

LEGAL CONSIDERATIONS IN INTEGRATED URBAN PLANNING
Some Current Developments in the
Federal Republic of Germany

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In any given society laws made with the intention of regulating the planning of complex systems such as cities or regions must be "open" laws. This means first of all that any particular society applies them in accordance to its own goals regardless of the nature, and likewise that these laws correspond to the inherently "open" nature of the planning process. It is in this second area, of course, where the legal systems and applied systems analysis meet. From a legal point of view the question is whether and to what extent applied systems analysis is available as an instrument for implementing the intention of any given law. In the following I should like to focus on -

- the problems involved in integrated urban planning
- the present legal solution in the FRG
- new solutions under consideration on the legislative and administrative levels and their potentials for innovation.

1. The problem

The problem of urban planning is determined by the given situation of different societies, that is, their respective technological, economic and political systems, as well as by their future perspectives, that is, their development.

In an attempt at an overview in dealing with urban problems and legal considerations I should like to present some experience and recent developments as to the situation in the FRG in an exemplary manner.

The complex nature of the problem one refers to nowadays as the urban crisis. The problem is due to several factors, such as

- population explosion
- migration from rural to industrialized urban areas
- new technological developments
- optimistic and naïve belief in unlimited growth as the guarantee for progress. (This may be called the naturalistic ideology.)
- deficiencies of rational planning and development policy.

While one might effectively deal with the first three factors by means of a more technical or rational method, such as systems analysis, the last two belong to what might be called the "irrational" domain of politics. Nevertheless they are important and thus create special difficulties in integrated approaches to urban planning.

2. The solution

From a legal perspective the following factors play a major role -

- property rights
- forms and regulations of land use
- economic order
- municipal services
- a humane, "healthy" environment.

Except for the first two factors of property rights and land use, the legal aspects are somewhat hidden. They can be more easily brought into the open if the general legal context is taken into consideration.

In the case of the FRG the constitutional provisions relating to civil liberties are here especially important.

According to the modern interpretation (which I basically agree with) the guaranteed freedoms not only serve as a basis for

interventions by the State but also as a constitutional policy mandate for State legislation and administrative initiative to bring about conditions which allow for everyone to make as much use of those freedoms as possible. Since urban and human settlement systems are one important area where these conditions should be present, it is easy to see that such legal considerations are quite relevant here.

The task is not a simple one, that is, to transform general legal principles into actual administrative activities within the planning process. Some of these aspects shall be dealt with later on in my presentation.

I consider the Federal Building Act (Bundesbaugesetz of 23 June 1960, Bundesgesetzblatt I, p. 341) most relevant for our topic. Before commenting on it, however, I should like to give some background information on the other legislative measures relating to area planning on the Federal and State levels. For historical area planning and urban planning are separated. Urban planning is controlled by the Federal Building Act and the correspondent Decree to Define Building Use (Baunutzungsverordnung of 26 Nov. 1968, Bundesgesetzblatt I, p. 1238). For constitutional reasons area planning is primarily controlled by Area Planning Acts of the respective States (Länder) of the FRG, while the Federal Planning Act of 1965 (Raumordnungsgesetz, Bundesgesetzblatt I, p. 306) provides general rules and guidelines.

It should be noted, however, that planners and politicians are becoming increasingly aware that urban and area planning can no longer be separated. Accordingly, suggestions for legal and administrative changes are being discussed. At any rate, the Federal Building Act requires that municipal land use and municipal comprehensive plans must be in line with area and development plans.

The comprehensive plan on municipal level is the most coordinated or integrated planning instrument where eventually all spatial needs of all other planning come together and thus have to be considered. This results in a very complex task, the complexity of which is reflected in the following sections of Paragraph 1 of the Federal Building Act.

Paragraph 1 - Sections 3 - 5 Federal Building Act

(Translated by author)

- (3) Land use and comprehensive plans must be in line with the goal of area planning and State development plans.
- (4) Land use and comprehensive plans must respond to social and cultural needs of inhabitants, to their safety and health interests. In this regard public and private interests are to be justly balanced amongst each other and reciprocally. Land use and comprehensive plans must serve housing needs of the inhabitants and should encourage house ownership.
- (5) Land use and comprehensive plans take into consideration the expressed needs of churches and religious societies incorporated according to public law as to their services and ministerial work. In addition, they must give due regard to the interests of the economy, of agriculture, youth, traffic and defense, as well as those of the preservation of wildlife and landscape and of the appearance of cities and countryside.

What are, therefore, the consequences for the preparatory stages of comprehensive planning?

The Federal Building Act provides a broad basis, but it does not make any specific planning procedures mandatory as to how these goals should be accomplished. Instead, this decision is left to the political process and to the planning capacities of cities and municipalities. Only certain minimal standards are required by the supervising bodies who must approve the comprehensive plan before it can become legally binding.

It is at this point advisable to consider what can be done through the law to improve the planning procedures as well as the plan. Unfortunately only little progress has been made in this regard due to certain deficiencies -

- (a) lack of well trained personnel
- (b) lack of adequate planning techniques
- (c) traditional reluctance to use planning in general and complex problem- and conflict-orientated planning in particular.

In view of these deficiencies, the results of comprehensive planning in municipal systems could conceivably have been worse.

Coupled with or affected by other crisis generating factors, the result was, however, bad enough to bring about a re-evaluation and new approaches.

Several defects of the still prevailing planning systems can be identified -

- lack of implementation instruments
- lack of funds
- poor sectoral planning, responding only to present, or even past but not future needs. (An example would be traffic planning, in the meantime well-documented)
- no, or almost no, planning at all in other sectors such as recreation and the environment.

The legislative measures regarding planning and expropriation, as well as other related procedures, were conceived with a view to a somewhat outdated urban planning perspective.

This is the notion, namely, that urban development can be left to be decided by the free play of relevant forces and factors, while only some corrective interventions are needed. The instrument for this was and still is the framework-setting comprehensive plan. The municipalities have to provide the public services and the general infrastructure. Depending on local policy decisions, the instrument of the binding comprehensive plan can become a means of directing general urban development.

Notwithstanding the lack of implementation instruments, most communities readily adopted the "unlimited growth ideology" and joined in the competition to attract as much industry and business as possible. The consequences are apparent and need not be pursued here, but some practical considerations are in order.

Some facts may be of interest here -

only about half of the communities in the FRG prepare land use plans prior to the comprehensive plan, making use of a provision in the Federal Building Act which allows for such procedure in cases where a comprehensive plan is considered sufficient. Sectoral plans on the municipal level are only prepared by bigger cities without being legally required. They usually only have limited impact on the actual comprehensive planning procedure.

Urban Renewal and Development Act of 1971 (Städtebauförderungsgesetz, Bundesgesetzblatt I, p. 1125)

The above mentioned defects had their greatest impact in the old sections of the cities, municipalities and villages, traffic planning being one of the major contributors to at least partial destruction of urban quarters. The decline of private investments and the financial problems of house owners along with other factors led to the generally known deterioration of the old sections of cities. This in turn led to a legislative response in the form of an Act specifically geared to the revitalization of the deteriorating sections of cities: The Urban Renewal and Development Act.

By way of new instruments, this Act of 1971 introduced the following -

- preparatory analysis in areas potentially in need of urban renewal planning
- compensatory social planning at any early stage to minimize the negative impact of urban renewal
- new devices for implementation, such as administrative orders to modernize or demolish buildings.

It is too early for an evaluation of what this Act has or can accomplish in the future. In passing I should note that the general economic and fiscal factors clearly will be decisive for the success of urban renewal projects. This aspect becomes especially important when attempting to answer the rather difficult question as to what makes old sections of cities in particular worth preserving.

While a special effort was made to solve the most pressing urban problems in deteriorating sections by means of respective legislation, the old, basic problems of urban development and planning remained unsolved.

3. New efforts are being made in this regard through an amendment procedure to the Federal Building Act

In 1974 the Federal Government introduced an amendment to the present Federal Building Act (Bundestagsdrucksache 7/2496). The intention clearly is to extend the planning effort and implementation procedures to the general urban planning procedures.

I focus on one major legal instrument, provided for in the draft Amendment - Development planning as a new steering instrument in general and urban planning.

This new and somewhat comprehensive approach is an expression of -

- the pressure exerted by mounting problems which can only be solved by planning
- a greater sensitivity to social and planning problems.

Particularly noteworthy in this draft is a change from a planning concept responding to existing and projected needs to a more active concept of planning, including in an integrated manner social, economic and spatial aspects of development.

At this point, it would be useful to indicate how this approach can be viewed from a constitutional and legal policy perspective.

It is sufficient to note that the functions of the State are determined by the constitutional definition of the State as a social welfare State. Thus there is a duty for the legislature to provide regulations which are in line with this character. This is also true for certain guarantees of civil liberties which tend to become meaningless or obsolete if sufficient efforts are not being made to provide a social and economic situation in which these rights can in fact be realized. Accordingly, it is not surprising that in the preparatory stage of the goal setting process for the "Nürnberg-Plan", which I shall deal with later, an attempt was made to make constitutional guarantees a starting point. (Compare also Paragraph 1, Federal Planning Act).

In general it is evident that legal inferences are quite important in this context. Furthermore the legal aspects of conflict resolution in the planning process are not satisfactorily developed. Generally there is a deficit in the relatively new area of planning law in terms of dogmatic structuring and jurisprudence.

I shall now turn to the text of Paragraph 1 of the draft amendment to the Federal Building Act which deals with urban development planning.

"The urban development planning is part of a more comprehensive development planning by the municipalities, which as the superior planning instrument develops goals and perspectives for the municipality as a whole and coordinates the different activities. It provides the framework for an ordered urban development of the area of the municipality or city and must serve social, cultural and economic needs and also must include all investments with spacial impact as well as their time and priority sequence. It must be in line with area and state development planning."

Some explanatory statements of the Federal Government are of interest here. Nowadays it is generally accepted that tasks of urban planning are an essential element of urban development, which primarily consists of active development tasks. This common sense has recently developed out of the realization that it is only in this way possible "to take into consideration the interdependencies of social, economic and spatial development" on the basis "of a concept which is integrated into general policy making". (Bundestagsdrucksache 7/2496)

In the explanation given justifying the amendment it is further pointed out that by legally relating urban planning to development planning, a more effective basis is provided for "better integrating and coordinating the necessary individual activities in the process of realization of the urban development goals with a view to their spatial and general importance as well as their implementation priority with regard to time and money ..."

Due to limits of legislative competence as set up by the Constitution (compare Art. 74 No. 18), the Federal legislator can only pass laws relating to the building and spatial aspects of urban planning. For this reason the draft version of the amendment is rather careful to limit its regulation in this regard, while at the same time indicating the desirability of the municipalities, embedding these spatial aspects into a more comprehensive development planning.

It is further of interest to note that the legislator is rather careful not to make the urban development plan mandatory. This is quite understandable because there is clearly a present lack of appropriate methods, staff and availability of data. Nevertheless, a beginning is being made, even if on a somewhat experimental basis.

4. Discussion of the development-planning in jurisprudence

Let me briefly focus on some aspects of the discussion which have an immediate impact on the question of whether and to what extent applied systems analysis methods can be legally applied.

To begin with, it should be noted that to date no satisfactory legal classification of planning in general, nor of development planning in particular, has been achieved.

This, coupled with the realization of a discrepancy between planning and legal approaches to problem-solving, explains the reluctance of many lawyers to do meaningful work in the area. Still, a fresh attempt has been made to encourage and to advance research in the legal aspects of planning.

The issue of legal instruments to be used in development planning was made the main topic of discussion in the public law section of the German Legal Society at its last biennial meeting in September 1974 in Hamburg. Without going too much into details, it is interesting to note that the main rapporteur saw the major difficulty of a legal approach in the transformation of theoretical planning-models and related issues into the system of concept and categories of jurisprudence. As he states, "...forms of cooperation and integration appear which have the effect of dispersing legal competence and making responsibility anonymous, and comprehensible legal and planning procedures expand into highly complex cybernetic systems of casual relationships." (Ossenbühl, Gutachten B zum 50. Deutschen Juristentag, p. 35).

To aid in legal analysis, he accordingly suggests that the planning process be divided into various segments. In spite of his reservations, he is nevertheless optimistic that even in this complex area lawyers can play their role effectively.

In spite of the constraints arising from the present Federal system of the Federal Republic of Germany and the corresponding division of legislative competence, integrated development planning can be regarded as a first major step in the direction of an all-encompassing planning system. Still, some in-between-steps of a more coordinative nature are likely to occur before a satisfactory, all-encompassing planning system will be achieved. In any event it would be a considerable improvement if the goals of specialized sectoral planning could be articulated so that their implications would become clear as to the principles of physical planning according to Paragraph 1, Sections 4 and 5 of the Federal Building Act (already discussed).

What seems to be essential for a profitable dialogue between the legal and the applied systems analysis approaches to integrated urban and development planning is the realization that integrated spatial planning and, even more so, integrated development planning encompassing time and money factors inevitably require new planning methods and techniques. These new methods and techniques serve the following goals which are, if not identical, at least in line with legal approaches and goals:

- higher degree of rationality and
- higher quality of planning as well as
- improvement of chances of implementation.

In this context the value and validity of different systems approaches, like cost-benefit-analysis, simulation models and mathematical optimization are to be discussed. As you, of course, realize this discussion is underway now.

5. Example - "Nürnberg-Plan"

In the late sixties some major German cities began to institute urban development planning procedures. To name but a few larger

cities which started proceedings, Berlin, Bremen, Frankfurt, Hamburg, Hannover, München, Nürnberg. Of these, Nürnberg developed a quite advanced systems approach which appears to be one of the examples in the present German urban planning situation which has some "model" qualities.

Nürnberg's planning methods also offer a highly interesting approach to legal aspects of integrated planning within the framework of existing laws.

I should like to present some of the considerations in this context based on reports by authors within the city administration and planning advisors. After a three year period of discussion and experimentation, the Mayor of Nürnberg, in his capacity as head of the city administration, put into action by administrative decree "Rules and regulations concerning the long-range and middle-range urban development planning of the City of Nürnberg." They became effective on January 1, 1972.

The Nürnberg approach, which appears to be the most innovative in the FRG, is based on the following two premisses -

- decision-making in this area is of a highly political nature in terms of "commonly shared and accepted" values and their implementation
- the systems approach is an indispensable tool in bringing this to bear in a decision-making-process.

As for methods, a variation of the PPBS approach was chosen with a view to developing an openly value-orientated, multi-level urban development system which would be at the same time consistent, transparent, and flexible and a tool to improve the political steering process.

Special attention was given to the problem of citizen participation. As far as the present legal structure is concerned, the approach is rather pragmatic although basically always consistent with its overall-systems-approach. Some of the legal considerations are worth mentioning here.

As has been mentioned earlier, general goals are already set up by the constitutional order with regard to individual liberties and the possibility for the greatest personal development based on a concept of "substantive" equal opportunity. At some stage of the planning process these general constitutionally defined goals have to be transformed into more concrete categories and concepts. Summarily speaking, these goals are based on needs voiced by citizens and are the outcome of a political process.

Input is also made available within the planning process from all relevant disciplines and is a source of better understanding of what goals can or should exist for the future.

The participation model would be a topic of its own and shall not be pursued any further at this point. As far as the technical legal framework is concerned, it is interesting to note how the interwovenness of spatial and non-spatial aspects of urban development planning is being reflected against the background of the present laws. Because the controlling Federal Building Act is concentrating on the building and spatial aspects of an ordered urban development, a "model of spatial order" is in the center of the planning process. All development goals and all State and local plans that have a spatial impact (and most of them do) are coordinated and include procedures and strategies for their implementation. Accordingly, both actual land use as well as comprehensive plans that are prepared have to comply with this integrated model of spatial order. In doing so, form is not put over substance. Rather this approach stems from the realization that there is no such thing as purely spatial planning. In general, it should be noted that the time and resource factor is also taken into consideration in the different planning stages and form of plans. Because the planning procedure as well as the outcome at different stages are internally binding as to the departments of city administration, chances for implementation here are considerably better compared to other cities and approaches.

In conclusion, let me indicate that, in my opinion, the legal and the applied systems analysis approaches to urban problems are both having distinctive but related roles to play. Their being regarded as incompatible enemies can be explained either as ignorance (which is mostly the case), or as an indication of the anxiety that either one might move closer to the center of power in the decision-making process at the "expense" of the other. New attempts to come to grips with the urban problems point in the right direction, as the examples of the draft amendment to the Federal Building Act on the legislative level and the "Nürnberg-Plan" on the administrative level have hopefully illustrated. In order to bring about practical solutions, more coordinated research in both fields is needed.