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## What Should Be The Leading Principles of Land Use Planning? A German Perspective

Clifford Larsen

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# What Should Be The Leading Principles of Land Use Planning? A German Perspective<sup>†</sup>

Clifford Larsen\*

## ABSTRACT

*In this Article discussing German land use planning, the author begins by tracing the historical emergence of land use planning in Germany. The author then evaluates the influence of Germany's constitution on the fundamental principles of land use planning. The author reviews German land use planning's historical and constitutional foundations, then examines the goals guiding federal and state planning and the system constructed to achieve these goals. The author proceeds to analyze the challenges presented to German land use planning by reunification, the environment, and European interdependence. In conclusion, the author reviews the relative merits of German land use planning and its lessons for the United States.*

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<sup>†</sup>Editor's Note: As a service to our readers, the Editorial Board normally checks cited material for both "blue book" form and substance. This article, however, relies extensively on sources available only in German. These sources are identified in the first full citation as "German-language source." The Editorial Board has not translated these sources and they have only been checked for "blue book" form.

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## I. INTRODUCTION

Land use patterns in populated areas of the United States have generated no shortage of controversies. Some of these controversies revolve around the physical and health problems associated with U.S. cities: urban sprawl, traffic congestion, polluted water and air, etc. Other sources of contention are the great inequalities among citizens of this country, particularly as reflected in the problems faced by residents of disadvantaged urban and rural areas: crime, lack of jobs and affordable housing, and a shortage of recreational areas, among many others.<sup>1</sup> Some of these latter issues, particularly environmental problems and health problems due to high concentrations of industry, are now discussed under the rubric of "environmental justice."<sup>2</sup> As a result of these controversies, new regulatory practices are now competing with traditional land use planning. Some states, such as Oregon and Washington, have implemented land use statutes quite unlike those typically found in other U.S. jurisdictions.<sup>3</sup>

In this context of controversy, experimentation, and change, the examination of land use planning in another developed

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1. See, e.g., Symposium, *Environmental Justice: Paradigms and Legal Strategies*, 9 J. ENVTL. L. & LITIG. 281 (1994) (demonstrating that minorities are subject to disproportionate health risks from environmental factors); Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599 (1992) (describing the condition of the underprivileged, poverty-stricken, underclass); M. Patrice Benford, Note, *Life, Liberty, & the Pursuit of Clean Air—The Fight for Environmental Equality*, 20 T. MARSHALL L. Rev. 269 (1995) (demonstrating the impact of "environmental racism").

2. See generally Symposium, *supra* note 1, at 282 (examining the environmental factors that disproportionately affect certain at-risk populations).

3. See, e.g., the state use planning legislation of Oregon, codified at OR. REV. STAT. ch. 197 (1991), and of Washington State, codified at WASH. REV. CODE ch. 36.70A (West 1991). The legislative finding of the Washington statute is noteworthy:

The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning. Further, the legislature finds that it is in the public interest that economic development programs be shared with communities experiencing insufficient economic growth.

*Id.* § 36.70A.010. The Washington statute then lists several planning goals, including encouraging development in urban areas with sufficient infrastructure, preventing urban sprawl, and providing multiple transportation alternatives. *Id.* § 36.70A.020. The statute does not have the *binding overarching* principles, however, that typify the German land use system.

country may serve both to put our own experience in perspective and to provide some insights into possible alternatives.<sup>4</sup> U.S. observers have been struck by the success of one country, the Federal Republic of Germany, in addressing major land use issues.<sup>5</sup> Germany has achieved<sup>6</sup> many of the goals on which virtually all parties to the debate over land use planning in the United States agree: creating livable urban areas, preventing urban sprawl and the destruction of green areas near cities, and providing access for all citizens to quality schools, health care providers, sports complexes, shopping areas, and public transportation.

As a preface to considering in detail German land use and its underlying principles, one may consider a small example of that system: the town of Tritttau, a community of approximately 10,000 inhabitants, with another 10,000 in surrounding communities.<sup>7</sup> Tritttau is located in the north German state of Schleswig-Holstein and is approximately 8 miles from the eastern edge of the city-state of Hamburg, a metropolis with a population of almost 2

4. This idea was nicely explained by Pierre Lepaulle:

When one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to historical accident or temporary social situation. . . . To see things in their true light, we must see them from a certain distance, as strangers, which is impossible when we study [the] phenomena of our own country. That is why comparative law should be one of the necessary elements in the training of all those who are to shape the law for societies . . . .

Pierre Lepaulle, *The Function of Comparative Law*, 35 HARV. L. REV. 838, 858 (1922).

5. Among the more recent anecdotal commentaries are Bob Ortega, *Growth Controls Haven't Curbed All Ills in Portland Area*, CHI. TRIB., Jan. 28, 1996, Real Estate, at 1; John Hamer, *The Lessons of Europe: A Seattle Delegation Found Regional Solutions*, SEATTLE TIMES, May 17, 1992, at A17. For older law review commentary, see Thomas J. Schoenbaum, *Planning and Land Development Law in the Federal Republic of Germany*, 54 TUL. L. REV. 624, 624 n.2 (1980), and sources cited therein.

6. Before German reunification, Germany had largely achieved these goals; since reunification, the achievement of these goals as between East and West has been a major preoccupation of German government at all levels. See *infra* part VII.A.

The achievement of these goals in Germany has certainly been influenced by other factors—tax policy, employment policy, etc.—as well. However, there is little debate in Germany that land use planning has been an essential element of the system's success. See *infra* text accompanying notes 216-17.

7. These figures are projections from figures published in *Regionalplan für den Planungsraum I des Landes Schleswig-Holstein - Kreise Herzogtum Lauenburg, Pinneberg, Segeberg und Stormarn - Neufassung 1987 mit Erläuterungen* (1988) (German-language source).

million.<sup>8</sup> Tritttau is not on the main development axes, radiating from Hamburg, along which Schleswig-Holstein state planners have determined that most development in the southern half of the state is to occur. Yet the state has designated Tritttau as a "small center,"<sup>9</sup> a designation made pursuant to federal law that requires the states to establish a system of "central cities."<sup>10</sup> Under this system, cities and towns are given different designations as centers of various levels, or as no center at all, according to criteria such as the population of both the urban area itself and the surrounding communities that the urban area "services."<sup>11</sup>

These designations are absolutely determinative both as to how much private development (both commercial and residential) will be permitted in Tritttau and as to the facilities that the city may and may not develop. For example, within a radius of approximately 5 miles of Tritttau, the 20-odd localities that have not been designated a central city generally will be allowed only extremely limited growth, whether residential or industrial. Future development in the area will be concentrated in Tritttau.

State law also enumerates what facilities, both private and public, should be available in Tritttau. These facilities and services include local administration and small branches of state agencies, grammar schools, both college-preparatory and other secondary schools, special schools, specialized doctors, credit institutions, and an employment office.<sup>12</sup> Tritttau receives state grants to help finance the public facilities. Frequent bus service connects Tritttau and outlying localities to the next largest central city, Ahrensburg, approximately 8 miles to the northwest. From Ahrensburg, frequent trains to Hamburg are available.

Tritttau may not add facilities, such as heavy industry or universities, that may be added to the infrastructure only of larger cities under German land use theory. Even though it is a small center, Tritttau must still submit all plans for development, including the designation of which lots may be used for housing, for approval to state planning authorities.

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8. The principles behind this example are discussed *infra* part VI.D.

9. See *infra* part VI.D.

10. See *infra* part VI.D.

11. For a more detailed discussion of the German concept of *Verflechtungsbereich*, see *infra* part VI.D. The determination of which cities receive which central city designation can be a hard-fought political issue, both because of the prestige connected with the designation and because of the possible state subsidies granted to the cities in order to acquire the facilities appropriate to that level of city. For a fuller discussion of this issue, see K. RABE ET AL., *BAU- UND PLANUNGSRECHT* 28 (3d ed. 1992) [hereinafter RABE] (German-language source).

12. See *infra* notes 205-9 and accompanying text.

This small example exhibits a definitive feature of German land use planning: the binding force of certain "leading principles" that animate the system and guide the implementation of particular land use policies.<sup>13</sup> In Trittau and throughout the country, the leading principle is that land use planning should seek to create "equivalent living conditions" in all parts of the country and for all members of society.<sup>14</sup> This principle is neither designed to "level" all incomes nor to create a socialist state in which government controls the means of production and determines the amount and type of goods and services produced. Rather, while recognizing the primacy of the private sector in development, the leading principles of German land use law provide that growth be steered (and market forces counteracted when necessary) in order to assure that all citizens have access to schools, employment and shopping opportunities, health care and recreational centers, etc. Green space between towns remains, to a large extent, undisturbed. In addition, the state can efficiently allocate its expenditures on infrastructure. Infrastructure is initially placed where need already exists or where need will be channeled. In the long run, the state avoids the problem of massive population movements causing the under-utilization and decay of older infrastructure and a concomitant increase in demand for new infrastructure. Perhaps surprisingly for many Americans, German officials and commentators are largely unanimous in concluding that their system is *more* efficient than a purely market-oriented system, and has contributed significantly to Germany's economic strength.<sup>15</sup>

Despite the recognized success of German land use, U.S. legal commentators have conducted little in-depth analysis of the system's leading principles, their sources, and their relationship to one another. These relationships, and the background against which they arise, are often not apparent on the face of German land use planning laws. Thus, this article analyses the structure of German land use planning with an emphasis on the system's fundamental precepts, particularly the goal of achieving equivalent living conditions for all members of society.

Part II of this article introduces basic German land use planning terminology used throughout the Article. Part III reviews the history of land use planning in modern Germany, particularly focusing on governmental objectives and actions at the federal, state, and local level. Part IV presents the

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13. For a general introduction to the German system, but with little as to its basic principles, see Schoenbaum, *supra* note 5, at 626.

14. For a more complete discussion of the meaning of the term "equivalent living conditions," see *infra* part V.A.

15. See *infra* part VI.

constitutional bases for the leading principles of land use planning in post-war Germany, including federalism and the notion of a social state. The leading land use planning principles of "equivalent living conditions" and cooperation among land use planning officials are discussed in Part V. The implementation of these principles through federal and state planning are evaluated in Parts V and VI. Part VII looks at the future challenges for German land use planning, such as German reunification, environmental concerns, and the European Union. This article concludes that the German land use planning experience, while facing new challenges and issues, provides the United States with an instructive perspective toward domestic land use planning.

## II. BASIC TERMINOLOGY

Mark Twain commented that German words can be "so long that they have a perspective. . . . These things are not words, they are alphabetical processions," "grand mountain ranges stretch[ing] across the printed page."<sup>16</sup> By these standards, German land use planning terminology is easily manageable. The fundamental concept of German land use planning is *Raumordnung*, or the ordering of space.<sup>17</sup> Although *Raumordnung* does not have a statutory definition, German officials and theorists often use the term to mean "comprehensive, supra-local planning at the highest level for the ordering and development of the [relevant] area."<sup>18</sup> As distinguished from *Raumordnung*, *Landesplanung*, or land use planning, is considered that part of the public administration of a German *state*<sup>19</sup> that prepares

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16. MARK TWAIN, *A TRAMP ABROAD* 300 app. D (The Awful German Language) (1903).

17. There is no clear English translation of the term "*Raumordnung*." Because "regions" play a large role in its concepts and goals, *Raumordnung* is sometimes translated as "regional policy." See, e.g., INTERNATIONAL INSTITUTE FOR LEGAL AND ADMINISTRATIVE TERMINOLOGY, *RAUMORDNUNG/REGIONAL POLICY* (1973). This translation, however, fails to convey the overarching nature of *Raumordnung*, both as to the areas and subject matters envisaged by the policy, and especially as to the philosophical underpinnings of the concept. Thus, others translate *Raumordnung* as the ordering of space. See, e.g., Schoenbaum, *supra* note 5, at 626.

18. This definition is taken from the list of definitions prepared by the Main Committee of the Council of Ministers for *Raumordnung* (*Ministerkonferenz für Raumordnung*, or "MKRO"), approved on Nov. 15, 1983, reprinted in W. CHOLEWA ET AL., *RAUMORDNUNG IN BUND UND LÄNDERN* [hereinafter CHOLEWA], *Vorbemerkung VI, Begriffe der Raumordnung und Landesplanung* 2 [hereinafter *Vorbemerkung VI*] (German-language source). This definition resembles closely the definition given to *Raumordnung* by the Federal Constitutional Court. See Decision of June 16, 1954, 5 BVerfGE 425 (German-language source).



comprehensive programs at the highest *state* level and coordinates plans and measures that affect space. As German practice generally refers to *Raumordnung* as planning at the federal level and *Landesplanung* as planning at the state level, this article will employ the German terms when distinguishing between planning at those two different levels. The English term "land use planning" will be used when referring to the German system as a whole.

### III. THE HISTORY OF LAND USE PLANNING IN MODERN GERMANY

Perhaps surprisingly, contemporary German land use planning that seeks to create equivalent living conditions for all members of society is not based upon a long tradition of German government activity in the field.<sup>20</sup> After the rise of liberalism in Germany following the French Revolution, market forces of supply and demand ordered the society and economy. The state took little role in structuring land usage, contenting itself with the declaration that all citizens were equal before the law.<sup>21</sup> The Prussian Land Law (*Preussisches Allgemeines Landrecht* or "PrALR") of 1794 embodied these liberal principles. Article 65 of PrALR provided that every property owner could build upon his property or alter buildings thereon. The police power was consistently limited to maintaining order and controlling dangerous conditions. Thus, while Article 66 of PrALR provided that the act of building or altering buildings must not harm the general populace or lead to the "disfigurement" of public squares, jurisprudence interpreted this restriction narrowly.<sup>22</sup>

19. Germany has a federal system of government. Thus, as with the "states" of the United States, German "states" (*Land* or *Länder*) are the constituent political subdivisions of the country.

20. There are instances of planning in the German "sphere of influence" that date back to the Middle Ages; examples are the settlement of the German knight orders in East Prussia and the planned settlement of Silesia in the thirteenth and fourteenth centuries, and the urban planning engaged in by the reigning German nobles after the Thirty Years' War. However, modern planning does not build upon this earlier experience. See W. ERNST & W. HOPPE, *DAS ÖFFENTLICHE BAU- UND BODENRECHT, RAUMPLANUNGSRECHT* 6 (2d ed. 1981) (German-language source); see also RABE, *supra* note 11, at 1-2.

21. See Cholewa, *supra* note 18, *Einleitung II, Geschichtlicher Aufriss der Raumplanung* 2-3 [hereinafter *Geschichtlicher Aufriss*] (German-language source).

22. RABE, *supra* note 11, at 2. In one decision, a Prussian court ruled that the PrALR allowed the police only to prevent danger to the public order, but not to engage in welfare work (*Wohlfahrtspflege*). See Decision of June 14, 1882, *Kreuzberg-Entscheidung des Pr.OVG* (Pr.OVGE 9, S. 353), quoted in RABE, *supra* note 11, at 2.

In the latter part of the nineteenth century, the quickening of the Industrial Revolution changed conditions in Germany to the extent that land use based exclusively upon liberal principles began to be called into question. Large numbers of people moved from the country to the city and created a high demand for housing. As industry also settled in more densely populated areas, new demands on space arose, with industrial, residential, and transportation (especially railroad) uses all competing for the same land. These developments gave rise to the first attempts by states to take a more active role in the management of land use. Examples are the Prussian "*Fluchtliniengesetz*" of 1871, which regulated the setback of buildings from streets, and the Prussian "*Ansiedlungsgesetz*" of 1876, which limited building in non-developed areas.<sup>23</sup> In an early case of land use planning on a broad scale, the Kingdom of Württemberg created an office for trade and crafts so as to decentralize the growing industrial structure of its territory.<sup>24</sup>

After the beginning of the twentieth century, problems arose due to the combination of explosive growth of urban areas beyond their corporation limits and the division of some major urban agglomerations into different jurisdictions.<sup>25</sup> The problems, which included supplying energy and establishing public transportation, made the solutions dictated by classic liberalism and the play of market forces at the local level insufficient. Localities responded to these problems in numerous ways. Some localities incorporated surrounding communities into their own. Other localities, supported by industry, transportation, and building concerns, entered into voluntary association with surrounding areas. One example of such attempted coordination was the creation of the urban planning area of "greater Berlin" in 1911. Although this entity created far-reaching plans, it had neither the power nor the financial means to implement the plans because the individual localities retained the ultimate decision-making power.<sup>26</sup>

In the Ruhr Valley, similar efforts were being made to solve the problems of rapidly-growing urban/industrial areas.<sup>27</sup> While focusing initially on the absence of green space that was becoming a hallmark of the growing metropolises, Robert Schmidt

23. See *Geschichtlicher Aufriss*, *supra* note 21, at 3.

24. J. VOGT, RAUMSTRUKTUR UND RAUMPLANUNG 78 (1994) (German-language source).

25. See *infra* notes 27-28 and accompanying text.

26. See *Geschichtlicher Aufriss*, *supra* note 21, at 4-5; VOGT, *supra* note 24, at 78-79. Given this background, it is telling that voters in the city-state of Berlin and the surrounding state of Brandenburg recently rejected an interstate entity between their two governments to merge those two political entities.

27. This history is based on VOGT, *supra* note 24, at 79-81.

of Essen and others soon concluded that the lack of coordinated steering of development was the main problem facing urban agglomerations. Such coordination was particularly difficult in the Ruhr because the valley was divided among two provinces and three different governmental districts.

Schmidt's initial, pre-World War I planning coordination efforts failed. After World War I, however, the planning dynamic in the Ruhr valley changed with the arrival of some 150,000 mining families which had moved to the area due to Germany's Treaty of Versailles obligation to pay reparations. Unable to cope individually with the increased demand for housing and services, cities and counties voluntarily transferred part of their planning authority to a newly-created regional planning entity, which was to direct the spatial development of the Ruhr coal mining area. The new entity, the *Stedlungsverband Ruhrkohlenbezirk*, or SVR, served as a model for other German entities and remained in existence until 1975.<sup>28</sup>

The success of the Ruhr experiment led to the creation in northern and eastern Germany of other voluntary supra-local planning entities that, in some instances, even crossed state lines.<sup>29</sup> By 1931, 30% of the surface area of Germany, which contained 58% of the population, was under the authority of such planning commissions. Germany became a world leader in this regard.

During the Weimar Republic, sporadic efforts were made to begin planning on a national level.<sup>30</sup> During the Nazi period, mandatory groupings and unified national planning under the control of the Reich Planning Office (*Reichsstelle für Raumordnung* or *Reichsstelle*) shifted the focus of planning away from the localities' voluntary coordination that had been typical of the post-World War I period. Although it allowed for some self-determination at the locality level, the *Reichsstelle* created unified national planning in the service of the goals of rearmament, industrial development, and National Socialism. Its activities were reduced and then eliminated during World War II.<sup>31</sup>

After Germany's defeat in World War II, many Germans, especially those connected with private business interests, rejected the concept of planning because it was associated with a

28. *Id.*

29. The states of Hamburg and Prussia created such an interstate entity in 1928. *See id.*

30. *Geschichtlicher Aufsatz*, *supra* note 21, at 6.

31. VOGT, *supra* note 24, at 81-82. For an interesting discussion of some of the tensions between state and local planning in the Third Reich, particularly in connection with Albert Speer, see GITTA SERENY, *ALBERT SPEER: HIS BATTLE WITH TRUTH* 232-72 (1995).

war economy and because the planned economies of Eastern Europe had brought planning into disrepute. The earlier success of voluntary planning at the regional level was forgotten by the Germans and was largely unfamiliar to the occupying Western allies.<sup>32</sup> However, as had occurred after World War I, a great migration forced a turn toward land use planning. Approximately eleven million refugees from the East were steered toward larger urban areas; communities were once again forced to look to supra-local entities to solve housing, employment, and infrastructural problems. In addition, because the areas bordering the Soviet Occupation Zone, later the German Democratic Republic, were isolated from traditional markets and developed less quickly than areas along the Rhine, a great East-West economic divide within West Germany became visible.<sup>33</sup>

The public attitude toward land use planning slowly began to change. Drawing on its successful prewar experience in the Ruhr, the state of North Rhine-Westphalia passed, in 1950, the first German post-war state land use planning law.<sup>34</sup> This law, which served as a model for the land use planning laws of other states,<sup>35</sup> gave land use planning entities the right, in principle, to create plans that were binding on local communities upon approval by the highest state authorities. However, the means for implementing these plans were lacking. Consequently, land use planning officials were often limited to the more "negative" planning familiar to Americans, *i.e.*, rejection or modification of individual projects.<sup>36</sup>

At the time of the founding of the Federal Republic of Germany in 1949, no clear political consensus had yet developed as to what should be the goals of land use planning law.<sup>37</sup> The

32. The drafters of the new German constitution, the *Grundgesetz*, did manage to include *Raumordnung* framework authority for the federal government, however. See *infra* notes 47-58 and accompanying text.

33. See *Geschichtlicher Aufriss*, *supra* note 21, at 10.

34. Gesetz v. 11.3.1950 (GV S. 41) (German-language source).

35. Bavaria followed in 1957, Schleswig-Holstein in 1961, Hesse and Baden-Wuerttemberg in 1962, the Saar in 1964, Lower Saxony and the Rhineland-Palatinate in 1966. Since the reunification of Germany, all of the new states have passed land use planning laws. The city-states of Hamburg, Bremen, and Berlin have no land use plans as such. See *Geschichtlicher Aufriss*, *supra* note 21, at 11.

36. ULRICH BATTIS, *ÖFFENTLICHES BAURECHT-UND RAUMORDNUNGSRECHT* 37 (1992) (German-language source). This early phase is often referred to as the period of "persuasive planning".

37. For example, the Federal Minister of the Economy of the day still took the position that *Raumordnung* was incompatible with a market economy. S. Jacob, DVBl. 1969, 677, quoted in BATTIS, *supra* note 36, at 38 n.19.

This discussion of the events leading to the passage of the *Raumordnungsgesetz* in 1965 is based on Cholewa, *supra* note 18, *Vorbemerkung*

land use planning movement, however, soon gained momentum at the federal as well as at the state level. In the early 1950s, the federal government created an interministerial committee for *Raumordnung*, staffed by officials from various ministries who were responsible for *Raumordnung* issues. In 1955, the federal government requested a subcommittee thereof to prepare a model for land use planning at the federal level.<sup>38</sup> The states, however, still saw land use planning, even that going beyond state borders, as a state affair. In 1957, the states negotiated an agreement with the federal government that again foresaw only cooperation, primarily the exchange of information, between federal and state governments.<sup>39</sup> The primary vehicle for this exchange was the *Raumordnung* Committee (*Konferenz für Raumordnung*), composed exclusively of representatives of the state and federal governments. While this body's focus on information sharing and consensus building foreshadowed the work of later, more successful *Raumordnung* bodies, the Committee's effectiveness was greatly reduced both by its failure to include representatives from the localities, industry, and labor and by its lack of overarching goals and of a permanent seat of operations.<sup>40</sup>

Despite state resistance, efforts to establish a true *Raumordnung* at the federal level were gaining momentum. In 1955, a group of 108 members from all parties of the lower house of the federal parliament, the *Bundestag*, presented a proposal for a *Raumordnung* law, or *Raumordnungsgesetz*, and for the creation of a federal commission, including representatives of the states, to increase cooperation among federal ministries on issues concerning *Raumordnung*.<sup>41</sup> An independent group of advisors from other sectors, including business and specialized fields, was to work alongside this commission composed of government officials.<sup>42</sup> This proposal failed to pass the *Bundestag*.

II [hereinafter *Entstehungsgeschichte des Gesetzes*] and *Geschichtlicher Auftriss*, supra note 21, at 12-14.

38. The interministerial committee was known as the *Interministerieller Arbeitskreis für Raumordnung*, or IMARO. The subcommittee was known as the *Sachverständigenausschuss fuer Raumordnung*, or SARO.

39. See *Verwaltungsabkommen über die Zusammenarbeit auf dem Gebiet der Raumordnung*, discussed in *Geschichtlicher Auftriss*, supra note 21, at 12.

40. The *Ministerkonferenz für Raumordnung* (MKRO), the successor established by the *Raumordnungsgesetz* to the *Raumordnung* Committee, has been much more effective.

41. The parliamentarians were known as the interparliamentary working group (*Interparlamentarische Arbeitsgemeinschaft*); their proposal was known as the initial proposal for a land use planning law (*Initiativantrag für ein Raumordnungsgesetz*). It is published as BT-Drucks. II/1656.

42. See *Raumordnungsgesetz* (ROG), v. 21.4.1965 (BGB1. I. S. 306) art. 9 [hereinafter ROG] (adopting the idea of an independent commission known as a *Beirat*) (German-language source).

Legislation in related fields, however, was advancing the cause of *Raumordnung*. In 1960, the Parliament passed the Federal Building Law (*Bundesbaugesetz* or "BBauG").<sup>43</sup> The BBauG established procedures for passing local plans known as "*Bebauungsplaene*" and "*Flächennutzungsplaene*." Both concepts have no exact equivalent in the United States, but may best be translated as building plans and zoning plans, respectively.<sup>44</sup> Article 1 of the BBauG states explicitly that the goals of local zoning must be in keeping with the goals of land use planning and *Raumordnung*.<sup>45</sup> Since, at the time of passage, the *Raumordnungsgesetz* did not exist, the *Bundestag* requested that the federal government begin procedures for the passage of *Raumordnung* legislation.<sup>46</sup>

In 1961, the federal government transferred responsibility for *Raumordnung* from the Interior Ministry to the Housing Ministry, which received the new name of Ministry of Housing, Urban Planning, and *Raumordnung*.<sup>47</sup> The Minister and his deputy favored *Raumordnung* and prepared a draft law that, for the first time, developed for the country as a whole independent *Raumordnung* goals, based on constitutional principles, toward which planners at all levels were to work.<sup>48</sup> In 1963, the government officially brought a draft<sup>49</sup> before the upper house of Parliament, the *Bundesrat*.<sup>50</sup> Despite a Federal Constitutional Court (*Bundesverfassungsgericht*) decision a decade earlier recognizing the power of the federal government to legislate in this field,<sup>51</sup> the *Bundesrat* rejected the draft on the constitutional ground that the law contained goals that violated the principles of a federal state. Reflecting state resistance to central government "interference" in this area, the *Bundesrat* indicated instead the willingness of the states to improve cooperation between the

43. *Bundesbaugesetz* i.d. Fassung v. 23.6.1960 (BGBl. I S. 341) [hereinafter BBauG] (German-language source).

44. *Id.* arts. 1-10.

45. BBauG Article 1, Paragraph 1, Sentence 4 states, "*Die Bauleitplaene [Flächennutzungsplan und Bebauungsplan] sind den Zielen der Raumordnung und Landesplanung anzupassen.*" Other laws passed during this period also contained provisions, known as *Raumordnungsklauseln*, which provide that the goals of *Raumordnung* should be respected or considered. *Id.* art. 1, ¶ 1, sentence 4.

46. See BT-Prot. III/6655 (German-language source).

47. *Ministerium fuer Wohnungswesen, Städtebau und Raumordnung*.

48. See *infra* part IV.A.

49. BR-Drucks. 54/63.

50. The *Bundesrat* is comprised of state delegates chosen by the state governments, rather than by popular vote. In this regard, the *Bundesrat* resembles the U.S. Senate before ratification of the XVIIth Amendment in 1913. See *Grundgesetz* (GG) (German Constitution) art. 51 (German-language source).

51. See *infra* part IV.A.

states and the federal government through the *Konferenz für Raumordnung* and under the agreement negotiated between the states and federal government in 1957.

The federal government was convinced, however, that the goals of *Raumordnung* could not be achieved through cooperation alone. The Ministry maintained that the goal of equivalent living conditions, the prerequisite for federal government action under its constitutional authority to pass "framework" legislation,<sup>52</sup> could be achieved only by a federal law. The government thus brought the rejected draft before the lower house of Parliament, the *Bundestag*.<sup>53</sup> During the hearings before the relevant *Bundestag* committees,<sup>54</sup> the localities, through their umbrella organization, played an active role in drafting the new law.<sup>55</sup> By an overwhelming majority, the *Bundestag* approved draft legislation on February 12, 1965.<sup>56</sup> The draft law was again brought to the *Bundesrat*, whose responsible committees had, along with responsible state officials, taken part in the work of the relevant *Bundestag* committees. After further negotiations between state and federal officials, the *Bundesrat* approved the law,<sup>57</sup> the *Raumordnung* law (*Raumordnungsgesetz* or "ROG"), which was promulgated on April 21, 1965.<sup>58</sup>

52. *Id.*

53. BT-Drucks. IV/1204 (German-language source). The federal government indicated its willingness, however, to consider some of the individual suggestions that had been made in the *Bundesrat* committees that had considered the issue. See *Entstehungsgeschichte des Gesetzes*, *supra* note 37, at 2.

54. The *Bundestag* gave primary responsibility for hearings on the new law to the 24th Committee for Housing, Urban Planning and *Raumordnung*. Other interested committees included those responsible for welfare (*Sozialhilfe*), nutrition, agriculture and forestry, and economy. The committees placed great weight on the maintenance of soundly structured areas and assistance for areas where economic development was weak. See *Entstehungsgeschichte des Gesetzes*, *supra* note 37, at 3-4.

55. See *id.* at 2.

56. BT-Prot. 4 Wahlperiode, v. 12.2.1965 (S. 8002ff) (German-language source).

57. The state of Hesse abstained in the voting; the state of Bavaria voted against the law on the grounds that it went beyond the framework authority of the federal government pursuant to Article 75 of the Federal Constitution. At the time of the passage of the law, the federal government had made use of its framework authority only five times; see Cholewa, *supra* note 18, *Vorbemerkung III* at 1 (*Das Bundesraumordnungsgesetz als Rahmengesetz*) (German-language source).

In rejecting the proposal of the Social Democratic Party (SPD) to include in the new law an authorization for the federal government to engage in a national economic development program, the new law did not make use of the federal government's exclusive authority to regulate *Raumordnung*, as recognized in the Federal Constitutional Court's decision of 1954. Rather, it limited itself to its framework authority under Article 75 of the *Grundgesetz*. See Cholewa, *supra*

#### IV. THE FEDERAL CONSTITUTION AS THE BASIS FOR THE LEADING PRINCIPLES OF LAND USE PLANNING IN POST-WAR GERMANY

The passage of the *Raumordnungsgesetz* was attributable not only to increasing sentiment in favor of its principles, but also to constitutional principles that had not existed prior to the founding of the Federal Republic. Germany's new constitution, the *Grundgesetz*, provided two important underpinnings for the new approach to land use planning. First, federalist principles allowed the federal government to set *Raumordnung's* underlying goals, leaving the states to implement plans to achieve those goals. Second, Germany was established as a social state. Germany's land use planning can be understood only in the context of these constitutional principles.

##### A. Federalism and the Establishment of Leading Goals such as Equivalent Living Conditions and the Free Development of the Personality

The *Grundgesetz* provides the basis for the federal-state division of authority that is now a hallmark of German land use planning. This division highlights land use planning's primary goal of equivalent living conditions for all members of society, because, as explained immediately below, certain federal legislative authority may be used only when needed to create equivalent living conditions.

In principle, the German federal legislature, like its U.S. counterpart,<sup>59</sup> has only that legislative authority granted to it by the national constitution.<sup>60</sup> The *Grundgesetz* grants two types of authority to the German federal government. The first type is

note 18, *Fortentwicklung des Raumordnungsrechts aus Anlass der Herstellung der Einheit Deutschlands* at 3-4 [hereinafter *Einleitung IV*] (German-language source).

58. *Raumordnungsgesetz* (ROG), v. 21.4.1965 (BGBl. I. S. 306) [hereinafter ROG] (German-language source). The ROG has been amended on several occasions, most notably in 1989, and after German reunification. Other Federal statutes with great relevance for *Raumordnung* are the *Bundesbaugesetzbuch* (Federal Building Law Code) and the *Gesetz über die Einführung des Raumordnungsgesetzes der Bundesrepublik Deutschland in der Deutschen Demokratischen Republik* (Law on the Introduction of the Federal Land Use Planning Law of the Federal Republic of Germany in the German Democratic Republic). A useful compilation of *Raumordnung* and building laws can be found in the dtv Beck-texte paperback no. 5018, *Baugesetzbuch* (1993) (German-language source).

59. See U.S. CONST. amend. X.

60. "The states have the right to legislate, to the extent that this Constitution does not grant the power to the Federal Government." ("*Die Länder haben das Recht der Gesetzgebung, soweit dieses Grundgesetz nicht dem Bunde Gesetzgebungsbefugnisse verleiht.*") GG art. 70, ¶ 1.



exclusive authority. Within those fields enumerated by Article 73 of the *Grundgesetz* as being within the exclusive authority of the federal government, the states may legislate only when specifically authorized to do so by federal law.<sup>61</sup> Broad-based land use planning is not listed in Article 73 as an area in which the federal government has exclusive authority.<sup>62</sup>

The second type of federal authority is concurrent authority, i.e., when the federal government "shares" power with the states.<sup>63</sup> This "sharing" is subject to conditions on both levels of government. The states may use their concurrent authority to the extent that the federal government has not used its concurrent authority to legislate.<sup>64</sup> Pursuant to Paragraph 2 of Article 72, the federal government may use its concurrent authority *only to achieve the creation of equivalent living conditions in the country or when the maintenance of legal and economic unity requires federal action.*<sup>65</sup>

The *Grundgesetz* further divides the concurrent authority of the federal government into two types: "full" concurrent authority and "framework" concurrent authority. Article 74 enumerates the areas in which the federal government has "full" concurrent legislative jurisdiction. The federal government may pass detailed legislation in the field, *provided* that the legislative goal is to

61. *Id.* art. 71.

62. A decision of the Federal Constitutional Court (*Bundesverfassungsgericht*) has recognized federal government jurisdiction for federal-level planning. See *infra* note 79. However, it is widely agreed that the main federal legislation in the *Raumordnung* field, the *Raumordnungsgesetz*, is based on the federal government's framework authority rather than under the exclusive authority recognized by the *Bundesverfassungsgericht*.

63. "The division of authority between the Federal Government and the States shall be determined according to the provisions of this Constitution regarding exclusive and concurrent authority." (*Die Abgrenzung der Zuständigkeit zwischen Bund und Ländern bemißt sich nach den Vorschriften dieses Grundgesetzes über die ausschließliche und die konkurrierende Gesetzgebung*). GG art. 70, ¶ 2.

64. *Id.* art. 72, ¶ 1.

65. *Id.* art. 72, ¶ 2. Although this authority may on its face appear quite broad, an October, 1994 amendment added Article 93, Paragraph 2a to the *Grundgesetz*, which grants jurisdiction to the Federal Constitutional Court to hear claims on the part of the *Bundesrat*, a state government or the *Volksvertretung eines Landes* that the requirements for Federal authority pursuant to GG art. 72, ¶ 2 were not fulfilled. *Gesetz zur Aenderung des Grundgesetzes*, v. 27.10.1994 (BGBl. I. S. 3146) (German-language source). The amendment also eliminated additional bases of federal concurrent jurisdiction. These eliminated bases, as enumerated in former GG Article 72, Paragraph 2, Numbers 1 and 2, concerned matters that could not be effectively regulated by the legislation of individual states, and matters in which regulation by state law could negatively effect the interests of other states or the interests of the nation as a whole.

For a discussion of the term "equivalent living conditions", see *infra* notes 119-29 and accompanying text.

achieve equivalent living conditions and legal and economic national unity. Again, land use planning is not an enumerated field within the full concurrent authority of the federal government.<sup>66</sup>

The second type of federal concurrent authority allows the federal government to pass "framework laws," or "*Rahmengesetze*," in areas enumerated by the *Grundgesetz*.<sup>67</sup> Although the *Grundgesetz* does not further specify the meaning of "framework law" or the authority of the federal government when acting pursuant thereto, the *Grundgesetz* does state that framework laws may regulate an area in detail only in exceptional circumstances. Once the federal government has passed a law pursuant to its framework authority, the states must pass more detailed implementing legislation.<sup>68</sup> As with federal full concurrent jurisdiction, federal framework concurrent jurisdiction exists only when necessary to achieve equivalent living conditions in the country or to create national political and economic unity.<sup>69</sup> Among the enumerated areas in which the federal government may pass framework laws are the "partitioning of land" and "*Raumordnung*."<sup>70</sup> The main federal legislation in the field of *Raumordnung* is based on this authorization.<sup>71</sup>

66. GG Article 74, Paragraph 1, Number 18 allows federal regulation of transaction in parcels of land, real property law, farming leases, building of housing, and other areas. However, this provision is more important constitutionally for related areas of federal legislation, such as general building law, than for land use planning law.

67. This "framework" authority is based upon the concept of *Grundsatzgesetzgebung* (passing of laws that lay down principles) as established in the Weimar Republic Constitution Articles 10-11. See Cholewa, *supra* note 18, *Kommentar Art. 1*, at 2 [hereinafter Art. 1 Commentary] (German-language source).

The *Grundgesetz* does not make clear what the "legal nature" of the framework laws may be, *i.e.*, whether the framework law is directly binding on the states or whether it is only advisory (*Anweisungsnormen an die Landesgesetzgeber*). At the time of the passage of the ROG, the federal government had used its framework authority under GG Article 75 five times, to issue both directly binding law and *Anweisungsnormen*. The ROG contains both types of provisions. See Cholewa, *supra* note 18, *Vorbemerkung III, Das Bundesraumordnungsgesetz als Rahmengesetz*, at 1-2 [hereinafter *Vorbemerkung III*] (German-language source).

68. See GG art. 75, ¶¶ 2-3; see also Judgement of Dec. 1, 1954, BVerfGE 4, 115 (129).

69. GG art. 75, ¶ 2.

70. GG art. 75, ¶ 1, no. 4. Such framework authority is consistent with the goals of *Raumordnung* in a social market economy. For a further discussion of the goals of *Raumordnung*, see *infra* part IV.B.3.

71. Cholewa, *supra* note 18, *Vorbemerkung I (Gesetzgebungskompetenz des Bundes)*, at 1 (German-language source).

A decision of the Federal Constitutional Court highlights the interplay of the several types of federal authority in the land use planning field defined broadly. In contrast to the limitation of Article 3, Section 2 of the U.S. Constitution on the

Financial provisions of the *Grundgesetz* reinforce the concept that federal activity in a field should be based on the effort to create equivalent living conditions. For example, Article 106 provides that the federal and state governments share the proceeds of sales taxes. The proportions that the federal and state governments receive are determined by a federal law that requires the approval of the *Bundesrat*, the upper house of the legislature that is composed state representatives. One of the leading principles used in determining those proportions provides that the taxes shall be apportioned so as to achieve equivalent living conditions.<sup>72</sup> Similarly, Paragraph 4 of Article 104a allows the federal government, under certain conditions, to provide financial assistance to states, localities, or groups of localities for particularly important investments. One such condition is that investments equalize differences in economic capacity across the country. Finally, as part of its obligation in discharging these responsibilities important to society as a whole, the federal government is to finance one-half of each state's expenditures in improving regional economic structures where federal participation is necessary for the improvement of living conditions.<sup>73</sup>

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authority of the U.S. Supreme Court to "cases and controversies", GG Article 93, Paragraph 2, and Federal Constitutional Court Law Article 13, Paragraph 6 & Article 76 have been amended to grant the Federal Constitutional Court the authority to answer questions, put to it by certain federal or state organs, regarding differences of opinion or doubts about the compatibility—in form or in substance—of federal or state law with the *Grundgesetz*. Gesetz über das Bundesverfassungsgericht v. 11.8.1993 (BGB1. I. S. 1473). Pursuant to such a request by the *Bundesrat*, *Bundestag*, and the federal government, the Federal Constitutional Court defined the parameters of the federal government's *Raumordnung* authority. Describing *Raumordnung* as an activity that is supra-regional, synoptic and interdisciplinary, (*überörtlich, zusammenfassend and übergeordnet*) and thereby distinguishing it from *Landesplanung*, the Court ruled:

*Raumordnung* cannot stop at the borders of the states. If one recognizes *Raumordnung* as a necessary function of the modern state, then the entire country is the largest space that can be ordered. Thus, in a federal state there must be *Raumordnung* for the entire country. The legal authority to regulate this field belongs by the nature of the matter exclusively and fully to the Federal Government.

Thus, the Federal Government may regulate "pursuant to its exclusive authority, *Raumordnung* at the Federal level; pursuant to its concurrent framework authority, the main features of the ordering of space of the states; pursuant to its concurrent full authority, urban planning."

Decision of June 16, 1954, BVerfGE 5, 425 (428) (German-language source).

72. GG art. 106, ¶ 3. This provision is part of what is known as the "vertical equalization" (*vertikaler Finanzausgleich*) between the federal and state governments.

73. *Id.* art. 91. It should be noted that these provisions, a detailed discussion of which is beyond the scope of this article, play a role in Germany's

## B. The Federal Republic as a Social State

### 1. Article 20 of the *Grundgesetz*

The second underpinning for land use planning and its leading principles in post-war Germany is the establishment of the Federal Republic as a "social state." While disagreeing on the appropriate level of state ownership and the proper amount of control given to workers, all major parties have agreed to move beyond classic liberalism and to provide the state with a role in achieving a social "*Ausgleich*" or equalization.<sup>74</sup>

Article 20, Paragraph 1 of the *Grundgesetz* embodies this social state principle. It reads simply: "The Federal Republic of Germany is a democratic and social federal state."<sup>75</sup> *Grundgesetz* Article 28, Paragraph 1 further requires that the constitutional order of the constituent states correspond to the principles of the republican, democratic, and social state of law as provided by the *Grundgesetz*.<sup>76</sup> The principle of Article 20 is considered so basic to the German constitutional order that *Grundgesetz* Article 79, Paragraph 3 forbids any change to the Constitution affecting the social state principle.<sup>77</sup>

Article 20 does not define the term "social state." Nor does Article 20, in and of itself, generally provide a cause of action for a citizen to claim that the state must act in accordance with its social mandate.<sup>78</sup> Similarly, the Federal Constitutional Court,<sup>79</sup>

fiscal structure, upon which the functioning of *Raumordnung* in part depends. See *infra* Conclusion.

74. See DER SOZIALSTAAT, INFORMATIONEN ZUR POLITISCHEN BILDUNG, heft 215, 15-16 (1992) (German-language source). In keeping with its *Leitbild* of democratic socialism, for example, the Social Democratic Party (SPD) has favored more government ownership of and worker control over industry than have the more social market economy-oriented Christian Democratic Union (CDU), its Bavarian sister party the Christian Social Union (CSU), and the centrist Free Democratic Party (FDP).

75. "Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat." GG art. 20, ¶ 1.

76. "Die verfassungsmässige Ordnung in den Ländern muss den Grundsätzen des republikanischen, demokratischen und sozialen Rechtsstaats im Sinne dieses Grundgesetzes entsprechen." *Id.* art. 79, ¶ 3.

77. GG Article 79, Paragraph 3 also forbids changing the following: the basic division of the country into states, the participation of the states in lawmaking, the provisions of GG Article 1, and the other provisions of GG Article 20. GG Article 79, Paragraph 3 reads, "Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Art. 1 und 20 niedergelegten Grundsätze berührt werde, ist unzulässig." *Id.*

78. The Federal Constitutional Court has recognized an exception to this rule: where lawmakers arbitrarily and without material reason ignore an

the Federal Administrative Court,<sup>80</sup> and the Federal Social Court<sup>81</sup> have all held that an individual citizen generally has no right to state benefits, particularly financial ones, unless granted by law.<sup>82</sup> Rather, the Federal Constitutional Court has referred to the social state principle embodied in the *Grundgesetz* as an "open-ended" principle<sup>83</sup> that is both capable of and requires a high degree of shaping.<sup>84</sup>

This open-endedness does not mean that the constitutional commitment to a social state is an empty phrase, especially in determining the basic principles of land use planning. Going beyond the concept of the classic liberal state of law, the social state principle *obliges* the state to actively shape the society. In an early decision, the Federal Constitutional Court stated that the legislature "is constitutionally required to be active in the social arena, in particular to provide for an acceptable balancing of competing interests and the providing of acceptable living conditions for all those who are in need."<sup>85</sup> More specifically, German courts have held that a social state must work toward social justice and security, meet the needs of those in economic distress, and abolish the disadvantages suffered by certain groups and classes of citizens.<sup>86</sup> This obligation has been further

obligation, an individual may have a constitutional claim. Judgment of Dec. 19, 1951, BVerfGE 1, 97 (105), *quoted in* 1 I. VON MUNCH, STAATSRICHT 114 (5th ed. 1993) (upon which this discussion of the meaning of the term "social state" is in part based) (German-language source).

79. Judgment of Dec. 3, 1969, 27 BVerfGE 253, 283 (German-language source); Judgment of June 13, 1976, 41 BVerfGE 126, 153 (German-language source); Judgment of Apr. 23, 1991, 84 BVerfGE 90 (German-language source).

80. Bundesverwaltungsgericht [BVerwG] (highest administrative court) 1958 DOV 737, 738 (German-language source).

81. Bundessozialgericht [BSG] [Supreme Social Court]. *See, e.g.*, Judgment of Nov. 31, 1967, 21 NJW 1158 (German-language source); Judgment of Feb. 16, 1989, 42 NJW 1885, 1886 (German-language source).

82. In addition, the Social Code, or *Sozialgesetzbuch*, specifically requires that a law be the basis for "social security" benefits. Article 31 reads, "Rights and duties in the area of social benefits as covered by this code may be based upon, changed, or eliminated only insofar as a law provides for or permits." *See* VON MUNCH, *supra* note 78, at 116.

83. Judgment of Jan. 13, 1982, 59 BVerfGE 231, 263 (German-language source). The *Bundesverfassungsgericht* spoke of the "*Offenheit des Sozialstaatsprinzips*."

84. Judgment of Aug. 19, 1956, 5 BVerfGE 85, 198 (German-language source).

85. Judgment of Dec. 19, 1951, 1 BVerfGE 97, 105 (German-language source).

86. *See, e.g.*, Judgment of Jan. 13, 1982, 59 BVerfGE 231, 263 (German-language source); 6 BSGE 213, 219, *cited in* VON MUNCH, *supra* note 78, at 115-16.

interpreted to mean that the legislature is required to reduce the economic gap between rich and poor.<sup>87</sup>

Thus, rather than providing the basis for any particular claim, the social state principle can be seen as providing the general direction and goals toward which the state must strive. This direction is binding<sup>88</sup> not just on the legislature, but on all branches of government.<sup>89</sup> In particular, government ministries are obliged to follow the social state principles when using their discretion in setting the norms for the interpretation of laws.<sup>90</sup>

The social state principle of Article 20 shapes German law not only in its own right, but also in its influence on the interpretation of other provisions of the *Grundgesetz*. Articles 1 through 19 are considered to embody basic rights, or *Grundrechte*, the substance of which may not be infringed upon.<sup>91</sup> For example, Article 1, Paragraph 1 of the *Grundgesetz* provides: "Human dignity is inviolable. To respect it and protect it is the duty of all state authority."<sup>92</sup> The Federal Constitutional Court has interpreted this Article, *in connection with the social state principle of Article 20*, to mean that the state *must* provide a minimum level of benefits necessary for survival because the care of those in need is an "obvious" duty of the social state.<sup>93</sup>

## 2. Other Constitutional Articles

Article 20 is not the only provision of the *Grundgesetz* that embodies the social state principle upon which the concepts of *Raumordnung* and *Landesplanung* are based. Article 2, Paragraph 1 states: "Each person has the right to free development of the personality, in so far as he does not violate the rights of others and does not violate the constitutional order or moral law."<sup>94</sup>

87. Von Munch finds the source of this obligation in both the social state and the concept of material justice inherent in the German Constitution, which requires the individual states of the Federal Republic to be "states of law" (*Rechtsstaaten*). VON MUNCH, *supra* note 78, at 116; *see also* GG art. 28, ¶ 1.

88. *See Bericht der Sachverständigenkommission Staatszielbestimmungen, Gesetzgebungsaufträge*, 1983, Rn.7, *cited in* VON MUNCH, *supra* note 78, at 124.

89. The judiciary would also be bound by this rule. *See* ERNST & HOPPE, *supra* note 20, at 14; VON MUNCH, *supra* note 78, at 117.

90. VON MUNCH, *supra* note 78, at 117.

91. GG art. 19, ¶ 2.

92. "*Die Würde des Menschen ist unantastbar. Sie zu achten und sie zu schützen ist Verpflichtung aller staatlichen Gewalt.*" *Id.* art. 1, ¶ 1.

93. Judgment of Mar. 6, 1952, 1 BVerfGE 144, 161 (German-language source); Judgment of June 18, 1975, 40 BVerfGE 121, 131 (German-language source).

94. "*Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.*" GG art. 2, ¶ 1.

Thus, on the one hand, this Article provides for a very broad individual right, *i.e.*, "free development of the personality." On the other hand, this freedom is immediately limited by its social context expressed in the rights of others, the constitutional order, and moral law.<sup>95</sup> This linkage of right and limitation of right emphasizes the movement of the Federal Republic away from a classically "liberal" state, especially since an individual's rights may be limited not only by the rights of others, but by the entire constitutional order, including its social state component. The development of the individual is thus inextricably linked to the societal order.<sup>96</sup> As the Federal Constitutional Court has stated:

While freedom and individual dignity are fundamentally guaranteed, it cannot be overlooked that the image of man of the *Grundgesetz* is not that of an individual in arbitrary isolation, but of a person in the community to which the person is obligated in many ways.<sup>97</sup>

The language of Article 2, Paragraph 1 has been drafted directly into the *Raumordnungsgesetz*<sup>98</sup> and several state land use planning laws.<sup>99</sup>

In addition to Article 2, Article 14 of the *Grundgesetz* specifically adds a social component to the ownership of land. Article 14, Paragraph 1 guarantees the right to property (and the right to inherit), but allows the right to be restricted by law. More importantly, Article 14, Paragraph 2 states: "Property entails obligation. Its use should serve the well-being of society."<sup>100</sup> This provision reinforces the concept, inherent in Article 2, that the individual's use of space is inextricably linked to the relationship of the individual to society.

95. According to some noted scholars, the moral law, or *Sittengesetz*, restriction has had relatively little substantive role as a limitation on basic rights. HERMAN V. MANGOLDT ET AL., 1 *DAS BONNER GRUNDGESETZ, COMMENTARY TO ARTICLE 2* (3d ed. 1985) (German-language source).

96. See T. MAUNZ & G. DÜRER, *GRUNDGESETZ KOMMENTAR*, Art. 2, 22-23 (1994) (German-language source).

97. See Art. 1 Commentary, *supra* note 67, at 15 (citing 4 BVerfGE 7). The danger that the "social" component of the GG Article 1, Paragraph 1 right may become so strong as to emasculate the right itself, is prevented by the GG Article 19, Paragraph 2 provision that in no case may the core (*Wesensgehalt*) of basic rights be violated. See MAUNZ & DÜRER, *supra* note 96, at 23-24.

98. See *infra* part V.A.

99. States that have included this goal in their land use planning laws include Baden-Wuerttemberg, North-Rhine-Westphalia, Rhineland-Palatinate, and Schleswig-Holstein. See Art. 1 Commentary, *supra* note 67, at 16.

100. "*Elgentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.*" GG art. 14, ¶ 2.

### 3. The Social State Principle and Land Use Planning

The leading principles of German land use planning link the social state goal, as embodied in Articles 2, 14, and 20 of the *Grundgesetz*, with the realization of that goal. Under German theory, the social state cannot be achieved, free development of the personality cannot occur, and the other *Grundgesetz* rights *against* the state—the freedoms of religion,<sup>101</sup> press,<sup>102</sup> schooling,<sup>103</sup> assembly,<sup>104</sup> travel,<sup>105</sup> choice of occupation,<sup>106</sup> etc.—cannot be realized unless the state<sup>107</sup> insures that the necessary infrastructure is in place. Infrastructure is broadly defined to include housing, schools, employment opportunities, and shopping and recreational facilities, among other things.<sup>108</sup>

U.S. observers may tend to underestimate the extent to which these broad social state principles truly characterize and define German land use planning. Leading German jurists reveal the error of such a belief:

Without sufficient schooling or other facilities for education and advanced training, there is no chance for free development of the personality within the society. The right to travel would be of no value if the state were allowed, through its investment and planning policy, [to create] environmental conditions fit for humans in only a small part of the country. The constitutional right to property would have no meaning if the state, through its investment and planning policy, allowed real property in broad areas of the country to decline economically while allowing property in densely populated areas to become the domain of the rich because of the disproportionate rise in land prices there.

The unordered further growth of the already overburdened urban agglomerations - with their permanent, desperate problems with overcrowded public transportation and clogged roadways, ever-longer commutes, lack of accessibility of nearby recreation areas, and air, water, and noise pollution—would make the free development of the personality within the community much more difficult. . . .

This fundamental understanding of the basic rights leads logically to the social state principle . . . now embodied in Article

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101. *Id.* art. 4.

102. *Id.* art. 5.

103. *Id.* art. 7.

104. *Id.* art. 8.

105. *Id.* art. 11.

106. *Id.* art. 12.

107. For a discussion of why this role falls to the state, rather than exclusively to the market, see the discussion *infra* part V.A.

108. See ERNST & HOPPE, *supra* note 20, at 28.



20, Paragraph 1 and Article 28, Paragraph 1 of the *Grundgesetz*.<sup>109</sup>

Moreover, the authors of a major commentary on German land use law discuss the link between *Raumordnung* and the constitutional principle of the social state and, in the process, demonstrate the fundamental difference between German and U.S. law:

As applied to the [ordering of space laws], the realization of the social state principle means that in order to achieve social justice, the state may not allow nonequivalent living conditions in different areas. . . . The roughly-equal support of the well-being of all citizens and the approximately equal distribution of burdens is the gist of the idea of the social state of law. . . . The ordering of space thus contributes to the protection and realization of the social state. . . . It is the role of the social state . . . to avoid great differences in the wealth and in the quality of life of the citizens. The notion of balance in the social state principle gives rise to the fundamental principle of equivalent living conditions in the ordering of space.<sup>110</sup>

At another point, the same authors emphasize how the intertwining of social state and land use planning principles leads to a balancing of freedom-guaranteeing and freedom-limiting concepts:

The principles of the state of law and the social state base *Raumordnung* on the state goal of a freedom-guaranteeing and community-based policy of the equalizing of areas and the nexus between areas. . . . Pursuant to the fundamental jurisprudence of the Federal Constitutional Court, the social state must guarantee, protect, and promote social justice (BVerfGE 22, 180). Through the development of the planning and providing functions of the interventionist state, the social state principle has increased in importance. Striking a balance between the guiding and the providing, as well as between the freedom-guaranteeing and the freedom-limiting, is the function of goal-oriented *Raumordnung* in the sense of Article 1 [of the ROG]. The social state and state of law principles, in their mutual dependency in the *Raumordnung* context, provide for the realization of major state goals of the *Grundgesetz*, by maintaining in the Federal Republic as broad a social and individual freedom as possible, while, at the same time, creating a high level of social justice.<sup>111</sup>

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109. *Id.* at 13-14; see also Cholewa, *supra* note 18, *Vorbemerkung IX, Gleichwertige Lebensbedingungen: Oberziel der Raumordnung*, at 4-5 [hereinafter *Vorbemerkung IX*] (German-language source).

110. *Vorbemerkung IX, supra* note 109, at 4-5.

111. Art. 1 Commentary, *supra* note 67, at 19.

## V. FEDERAL PLANNING

The federal land use law, the *Raumordnungsgesetz*, takes the general social-democratic constitutional principles discussed in the preceding section and specifically establishes them as land use planning principles at all levels of government. In applying these principles, the ROG provides both for federal-level coordinating activities and for a mandatory blueprint for state-level planners, who then establish specific land use plans and procedures in accordance with those principles.

A. *The Heart of German Land Use Law: The Goal of Equivalent Living Conditions in All Areas*

Article 1 of the ROG establishes overarching goals for the entire land use planning system. Article 1, Paragraph 1 reads:

The structure of the entire area of the Federal Republic is to be developed with due regard to the natural conditions, the development of the population as well as the economic, infrastructural, social and cultural needs, and with due regard to the following leading principles, such that it [that structure]:

1. best serves the free development of the personality,
2. assures the protection, care, and development of the environmental essentials of life,
3. keeps open the long-term organizational options for the use of space and
4. provides or leads to equivalent living conditions for people in all areas of the country.<sup>112</sup>

As with their analysis of the social state provisions in the *Grundgesetz*, observers trained in the common law may tend to dismiss these provisions as mere flourishes that are as hollow as they are high-sounding. Such a reading is understandable because such broad phrases in common law statutes often do not have true legal impact. Yet these leading *Raumordnung* principles are not empty formulas. As the ROG is a framework law passed pursuant to the federal government's power to create equivalent living conditions, the principles stated therein are and must be

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112. The succeeding paragraphs of Article 1 address less overarching goals, *i.e.*, those related to the interaction of the "whole" to the various "parts", or of the "parts" to one another: Article 1, Paragraph 2 focuses on the work of reunifying the country since 1989, providing that the spatial connection between the former East Germany and West Germany is to be improved. Article 1, Paragraph 3 looks outward, providing that *Raumordnung* in Germany is to create and promote land use planning cooperation within Europe. Article 1, Paragraph 4 states that the spatial order of the individual areas is to fit into the order of the area as a whole, and that the order of the area as a whole must respect the conditions and needs of the individual areas.

general.<sup>113</sup> As overarching principles, they provide direction and content to the ROG.<sup>114</sup> Article 2 of the ROG requires the principles to be used to measure efforts to achieve the more specific goals in Article 2.<sup>115</sup> In this capacity, the goals of Article 1 are *binding* on all federal officials and on state planning officials.<sup>116</sup>

An example of the interplay between the overarching principles of Article 1 and the more specific goals of Article 2 can be found in the goal of creating a balanced, integrated structure of urban and rural areas. Rather than allowing an urban area to expand unchecked, with subsequent overburdening of infrastructure and disappearance of green space, planners attempt to spread urban development and coordinate the building of traffic, supply, and disposal facilities. For rural areas, Article 2 establishes further priorities, such as the creation of a diversified economy, even in those areas where rural population is declining. For all areas, other Article 2 goals include respecting the environment (including ecologically sound agriculture and forestry), providing housing in areas of heavy job concentration, and meeting the needs of the population for recreation in natural surroundings.<sup>117</sup> Because these sometimes contradictory goals are not listed in any order of priority and cannot be pursued simultaneously, Article 2 provides that they should be weighted *in accordance with the principles of Article 1*.

Article 1, Paragraph 1 does not specifically rank its four enumerated principles in order of importance. However, some of these principles have shown themselves to have greater weight than do others. For example, as discussed previously, the Article 1 provision regarding free development of the personality is taken directly from Article 2, Paragraph 1 of the German Constitution.

113. See the discussion of GG Article 75, *supra* part IV.A.; see also *Vormerkung IX*, *supra* note 109, at 2.

114. See Art. 1 Commentary, *supra* note 67, at 2-3.

115. "The goals [of Article 2] are to be balanced between and among each other according to the standards of Article 1, by the authorities listed in Article 3, within the limits of their discretion." ROG, *supra* note 58, art. 2, ¶ 3.

As with the constitutional provisions regarding the duties of the social state, however, these principles create no rights on the part of individuals. See *id.* art. 3, ¶ 3.

116. Article 3, Paragraphs 1 and 2 of the ROG provide that the principles of Article 2 are directly binding on Federal officials, and for *Landesplanung* in the states. ROG, *supra* note 58, art. 3, §§ 1-2. Although the latter term may technically bind only *state* officials, community and other lower-level officials would be similarly bound by the state land use planning laws, and by the building laws that are applied by these lower-level officials and that are subject to the goals of both *Raumordnung* and *Landesplanung*. See, e.g., BBauG, *supra* note 43, art. 1, ¶ 1, sentence 4.

117. ROG, *supra* note 58, art. 2, ¶ 1, nos. 1, 6, 8, 12-13.

The incorporation of this constitutional principle directly into the ROG emphasizes the "master and servant" relationship between principles and means: land use planning is not an end unto itself, nor is the Federal Republic an empty map upon which land use planners may move resources hither and yon. Rather, land use planning must attempt to achieve certain goals.

Free development of the personality is one of most important of those goals. An analysis of both official pronouncements and commentary, however, reveals which principle is truly paramount: the providing of equivalent living conditions in all areas of the country.<sup>118</sup> Equivalent living conditions has been described as the social state principle that has been "the self-evident leitmotif" of all land use planning decisions.<sup>119</sup> As one commentator has stated:

The achievement of equivalent living conditions is recognized both in government and society as the main goal of *Raumordnung*. It is the fundamental concept underlying the setting of standards for the activities, goals and principles of *Raumordnung*. . . . *Raumordnung* policy has recognized the achievement of equivalent living conditions as the framework for individual plans and measures. The government has never attempted to alter or limit the achievement of equivalent living conditions as the highest goal of *Raumordnung*.<sup>120</sup>

In a similar vein:

Especially against a background of far-reaching changes in European and inner-German conditions for *Raumordnung*, the goal of providing or maintaining, respectively, equivalent living conditions in all parts of our country must remain the strategic basic orientation of *Raumordnung*, regional and structural activities. More than ever, it represents a basic prerequisite to the creation and maintenance, respectively, of decentralized, social, and balanced society.<sup>121</sup>

Since the passage of the ROG, successive German administrations have reaffirmed equivalent living conditions as

118. It frequently has been noted that the provision of equivalent living conditions has always been a main principle of *Raumordnung*, even though that principle became part of the ROG only in 1989. See, e.g. H. J. von der Heide, *Gleichwertigkeit der Lebensverhältnisse*, in AKADEMIE FÜR RAUMFORSCHUNG UND LANDESPLANUNG, RAUMORDNUNGSPOLITIK IN DEUTSCHLAND 25 (1993) [hereinafter ARL] (German-language source). Because of the Federal Republic's continual commitment to equivalent living conditions since the passage of the ROG, the discussion *infra* of the goals of the ROG will not distinguish between the period before and after the passage of the amendment that made the goal of equivalent living conditions part of the law itself.

119. *Id.*

120. *Vorbemerkung IX*, *supra* note 109, at 2.

121. G. Tönnies, *Thesen zur Gleichwertigkeit der Lebensbedingungen im vereinigten Deutschland*, in ARL, *supra* note 118, at 31 (German-language source).

the main purpose of *Raumordnung*.<sup>122</sup> Attempts to change the primary goal of German land use planning from equivalent living conditions have failed. In 1977, for example, a group commissioned by the federal government recommended measures that lessened support of rural areas, support considered vital to achieving equivalent living conditions.<sup>123</sup> These recommendations were promptly rejected by the federal government, which stated: "The goal of *Raumordnung* policy, to ensure equivalent living conditions in all parts of the country, remains valid for the federal government."<sup>124</sup> Similarly, the *Raumordnung* Report of 1993, a report from the federal government to the *Bundestag*, reiterates that a broad consensus considers the establishment of equivalent living conditions as the central tenet of *Raumordnung* activities at all levels.<sup>125</sup> This goal has also been supported by advisory bodies composed of broad cross-sections of business, labor, and other groups.<sup>126</sup>

While German practice has always been to emphasize the achievement of "equivalent living conditions" as the chief goal of land use planning, the ROG itself does not define the term. By considering both official and unofficial statements, however, the broad outlines of the policy become relatively easy to discern:

The designation "equivalent living conditions" is not meant to mean equality in the sense of equalizing. That meaning, in light of the very different structures of the individual regions of the Federal Republic of Germany, is illusionary and not reachable. Rather, this equality means an equivalence in the sense that in each region, especially through the providing of necessary infrastructure, all main activities can be undertaken and at least a minimum level of proper environmental conditions can be achieved. In specific terms, most important are varied work opportunities within a reasonable distance from the home, the possibility of modern living, appropriate environmental policies and the maintenance of natural resources as well as a sufficient supply, through public and private channels, of the populace with goods and services and infrastructure for all levels of needs, within a reasonable distance of the home.<sup>127</sup>

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122. See, e.g., *Raumordnungsprogramm für die grossräumige Entwicklung des Bundesgebietes* (Bundesraumordnungsprogramm), BT-Drucks. 7/3584 (30.4.1975), § I [hereinafter BROP] (German-language source); *Programmmatische Schwerpunkte der Raumordnung*, BT-Drucks. 10/3146 (30.1.1985), § I ("The goal of the *Raumordnungsgesetz*, to create and maintain healthy and equivalent living conditions in all parts of the country, retains its validity.") (German-language source).

123. See ERNST & HOPPE, *supra* note 20, at 15.

124. *Vorbemerkung IX*, *supra* note 109, at 6-7.

125. *Raumordnungsbericht 1993*, BT-Drucks. 12/6921 (28.2.1994), § 1.1.1 (German-language source).

126. See the discussion of the *Beirat für Raumordnung* *infra* part V.B.

127. ERNST & HOPPE, *supra* note 20, at 14-15.

Government reports have made the same point, stating that equivalent living conditions are not to be confused with exact equality and must leave sufficient room for different development and individual initiative.<sup>128</sup> In addition, the Federal *Raumordnung* Ministry has indicated that the meaning of "equivalent living conditions" varies with time, with external circumstances, and with area. This variation is particularly relevant in light of German reunification, according to the Federal Ministry of *Raumordnung*:

This [report] must attempt to make its contribution to the goal of achieving equivalent living conditions between the former eastern and western parts of Germany. That means, at the same time, discussing the new determination of the goal of equivalent living conditions:

- Equivalent living, working, and environmental conditions is a dynamic, situation-dependant goal, not an absolute measure.

...  
 - The state can directly guarantee equivalent living conditions only in certain areas - in law and safety, as well as the providing for the necessities of life [*Daseinsvorsorge*] in infrastructure (social and educational infrastructure, technical infrastructure, regional infrastructure as a place of business or living [*Standort*], environmental measures).

Equivalency is not to be misunderstood as

- all-inclusive equality,
- a right to equal, undifferentiated support and "levelling,"
- an across-the-board obligation of the state to

equalization.<sup>129</sup>

This state involvement in the creation of equivalent living conditions reflects a conviction that market forces, the main engine for growth, will not by themselves create the equivalent living conditions that are the goal of both *Raumordnung* and the social state. Rather, the state must actively guide, even counterbalance, market forces. This view is very widely accepted in both government policy<sup>130</sup> and academic circles. As expressed by one commentator:

The ordering of space, left to itself, inevitably leads to considerable burdens and dislocations in employment structure and infrastructure in the Federal Republic, bringing with it social problems and unequal treatment. Thus *Raumordnung*, as the

128. *Raumordnungsbericht* 1993, BT-Drucks. 12/6921 (28.2.1994), § 1.1.1 (German-language source).

129. *Raumordnungspolitische Orientierungsrahmen* issued by the Federal Ministry of *Raumordnung*, Building and Urban Development on Nov. 27, 1992, § 5.1 [hereinafter RPO], reprinted in Cholewa, *supra* note 18, at vol. II.4 (German-language source).

130. See, e.g., *id.* § 5.1.

gradual creation of equivalent living conditions, has been shown to be necessary.<sup>131</sup>

German reunification has made the inadequacy of the steering capability of the private sector even more readily apparent to many Germans:

Left to themselves, market forces will inexorably continue this development [the worsening of East-West migration and disparities between East and West], thus making unreachable [the goal of] equivalent living conditions in all parts of the Federal Republic. Thus state counterbalancing is required in order to achieve social, ecological and economic justice.<sup>132</sup>

### B. *Coordination and Cooperation among Land Use Planning Officials as a Main Element of the ROG*

The ROG provides that a primary manner in which to achieve equivalent living conditions is to coordinate land use planning activities at different government levels. In keeping with this philosophy, the Federal Ministry of Land Use Planning, Building, and Urban Development (*Bundesministerium für Raumordnung, Bauwesen und Städtebau* or "BBauM") must inform the competent state ministers of any major plans of the federal government that could significantly affect land use planning. Similarly, the ROG requires that relevant state ministers inform the federal minister of both passed or proposed land use plans and major passed or proposed measures that significantly affect land use planning. In addition, both federal and state governments are obligated to provide each other with all information necessary for accomplishing the goals of land use planning.<sup>133</sup>

The ROG further requires planners at the various governmental levels (federal, state, local) to coordinate their planning activities and to discuss basic concepts and open issues.<sup>134</sup> For example, as discussed above, Article 2 of the ROG requires the states to designate those areas with particularly strong or weak land use planning structures. Article 8 of the ROG requires that federal and state officials jointly discuss the factors to be considered in designating those areas. In their own planning, the states must also ensure that their activities do not make achieving ROG-established goals more difficult in

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131. Art. 1 Commentary, *supra* note 67, at § III.5.

132. G. Rothe, *Gleichwertige Lebensbedingungen unter besonderer Berücksichtigung der Verhältnisse in den neuen Bundesländern*, reprinted in ARL, *supra* note 118, at 46.

133. ROG, *supra* note 58, art. 10.

134. *Id.* art. 4, ¶ 5.

neighboring states or in the country as a whole.<sup>135</sup> Planning that affects neighboring countries must also be discussed and coordinated with those countries.<sup>136</sup> Even when federal, state, and local officials are engaged in activities that involve the use of land, but do not constitute land use planning, such officials must respect the goals of federal land use law.<sup>137</sup>

The BBauM plays the major federal role in these activities.<sup>138</sup> Because federal authority in land use planning has been based primarily on the federal government's "framework" competence, the BBauM does not engage in detailed land use planning for the states, nor does it act as a "super ministry" in which all federal activity relating to spatial ordering is planned.<sup>139</sup> Rather, the BBauM is charged with the coordination of federal and state land use planning activities, the issuing of reports on *Raumordnung*, and the review of the general direction and priorities of land use planning.<sup>140</sup> The federal government emphasized its coordination role in the RPO of 1992:

The mission of *Raumordnung*, land use planning and regional planning is to give the various actors who influence spatial development a basic orientation and structure. In the social market economy, clear principles about the use of space must be optimally combined with the free development of the personality and economic forces and potentials. Planning in a democratic and

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135. *Id.* art. 4, ¶ 4.

136. *Id.* art. 4, ¶ 6. Indeed, the Federal Republic coordinates in the land use planning area bilaterally with France, the Netherlands, Belgium, Luxemburg, Austria, Switzerland, Poland, the Czech Republic, and Denmark. See Cholewa, *supra* note 18, *Kommentar VIII, Bundesgrenzüberschreitende Zusammenarbeit* (German-language source). For a discussion of Germany's land use planning activities within the multilateral framework of the European Union, see *infra* part VII.C.

137. ROG, *supra* note 58, art. 5, ¶ 4. Many other laws not directly connected with land use planning also contain a specific statement (a *Raumordnungsklausel*) to this effect. For a list of these laws and an explanation of their relationship to land use planning, see Cholewa, *supra* note 18, *Vorbemerkung XI, Das Verhältnis der Ziele der Raumordnung und Landesplanung, insbesondere Raumordnungsklauseln zur Fachplanung* (German-language source).

138. Even before the passage of the first Federal *Raumordnung* legislation, Federal ministries were charged with overseeing *Raumordnung*. See *supra* notes 37-40 and accompanying text.

139. Indeed, the raw power of the BBauM is very much limited by the interests of other ministries (many of which have more political clout than the BBauM), and the right of those ministries under Article 65 of the *Grundgesetz* (the so-called *Ressortsprinzip*) to direct their own affairs. The BBauM does have its own particular spheres of authority, such as the promotion of urban planning and investment, and congruent financial authority. See *Raumordnungsbericht 1993*, BT-Drucks. 12/6921 (28.2.1994) at 97 *et seq.* (German-language source).

140. *Id.*



social state of law is above all coordination, information, support and initiation of measures, as well as cooperation.<sup>141</sup>

In providing direction and guidance to the states, the BBauM and its research arm, the Federal Research Institute for the Study of States and Land Use Planning (*Bundesanstalt für Landeskunde und Raumordnung*), provide studies on dozens of issues relevant to land use planning: population growth and structure, local and regional infrastructure, availability of housing and leisure facilities, environmental issues, and many others. For example, the BBauM divides the country into a number of analytical regions<sup>142</sup> based upon criteria such as the number of cities of a certain size and the interconnections among those cities.<sup>143</sup> The living conditions in these regions are then compared. Subsequent state actions are often based on these studies.<sup>144</sup>

Pursuant to the ROG, the BBauM also reports to the *Bundestag* on the current status and future trends in the ordering of space in the country, the effect of international treaties on this development (especially regional development), and the measures in the field of spatial ordering that have been implemented or are planned.<sup>145</sup> In addition, the BBauM periodically issues studies that discuss perspectives, leading ideas, and strategies for the spatial development of the country as a whole.<sup>146</sup> These studies carry significant weight among land use planners nationwide, setting the agenda and the basis for discussion.

Another manner for achieving the goal of cooperation and coordination in land use planning is through the use of advisory bodies to the federal government on questions of *Raumordnung*. One such body, the *Ministerkonferenz für Raumordnung*, is composed of representatives of the BBauM and of the relevant state ministries.<sup>147</sup> Given the limited federal authority in the field of land use planning and the importance of federalism in Germany generally, this body plays an essential role in the achievement of equivalent living conditions by fulfilling the ROG's mandate that plans and measures among the states and between

141. RPO, *supra* note 129, § 6.

142. See ROG, *supra* note 58, art. 4. The region (*Teilraum*) plays a central role as the area of measure for federal government determination of equivalent living conditions. These federal analysis regions are not binding upon state planners.

143. These factors are discussed in greater detail *infra* part VI.D.

144. See, e.g., BRÖP, *supra* note 122, § II.1; VOGR, *supra* note 24, at 37.

145. ROG, *supra* note 58, art. 11.

146. See generally RPO, *supra* note 129; BRÖP, *supra* note 122.

147. The ROG does not specifically call for a *Ministerkonferenz*, as it does for the *Berat.* However, since 1967 the *Ministerkonferenz* has been used to fulfill the ROG's coordination mandate.

the states and the federal government be coordinated.<sup>148</sup> The *Ministerkonferenz* has helped to standardize land use planning terminology and to steer various ministries' individual activities that have strong land use ramifications. It also provides a permanent forum for the airing of different points of view, especially the states' view that the federal government should not overly expand its *Raumordnung* activities.<sup>149</sup>

The ROG specifically provides for another advisory body, the Council for *Raumordnung* (*Beirat für Raumordnung* or "*Beirat*"). The *Beirat* is composed of representatives from, *inter alia*, local government, science, land use planning, business, agriculture, forestry, labor, ecology, and sports organizations.<sup>150</sup> In this body, these representatives work closely together, enhancing and balancing the concepts and goal-setting from "above" with the needs and desires "from below."<sup>151</sup> For example, the *Beirat* developed a system of indicators for determining minimum economic, ecological, and other standards for the different regions of the country.<sup>152</sup> The *Beirat* also acts as a bellwether on the reaction of various segments of society to the goals of land use planning. Thus, it is particularly noteworthy that this body has continued to endorse equivalent living conditions in all regions of the country as the main goal of *Raumordnung*:

The social state claim of equivalent living conditions remains a fundamental goal of any *Raumordnung* policy; for the level of justice - not only constitutionally required, but also politically indispensable - that the social state owes to its citizens requires the fulfillment of minimum standards for the populace in all areas [of the country].<sup>153</sup>

In the context of coordination and cooperation between the federal and state governments, the *economic* planning activities of the federal government must be mentioned. Many of these

148. ROG, *supra* note 58, arts. 8, 10. As well as providing a general mandate, Article 8 lists several specific areas in which the federal and state governments are to hold discussions, including questions as to when to apply the principles of Article 2, in what circumstances the federal government may raise objections to state land use planning measures, and the effects that efforts to achieve the goals of Article 2 may have in neighboring states.

149. See VOGT, *supra* note 24, at 102-03.

150. ROG, *supra* note 58, art. 9.

151. Von der Heide, *supra* note 118, at 26; see also VOGT, *supra* note 24, at 103.

152. *Vorbemerkung IX*, *supra* note 109, at 8; see also Thoss, *Grossräumige Funktionszuweisung und ausgeglichene Funktionsräume in Strategien des regionalen Ausgleichs und der grossräumige Arbeitsteilung*, Band 57 der Beiträge der Akademie für Raumforschung und Landesplanung 13 (1981) (German-language source).

153. Empfehlung des Beirats, v. 16.6.1976, quoted in *Vorbemerkung IX*, *supra* note 109, at 8.

activities, such as federal-state<sup>154</sup> regional infrastructure investment, *i.e.*, public transport, highways, power plants, etc., are largely outside of the scope and competence of the BBauM, the ROG, and thus, this article. However, a fluid line exists between land use planning on the one hand and economic planning (especially at the regional level) on the other. As such, the implementation of the ROG and the state plans passed pursuant thereto led to a 1960s *economic planning* "euphoria."<sup>155</sup> States passed or amended their land use plans to include more active and broad-based economic planning.<sup>156</sup> For many reasons, however, by the time of the economic downturn accompanying the energy crisis of 1973, land use planning was beginning to back away from such broad economic planning. A new emphasis on individuality and simpler, more accessible government ran counter to broad-based economic planning. This retreat from broad-based development planning to more traditional land use planning has been credited with avoiding the overtaxing of the planning system with unattainable and possibly undesirable goals.<sup>157</sup>

### C. Provision of a State Planning Law Blueprint

As well as establishing the basic principles of land use planning at all levels and institutionalizing coordination and cooperation among land use planning officials at the federal and state levels, the ROG *requires* the states to create comprehensive land use plans that work toward the goals enumerated in the ROG.<sup>158</sup> The ROG further mandates several specific goals related to the creation of equivalent living conditions for all members of society. For example, the state plans must designate those areas "where the living conditions in their totality are or are in danger of falling below the Federal average," so that "the living conditions of the population, in particular the job opportunities, housing conditions, environmental conditions, as well as the transportation, supply, and disposal systems" can be

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154. The *Grundgesetz* provides for joint tasks (*Gemeinschaftsaufgaben*) in certain areas, such as the improvement of the regional economic structure. GG art. 91. In the latter case, the federal government provides one-half of the financing, provided that the *Bundestag* and state parliament so provide for these projects in their budgets.

155. This history is based on BATTIS, *supra* note 36, at 38-41.

156. See, *e.g.*, the Baden-Wurtemberg Law on the Binding Nature of State Development Plans, v. 14.11.1972 (GBl. S. 170) (German-language source).

157. See BATTIS, *supra* note 36, at 39-40.

158. ROG, *supra* note 58, art. 5, ¶ 2. The law has special provisions for the three city-states of Hamburg, Bremen, and Berlin, where the *Flächennutzungsplan* takes the place of the state plan. See, *e.g.*, *id.* art. 3, ¶ 2.

improved.<sup>159</sup> Similarly, the states must identify those urban areas where air and noise pollution, overcrowded transport systems, and other disadvantages of urban concentration have or could lead to unhealthy living conditions or to imbalances in economic or social structure, so that structural improvements can be made.<sup>160</sup> The states must also designate those urban areas with good living conditions, so that these conditions can be maintained.<sup>161</sup>

In order to provide all citizens with access to the basic infrastructural facilities of the country, the ROG also requires that the states establish a "central cities system" (discussed in more detail in Sec. VI.D. *infra*).

## VI. STATE PLANNING

### A. General Principles: State Statutes and Activities of the State Ministry

While federal legislation establishes the *Raumordnung* framework by designating ultimate goals such as the achievement of equivalent living conditions and methods of coordination and cooperation between and among levels of government, the individual German states are responsible for the implementation of those goals through the planning process. This Article will use specific examples from the north German state of Schleswig-Holstein to illustrate German state land use planning.<sup>162</sup>

The legal basis for a state land use ministry's work may consist of several different laws, including a state land use planning law that establishes the basic organization of planning at the state and local levels,<sup>163</sup> a law on the guiding principles of

159. See *id.* art. 5, ¶ 1 (referring to the goals of Article 2, Paragraph 1, Number 3).

160. See *id.* art. 5, ¶ 1 (referring to the goals of Article 2, Paragraph 1, Number 5, from which the quoted material is taken). After identifying these areas, the states are to establish particular plans to assist the particular areas or issues involved.

161. *Id.* art. 2, ¶ 1, no. 5.

162. Which ministry is responsible for *Landesplanung* varies greatly from state to state, and the issue of which ministry *should* be authorized to address land use issues is a subject of considerable debate. Some German states have ministries that have land use planning as one of its major fields of competence, whereas others place land use planning, as an overarching field of activity, directly in the hands of the state president.

163. Gesetz über die Landesplanung (Landesplanungsgesetz) v. 10.6.1992 (GVOBl.Schl.-H.S. 342), as amended by Gesetz v. 26.7.1994 (GVOBl.Schl.-H.S. 428), as amended by Gesetz v. 3.3.1995 (GVOBl.Schl.-H.S. 114), as amended by

state development,<sup>164</sup> and a general state plan.<sup>165</sup> Because the states carry the primary responsibility for planning in Germany's federal system, virtually all state laws emphasize the organizing principle that state planning is "overarching" and "comprehensive" in the sense that state planning laws seek to coordinate the land use activities of all state ministries and of officials at all levels of state government. As a result, the requirement that land use planning goals be respected applies to all state officials and not just the planning ministry.<sup>166</sup>

As with the federal ROG, the primary goal of state land use planning statutes is land use development that provides living conditions that, in their entirety, are at least equivalent to those in the state generally<sup>167</sup> or living conditions that serve the free "unfolding" of the personality within the community.<sup>168</sup> In order to achieve these goals, the basic natural and man-made prerequisites must be present. Thus, state planning laws emphasize the necessity of providing long-term protection to land, water, and other natural resources as well as of balancing preservation and access by the public to sensitive areas such as forests, sea coasts, and inland lakes.<sup>169</sup> Similarly, German state law seeks to provide each citizen with access to all "aspects" of life, including employment and shopping opportunities, housing,

Gesetz v. 31.11.1995 (GVOBl.Schl.-H.S. 364) [hereinafter LPIG] (German-language source).

164. Gesetz zur Neufassung der Landesentwicklungsgrundsätze v. 31.11.1995 (GVOBl.Schl.-H.S. 364) [hereinafter LEGr] (German-language source).

165. Raumordnungsplan für das Land Schleswig-Holstein (Landesraumordnungsplan) v. 17.9.1979 (Amtsbl. Schl.-H. S. 345) [hereinafter LROPl] (German-language source). A new *Landesraumordnungsplan* was drafted in late 1995, and is currently being circulated to localities and other interested groups for their reaction. A new plan based on this draft is expected to enter into force in mid-1997. The initial draft of the plan, as circulated by the relevant ministry in Schleswig-Holstein, does not depart from the principles discussed in this article.

The legal form of the state plan varies from state to state: some states pass the state plan in the form of a law of the state legislature; others issue it as an ordinance, or simply as the binding plan of the planning ministry. The method of passage of the plan can have important implications for communities that wish to challenge the plan. See RABE, *supra* note 11, at 20.

166. LPIG, *supra* note 163, § 4.

167. LEGr, *supra* note 164, art. 2. The BBauM and its research institute are major sources of statistics used in making such determinations.

168. *Id.*; see also Laws of the Rhineland-Palatinate (Gesetz über Raumordnung und Landesplanung (Landesplanungsgesetz)) i.d.F. v. 8.4.1991, art. 1, ¶ 1 (German-language source) and of the Saar (Gesetz Nr. 1076, Saarländisches Landesplanungsgesetz) v. 14.5.1986 (SLPG) (German-language source).

169. LEGr, *supra* note 164, arts. 5-6. The 1995 revision of the law on the guiding development principles for the state has greatly strengthened these provisions, in comparison to the corresponding provisions of the 1981 law that the revision replaced.

roads and public transport, primary and secondary education, and recreational facilities, all within a reasonable distance of the home.<sup>170</sup> The state long-term land use plan reiterates this concept.<sup>171</sup>

German state law attempts to achieve these main goals by steering the spatial development of the state. State law starts from several "spatial" propositions: different parts of the state have different contributions to make to the state's general development,<sup>172</sup> industrial activity is generally to be concentrated along certain existing or extendable "axes,"<sup>173</sup> and the "settlement structure" of the state should be balanced in the sense that urban areas grow only in coordination with a spatially-wise distribution of housing and industrial areas and that open areas for rest and relaxation remain within easy reach of city dwellers.<sup>174</sup> Several vehicles are used to steer this spatial development.

### B. *Establishment of a State Plan*

One such vehicle for steering planning so as to achieve equivalent living conditions is the establishment of a state land use "plan."<sup>175</sup> This plan typically determines long-term goals, often for a period of fifteen to twenty years, although state law provides for modification of the plans before the end of that period.<sup>176</sup> Providing the point of departure for many of the specific decisions made by state and local level planners, the plan considers a vast array of factors that indicate whether the state is achieving its goal that all citizens have access, within a reasonable distance of their homes, to all major public and private infrastructural facilities. These factors include:

- the macroeconomic environment, including the land use planning effects of events such as the entry of countries into the European Union, the fall of the Iron Curtain, and the reunification of Germany, and the effects of these events on the geographical and economic development of the state;<sup>177</sup>

170. *Id.* arts. 2, 7, §§ 2, 8, 12.

171. LROPl, *supra* note 165, art. 5.12(I).

172. LEGr, *supra* note 164, art. 4, § 2.

173. *Id.* art. 7, § 2.

174. *Id.* art. 7, §§ 2-3 & art. 9, § 5.

175. In Schleswig-Holstein, the authority for developing this plan is found in LPIG, *supra* note 163, art. 3. The plan itself is the LROPl, *supra* note 165.

176. LPIG, *supra* note 163, art. 3, § 2. Modification is particularly common when macroeconomic or political circumstances change.

177. LROPl, *supra* note 165, art. 1.

- long-range population forecasts, and the effects of population growth/decline, movement (both long-term and commuting), and structure on the needs for services, schools, infrastructure, etc. of individual areas;<sup>178</sup>

- for those areas with current or potentially high unemployment, a strengthening of the regional economic structure;<sup>179</sup>

- the main economic branches of the state (industry, mining, agriculture, forestry, fishing, construction, crafts and trades, services, etc.) and their future potential;<sup>180</sup>

- trends in leisure activities, and the resulting setting of goals for an environmentally-sound development of tourism facilities (hotels, rental homes, campsites, etc.) for both longer vacations and day and weekend trips;<sup>181</sup>

- educational facilities, which are specifically stated to be absolutely essential to the achievement of equivalent living conditions in all parts of the state. The law considers the entire array of schools, including grammar schools, college prep schools (*Gymnasten*), vocational training, research institutes, adult education, and libraries;<sup>182</sup>

- the need for various other "social" facilities, such as sports facilities (which should be provided equally for all areas of the state), facilities for the aged and handicapped, mobile medical personnel, hospitals (including the number of beds available per unit of population), and other medical facilities;<sup>183</sup>

- the priorities for further development of road, rail, and air traffic, as well as of port facilities;<sup>184</sup>

- the future demands for power, water supply, and water and waste disposal;<sup>185</sup>

- the needs of the military, civil defense, emergency medical services, and fire departments;<sup>186</sup>

- environmental protection;<sup>187</sup>

- the division of the state into planning regions that may, upon state approval, create their own development plans;<sup>188</sup>

178. *Id.* arts. 1.2, 4.2.

179. *Id.* art. 4.

180. *Id.* art. 6.

181. *Id.* art. 7.

182. *Id.* art. 8.1.

183. *Id.* arts. 8.2-8.4.

184. *Id.* art. 8.5.

185. *Id.* arts. 8.6-8.7.

186. *Id.* art. 9.

187. *Id.* art. 10.

- the division of the state into different types of areas, depending upon the population level and infrastructure and, based upon the development desired for that type of area (industrial, agricultural, foreign commerce, and others), the setting of standards for housing, job opportunities, etc. that should be available;<sup>189</sup> and
- the central cities system described below.<sup>190</sup>

Regional plans (for regions designated by state law)<sup>191</sup> apply these same goals of *Raumordnung* and land use planning to state planning regions.<sup>192</sup>

### C. Approval and Coordination of Planning at Different Levels

As at the federal level, the state-level quest for equivalent living conditions leads inexorably to another central feature of land use planning: close coordination among different levels of government and between government and other groups. For example, in addition to establishing the state plan, state-level planning officials perform a number of activities in approving and coordinating activities within the state. The state reviews the county (*Kreis*) and free city (*kreisfreie Stadt*) development plans, which are drafted for a period of five years, and may disapprove the plans if they do not meet federal and state planning goals.<sup>193</sup> Local planners wishing to establish plans must also inform state planners, who then notify local officials of the goals of federal and state planning law, both of which are binding on local planning.<sup>194</sup> The actual local plans must be submitted to state planners before the plans may go into effect.<sup>195</sup>

In addition, state planning officials can in certain instances delay, for a period up to two years, building activities that are in accordance with published local plans, yet contrary to new or changed state planning goals.<sup>196</sup>

188. *Id.* art. 3.2.

189. *Id.* arts. 3, 5.

190. *Id.* art. 5.

191. LEGr, *supra* note 164, art. 4.

192. LPIG, *supra* note 163, arts. 3, 6.

193. LPIG, *supra* note 163, art. 13, ¶ 4. The state may grant variances to planners at both *Kreis*s and other lower levels. *Id.* art. 4, ¶ 3.

194. *Id.* art. 16, ¶ 1; BBauGB, *supra* note 43, art. 1, ¶ 4.

195. LPIG, *supra* note 163, art. 16, ¶ 3; *see also* BBauGB, *supra* note 43, art. 6, ¶ 1, art. 8, ¶ 2, & art. 11, ¶ 1. Local planning is governed not only by state law, but also by a variety of federal decrees and provisions beyond the scope of this article. For a brief introduction to this topic, *see* Schoenbaum, *supra* note 5, at 626.

196. LPIG, *supra* note 163, art. 15; *see also* ROG, *supra* note 58, art. 7. In these instances, however, the state must compensate entities wishing to build in conformance with the plan. *See* LPIG, *supra* note 163, art. 15, ¶ 3.



Planning at the state level does not consist only of approval from above; it is also a system of coordination. State officials must include representatives of the counties, including representatives of the localities, and free cities in the state planning process.<sup>197</sup> In addition, when submitting their plans to state officials for approval, county and free city officials must explain why concerns expressed by neighboring counties, or by localities within the county, have not been respected.<sup>198</sup> Finally, as at the federal level, the state planning authorities are advised by a special body consisting of representatives of, among others, the state legislature, umbrella organizations of the localities, the Chamber of Commerce, tradesmen, agriculture, unions, business, and the environment.<sup>199</sup> This body must be included in the drafting of state and regional plans and in the preparing of a compilation of all major plans and individual projects under way or proposed.<sup>200</sup>

#### D. *Establishment of a Central Cities System*

Another vehicle employed by state planning to provide all citizens with equivalent living conditions is the federally-mandated central cities system. This system, based on the pioneering work of Walter Cristaller in the 1930s and later refinements by August Loesch,<sup>201</sup> starts with the principle that a community is interwoven with the surrounding area for which the community provides the source of services and facilities. The size of the surrounding area supplied by the city and the array of goods and services offered varies with the size of the city.<sup>202</sup> Briefly summarized,<sup>203</sup> the central cities system channels certain types or levels of development and limited government resources into particular areas, and in so doing, attempts to assure that all citizens have access to a full array of work, social, cultural, and

197. LPIG, *supra* note 163, art. 7, ¶ 1; ROG, *supra* note 58, art. 5, ¶ 2, sentence 2. The required representation of the localities stems in part from their right of self-determination under Article 28 of the *Grundgesetz*.

198. LPIG, *supra* note 163, art. 13, ¶ 3. Federal law also requires that localities coordinate their plans with those of neighboring localities. See BBauGB, *supra* note 43, art. 2, ¶ 2.

199. LPIG Articles 9 and 10 contain detailed provisions for the selection of these representatives. LPIG, *supra* note 163, arts. 9-10.

200. *Id.* art. 9, ¶ 2.

201. W. CHRISTALLER, *DIE ZENTRALEN ORTE IN SÜDDEUTSCHLAND* (1933) (German-language source); A. LÖESCH, *DIE RÄUMLICHE ORDNUNG DER WIRTSCHAFT* (3d ed. 1962) (German-language source).

202. LEGr, *supra* note 164, arts. 14-18.

203. The following is only a brief summary of the major features of a quite complex designation system, much of which is regulated in detail in the LROPL, *supra* note 165.

educational opportunities within a reasonable distance of their homes.<sup>204</sup>

As discussed in the Introduction, cities and towns are given different designations as "centers" of various levels, or as no center at all, with each designation determining the level of development allowed in that city or town.<sup>205</sup> State law provides that each type of center is to have certain minimal facilities, both private and public, and specifies the type of commercial development allowed. Thus, the smallest designated centers, known as country centers (*ländliche Zentralorte*), meet the basic needs of the town itself and the immediately surrounding community. These centers are to have:

grade schools [grades 1-4] and, whenever possible, *Hauptschule* [the upper-level of a non-college-preparatory elementary school], playground and sports facilities, open-air swimming pool, kindergarden, medical and dental services, pharmacy, small retail stores, tradesmen and craftsmen, [private] service providers such as branches of credit institutions, as well as local government institutions.<sup>206</sup>

The next-highest level, small centers (*Unterzentren*), are to provide a more complete source of supply for basic needs. As stated above, in reference to the town of Trittau, small centers are to have, in addition to the facilities of a country center:

full-time local administration, *Realschule* [a secondary school largely non-college-preparatory], special schools, doctors who specialize, credit institutions, individual state officials or service centers, a [state] employment office, and where size warrants, a technical school, and college-preparatory secondary school.<sup>207</sup>

204. See VOGT, *supra* note 24, at 15-25.

205. Articles 14-18 of the LEGr list the basic factors in determining the classifications to be given to individual cities. LEGr, *supra* note 164, arts. 14-18. The classifications themselves are listed in the *Verordnung zum zentralörtlichen System* of Dec. 1, 1995. Articles 5.27-.40 of the LROPI provide more details as to the type of development allowed in each category of central city. LROPI, *supra* note 165, arts. 5.27-.40. The law attempts to prevent both the destruction of the countryside through unplanned housing construction and the creation of a far-flung infrastructure that does not maximize use of public expenditures.

Article 5.3 of the LROPI provides that each locality that is not designated as a "center" also should make its specific contribution to the achievement of the goals of land use planning. LROPI, *supra* note 165, art. 5.3. Thus, as well as designating cities as centers, state planners use historical, geographical, and other considerations in determining main or secondary functions (agriculture, industry, trade or services, tourism, etc.) for certain "non-center" cities. These classifications, as well as the resulting descriptions of the type of development appropriate to these designations, are considered by planning officials when determining specific questions relating to the development of those cities.

206. LROPI, *supra* note 165, art. 5.23.

207. *Id.* art. 5.23(2).

The next-highest level, middle-size centers (*Mittelzentren*), provide goods and services not only for daily needs, but also for middle-term needs of the city itself and of several surrounding smaller cities. The additional facilities they should contain are:

Trade and technical schools, college-preparatory schools, other educational facilities, especially those for adult education, general hospitals, doctors in many different specialty areas, larger sports facilities, the offices of lower-level federal and state officials, courts and credit institutions.<sup>208</sup>

The highest designation, main centers (*Oberzentren*), meet not only short-term and middle-term needs, but also long-term needs of the city itself and of its large surrounding area, including middle and small "centers" and rural areas. Main centers have:

Post-secondary education [universities, technical universities, etc.], hospitals of supra-regional status, stadia, covered swimming pools, theaters, department stores, higher-level or regionally-responsible federal and state officials, courts, insurance and large credit institutions.<sup>209</sup>

Main centers are also to have large, diversified industrial bases that are to be further developed.

The law further provides additional designations for cities on the outskirts of other centers and "mixed" designations for cities that provide goods or services at different levels.<sup>210</sup>

The state provides financial assistance to the central cities for these facilities.<sup>211</sup> In addition, in order for the central cities system to help achieve equivalent living conditions, inhabitants of smaller towns must be able to travel to the facilities in larger centers. Thus, state law strives to organize the road and rail system such that larger centers are accessible by road and rail from smaller centers.<sup>212</sup>

Finally, in addition to designating these centers—an idea based upon the somewhat "static" concept of providing a sufficient infrastructural level to all - state law also typically provides for regional economic development plans that entail the creation of development "axes" or corridors.<sup>213</sup> As on the federal level, state planners pursue other goals, such as stabilizing the countryside population and developing a structure of decentralized concentration. The entire process is animated by the same goals as at the federal level, including the provision of

208. *Id.* art. 5.24.

209. *Id.* art. 5.25.

210. LEGr, *supra* note 164, art. 14.

211. See the *Finanzausgleichsgesetz v. 18.4.1994* (GVOBl. Schl.-H. S. 220), as amended by LEGr, *supra* note 164, art. 3 (German-language source).

212. See, e.g., LROPI, *supra* note 165, arts. 5.23(2), 8.51(7), 8.53(1).

213. See, e.g., LEGr, *supra* note 164, art. 7, § 3.

equivalent living conditions for all citizens and of the infrastructure necessary for each citizen to achieve the "free development of his personality."<sup>214</sup>

#### VII. NEW CHALLENGES FOR THE PRIMARY GOALS OF GERMAN LAND USE PLANNING

It is beyond the scope of this Article to review in detail the implementation of land use planning principles, the various development strategies employed in the several German states, and the various trends in *Raumordnung* philosophy that have developed over time.<sup>215</sup> It is generally agreed, however, that by the 1980s, the German land use planning system had largely succeeded in its main goal of providing equivalent living conditions to all regions, particularly in the context of providing access to infrastructure. As stated by the federal government in its official 1993 *Raumordnung* report to the *Bundestag*:

The central tenet of *Raumordnung*, the equalizing of the living conditions of the regions, has been largely achieved, even by international standards. This has not prevented some spatial distortions, but has been able to largely counter undesirable development. This has strengthened German "cooperative federalism," that has resulted in a decentralized spatial and living structure with a markedly efficient polycentric city system.<sup>216</sup>

German officials also emphasized that the balanced development structure (often known as "decentralized concentration") promoted by *Raumordnung* has played a major role in creating the excellent business conditions that form a pillar of the German economy.<sup>217</sup>

Despite these achievements, new issues have refocused interest on *Raumordnung*, particularly on *Raumordnung's* goal of equivalent living conditions.

214. LPiG, *supra* note 163, art. 6.

215. See, e.g., VOGT, *supra* note 24, at 116-41 (*Konzepte der Raumordnungspolitik zur Entwicklung der Siedlungsstruktur*).

216. *Raumordnungsbericht* 1993, BT-Drucks. 12/6921 (28.2.1994) § 1.1.1 (German-language source). For the similar conclusion of a private commentator, see von der Heide, *supra* note 118, at 26.

The achievement of the goal of equivalent living conditions does not mean, of course, that Germany has no economic problems. Problems that remain—unemployment and areas dependent upon older industries such as coal mining, steelmaking, and shipbuilding, for example—are correctly considered more an issue of general and regional economic policy than of land use planning.

217. RPO, *supra* note 129, § 5.3; see also *Einleitung IV*, *supra* note 57, at 6.

### A. German Reunification

First, the reunification of Germany has brought new urgency to land use planning and its embodiment of the social state goal of equivalent living conditions.<sup>218</sup> As a result of reunification, Germany moved from being the European country with perhaps the highest degree of equivalent living conditions to the country with both the highest and the lowest standards of living in Western Europe.<sup>219</sup> The need for renovation and improvement in former East Germany is enormous and encompasses virtually every segment of the economy, every level of government, and every level of infrastructural facilities.<sup>220</sup>

This disparity in living conditions between the old and new states causes other serious structural problems. Within two years after the fall of the Berlin Wall, for example, some one million people moved from East to West Germany, and another 600,000 people commuted between the two areas (mostly between living areas in the East and jobs in the West).<sup>221</sup> Those Germans leaving the East are younger and have better job qualifications than those staying behind. As a result, serious specialized labor bottlenecks are developing in certain Eastern industries and hindering the ability of the area to attract new business. "Voting with the feet" eventually destroys even the local retail trade, thus reinforcing the incentive for people to leave.<sup>222</sup> This problem does not affect the East alone. Without government land use planning efforts counterbalancing these market forces, some Germans fear that a chain reaction from the serious development problems in Eastern Germany will result in still greater migration to Western Germany, more pressure on the housing market, a shortage of building space, and greater environmental problems.<sup>223</sup>

Officials in former East Germany echo the conviction that the free market alone will not rectify these problems. As an official of the government of the state of Brandenburg (in former East Germany) has concluded:

These East-West migrations now taking place are aggravating both constantly and steadily the disparities within the Federal Republic.

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218. See VON MUNCH, *supra* note 78, at 118.

219. Von der Heide, *supra* note 118, at 26; *Einleitung IV*, *supra* note 57, at 8.

220. Tönnies, *supra* note 121, at 28-29. Some experts have questioned even whether the time-honored methods, such as a central cities system, that have been used in the West can be successful in the East, because of factors such as the small size of East German localities. See Weyl, *Diskussionsbeitrag in ARL*, *supra* note 118, at 144 (German-language source).

221. *Einleitung IV*, *supra* note 57, at 7.

222. Rothe, *supra* note 132, at 35; Weyl, *supra* note 220, at 144.

223. Tönnies, *supra* note 121, at 31.

This cannot be accepted, ecologically and economically as well as socially. Left to market forces alone, this development will continue unstopably, thus making ever more unachievable equivalent living conditions in all areas of the Federal Republic. Thus a basic counteracting by the state is required in order to create social, ecological and economic justice.<sup>224</sup>

In Eastern Germany, the role of land use planning as a method of supporting, or "jump-starting," the private sector thus becomes particularly important:

Under the current conditions of the total breakdown of political, administrative and judicial, economic and social, demographic and ecological structures in Eastern Germany (and Eastern Europe), market forces alone are insufficient to gradually bring closer the strategic goals of equivalence. This is particularly apparent during times of economic depression and recession as well as chronic structural crises. Especially at such times, specific spatially-effective measures must be taken, such that market forces can take hold, with priority in those regions that are currently particularly in need of an developmental boost as a catalyst for future, primarily independent development.<sup>225</sup>

Recognizing the need to apply the social state goal of equivalent living conditions within former East Germany and especially between East and West Germany, both the Treaty of Unification between the Federal Republic and the former German Democratic Republic and amendments to the ROG have extended the principles of *Raumordnung* to the new states.<sup>226</sup> The new goal of respecting and improving the "spatial integration" between the former East and West Germans was added to the leading principles of Article 1 of the ROG.<sup>227</sup> In addition, Article 2 of the ROG received the new mandate of strengthening areas of the "new states," especially border areas and areas named in the Treaty of Unification, such that living conditions and the socio-economic structure would be equivalent to those in former West Germany.<sup>228</sup> Other laws passed since reunification have focused on improving the land use planning prerequisites to create more

224. Rothe, *supra* note 132, at 46.

225. K. Scherf, *Gleichwertige Lebensbedingungen und dauerhafte, umweltgerechte Raumentwicklung*, in ARL, *supra* note 118, at 65 (German-language source).

226. Einigungsvertrag - Anlage 1, Kapitel XIV, Abschnitt II, Nr.3 - v. 31.8.1990 in Verbindung mit Artikel 1 des Gesetzes v. 23.9.1990 (BGBl. II S. 885, 1125) (German-language source); Gesetz über die Inkraftsetzung des Raumordnungsgesetzes der Bundesrepublik Deutschland in der Deutschen Demokratischen Republik v. 5.7.1990 (GBl. I. S. 627) (German-language source); Gesetz zur Förderung von Investitionen und Schaffung von Arbeitsplätzen im Beitrittsgebiet sowie zur Änderung steuerrechtlicher und anderer Vorschriften (BGBl. I. S. 1322) (German-language source).

227. ROG, *supra* note 58, art. 1, ¶ 2.

228. *Id.* art. 2, ¶ 1, no. 4.

private investment in the new states and to meet the pressing need for new housing.<sup>229</sup>

However, it is widely agreed that application of the concept of equivalent living conditions to former East Germany cannot proceed in the same manner as that concept has been developed in the West. Thus, in 1992, the BBauM issued new land use planning orienting principles, *Raumordnungspolitische Orientierungsrahmen* ("RPO"), that address the need both to adapt *Raumordnung* principles to Eastern Germany and to balance the *Raumordnung* priorities of East and West Germany.<sup>230</sup> The RPO is not a binding federal program to be carried out by lower levels of government. Rather, consistent with the federal government's role of coordinating and informing, it is a statement, aimed at those who make planning decisions at federal, state, and local levels, of the leading principles and priorities of the federal government in addressing *Raumordnung* after reunification. The RPO sketches, from the federal perspective, the main goals, challenges, potential solutions, and perspectives of future *Raumordnung* policy.<sup>231</sup>

The RPO emphasizes the traditional *Raumordnung* goal of creating equivalent living conditions in all parts of the country.<sup>232</sup> After stating what pursuit of this goal does *not* mean in reunified Germany (an absolute measure, all-inclusive equality, an across the board obligation of the state to equalization, etc.), the RPO emphasizes the state responsibility to spur development, spearheaded by private investors, leading to the creation of equivalent living conditions.<sup>233</sup>

Upon realizing that equivalent living conditions (as that term has been understood in West Germany) cannot be achieved overnight in the East, Germans have reconsidered the meaning of the term. Increasingly, the focus is shifting away from purely economic and structural considerations. In its place, Germans

229. Gesetz zur Erleichterung von Investitionen und der Ausweisung und Bereitstellung von Wohnbauland v. 22.4.1993 (BGBl. I. S. 466) (German-language source).

230. See *supra* note 129. Germany's developing *Raumordnung* policy at the European Union level provided an additional reason for issuing the RPO. For the past several years, the Commission of the European Community has been in the process of developing its own leading principles for Community land use planning. As the Commission had made first steps in that direction with its document *Europe 2000*, *infra* note 254, the feeling in Germany was that a document containing German priorities and principles would better allow those principles to be respected and even integrated into European planning. See *Einleitung IV*, *supra* note 57, at 4-5.

231. RPO, *supra* note 129, § 6.

232. See, e.g., *id.* at Introduction (*Vorbemerkung*).

233. *Id.* § 5.1.

are employing a broader-based analysis that looks to such factors as ecologically-sustainable development, citizen participation in and identification with government and community, and other social factors.<sup>234</sup>

Regardless of how it is defined, the traditional *Raumordnung* goal of equivalent living conditions will take years, if not decades, to achieve in former East Germany.<sup>235</sup>

### B. Environmental Concerns

As political areas of endeavor, land use planning and the environment are closely linked.<sup>236</sup> Both are overarching fields that must address the activities of many different subject-specific fields, such as transportation, housing, development, etc. Because Germany is a densely populated country with associated problems of waste disposal, sewage treatment, and pollution of air and water, and because Germans are concerned about protecting environmentally sensitive areas, the goal of equivalent living conditions is now being examined more intensively from the environmental perspective.<sup>237</sup>

The ROG was amended in 1986 to provide greater protection to the environment, especially land in rural areas.<sup>238</sup> At approximately the same time, the European Community issued a directive calling for environmental impact studies for major building projects.<sup>239</sup> Germany codified this directive in national law by amending the ROG<sup>240</sup> to provide for a state-level environmental impact survey in any of 17 circumstances specified

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234. Tönnies, *supra* note 121, at 33.

235. *Id.* at 28.

236. The legal structure of land use planning reflects this linkage. At least 10 of the 16 German states—Bavaria, Berlin, Brandenburg, Bremen, Hesse, North Rhine-Westphalia, The Saar, Saxony, Saxony-Anhalt and Thuringia—have combined environmental protection and land use planning in the same ministry. Schleswig-Holstein combines these subject areas to some degree.

237. Purely cultural factors may also play a role here. The traditional German love of the forest, for example, certainly is a factor in the great German emphasis on forest preservation.

238. Gesetz zur Verbesserung des Umweltschutzes in der Raumordnung und dem Fernstrassenbau v. 19.12.1986 (BGBl. I. S. 2269) (German-language source). This amendment, originally introduced by the state of Bavaria (BT-Drucks. 360/85), was added to the ROG. See ROG, *supra* note 58, art. 2, ¶ 1, no. 7.

239. European Community Directive of June 27, 1985 (85/337/EEC) (German-language source).

240. Gesetz zur Verbesserung des Umweltschutzes in der Raumordnung und im Fernstrassenbau v. 19.12.1989 (BGBl. I. S. 1417) (German-language source).



in a separate decree.<sup>241</sup> These circumstances include, *inter alia*, the creation or change of a water course or its bank and the building of highways, railroads, airports, vacation complexes, high-tension wires, or nuclear or waste treatment facilities. State law spells out the procedures of the survey.<sup>242</sup>

In recognition of this increased environmental emphasis, the ROG was further amended in 1989 to include environmental protection among the leading principles of land use planning.<sup>243</sup> Article 1, Paragraph 1, Sentence 2 now includes as a leading principle, by which the structure of the country is to be developed, the protection of all aspects of nature that form the basis for life. This addition reinforces the numerous Article 2 goals related to the environment: protection of fauna, flora, forests, air quality, and water supplies; reduction and disposal of waste; sparing use of water and land; the need for open areas for recreation in natural surroundings, and for ecological balance; etc.<sup>244</sup>

In this context, both governmental and non-governmental land use planners are now discussing issues such as whether sustainable development is the prerequisite for equivalent living conditions or whether the two are mutually exclusive.<sup>245</sup> The answers have significant ramifications for investment and infrastructural policy. For example, should land use planning concentrate all investment in developed areas, which are already environmentally damaged, so as to keep the countryside air and water pure? Alternatively, should industry spread into the countryside in order to create more equivalent conditions between city and country? What transfer costs does each of these alternatives entail? In connection with the new German states, should polluted industrial areas be cleaned up in order to keep the population there? Or should efforts to keep the population of heavily polluted areas stable be scaled back in favor of investment in new infrastructure for thinly-populated areas?<sup>246</sup>

241. Verordnung zu § 6a Abs. 2 des Raumordnungsgesetzes v. 13.12.1990 (BGBl. I. S. 2766) (German-language source).

242. ROG, *supra* note 58, art. 6a, ¶ 1; see, e.g., LPlG, *supra* note 163, art. 14.

243. Gesetz zur Änderung des Raumordnungsgesetzes v. 14.7.1989 (BGBl. I. S. 1417) (German-language source).

244. ROG, *supra* note 58, art. 2, ¶ 1, §§ 8, 12.

245. Among private commentators, see, for example, Bergmann & Marx, *Gleichwertige Lebensverhältnisse und dauerhafte, umweltgerechte Raumentwicklung*, in ARL, *supra* note 118, at 59 (German-language source). Government statements (in addition to the new provisions of the ROG) include the RPO, *supra* note 129, which devotes one of its five major sections to *Raumordnung* and environment.

246. Bergmann & Marx, *supra* note 245, at 59-60.

## C. Europe

In 1989, Article 1 of the ROG was amended to include, among other things, a new "leading principle." Article 1, Paragraph 3 now reads:

The *Raumordnung* in the Federal Republic is to create and promote the spatial prerequisites for cooperation in the European area.<sup>247</sup>

The addition of this principle parallels the development of *Raumordnung* philosophy in Germany since the 1960s: just as there are certain spatial ordering problems that cannot be solved at the local level, thus requiring the development of *Raumordnung* at the state and national level, so are there European-level modalities that create spatial and habitation structure issues that cannot be addressed exclusively at the national level.<sup>248</sup> Germany's position has thus been to support both cooperation between neighbors and those European-level activities in particular subject areas that affect the ordering of space.<sup>249</sup>

*Raumordnung* on the European level is in its infancy because the European Union has no broad-based *Raumordnung* competence. Consistent with the principle of decentralization characteristic of its internal policy, Germany has not promoted such authority.<sup>250</sup> Importantly, Germany has not extended its goal of achieving equivalent living conditions for all members of society to the European level.<sup>251</sup>

Despite these limitations, *Raumordnung* at the European level is likely to develop in the years ahead. Within the context of environmental policy, the Maastricht Treaty does provide that the Council can pass measures in the area of *Raumordnung*, land use, and the management of water resources.<sup>252</sup> Perhaps more importantly, Germany and the European Union are addressing

247. Gesetz zur Änderung des Raumordnungsgesetzes v. 14.7.1989 (BGBl. I. S. 1417) (German-language source).

248. RPO, *supra* note 129, § 4.2.

249. The bilateral *Raumordnung* commissions between Germany and neighboring states provide an illustration of the practical application of this philosophy. See *id.* § 6.

250. *Id.* § 4.2. German fear of overcentralization of power at the European level generally also has led to the passage of a new Article 23 of the *Grundgesetz*, which reinforces the "subsidiarity" principle, *i.e.*, that the EU may operate only in those areas in which the European level is better qualified to operate than are the member states. See generally A. Benz, *Föderalismus und europäische Integration*, in ARL, *supra* note 118, at 73 (German-language source).

251. See RPO, *supra* note 129, § 5 (emphasizing equivalent living conditions in its discussion of ordering and development at the national level, yet making no mention of this goal in its Section 4 statements on European *Raumordnung*).

252. See Treaty on European Union, Feb. 7, 1992, art. 130(s), O.J. (C 224) 79 [hereinafter Maastricht Treaty].

many *Raumordnung* issues within the context of regional policy. In 1991, the Second Conference of the European Parliament on Regions of the Community was held. The final resolution of the conference stated that the European Union should establish, for European-wide development, broad principles that are within the framework of the subsidiarity principle and based on the political will of the regions and member states. The alternative, continuance of uncoordinated national and regional policies, would lead to unordered growth of cities and to destruction of rural areas, the environment, and Europe's architectural and cultural heritage.<sup>253</sup>

Although the activities of the European Parliament in this field are only advisory and have no binding authority, other E.U. organs also have been active in regional development studies and activities. The Commission has published "Europe 2000," a preliminary study of factors that reflect or determine where economic activity within the Community takes place.<sup>254</sup> The document is designed to support the various levels of decision-makers in their long-term planning and decision-making. It makes cautious middle-term predictions in the areas, *inter alia*, of demographics, transportation, rural areas, and border regions.<sup>255</sup>

In addition, the European Union has used its regional development programs to achieve goals such as increased access to advanced telecommunications for disadvantaged regions, regional development through mobilization of local sources of energy, and the restructuring of areas dependent upon industries such as iron, steel, and shipbuilding.<sup>256</sup> Not surprisingly, individual German states as well as local communities and their umbrella organizations are now increasing their contacts with relevant European Union officials.<sup>257</sup> These contacts mirror the German analysis that competition in the Europe of tomorrow will not be between individual industries or even cities, but between entire regions.<sup>258</sup>

253. Second Conference of the European Parliament on the Theme "Regions of the Community", Final Resolution, ¶¶ A. 3-4, *cited in* F. Drey, *Europäische Raumordnungspolitik*, in *GEOGRAPHISCHE RUNDSCHAU* 682 (1992) (German-language source). Much of the European Union's work on regional issues has been performed by an advisory body known as the The Committee of the Regions, established by the Maastricht Treaty, *supra* note 252, art. 198(a).

254. Europe 2000—Perspectives of the Future *Raumordnung* of the Community, COM (91) 453.

255. See Drey, *supra* note 253, at 684-85.

256. *Id.*

257. E.H. Ritter *et al.*, *Arbeitsgruppe 'Regionalisierung'*, in *ARL*, *supra* note 118, at 99 (German-language source); M. Sinz, *Europäische Integration und Raumentwicklung in Deutschland*, in *GEOGRAPHISCHE RUNDSCHAU* 686 (1992) (German-language source).

258. Sinz, *supra* note 257, at 686.

## VIII. CONCLUSION

Although this analysis of the fundamental principles of German land use planning cannot consider all of the issues arising in the context of the German system,<sup>259</sup> these principles, in and of themselves, raise certain issues that should be considered when viewing the German system from afar. One major issue is the absence of major debate in Germany about the need for such an elaborate system of land use planning. This lack of debate is not due to any lack of attention given to land use issues. Among public officials and concerned academics, the "how" questions of *Raumordnung* are the subject of constant discussion. The general public also has some awareness of the system, for the teaching of its fundamentals frequently is a part of the high school curriculum.<sup>260</sup>

Several factors may account for the widespread German acceptance of the principles of land use planning. One factor, alluded to earlier, is the system's success in contributing to a high level of living conditions for a very large part of society - no small feat in a country as densely populated as Germany. Considering this success, it is not surprising that people rarely argue that social state principles violate "liberal" precepts.

Another major factor influencing the paucity of debate over principles may be that German land use planning experts - particularly those who are geographers or planners, rather than lawyers - seem to *presume* that a state inherently has the power and obligation to engage in extensive land use planning. Rather than viewing fundamental principles such as equivalent living conditions as a function of constitutional doctrine that varies by time and place, these experts speak of the 19th century and earlier as a time when the power of the state to intervene in land use planning was "withdrawn" or "denied," as if to say that some inalienable principle in favor of state land use planning existed.<sup>261</sup>

A third reason for the absence of major public debate may be that the German system succeeds at creating the consensus

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259. The German system raises, for example, issues of how localities finance themselves: if *Raumordnung* and *Landesplanung* determine in large part the amount of residential and commercial activity in an area, wouldn't these decisions condemn some communities to wealth and others to poverty? One part of the answer might be found in the German method of locality finance, another in the horizontal and vertical tax equalization measures of the German constitution. The author will be considering this and other topics relating to the fiscal aspects of the German land use planning system in a subsequent article.

260. That is the case at least at the *Gymnasium* level, in the schools of Schleswig-Holstein, the German state that this article has used as representative.

261. See *Geschichtlicher Aufriss*, *supra* note 21, at 3; RABE, *supra* note 11, at 2.

necessary to implement such a far-reaching land use planning program. As described above, achieving this consensus is a characteristic feature of the German system: federal officials confer frequently with state officials; local officials are included in the planning process at the state level; representatives of business, labor, environmental, and other groups sit on advisory boards at various levels of land use planning; etc.

Whatever the reason for the strong consensus on the fundamental principles of land use planning, these principles and their implementation create certain theoretical and practical tensions upon which German commentators do not focus. These tensions, however, must be seriously considered by foreign observers who are looking to this system for insights into both the foreign system and their own.

For example, tension exists between the principle of equivalent living conditions and the shortage of land available for building single-family homes. Germany ranks last among western European countries in the percentage of the population that own their own home.<sup>262</sup> While this statistic may be attributable in part to the country's high population density, countries such as the Netherlands, which have an even higher population density, rank ahead of Germany.<sup>263</sup> Certainly, this situation is due in part to land use planning policies that both discourage large areas of single-family homes that create "urban sprawl," and encourage green spaces around urban areas, the concentration of home building only in designated areas, and the maintenance of areas throughout the countryside that are totally free of building. As a result, lots available for building are relatively few in number, and, especially in urban areas, so expensive as to put them out of the financial reach of many citizens whose only alternative is to live in apartment buildings.<sup>264</sup> Because of the absence of public debate on land use principles, it may be that Germans as a whole are not aware of a correlation between the shortage of and expense of private homes

262. Report of the Bonner Institut für Städtebau, *Wohnungswirtschaft und Bausparwesen*, reported in HAMBURGER ABENDBLATT, Sept. 1, 1994, at Finance 1 (German-language source).

263. *Id.*

264. Officials with whom this author has met often take the position that even if basic German land use planning principles were abandoned in order to allow more widespread building, the number of people who could afford single-family homes would remain small, due to both the high population density and the high cost of the building techniques used (brick-by-brick, rather than wood-frame construction). Thus, it is argued, it would be senseless to abandon the many advantages of the system so that a relatively small number of additional people could own homes. Interview with H. Gertz, Deputy Planning Director for the City-State of Hamburg (July 12, 1995) (unpublished notes on file with the author).

on the one hand and the application of these principles on the other.

A corollary of this first issue is the extent to which German land use planning law remains true to its constitutional principles. Land use planning should serve the free development of the personality rather than the needs of planners. To some extent, planners may end-run the issue by focusing on the constructs, such as the central cities system, that provide the infrastructural framework necessary for free development of the personality and for equivalent living conditions. Yet, as checks on the actions of planners are more political than legal in nature, the possibility always exists that the system will achieve a momentum, a dynamic of its own, by focusing more on its own plans for development than on individuals.

A second issue is the expense that the application of land use planning principles may add to the cost of doing business in Germany. In the long run, the realization of these principles may allow government to better plan its investment in infrastructure, prevent excessive growth in some areas and the desertion of others, avoid social problems by providing individuals of all income groups with acceptable schools and sports facilities, and create other advantages that lead not only to social stability, but also to the creation of goods and services. Yet, in an era of free trade and open markets, such regulation may create an incentive for an individual company, which seeks the lowest *firm* cost structure rather than the lowest *societal* cost structure, to leave the country in search of countries where the company's fixed costs would be lower.

A third tension is between the principle of equivalent living conditions on the one hand and individual liberty on the other. On a most basic level, equivalent living conditions for all citizens necessarily involves a certain limitation on the ability of each individual to build, work, travel, etc. as he chooses. In addition, the German system allows public officials (often non-elected officials) to make sweeping decisions (albeit only after receiving the input of the communities) that largely structure development, habitation, and transportation patterns. Input into land use planning decisions at the state level is primarily in the hands of differing groups, especially the local political units.<sup>265</sup> Individual

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265. The environmental impact study, the *Raumordnungsverfahren*, called for in Article 6a of the ROG provides a typical example. Paragraph 7 of Article 6a allows the states to decide to what degree the public may participate in these studies. Pursuant to LPIG, Article 14a, Paragraphs 2 and 3, general "group" participation is very broad, including the counties (*Kreise*), neighboring states, and other planning officials, but the public, *i.e.*, the individual citizen, participates only through the localities. LPIG, *supra* note 163, art. 14a, ¶¶ 2-3.

citizens play a relatively minor role because the provisions of the *Raumordnungsgesetz* and other statutes expressly do not allow private causes of action based on the statutes' provisions.<sup>266</sup> Thus, equivalent living conditions becomes more of a political principle, as interpreted by various governmental bodies, rather than a legal principle to be interpreted by the courts in response to private challenges.

While similar tensions between governmental regulation and total freedom of action exist in any democratic system, land use planning as practiced in Germany could not be applied as easily in the United States.<sup>267</sup> As well as having different histories and population densities, U.S. and German citizens start from widely varying constitutional premises. For example, the German conception of freedom is at once both broader and narrower than its American counterpart. It is narrower in that individual freedom is more clearly linked to and limited by existence in society, and broader in that freedom is not merely the right of the individual to do as he pleases, but also the right of free development of the personality in connection with the social state obligation to provide the conditions necessary for that individual development.

Not surprisingly, Americans and Germans tend to have different mentalities in approaching land use planning issues. For example, U.S. citizens would be unlikely to grant public officials the power to make the sweeping decisions necessary to achieve a principle such as equivalent living conditions. That hesitation would be particularly great when the officials are primarily non-elected and operating at the state level, rather than local and elected.<sup>268</sup> In addition, the German approach of achieving consensus on land use planning issues—through the political means of inclusion of many different groups in the decision-making process, but then precluding many private legal

266. This rule does not apply to circumstances such as when government must pay compensation to a landowner. For an analysis of German "takings" law, see Carl-Heinz Davis, *Compensation Aspects of the "Takings Issue" in German and American Law: A Comparative View*, in TAKINGS 315 (David L. Callies ed., 1996).

Note that individual citizen input is much greater in the lower levels of land use planning, such as the establishment of local building and development plans, than in the area of *Raumordnung*. This participation is regulated primarily by *building law* (the BBauG) rather than by land use law.

267. Schoenbaum reaches the same conclusion when considering German land use planning more globally. See Schoenbaum, *supra* note 5, at 656.

268. The differences in the political party systems in Germany and the United States may also be relevant. German political parties are quite cohesive, with the result that elections are contested primarily on a party basis. By contrast, in the United States, elections are often contested on a much more personal level, with the result that both individual voters and smaller interest groups would appear to have more control over the election of local officeholders.

challenges to the system—would seem unusual to U.S. citizens accustomed to relying more heavily on the courts to regulate the relation of the individual to government.

U.S. land use planning is not static, however. In recent years, Americans have begun to question long-standing practices and to look beyond the “liberal” and “local” principles that comprise much of our land use planning heritage. The state simply “getting out of the way” is no longer enough to many U.S. citizens in light of the tremendous discrepancies among the living, working, educational, environmental, transportation, and other conditions that prevail in different communities. Some jurisdictions have added to their land use planning regime individual goals that are similar to those being pursued in Germany. No jurisdiction, however, has taken the additional step of adding binding overarching goals similar to those of German land use planning. Thus, the German concept of striving for equivalent living conditions provides Americans with another perspective when viewing domestic land use planning issues. The further analysis and consideration of this foreign system could provide more insight into where our system is aimed, and whether it is moving in that direction.



