law is silent about compensation rights. This chapter discusses the extent of these rights as determined by specific laws.

The German law of liability for damages caused by planning decisions (*Planungsschadensrecht*) is concerned with compensating property owners for the effects of (lawful) interferences by public authorities with their property rights. In German legal doctrine, it is irrelevant whether liability for damages is caused by an "expropriation" decision within the meaning of article 14 of the Basic Law or by a regulation that restricts property rights. In the end, they are always a form of property restriction (unless the municipality accepts a transfer of title claim).

The law of liability for injuries caused by planning decisions is determined by sections 39 to 44 of the Federal Building Code (*Baugesetzbuch*). This form of liability is distinct from claims for damages under civil law for unlawful action, whether by a private person (such as damage due to negligence) or by a government agency.

Some local politicians, however, do not communicate this distinction well. When a municipality awards compensation for damages within the meaning of sections 39 to 44, people often misunderstand this to be equivalent to admitting that the municipality undertook an unlawful action. Thus, compensation claims are often refused on principle. This attitude does not serve the interests of municipal planning. If good planning demands an action, then municipalities should risk liability for damages.

H1 . TYPES OF PLANNING DECISIONS AND RELATED COMPENSATION RIGHTS

German law clearly sets out several different planning situations and spells out the specific compensation rights that apply to each.

H2 Types of plans

According to the German planning law system, preparatory land-use plans, opportunities for development are initiated primarily through preparatory land-use plans ("F-plans"). Each F-plan is prepared for the entire area of a municipality. Subsequent binding land-use plans ("B-plans") are developed out of F-plans[2].

The F-plan is only binding on the public administration. It does not convey any rights or claims to landowners. For this reason, the opportunities for development expressed in a preparatory land-use plan can be withdrawn without giving grounds to a compensation claim.

A binding land-use plan is a different matter. Once a B-plan comes into force, the binding land-use plan is a rule of law. Owners may rely on these plans and can usually expect to receive

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[2] For an introduction to the German planning system see: Gerd Schmidt-Eichstaedt *National-level planning Institutions and Decisions in The Federal Republic of Germany.* IN RACHELLE ALTERMAN, NATIONAL-LEVEL PLANNING IN DEMOCRATIC COUNTRIES: AN INTERNATIONAL COMPARISON OF CITY AND REGIONAL POLICY-MAKING (LIVERPOOL UNIVERSITY PRESS, ed. 2001).

building permission. Therefore, according to section 39 of the Federal Building Code, as soon as a B-plan becomes legally binding, the municipality is liable for the expenses incurred in justifiable reliance on the plan. Yet, as we shall see in greater detail below, the right to receive development permission holds only after the necessary local public infrastructure is secured.

H2 Withdrawal of the Currently Permitted Land-Use

H3 . Designation for Public Purposes

Section 40 of the Federal Building Code lists fourteen public use categories that explicitly make property owners eligible for compensation.[3] Such public use categories include the designation of land for community use (such as for schools), public thoroughfares, garages and public parking, and government programs designed to protect, conserve, and develop soil, landscapes, and the natural environment ("PCD spaces").[4]

If a binding land-use plan explicitly contains one or more of the public use categories listed in section 40, the municipality will generally try to purchase the relevant property by negotiating with the property owner. If the negotiations prove unsuccessful, the municipality can initiate expropriation procedures.[5]

Normally, when a property is claimed for public purposes, the public agency will take the property from the owner, either by purchase or by expropriation (if there is disagreement). However, there are cases when many years pass between the designation of a B-plan (with the goal of a public purpose) and the implementation of the public purpose use. These cases occur especially when implementation would be too taxing on the public budget and the authorities prefer to wait; they cannot be forced the authorities to realize the plan.

In such circumstances, a landowner can submit a "transfer of title" claim[6] to the municipality when the landowner can show that the designation or implementation of the binding land-use plan makes it economically unreasonable to continue the existing use of the land. Landowners are obliged to keep their properties in the interim if it is reasonable to expect them to do so, such as when a property has tenants who can continue to rent the property until the time when the public use will commence. In the course of retaining the property, however, an owner is not permitted to carry out works that may increase the value of the property unless the public agency agrees, and the owner waives any rights to indemnification for these investments within the scope of his or her future claim for compensation for the expropriation.[7] However, in reality, landowners rarely issue such waivers because they rarely wish to make investments in such properties. When designation to public use severely limits or effectively terminates the exiting

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3. Baugesetzbuch [BauGB] [Federal Building Code] June 23, 1960, Bundesgesetzblatt, Teil I [BGBl. I] at 2414, as amended, § 40 (F.R.G.), *available at* Gesetz im Internet, http://bundesrecht.juris.de/bundesrecht/bbaug/gesamt.pdf, *translated in* Federal Building Code, (Baugesetzbuch, BauGB), http://www.iuscomp.org/gla/statutes/BauGB.htm.

4. *Id.*

5. This chapter does not focus on expropriation per se.

[6] A related American concept is "inverse condemnation."

[7] Baugesetzbuch [BauGB] [Federal Building Code] June 23, 1960, Bundesgesetzblatt, Teil I [BGBl. I] at 2414, as amended, § 32 (F.R.G.), *available at* Gesetz im Internet, http://bundesrecht.juris.de/bundesrecht/bbaug/gesamt.pdf, *translated in* Federal Building Code, (Baugesetzbuch, BauGB), http://www.iuscomp.org/gla/statutes/BauGB.htm.

land use, the owner may submit a transfer of title claim. In cases where the previous use of the property has been economically impaired, but the owner still has reasonable use of the property, the owner is entitled to appropriate financial compensation.

This situation frequently arises in transportation planning, which inherently deals with long-term matters. In this scenario, a binding land-use plan designates land for transportation routes; however, the municipality does not intend to implement the plan for at least ten years. On the one hand, affected landowners may not want to retain their properties because they cannot use them in an economically meaningful way. On the other hand, the municipality has no interest in acquiring the land at the present time.

Transfer of title claims also arise in situations when time is a major factor. Consider, for example, a tree nursery that requires trees to be raised for a minimum of six years. If the owner of the tree nursery anticipates that a binding land-use plan will call for the construction of a street in five years, the owner may be left with no meaningful use for the land. At the same time, however, the municipality has no interest in acquiring the land and holding on to it for the next five years. In these types of situations the owner may demand that the municipality take over the title to the land.[8]

In some situations, German law may require a private landowner or developer to "counterbalance" (Americans might say "mitigate") incursions of proposed private development into the landscape or environment by dedicating some of the private land to the relevant categories of PCD use. In such cases, a property owner has the right to make a transfer of title claim for some of his or her property which is already designated as PCD use. However, if the property owner benefits from the designation of the land for environmental mitigation in the other plots of land owned by him, such added value is to be deducted from the compensation received when the title is transferred.[9]

A transfer of title claim partially corresponds to a "right to be expropriated." When a landowner submits such a claim, the municipality cannot avoid paying compensation. Whenever municipalities fail to come to a financial agreement, expropriation regulations apply, especially those governing compensation.

Ultimately, German law makes it unlawful for a municipality to cause an unacceptable negative impact on private property by designating it for a public use category and thereby causing an "indirect expropriation." Otherwise, all municipalities would use this method, and landowners would have no legally regulated claim for compensation.[10]

Section 41 of the Federal Building Code provides an avenue to financial compensation that is independent from the transfer of title claim. According to this provision, when a binding land-use plan encumbers privately-owned land by granting walk-through or driving rights to the public (equivalent to an easement), the landowner may seek compensation. Compensation should be granted only if the drop in the value of the property is significant or the expenditures incurred go beyond the level required for "proper management of the property." However, no

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8. For a list of the requirements of unacceptability, see Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 13, 1984, 1985 Neue Juristische Wochenschrift [NJW] 1781 (1985) (F.R.G.).

9. BGH Oct. 9, 1997, 1998 Zeitschrift für deutsches und internationales Bau- und Vergaberecht [ZfBR] 42 (1998) (F.R.G.). German citation is: Name of the Periodical (Abbreviated – i.e. ZfBR), at first the Year (is the same as volume), and then the Page

10. *See* Bundesverwaltungsgericht [BVerwG] [Highest Administrative Court], 47 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 144 (F.R.G.).

compensation is to be paid for foliage that merely fulfills the requirements set by building laws to horticulturally manage the undeveloped areas of a building property.

It is important to note that when a municipality rezones property from a private-type use to a public use category, the seven-year time limit for private-type use categories (see below) does not apply. Thus, even if land has been designated for (private-type) development for more than seven years and the landowner has not yet made use of the development rights, when a municipality revokes the original land use, it must compensate the landowner for the full difference in value between the former permitted use and the new public use.[11]

H3. The Rights of Landowners When a Private-Type Land Use Is "Downzoned"

We turn now to the law of compensation pertaining to situations when a private-type use category is "downzoned" (to use an American term). First, we consider the situation in which an area has already been developed and the municipality wishes to change the permitted use by amending a binding land-use plan or approving a new one. This type of situation can occur, for example, when a binding land-use plan converts land from a previously mixed residential and commercial use to a purely residential use, or when land that was first used for single-family residential estates is re-designated for industrial use.

Before 1976, whenever private property was downzoned, the affected property owner always had a valid claim for compensation without any time restrictions. In 1976, the right to claim compensation was limited by an amendment to the Federal Building Code, which introduced a seven-year "period of liability for plans." The amendment's provisions required a municipality to draft a binding land-use plan that contained an explicit guarantee to affected landowners: Landowners had the right to develop their properties in accordance with the binding land-use plan's designation for the seven-year period following the date when the plan came into effect.

Subsequent to this amendment, Section 42 of the Federal Building Code specifies that if a municipality makes any changes to the plan during this seven-year period, the municipality has to compensate the relevant owners for the full depreciation in property values caused by the change in the plan.

Once the seven-year period passed and property owners still had not yet implemented their development rights, a municipality may alter the binding land-use plan without being liable for compensation. There are, however, three exceptions:

First, if the revised zoning is for a private-type use that is less lucrative than the *existing* use, the municipalities must fully compensate property owners. Second, as noted above, when the property is designated for a public rather than a private use, a municipality must fully compensate the affected property owner. Third, when the opportunity to use the land as specified by the modified land-use plan is in reality significantly limited or nonexistent.

The amount of compensation equals the value that the property would have attained under the previous land use, regardless of how long this use was permitted for development. Similarly, when a property is downzoned below its existing use, the municipality must fully compensate the property owner even after the seven-year period has passed. Note that German

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11. Bundesgerichtshof [BGH] [Federal Court of Justice] May 6, 1999, 1999 Zeitschrift für deutsches und internationales Bau- und Vergaberecht [ZfBR] 273 (1999) (F.R.G.), *confirmed by* BGH July 11, 2002, 2002 ZfBR 799 (2002) (F.R.G.).

law protects the existing use even after the land has been rezoned (Americans may call this a nonconforming use). Landowners are not obliged to terminate the previously permitted use, except in cases when the previously permitted use becomes seriously dangerous to the new (legal) surrounding users.

For example, suppose a property that had originally been used for industrial purposes is downzoned to "allotment plots" (lots rented or sold for small urban farming). Suppose that the seven-year period of liability has expired and that the value of the property dropped from an original figure of 80 € to 50 €. Even though seven years have passed, the municipality must pay the owner the 30 € difference in value as compensation for the injury sustained by the planning decision because the *existing* "live" use is of higher value.

Special (but similar) principles apply to situations where landowners consistently under-utilize development rights in built-up areas. This applies where, for several years, landowners in a particular area consistently apply for building permits that would grant *less* than the maximum permitted development rights or the most lucrative land-use. In such a case, which the Code calls a "built-up" area, special rules apply as specified by section 34. Municipalities have the flexibility to modify land use classifications at any time without having to pay damages, so long as the change does not deviate significantly from the existing built-up land use.

For example, consider an area in a city that has been zoned for mixed residential and commercial use. However, the property owners are interested in developing only residential buildings. In this situation, the municipality may, after a period of seven years following this development, change the land-use designation to residential only, without having to pay compensation. Henceforth, only residential development will be permitted.[12] Note, however, that to avoid paying compensation, the municipality must not rezone below the value of the predominant existing level of de facto land use – in this example, residential use.

We turn our attention now to undeveloped areas. Here, the period of liability of a land use plan becomes highly relevant. The law distinguishes between areas within plans where building permits may be issued immediately, and those areas where some prior conditions, as set out in section 30, have not yet been met (such as infrastructure availability). In the latter case, the municipality may refuse a building permit even though it accords with the plan's designation.

We will first look at situations where the conditions of section 30 are met. In such cases, property owners have seven years to develop their properties. Those who do not develop during this period must take the risk that the municipality may one day revise the permitted land-use without being liable for a compensation claim.

For example, consider a land-use plan that designates a particular area for industrial use. The landowners do not make use of the development rights for seven years following the enactment of the land-use plan, and prefer to use the site for urban-farming "allotment" plots. Given this situation, once the land-use plan's period of liability expires, the municipality is free to cancel the industrial use category and designate the area as a permanent allotment site, without having to pay compensation to the property owners.

Here is another example. An owner has several adjoining plots of land designated by a

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12. In a case with similar facts the Federal Court of Justice ruled that there are no longer rights for commercial development under section 42 of the Federal Building Code. See in *See* BGH ZfBR 87 (107) (F.R.G.). *See also* BGH 1988 ZfBR 145 (1988).

land-use plan for residential development. The property owner chooses to build a single house and use the other plots as an enlarged garden. After seven years, the municipality may change the land use category of these undeveloped plots from "residential" to "private green spaces," thus prohibiting construction in the future. Even though this municipal action prohibits the owner from using these plots for development, thereby reducing the plots' economic value, the property owner has no claim for compensation. However, while the municipality may not be liable for compensation, it has to be careful that the downzoning decision is not challenged on substantive grounds. The downzoning of the vacant plots should reflect solid town-planning principles and fit well within the broader planning of the city. For example, if there is significant demand for residential plots within the municipality, and new areas are designated for residential use, the municipality may have to justify why it has reclassified formerly residential plots into designated private gardens. This type of decision might be ruled by the courts to constitute a "balancing error" and may thus lead to invalidation of the plan.

Because municipalities may only limit previously permitted uses when they are justified by good town-planning principles, municipalities in practice do not hasten to downzone land even after the seven-year period has elapsed. Town planning should be predominantly concerned with long-term matters; relatively short-term redesignation is generally avoided.[13] The mere expiration of a seven-year deadline is not, by itself, a sufficient basis for making town-planning decisions that change land uses.[14]

According to a decision by the German Federal Court,[15] the rule about compensation rights is different when an undeveloped enclave of land that is eligible for private development is redesignated for a *public* land use. For example, in a developed residential neighborhood, there is a vacant plot of land that is also designated for residential use. After the seven-year period elapses, the municipality re-designates that plot as a children's playground or a nursery school. In that situation, the Court has ruled that the municipality nevertheless must pay compensation equal to the full value of the property as residential land, not its value as green space. Property owners in this situation cannot be forced to make special sacrifices for the community. This is a reasonable outcome because the municipality cannot convincingly argue that the area has lost its character as residential development land simply because the municipality had acquired a single property for public purposes.

Section 42 of the Federal Building Code, which regulates the period of plan liability, lists a set of exceptions to the compensation rule stated above. If, during the seven-year period, implementing development was hindered by circumstances beyond the control of the private owner or developer, that period should be extended. For instance, if a development freeze is imposed on a property during the seven-year period, the length of the development freeze must be added to the seven-year period. Furthermore, if municipal negligence results in a failure to grant building permission before the seven-year period has expired, the property owner should be granted the permit or be compensated (so long as the owner applied for building permission sufficiently before the deadline).

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13. *See, e.g.*, BGH 1990 ZfBR 298 (1990) (F.R.G.).

14. Oberverwaltungsgericht [OVG] [Administrative Appeals Tribunal] Apr. 5, 2000, 2001 ZfBR 54 (2001) (F.R.G.).

[15] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] May 6, 1999, 141 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 319 (F.R.G.).

We thus see that the German legislature codify in section 42 all possible scenarios that may arise, and has spelled out whether or not there are rights to compensation, and on what range of injuries.

H3. Compensation for Expenses Incurred While Relying on Government Policy ("Breach of Faith")

When a binding land-use plan is later amended or revoked, an owner who has suffered a direct financial loss by relying on the plan has the right to be indemnified. (*Editor's note:* A related term in American takings law is "investment-backed expectations"). A claim for compensation for reliance on government policy is available only when the landowner or other persons with appropriate rights have made concrete preparations to develop the land in accordance with the B-plan, so long as continued reliance on the validity of the B-plan was justified.

Section 39 of the Federal Building Code provides that this right would hold regardless of the amount of time that has passed since the plan's approval. For example, a landowner may have commissioned an engineer to test the load-bearing capacity of the ground, or hired an architect to design a building in accordance with the permitted use. In such circumstances, the owner may demand appropriate financial compensation for expenditures, provided that the rezoning has decreased the value of these investments. Section 39 also grants the right to claim reimbursement of federal levies paid[16].

The right to indemnification under Section 39 does not cover declines in land values or the purchase price of the property; these fall under section 42. Those who seek to buy real property should protect themselves by entering into private contracts or by obtaining building permission within the seven-year period.

The right to indemnification for "breach of faith" under section 39 of the Federal Building Code is the "common denominator" of the law on compensation for adverse impacts by planning decisions. This right holds both regarding transfer claims under section 40, and regarding claims based on the 7-year implementation period according to section 42. However, unlike claims under section 42, claims for breach of faith do not require that a building permit could have been issued immediately (that is, that the pre-conditions of infrastructure availability would have been met). Breach of faith claims may be submitted and must be considered and satisfied even if infrastructure is not yet available.

H3 Revocation of a Valid Building Permit or Denial of a Variance or Exception.

Revocation of a valid building permit can lead to a compensation claim. However, the validity of a building permission automatically expires after three years unless it is extended. By contrast, there is no right to compensation for denial of a request for a "dispensation" (exemption, variance) from the provisions in a binding land-use plan.

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[16] However, if an owner relies on a plan that later proves to be invalid, the owner cannot base a claim for injury on section 39 of the Federal Building Code. At most, an actionable claim may be submitted under section 839 of the Civil Code (*Bürgerliches Gesetzbuch*) (BGB) in conjunction with article 34 of the Basic Law (*Grundgesetz*) (GG), which defines misconduct of a public servant. *See* BGH June 24, 1982, 84 BHGZ 292 (F.R.G.).

H3 . Temporary Damages During the Constructon of Public Works

Where public works carried out by a municipality cause a temporary decline in property values, compensation may be granted if the extent of injury goes beyond what is regarded as a justifiable "sacrifice in the public interest."[17] A German court has upheld a decision to provide such relief when construction of a new subway line under a shopping street rendered the shops unusable for a long period, resulting in significant sales losses.[18] Even though the municipality did not act negligently—the new subway line was deemed necessary, and the planning decision regarding the line was legal—the court held that the pecuniary damage to the businesses was unlawful. The court stated that the construction had the same effect as a deliberate temporary expropriation. The Federal Court of Justice therefore obligated the party causing the interference to pay compensation under the legal institution of "interference equivalent to expropriation." The Federal Court of Justice held that such claims are based on the legal institution of "sacrifice in the public interest," and owners should be compensated.

H2. Temporary Suspension of the Permitted use and development rights

H3. Development Moratorium for an interim Period of up to four Years

The preparation of a binding land-use plan does not happen overnight. On average, about three years elapse between a municipality's decision to prepare a B-plan and the notification in the official gazette that a B-plan has come into force. While in some special cases this period can be shortened to just under a year, some plan preparation procedures can last five years or even longer. Municipalities fear that during the interim period, landowners hasten to carry out permitted development quickly before the new plan goes into effect, and that such development may tie their hands in seeking to amend the plan. Unless a special "development freeze" is enacted, a municipality cannot refuse a building permit on the basis of the old plan until the new plan has come into force [19]. The "development freeze" instrument is set out in sections 14 and 15 of the Federal Building Code.

A municipality is authorized to enact a development "freeze" (formerly called a building prohibition) as soon as it decides to prepare, amend, supplement, or revoke a binding land-use plan.[20] According to section 17(1), the freeze initially lasts for two years. It can be extended twice, for one additional year per extension. The second extension, however, is permitted only when required by "special circumstances." The extension decision must be made before the original freeze has expired.

Landowners must accept development freezes for four years without compensation. A freeze regulation need not provide much detail, but the general intentions of the new plan must already be discernible.[21] A mere desire by the authorities to prevent a particular project from

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[17] This concept derived from the General Law for the Prussian States (*Preußisches Allgemeines Landrecht*) and was afterwards based on common law.

18. 57 BGHZ 359 (365) (F.R.G.); BGH 1980 Neue Juristische Wochenschrift [NJW] 2703 (1980) (F.R.G.); BGH 1983 NJW 1663 (1983) (F.R.G.).

19. BGH July 12, 2001, 2001 ZfBR 555 (2001) (concerning misconduct in office).

20. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1989 Zeitschrift für deutsches und internationales Bau- und Vergaberecht [ZfBR] 171 (1989) (F.R.G.).

21. *See* Bundesverwaltungsgericht [BVerwG] [Highest Administrative Court] Aug. 10, 1976,

proceeding is insufficient to justify a freeze.[22] If a municipality intends to institute a fundament change, the municipality must update its decision to prepare a B-plan or adopt a new decision, and it must also pass an interim development freeze.[23]

A development freeze may prohibit all new development in the declared area, or only specific types of development. The boundaries of area designated for the freeze does not have to correspond to the boundaries of the amended plan, but they generally do. When a freeze is in force, even those types of works that are normally exempt from a permit or do not fall under the category of "construction," are prohibited. For example, the freeze may include clearing a wooded property or excavation.

During a freeze period, the building permit authority has the power to permit development only in exceptional cases, where "there is no overriding conflicting public interest," particularly when the project corresponds to the current planning. However, once a building permission has been granted—even in the form of a (binding) preliminary notice—the building permission remains valid throughout the freeze.[24]

A municipality is also authorized to re-declare the freeze if the planning procedures are not completed after four years, but it must offer important justifications for the duration of the procedures[25]. Otherwise, the continued freeze would be unlawful and must be lifted.[26] The affected party is eligible to be compensated only for the period beyond the four years.[27] If a freeze is extended beyond four years, the municipality must compensate the affected parties for pecuniary losses suffered after the four year period has expired. The landowner may claim compensation for the loss of income from rent, lease, or ground income directly caused by the

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1977 Neue Juristische Wochenschrift [NJW] 400 (1977) (F.R.G.). *See also* Oberverwaltungsgericht [OVG] [Administrative Appeals Tribunal] 1989 Zeitschrift für deutsches und internationales Bau- und Vergaberecht [ZfBR] 77 (1989) (F.R.G.); Verwaltungsgerichtshof [VGH] [Court of Appeals] 1989 ZfBR 172 (1989); Bundesgerichtshof BGH [Federal Court of Justice] Dec. 17, 1981, 1982 NJW 1281 (1982) (following the direction of Feb. 10, 1972, 58 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 125 (128)); BVerwG [Highest Administrative Court] Feb. 3, 1984, 1984 NJW 1473 (1984); 70 Entscheidungen des Bundesverwaltungsgerichts [BVerwGE] 227; BVerwG [Highest Administrative Court] Feb. 19, 2004, 2004 ZfBR 464 (2004) (concerning the relationship between binding land-use plans and development freezes).

22. This is noted explicitly in Bundesverwaltungsgericht [BVerwG] [Highest Administrative Court] 1990 Zeitschrift für deutsches und internationales Bau- und Vergaberecht [ZfBR] 206 (1990) (F.R.G.).

23. *See* Oberverwaltungsgericht [OVG] [Administrative Appeals Tribunal] Oct. 15, 1999, 2000 Zeitschrift für deutsches und internationales Bau- und Vergaberecht [ZfBR] 141 (2000) (finding that a change of planning intentions leads to the invalidity of the development freeze).

24. BVerwG [Highest Administrative Court] 1984 Neue Juristische Wochenschrift [NJW] 1473 (1984) (F.R.G.).

25 The Administrative Appeals Tribunal in Berlin has held that, under special circumstances, a development freeze may be extended by more than three additional years. Alternatively, a municipality can pass a freeze again after two or three years if the grounds still exist. Oberverwaltungsgericht [OVG] [Administrative Appeals Tribunal] BRS 42, Nr. 101. *See also* Verwaltungsgerichtshof [VGH] [Court of Appeals] 1994 BauR 344 (1994) (discussing the proof of special circumstances). This occurred in connection with the 1985 German Horticultural Show in Berlin, where the planning of recreational parks and twelve B-plans diverged significantly from usual planning modes.

26. BVerwG 1977 NJW 400 (1977).

27. Feb. 10, 1972, 58 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 124. The municipality subtracts one year from the compensation-free period as it skips the work and time required to prepare a development freeze. *Id*.

development freeze.[28]

A development freeze that is *unofficially* extended beyond four years is called a "de facto building prohibition" and is unlawful. Such situations can create compensable liability. They may include refusal of a building permit authority (*Baugenehmigungsbehörde*) to process a building permit applications, procrastination in processing the application, or bad-faith attempts to deter a landowner from submitting a building applications or from disposing property.

The affected party may be compensated for a de facto development freeze. If the material conditions to impose a legal development freeze were not met, landowners cannot be expected to bear the brunt. Section 18 stipulates that the municipality should grant them compensation from the outset. However, because unofficial development freezes are unlawful, citizens do not have the right to accept compensation from the municipalities. They are obliged to seek legal redress in the courts.[29] [30] If they fail to go to the courts, they will have no right to compensation for any disadvantages incurred, which could have been avoided had they filed appeals.

The institution of the development freeze appropriately demonstrates the difference between those types of governmental interventions that must be accepted without compensation as a part of the societal responsibility inherent in property ownership, and other types of interventions that are permissible only with the payment of compensation. The first four years of a development freeze must be accepted by the owners without compensation because the freeze expresses the obligations of ownership to society. A municipality that requires more than four years for the planning process is regarded as exceeding the acceptable bounds of the owner's obligations to society and is liable to pay compensation.

H3 . The differences in compensation rights between official and unofficial Freeze decision: A critique

In the author's opinion, compensation should be due regardless of whether the development freeze was legally extended for more than four years or extended unofficially. If an owner affected by a lawful prohibition lasting more than four years is eligible for compensation, surely an owner affected by an *unlawful* prohibition should also be able to submit a compensation claim to the municipality to cover the time when the prohibition began.

However, on this point German law presents a paradox. The provisions for compensation in section 18 regulate only liability stemming from a *lawful* prohibition for more than four years, not for unlawful development freezes. Liability for compensation for unlawfully authorized or extended prohibitions is not statutorily enacted, but instead, is derived from legal principles developed through the case law of the Federal Court of Justice. The Court has held that public authorities are liable for compensation for any intervention equivalent to expropriation. This principle states that where governmental intervention creates a major negative impact that is lawful but equivalent to expropriation, the property owner must receive the same compensation

28. Bundesgerichtshof [BGH] [Federal Court of Justice] 1981 Zeitschrift für deutsches und internationales Bau- und Vergaberecht [ZfBR] 44 (47) (1981) (F.R.G.). *See also* June 4, 1962, 37 BGHZ 269; Dec. 14, 1978, 73 BGHZ 161.

29. Bundesverwaltungsgericht [BVerwG] [Highest Administrative Court] 58 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 300; Bundesgerichtshof [BGH] [Federal Court of Justice] 1984 DVBl. 391 (1984) (F.R.G.).

30. Bundesgerichtshof [BGH] [Federal Court of Justice] 1982 Zeitschrift für deutsches und internationales Bau- und Vergaberecht [ZfBR] 133 (1982) (F.R.G.).

as in the case of an unlawful interference.[31]

According to the Federal Constitutional Court,[32] landowners who think they have suffered damages from unlawful interventions by public agencies are obliged to take legal action in the courts. They cannot submit a compensation claim directly to the public agency that caused the injury. The Federal Constitutional Court clarified this principle in its famous "wet gravel extraction" decision (*Naßauskiesungsentscheidung*), holding that an "expropriation" is only present when the intervention specifically affects the property. A law that allows such an intervention must also provide for compensation.[33] However, if the intervention is not explicitly based on legislation or if its preconditions are not met, then the landowner has no choice but to fight the intervention in the courts. The only exception when a landowner may submit a compensation claim to the municipality even though the decision was unlawful, applies when action in court would have been an unreasonable expectation, for instance because a government authority had advised the owner against such action, or because the remedy from the court would likely take an unreasonably long time.

H3. Conditions on the Grant of Building Permits (awaiting infrastructure)

A binding land-use plan may include specific conditions that must be met before granting a building permit. Such conditions may require that the landowner wait until the condition is fulfilled. For example, the plan might state that permits for a residential development should not be issued until a noise barrier is constructed along a busy highway. Such conditions do not create sufficient grounds for compensation claims. They are part of the authority to regulate property rights without compensation.

Similarly, a request for a building permit may be denied or delayed because the required infrastructure is not yet available. Section 123 of the Federal Building Code states that "no legal claim exists" to oblige a municipality to provide local public infrastructure. The owner does not have the right to demand that the infrastructure be provided at a particular time.

However, a property owner can extend an offer to a municipality to provide the local public infrastructure at his own expense, and the municipality must accept any reasonable offer. Otherwise, if the municipality declines a reasonable offer, the municipality must provide the infrastructure, and the landowner has the right to receive building permission.

H3. A*utomatic Expiration of a Temporary Land Use Designated in a B-plan*

Since 2004, the law authorizes municipalities to include in B-plans land-use designations for specific uses that will automatically terminate within a set period of time. For example, a municipality may wish to designate an exhibition site for a limited time only. In this case, a subsequent use must also be designated in the same plan. The self-expiration of a temporary (or

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31. See Bundesgerichtshof [BGH] [Federal Court of Justice] 73 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 161, regarding unlawful development freezes. In another case in 1989, the Federal Court of Justice found that disruption of the extraction of natural resources to secure archaeological finds of planetary history was an interference that had an expropriating effect that created liability for compensation.

32. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 58 Entscheidungen des Bundesverwaltungsgerichts [BVerfGE] 300, regarding wet gravel extraction.

33. In order to comply with the package deal clause of article 14, subsection 3 of the Basic Law, an expropriation can only be permissible when it is based on a law that regulates compensation at the same time.

conditional) use does not constitute grounds for a compensation claim. The seven-year rule does not apply in these cases—except when the temporary use is withdrawn within the given period or the subsequent use is changed by a new plan.

H3. Postponement in Granting a Building Permit and Interim Prohibition for a Maximum Period of One Year

Although development freezes are effective in principle, in some situations, their application may come too late. For example, landowners may have become aware of the intention to revise the B-plan before the municipality has had the opportunity to declare an official freeze; or, the freeze may not yet have come into effect, awaiting publication in the official gazette. In such situations, as a last resort, the municipality has the authority to instruct the state's Building Permit Authority[34] to postpone consideration of requests for building permits for a maximum of one year. If exempted works are involved (which do not require permission), the municipality is authorized to impose interim prohibitions of the works. Both possibilities are regulated by section 15 of the Federal Building Code.[35]

In practice, a municipality's decision to prepare a new B-plan and pass a development freeze is often triggered by an owner submitting an undesirable application for a building permit. As soon as the municipality learns that such an application has been submitted, it often decides to amend the binding land-use plan and impose a development freeze at the same time. The municipality immediately requests that the state's building permit authority adopt an interim prohibition. Such a temporary prohibition or postponement is valid for a maximum period of twelve months, commencing from the time the applicant received the postponement notice.[36] The applicant may file an objection. A postponement order or a development freeze is possible until the day when the permit is granted. It may also be imposed during the administrative dispute proceedings[37] or even after a decision has been made to issue the permit.

According to the Federal Court of Justice,[38] the objection has a delaying effect. It is therefore advisable to furnish each postponement with an order of immediate enforceability. A retroactive postponement is also possible when a building application is first unlawfully refused but later shown that it should have been allowed.

However, once the project receives permission, it is too late for the municipality to act. It

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[34] The general authority regarding planning matters rests with the municipality. However, building permissions are issued by the building permit authority (*Baugenehmigungsbehörde*), which is usually part of the state's (*Länder*) administrative system rather than the municipality's. Section 36, paragraph 1, sentence 3 of the Federal Building Code ensures that municipalities are sufficiently informed ahead of time of applications for building permits within their territories before construction begins. Baugesetzbuch [BauGB] [Federal Building Code] June 23, 1960, Bundesgesetzblatt, Teil I [BGBl. I] at 2414, as amended, § 36, ¶ 1, sentence 3 (F.R.G.), *available at* Gesetz im Internet, http://bundesrecht.juris.de/bundesrecht/bbaug/gesamt.pdf, *translated in* Federal Building Code, (Baugesetzbuch, BauGB), http://www.iuscomp.org/gla/statutes/BauGB.htm. The states must allow the municipalities sufficient time before construction begins to consider what measures are necessary to safeguard the urban land-use planning. *Id*.

35. *Id*. § 15, ¶ 1, sentence 2.

36. Building permit authorities must notify applicants by postponement notices within three months.

37. Oberverwaltungsgericht [OVG] [Administrative Appeals Tribunal] BRS 38, Nr. 111.

38. Bundesgerichtshof [BGH] [Federal Court of Justice] July 26, 2001, III ZR 206.00, 2001 BGHZ 557 (2001) (F.R.G.).

is irrelevant whether the issued building permit is contested and therefore not definitive.[39] For a project that is exempted from a building permit, the maximum duration for a temporary freeze varies from state to state (*lander*). Very short periods are the general rule.[40] Logically, this period cannot be longer than the time a landowner would have had to wait for a decision about a permit request.

The municipality must ensure that the development freeze becomes effective within the period of the postponement or prohibition. The municipality must remember that the period of postponement of a building application, as well as the period of a de facto building prohibition before a lawful development freeze is passed, will be added to the four year deadline. After the expiration of the deadline, the municipality must compensate the developer for any resulting pecuniary losses.[41] Thus, even within one area with a single development freeze, the period of liability for compensation may commence at different times for different property owners.

H2 . Compensation for Indirect Injury by an Adjacent Public Use

In Germany, there are no general compensation rights for indirect adverse effects on property values, such as those that affect adjacent plots of land. However, there are a few specific situations where the law does award such rights.

H3. Reduction of the Value of the Remaining Part after Expropriation of Part of a Property

This scenario – which Americans may call "severance" - is explicitly regulated in section 92(3) of the Federal Building Code.

> Where a plot or a physically or economically cohesive property is to be expropriated only in part, the owner may demand that expropriation be broadened to cover the rest of the plot or the rest of the property where this is no longer capable of being put to building or economic use.[42]

There have been no disputes or court decisions about this rule in Germany.

H3. Injury from Adjacent Land Designated for a Public Purpose

Designation for public use or expropriation of an adjacent property for a public purpose can be a cause for compensation only when the adjacent use causes demonstrable damage and not just irrational, "perceived" damage, such as in the case of cellular antennas.

The principle is that landowners should tolerate adjacent uses – whether public or private - without compensation so long as the planning decision is reasonable and within the law. Even if the landowner does not like the adjacent use, such as a prison or a hospital for mentally ill

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39. *See* OVG Mar. 9, 1999, 1 M 405/99 (1999).

40. In Baden-Württemberg, for example, the application for an interim prohibition is only possible within one month after receipt of the complete building documents by the municipality. Verwaltungsgerichtshof [VGH] Feb. 4, 2000, 8 S 2633/00.

41. *E.g.*, Bundesverwaltungsgericht [BVerwG] [Highest Administrative Court] 1971, 468; Bundesgerichtshof [BGH] 1982, 133.

[42] Baugesetzbuch [BauGB] [Federal Building Code] June 23, 1960 Bundesgesetzblatt, Teil I [BGBl. I] at 2414, as amended, § 92, ¶ 3 (F.R.G.), *available at* Gesetz im Internet, http://bundesrecht.juris.de/bundesrecht/bbaug/gesamt.pdf, *translated in* Federal Building Code, (Baugesetzbuch, BauGB), http://www.iuscomp.org/gla/statutes/BauGB.htm.

patients, the landowner is not eligible for compensation from the public authority.

The most common example of objective damage is the construction of public streets and railways that cause high traffic noise. This particular situation is regulated by sections 41, 42, and 43 of the Federal Emission Control Act (*Bundesimmissionsschutzgesetz* BImSchG). Where heavy traffic noise is expected, the law sets out three policy levels.

First, the agent responsible for road construction is obliged to contain the traffic noise as much as possible through the use of noise protection barriers, trough-style construction, or directing traffic through tunnels. This is known as active noise protection.

If this is not possible, either because of technical reasons or high costs, the agency responsible for highway or road construction must reimburse property owners for the costs of installing double-glazed windows or similar means of noise abatement. This is known as passive voice protection.

The municipality may also extend the section 40 public use category to the affected property and directly expropriate it. In this case, the landowner would be entitled to compensation. If the negative impacts of an adjacent public project, such as a major highway, are beyond what is regarded as "unacceptable", the landowner has the right to demand payment of compensation, or that the plot be expropriated and compensation be paid. What is regarded as unacceptable depends on the current use of the property. Housing near a major highway is likely to be regarded as suffering unacceptable noise, but a factory may not be.

Another situation where there are special compensation rights is the construction of airports. The law requires that airport plans designate zones of noise impact where landowners have compensation rights. A special law against noise from airplanes[43] forbids landowners from constructing new houses in the defined zones of noise impact where airplanes take off and land at airports. Landowners of these relevant plots are compensated.

H2. Injury Caused to a Neighboring Private Landowner by a New Private Use

In general, German law does not award compensation rights to an owner whose land has suffered a decline in value due to the rezoning of another property. For example, where a plot of land is redesignated from a private low-rise building to a high-rise building, adjacent plots may suffer a decline in value due to the expected noise and traffic.

The municipality's decisions about land uses are governed by the principle of consideration. Under German law, this principle applies not only to public agencies, but also to private developers, who must, within reason, exercise all possible consideration for the neighbors' interests. If a developer is indeed considerate, the injured neighbor must endure the new plan and building permit. However, if the neighbor believes that the developer has violated the principle of consideration, the neighbor may take legal action against the new land-use plan or development permit to stop them.

The injured party usually has enough time (one month) to take legal action before construction begins. There is no obligation to notify the injured party when a building permit is issued; only if an exemption from the B-plan is granted. However, the law grants the injured party three months after the party learns about the new permit. The injured neighbor has the

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[43] Gesetz zum Schutz gegen Fluglärm [Special Law Against Noise from Airplaines] Bundesgesetzblatt, Teil I [BGBl. I] Mar. 1971, § 282 (F.R.G.).

choice of either challenging the legality of the permit (or the plan itself) under pubic law, or taking the case to civil courts under civil law. Most landowners prefer the pubic-law track because the costs of legal action are lower and because the threshold of damages under public law is lower than under civil law.

In practice, negotiations between the developer and the injured landowner occur often. If the injured party has taken timely action, he or she may be able to "sell" to the developer the right to impose an injunction order in exchange for payment of compensation. This is the most common outcome of neighbor-developer conflicts over rezoning or a building permit.

H1. The Rise in Property Values and Its Relationship with the Right to Compensation

German law differentiates between impacts on property values from planning decisions that affect a single landowner from impacts that are distributed among several different owners. Where planning decisions that pertain to a particular landowner entail a rise and a decline in property values, the rise in value is deducted from the amount of compensation due. However, if planning decisions distribute advantages for some landowners and disadvantages for others, German law does not provide a general mechanism for balancing the two. The law grants only rights to claim compensation but no obligation to share the added-value with the public. The advantages are not balanced into the equation.

There are, however, several special instruments that may be applied in specific cases to achieve an adequate balance. The primary instrument is called land reallocation (also known as "land readjustment") where property boundaries are realigned based on the relative distribution of advantages and disadvantages. It is also possible, by means of a special legal instrument, to formally designate a particular area as one where the added property values will be taxed. Such areas are either urban redevelopment areas or sites for large new developments. Landowners within these formally designated areas must pay levies for the increased value of their properties due to public investments in infrastructure. A frequent issue arises regarding how to properly identify the relative increase in value.

H1. Procedures and Other Matters

H2 Burden of proof

Administrative proceedings adhere to the guiding principle that the facts of the matter should be ascertained by the court. Thus, the injured party need not present proof of the incidence or the extent of the injury caused by a planning decision. The injured party need only make a plausible argument. The court will conduct its own investigation and issue a report.

H2 The Types of Land Tenure That Are Entitled to Compensation Rights and the Issue of Transferring Claims to Future Buyers

Under German law, compensation rights extend only to landowners[44]. The respective rights are directly connected with ownership; users and operators are limited by the rules of their

[44] However, tenants relocated in urban renewal areas have special rights to "social payments" (Härteausgleich).

contracts with the landowner.

The party entitled to file a claim is generally the legal entity that was the owner of the relevant property at the time the injury occurred. The right to compensation for injury is not viewed as an "in rem" right; it is not automatically transferred to a buyer upon the sale of the property. The assumption probably is that the buyer has already paid a reduced price resulting from the lowered value of the property.

There is one exception, however. Claims for indemnification of expenses for noise protection measures pursuant to the Federal Emissions Control Act always rest with the party that has advanced those costs, even if the noise was caused while another owner governed the property. This claim is transferred to the buyer in the event that the property is sold.

H2. Time Limits for Making Compensation Claims

The right to compensation for injuries under sections 39, 40, and 42 expire if the compensation claim is not registered within three years following the calendar year in which the pecuniary losses occurred. Potential claimants must therefore approach the municipality within this time frame, or forfeit their right to claim compensation.

H2. The Right to Information: Must the Authority Inform the Affected Property Owner Directly?

All landowners must keep themselves informed about planning processes by reading the newspaper. The owners must play a role in the public participation process. There is no obligation to notify landowners directly about planning decisions, even if the land is rezoned from private to public use, leading to expropriation. Of course, any expropriation cannot occur without personally notifying the affected landowners, but this notification may come after the plan has come into force.

H2. Judicial Authorities

Claims concerning injuries caused by planning decisions must be registered with the chambers and divisions for building land matters – a special judicial panel of the civil courts. This is so even though compensation claims often also relate to public law conflicts for which the administrative jurisdiction would be responsible. The civil courts' responsibility in these matters is based on a provision in the German Constitution that requires legal recourse through the ordinary civil courts of justice in matters of expropriation.[45]

The history of this special assignation is interesting. Prior to the introduction of administrative jurisdiction in 1875, the German legal system already acknowledged that a citizen may sue the state in financial matters. Disputes regarding the amount of compensation due after expropriation were understood as "financial matters." Although the amount of compensation resulting from the expropriation could be challenged, the expropriation as an act of sovereignty could not. For this reason, disputes over the amount of compensation for expropriation traditionally belonged to the jurisdiction of the civil courts. Even today, civil courts are more "owner-friendly" than administrative courts.

Civil courts are divided into three categories: the district courts, the regional Supreme Court and the Federal Court of Justice. Under federal law, there is no preliminary procedure for

45. Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, Bundesgesetzblatt, Teil I [BGBl. I] art. 14(3) (F.R.G.).

administering disputes regarding injuries caused by planning decisions. The interested party can address the district court directly by submitting an application for a court decision. The administration then presents the application to the court unless it changes its decision in favor of the applicant's interest.

F. Which Administrative Level Must Pay the Compensatoin?

Individual compensation claims for injuries caused by planning decisions are always first addressed to the municipality. The municipalities are also responsible for both active and passive noise abatement. In rare cases a claim may be made against a private beneficiary. For instance, a private provider may be acting for a public school for which a property has been expropriated.

When there is some uncertainty about which government body should be responsible for paying the compensation, the claimant is first referred to the municipality. If a municipality lacks funds to pay for the injury, the State, as guarantor for the municipality, must arrange the necessary financial transfer.

H2. Nonfinancial Forms of Compensation

Claims for injuries caused by planning decisions are generally settled by means of a financial payment. On a voluntary basis, compensation can also take the form of granting of development rights elsewhere in a municipality in exchange for "downzoning" This type of technique, which Americans call "transfer of development rights" is legal only if it is directly justified by town planning considerations—and should not serve as primarily a compensation mechanism. Compensation by means of allocating land is permitted only when explicitly provided for in the law on expropriation. Claims for transfer of title (inverse condemnation) may also be settled in this manner.

H1. Planning Practice and Final Evaluation

Compensation claims for damages caused by permanent rezoning other than rezoning for public services) are rare. The reason is that municipalities make every effort to avoid withdrawing development rights during times of growth. In addition, claims for compensation for a temporary freeze are rare because the law dictates that landowners cannot be compensated for freezes that last less than four years – and this time frame is usually adequate for most plans to be finalized.

Claims are more frequent where private land use is designated for public use. These cases are usually directly connected with offers by the public authority to buy the private land. Generally, the public authority attempts to purchase the property before the final planning action is done. Disagreements may sometimes arise regarding the amount of compensation, but rarely over the validity of the public need.

In recent years, however, as a result of Europe's low birth rate and the migration from the eastern to the western parts of Germany, many cities are no longer growing. There is a surplus of land designated for residential use, particularly in the eastern areas (formerly under the communist regime). Extensive areas designated for development during the euphoric years after unification are no longer necessary. For this reason, land use plans are being amended and development rights are being withdrawn *en masse*. Yet, by default these development rights are of no real value and zoning for development is often only a burden on the landowners. For this

reason, there are hardly any compensation claims for injuries caused by these recent planning decisions.

It is no coincidence that the German law regarding compensation for injury caused by planning decisions has not been amended since the introduction of the seven-year period of liability for compensation in 1987. This is especially significant in view of the fact that other aspects of building laws were revised in 1990, 1993, 1998, 2001, and 2004.

The reason there has been no need for revisions is that the regulations regarding compensation rights have been thought out so well, that their mere presence is effective. In making decisions, the planning bodies usually do their best to avoid claims for injuries. Much more common are disputes among private individuals—usually neighbors—regarding adherence to the principle of consideration for neighbors. However, such disputes are generally not related to the law on compensation for injuries caused by planning decisions.