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LAND USE PLANNING AND CONTROL IN THE GERMAN FEDERAL REPUBLIC*

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By American standards, land use planning and control in Germany is highly developed. In its effects it is considerably more comprehensive than land use planning in the United States, blanketing the entire country and dealing with a wide range of land use related subjects. Some would conclude, therefore, that it is more restrictive of both governmental and individual initiative and action. In any case, it seems obvious that the German experience would have considerable relevance to the American situation, if only because levels of industrialization are generally comparable, and both countries share a commitment to a market economic system and to democratic individualism.

Although the literature on land use planning and control in the German Federal Republic[1] is substantial, very little has been written in English, and few German writings on the subject have been translated. This article is, therefore, a beginning attempt to remedy this lack. In reviewing German land use planning and control it will suggest some of the background factors which have conditioned the German approach, examine relevant provisions of the Basic Law (Constitution),[2] and review the statutory and administrative structure within which planning takes place.[3]

Land use planning and control in the German Federal Republic

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1. This article deals exclusively with the German Federal Republic; nothing is said about the German Democratic Republic. When the terms "German" or "Germany" are used they apply to the German Federal Republic (or West Germany).

2. The Basic Law of 23 May 1949 (*Grundgesetz*), *Bundesgesetzblatt,* S. 1. The *Bundesgesetzblatt* (Federal Law Gazette) will hereinafter be cited as "BGBl. S. 1," the S meaning *"seite"* or page and the number being the page number. In this article, German terms or their equivalent English translations are used interchangeably as the sense seems to require. All translations are those of the author. The Press and Information Office of the Government of the Federal Republic of Germany has issued an English version of the Basic Law, translated by the Linguistic Section of the Foreign Office (printed by Wiesbadener Graphische Betriebe GmbH, 6200 Wiesbaden).

3. A useful overview of the German governmental system (and one much used by German citizens and frequently reissued in new editions) is the *Staatsbürgertaschenbuch* (Citizen's Handbook), by Dr. Otto Model and Dr. Carl Creifelds, C. H. Beck'sche Verglasbuchhandlung, München und Berlin (various years depending on the edition).

must be understood in the context of major social, economic, and political developments—those since 1945 as well as those which developed before that date.[4]

Population Density

One of the important current factors is population location and density. Although the territorial area of the German Federal Republic is about 10% less than that of the State of Colorado, it has a population of about 60 million—twenty times larger than that of Colorado. This population is, of course, not equally distributed over the total area. As a result, some very high density areas pose problems requiring special planning efforts, and policies are designed to encourage development with a redistribution of population to some of the more sparsely settled regions, *e.g.* communities which have been losing population and the zone bordering East Germany.

As of 1967, densities ranged from about 136 to 1549 persons per square kilometer or about 350 to 4000 persons per square mile.[5] The areas of particularly high density (designated *"Verdichtungsraume"* or *"Ballungsgebiete,"* terms roughly comparable to our "Metro Regions" or the larger Standard Metropolitan Statistical Areas) number twenty-four, with the largest and most densely settled being the region north from Bonn to the Ruhr, east along the Ruhr, and west to the French, Belgian, and Dutch borders. The next largest is the Frankfort area at the confluence of the Main and Rhine Rivers.[6]

Two Germanies

Another important factor of recent occurrence was the splitting of the country into two Germanies, which ended what had been a dominantly East-West orientation for trade and commerce, and expanded the North-South pattern. Customary markets and supply patterns had to be readjusted, with accompanying shifts in economic activities and related location of population concentrations. The latter were also influenced by the influx of refugees from the East. At the same time, the freedom of movement, guaranteed by the

4. The generalizations are sweeping; they do not purport to be tightly reasoned, but rather seek to suggest a few of the background factors and forces. Further research on this background would be useful.

5. From *Europa-Glossar der Rechts–und Verwaltungssprache, Volume 9: Raumordnung* at 25. Langenscheidt, Berlin and Munich (1970). Cited hereafter as "Langenscheidt."

6. *See* discussion on "Verdichtungstraum" in *Handwörterbuch Der Raumforschung und Raumordnung* (Encyclopedia on Spatial Research and on the Ordering of Space), prepared by the Akademie für Raumforschung und Landesplannung and published by Gebrüder Jänecke Verlag, Hanover (1970). Three volumes: Vol. III, 3536. This most useful and scholarly work will be cited frequently as "Handwörterbuch." Without it, this article could not have been written.

Basic Law,[7] tended to intensify locational problems as well as to emphasize the need for governmental planning of land use and development.

Philosophical and Ideological Factors

An important historical perspective on present-day German land use planning and control lies in the nature of the ideological-political struggle over the past 200 years, particularly with respect to the concept of property, and the relationship of property rights to the social, political, and economic system. The direct impact on the development of planning in Germany (and probably in Europe generally) is in sharp contrast with American experience where consensus rather than conflict was more typical. In pragmatic America, philosophy and ideology has served more as rationalization for than as instigation to action. Here the dominance of problem solving and the avoidance of philosophic or conceptual approaches in legislative, executive, and judicial decisions have largely left the clash of political ideas to the classroom, or more superficially to the hustings.

Long after John Locke's cogent arguments with respect to the connection between property and liberty had shaped the views of the American Founding Fathers,[8] the almost unchallenged acceptance of laissez-faire economics and the reliance on the unseen hand of the price system and the market place dominated thought and practice with respect to property and property rights. Henry George, for example, probably had a greater influence on Danish land and tax policy than in his native land where he was and is regarded as a part of the small, dissident minority, tolerated but largely ignored.[9]

In Germany, on the other hand, ideology has had a much closer relationship to action, and in the case of property concepts, clashes between Marxists, on the one side, and those who viewed property ownership as important for a variety of reasons on the other, were sharp and real. In its judicial application the Civil Law (Roman Law)

7. *Articles 1 and 2.* See discussion later in this article. Of use in interpreting the "Bill of Rights" of the *Basic Law* (Articles 1 through 19) has been Bruno Schmidt-Bleibtreu and Franz Klein, *Die Grundrechte* (Fundamental Rights), Hermann Luchterhand Verlag GmbH, Neuwied and Berlin (1970).

8. There are, of course, many sources for these "roots" of American Constitutional concepts, one of which is *Democracy, Liberty, and Property,* ed. F. Coker, MacMillan Company, New York (1942), especially Part III entitled "Government and Property Rights." *See also* N. Wengert, "Legal Aspects of Land Use Policies, . . ." *National Land Use Policy: Objectives, Components, Implementation,* 142 ff, Soil Conservation Society of America, Ankeny, Iowa (1973).

9. *See* biographical article on "Henry George" in *Encyclopaedia of the Social Science,* Vol. VI, p. 630 et seq., The Macmillan Company, New York (1931).

has traditionally given more weight to the debates, analyses, and arguments in scholarly essays, than has been the practice of American Courts. Thus, for example, the jurisprudence of the von Jehring in the 19th Century, stressing the social responsibility of property, helped to undermine the view that a property owner could do as he pleased with his own, had a more direct impact on juridical thinking and prepared the way for an acceptance of planning as a legitimate function of government. No such claim can be made by the American Sociological School of Jurisprudence or the later Legal Realists. In the American situation, social philosophy affects action largely through the behavior of individuals who may have absorbed some philosophic notions while students!

A related difference between German and American planning stems from the different approach of the Civil Law with respect to the role of administration in the governmental system. In German practice under the Civil Law, administration is much more law and proportionately less management, more adherence and attention to legally determined rules and less judgmental discretion and administrative flexibility. There are, of course, many explanations for this difference in approaches—one of which is simply that many key German administrators hold law degrees, and until quite recently this was regarded as the accepted training for public service. Another, no doubt, is the institutionalization of administrative courts. In any case, in the field of land use planning and control, one finds an emphasis on legal provisions, with a concern for specific delegation of authority directly traceable to legislative specifications. Thus the stance of those administering land use planning tends to stress responsibility consistent with concepts and procedures of administrative law.[10]

It is considered perfectly normal, therefore, that at a particular point in the planning process (see below) plans have legal effect. The designation of particular areas or parcels as "agricultural land," as a matter of law forecloses any other uses. Similarly, land classified as "building" or "housing" land (*Bebauungsland*) can only be used for the designated purpose. Exceptions or variances in the American pattern are virtually unthinkable, because the same procedure by which the plan became law must be followed. Classification of land in a legal plan does not require its development to meet plan objectives; classification only prohibits contrary uses.

10. The deeper I became involved in the subject of land use planning and control, the more I came to feel that the differences between the Civil Law and the Common Law, especially as related to the administrative process, were of tremendous importance—and certainly require far more investigation than I have been able thus far to undertake.

A dramatic illustration of the binding effect of an approved plan was a situation in which a farmer owning agricultural land sought special permission to build a home on his agricultural land but was denied this permission.[11] In most parts of Germany farmers do not live on their farms, but in villages. But in this case the denial seemed to have particularly harsh effects because the farmer's housing situation in the village was most inadequate due to the size of his family. After exhausting his administrative appeals, he ultimately petitioned the State legislature for relief.[12] Even then he was turned down, although the legislative committee directed the mayor of the village to find "building land" for the farmer in the village and then to work out an equivalent trade—an authority possessed by most German planning agencies.[13]

The Feudal Heritage

Present day Germany property law appears to show less evidence of feudal institutions than is the case with respect to the American Common Law of property. This may simply be because the intellectual and political ferment of the 19th and 20th Centuries involving the role and function of property had a proportionately larger impact, and also because the Civil Law places less emphasis on precedent and hence pays less attention to previous lines of legal reasoning, practice, and judicial opinion, stressing (as suggested above) authoritative legislative enactments and scholarly arguments. Despite the deliberate break with the English Common Law and with most feudal property institutions and concepts of property rights at the time of the American Revolution, many Common Law ideas and procedures nevertheless came into American legal practice in the 19th century.[14] Particularly important in this process of assimilating English Common Law ideas were Blackstone's *Commentaries on the Laws of England*[15] which served many frontier lawyers with their chief introduction to the Common Law. As professor John E. Cribbett has noted, in the process it would seem that many of the

11. This incident is recounted in *Landtag von Baden-Württemberg, Drucksache 6/2760, 6, Wahlperiode, Anträge des Petitionsausschusses zu verschiedenen Eingaben,* 1. Petition Nr. 286 betr. Bausache. (3 July 1973).

12. Petitioning the legislature, in this case the State legislature, is not only guaranteed as in our First Amendment, the procedure for petition is institutionalized so that the concerned legislative committee becomes a kind of "Ombudsman."

13. The right to buy, sell, and trade land is an important tool in effectuating plans. It could be useful in the United States!

14. L. Friedman, *A History of American Law.* Simon and Schuster, New York (1973), especially Ch. V, "The American Law of Property."

15. The original edition was published in four volumes in London, 1765 to 1769. Many editions are available.

wrong elements of feudal property concepts were retained, while the stress on duties of ownership, so important in feudal land relationships, was discarded.[16]

More significant in the German situation, particularly as related to planning, was the continuance not of feudal property concepts, but rather of a feudally based hierarchy of land ownership and land rights. In addition, the pattern of living in villages with prohibitions against living on farm land (referred to above) apparently had feudal origins.[17] In contrast to France and some other European countries, the German nobility was never expropriated, and hence in many areas substantial acreages remain the domain of a baron or count or other titled person, with cultivators holding land under a variety of tenure forms short of "fee simple ownership," even though many have a high degree of stability. It seems reasonable to conclude that a landed aristocracy, as well as those who hold land under them, are likely to have a considerably different "land ethic" than the American nouveaux riche whose fortunes were based on buying and selling real estate, or those hoping to become nouveaux riche by means of land speculation.[18]

Only a few additional sociological-historical factors can be briefly mentioned. One of these is the frequently noted love and respect the German people seem to hold towards land and nature. Whereas Americans often think of land as a commodity for buying and selling, German attitudes are quite different. Not unrelated, the German people seem to accept the fact that population densities require a high level of land use control and planning, an attitude probably reinforced by a still evident willingness to accept authority and to respect bureaucratic and technical decisions. Another factor is the reliance on associations and organized groups, not so much as in this country to "lobby" for political action, but rather in the sense of the corporate state to undertake societal tasks. Thus planning associations, nature protection societies, and similar corporate organizations form important links in the evolution and acceptance of land use planning and control.[19]

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16. J. Cribbet, "Changing Concepts in the Law of Land Use," 50 Iowa L. R. 245 (Winter, 1965) at 251.

17. The requirement was not only to live in villages but also to maintain village structures since these provided the basis for taxation payments to the overlord.

18. How many of America's leading families owed their fortunes to land and land sales, is difficult to suggest. But it is clear that Washington and many of the "Founding Fathers" were owners of large tracts of land, not for farming or plantation purposes, but for real estate development purposes.

19. *See* for example "Raumordnungsverband: Rhein-Neckar" and "Verbände und Raumordnung" in *Handwörterbuch,* 2535 and 3518.

Raumordnung: Towards Comprehensive Planning

In a formal sense, general land planning began in Germany about the same time it did in the United States—in the early 1920's. As in the U.S., there are examples of earlier specialized or functional planning (*e.g.* with respect to farming and forestry, and mineral development), and the role of the German Imperial Government in the development of railroads and key industries required a limited kind of state planning. City planning began to be evident at about the turn of the Century, not unlike the so-called "City Beautiful" movement in the U.S. of about the same time. But German authorities date general land planning to the post World War I period when an influx of 150,000 miners into the Ruhr (about 600,000 persons) resulted in a 1920 statute authorizing comprehensive planning (*Siedlungsverband Ruhrkohlenbezirk*).[20]

During the Weimar Republic, planning continued to be primarily local in orientation, although a recognition of the need for planning on a broader geographic basis began to develop. Wider geographic scope was accomplished through the formation of voluntary planning associations in which local governments combined to deal with problems of larger areas.[21] It has been estimated that by 1932 approximately 30% of the area of Germany and 58% of its people were affected by plans developed by planning associations.[22]

National, as against local, planning was stressed during the Third Reich, and under the philosophy of centralization which characterized administration in that era, local governments were simply end links in the chain of authority. In 1936 a national department for *"Raumordnung"* was established, representing the first formal use of this term.[23] Planning was directed to serve the purposes of the regime, and was less concerned with the policy values expressed in the present *"Raumordnungsgesetz,"* as will be indicated below.

The first problem after the end of World War II in many communities was recovery from bomb damage and restoration of housing and other community services. Initially, because there were no higher levels of government, and because the occupying powers encouraged it, responsibility for action was taken by the *"Gemeinden,"* the most local units of government.[24] With the eventual drawing of State

20. *See* "Siedlungsverband Ruhrkohlenbezirk" in *Handwörterbuch* 2914.

21. *See* note 19, *supra.*

22. *Id.*, "Landesplannung," at 1718. Also see Hans-Ulrich Evers, *Das Recht der Raumordnung,* Wilhelm Goldmann Verlag, Munich (1973), p. 20.

23. *Handwörterbuch* 2465.

24. The term "Gemeinde" is approximately equivalent to the English "Community," except that it has a more formal and legal meaning and might best be translated "Parish" in

boundaries, these governments began enacting legislation on such topics as housing, highways, and ultimately on land planning. The Federal Parliament enacted its first major statute concerning planning in 1960, although prior to that time it, too, had dealt with numerous functional issues that had far reaching significance for land use. Thus a basic statute concerning the railroads was enacted in 1951, and a broad highway policy in 1961. And statutes concerning nature protection, forestry, and conservation subjects continued in effect from the prewar period. But, as in the United States, the need for coordination and integration of functional programs became increasingly apparent, and it was partly in recognition of this need that the Federal Parliament enacted two important planning statutes in the 1960's: first, the *"Bundesbaugesetz"* in 1960, and second, the *"Raumordnungsgesetz"* in 1965.[25]

It must be stressed that the government which emerged after the War was strongly federal, and the States were reluctant to give up planning responsibilities to the Federal Government. Only as it became apparent that planning which did not take into account spatial consequences of economic activity, of public investment policies, and of transport development, was ineffective, did agreement on the need for Federal guidance begin to develop.

Present German planning stresses comprehensive man/land relationships as evidenced in the increasing use of the term *"Raumordnung"* (organization of space) as an overriding concept broader than but including the older term *"Landplanung."* The Federal statute on *"Raumordnung"* will be discussed below. It is clear that this concept emphasizes coordination and integration of all public programs as these affect land use. This stress on organizing spatial relationships appears also in France where a comparable term—*"Aménagement du territoire"*—is used and long-range plans are formulated by a *"Commission nationale d'Aménagement du Territoire,"* designated "C.N.A.T."[26]

"Raumordnung" is conceived of as more than simply planning for a larger area. Rather it seeks to integrate all public action in its spatial manifestations. Thus one commentator states:

> The role of *Raumordnung* in development planning is simply paper planning if citizens and the state do not by means of investment

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the Louisiana usage. In this article both the German term and the English "Community" are used as the sense seems to require.

25. Bundesbaugesetz, 23 June 1960 (BGB1 I, S. 341) as amended 7 June 1972 (BGB1 I, S. 873); Bundesraumordnungsgesetz, 8 April 1965 (BGB1 I, S. 306); the first is cited hereinafter as BBauG and the second as BROG.

26. Langenscheidt, p. 43.

> expenditures implement the structural and improvement goals in the plans. In this connection it is not irrelevant to consider the time span for investment since investment in functional activities is intertwined with development and requires simultaneous development action. Development of the infrastructure without the location of the presumed industries remains only a torso and not a whole body, just as the development of extensive housing which results in pupils without schools is similarly unbalanced.[27]

Planning Structure: The Importance of the Community

At first glance, the structure of German planning is quite similar to that in the United States. At least three levels of government share in planning responsibility: the Federal Government or *Bund,* the States or *Länder,* and the local governments. But a closer examination of this structure indicates some important differences, particularly at the local level.

To begin with, the structure is not completely uniform along the eleven States, the sharpest differences being with respect to the three City States–Berlin, Bremen, and Hamburg. Certain major differences are also found in the Saarland. Space will not permit a State by State review (see chart), so the following generalizations are subject to some exceptions in particular situations.

At the lowest jurisdictional level are the *"Gemeinden"*[28] or communities (probably approximating New England or Pennsylvania towns). The *"Gemeinden"* are both political or governmental and sociological entities–in the latter sense having hundreds of years of history behind them. As of 1969, the German Federal Republic was composed of some 24,000 *"Gemeinden,"* many of which are in fact cities. One writer defines *"Gemeinden"* as follows:[29]

> The *"Gemeinden"* are jurisdictional public corporations, answerable to themselves (*i.e.* independent), managing their own affairs and their areas within guidelines of the Constitution and statutes which apply to public management. Within their areal jurisdictions, they may undertake any public assignment which is not by statute delegated to another agency.

The similarity to American "Home Rule" concepts is evident. Paraphrasing another author:[30] The *"Gemeinde"* has a key position in *Raumordnung;* it is the articulate partner in planning administration. It is the focal point for *Raumordnung* action; its area is the object of

27. Evers, *op. cit.* n. 22 at p. 29.
28. *Id.*, Chapter 9; *Handwörterbuch,* "Gemeinde" 890.
29. *Handwörterbuch,* "Gemeinde," 891.
30. Evers, *op. cit.* n. 22 at p. 135. This is labeled a "paraphrase" rather than a translation, since a few liberties were taken, drawing on other writers and information.

STRUCTURE FOR "RAUMORDNUNG"
GERMAN FEDERAL REPUBLIC

Cabinet Committee for "Raumordnung" of the Government
Federal Minister for the Interior as the Minister
Responsible for "Raumordnung"
Interagency Committee for "Raumordnung" (IMARD)

Ministerial Conference
for "Raumordnung"

Adapted from Europa-Glossar der Rechts-und Verwaltungssprache: Raumordnung, Volume 9. Langenscheidt: Berlin/Munich, (1970?), p. 31.

FEDERAL LEVEL:

FEDERAL STATE COOPERATIVE LEVEL:

STATE LEVEL:

Baden-Württemberg	Baveria	Hesse	Lower Saxony	North Rhine-Westphalia	Rhineland-Palatinate	The Saar	Schleswig-Holstein	Berlin	Bremen	Hamburg
Interior Ministry, highest authority for land planning	State Ministry for Economics and Commerce, highest authority for land planning	Minister-president, highest authority for land planning	Interior Minister, highest authority for land planning	Minister-president, highest authority for land planning	Minister-president, highest land planning administrator	Interior Minister, land planning administrator	Minister-president, highest land planning agency	Senator for Construction and Housing	Senator for Housing	Senate Staff Office Planning Unit

The City States carry on internal "Raumordnung" in terms of urban land use and control pursuant to the Federal Housing Statute.

AREA (BEZIRK) LEVEL:

4 administrative chairmen with subordinate authority for land planning	7 area (Bezirk) administrations with intermediate administrative authority for land planning	2 administrative chairmen as area planning agencies	8 administrative chairmen (or heads of administration) intermediate planning authorities	6 administrative chairmen and the administration for the Ruhr as area planning authorities	3 area administrators as intermediate planning agents

"KREIS" AND REGIONAL PLANNING LEVEL:

Regional Planning Associations formed by "Gemeinden" and "Landkreisen"	District authorities (administrators of the "Kreisen") lower level planning authorities, also responsible for regional planning associations of the "Gemeinden" and "Landkreisen"	District administrator of state authority Also the Cities not included in "Kreisen" and "Landkreisen" which have organized planning associations	"Landkreise" and Cities not in "Kreisen" as lower level planning authorities. These may combine in planning associations; if not the Hanover Federation is resonsible for the regional planning	Chief "Kreis" director, responsible for supervising lower level planning administration. 3 land planning associations for Rhineland, Jesiphalia, and Settlement Association for the Ruhr Coal Area (Bezirk)	District authorities, lower level planning agencies who also are responsible for regional planning associations formed by "Kreisen," and Cities not in "Kreisen"	District administrator for lower level administrative units "Landkreisen" and planning associations made up of "Landkreisen," agencies, and "Gemeinden"	"Kreisen" or regional land planning associations, made up of "Landkreisen" or Cities not in "Kreisen"

as well as the showplace for development planning. The *"Gemeinde"* is active and answerable for the realization of plans because it has responsibility for building planning and control of building land, and for location and maintenance of the intra-city street network. It shares with the *"Landkreis"* responsibility for providing water, and often also electricity and gas, as well as for the construction of schools, hospitals, and cultural facilities. The *"Gemeinden"* develop markets and commercial areas, and together with the *"Landkreis"* generally facilitate commerce. Through their savings banks they encourage industry and of course are active in the construction of public housing. In many cases the *"Gemeinde"* owns the land which is utilized for development, or it may use its land to work out land trades to further development plans. Because of the emphasis on self-determination (home rule) and independence, the *"Gemeinden"* and the *"Landkreisen"* are important links in the legal structure for development. In this connection, they are obligated to conform their activities to the goals and provisions of *"Raumordnung"* and land planning, and required to act consistent with policies determined at higher jurisdictional levels; it is apparent that the flexibility of the local governments is increasingly being restricted and limited through State and Federal actions, which recognize the importance of larger geographic units for coordination and integration of planning.

Throughout the 19th Century, the trend in Germany was to increase the authority and autonomy at the local level. The Weimar Constitution confirmed this local autonomy, even while planning problems more and more transcended local boundaries and competence. Under the Third Reich, the *"Gemeinden"* lost much of their autonomy, serving as end links in an administrative system. Immediately after the end of World War II, even before State and National governments were restored, the *"Gemeinden"* again assumed their autonomous functioning with noteworthy responsiveness to the needs and problems of the local populace. Presently, however, although still key governmental units, the *"Gemeinden"* have been reduced in number through consolidation, and others have been encouraged (and sometimes required) to join in cooperative regional planning efforts. Even where they have been consolidated the government seeks to preserve their cultural integrity, and in the planning process decisions at the local level provide for a maximum of citizen input.

A considerable amount of planning responsibility, however, has been placed at the next higher levels of government (the *"Landkreis"* or the *"Regierungsbezirk,"* approximating our counties or intra-state

regional units). Planning associations of local communities (*Landesplanungsgemeinschaften*) remain important planning agencies, while review and surveillance of plans rests with the *"Länder."*

Regional planning is emphasized in the German system, a variety of arrangements for carrying on such planning have been developed, including the establishment of federations or associations (previously referred to) which are not unlike American Councils of Governments.

The Basic Law and Planning

The Federal statutes on *"Raumordnung"* and land planning, discussed below, apply in the first instance to government, government agencies, and public corporations. At the same time, their consequences for what an individual may do with his land are far reaching. Thus it is significant to examine the provisions of the German Basic Law, particularly its Bill of Rights, as it relates to property and property rights.[31]

Clearly, the Basic Law (*Grundgesetz*) contains more detailed language on property and property rights than does the American Constitution. In one sense, therefore, judicial (as contrasted to legislative and administrative) interpretation has played a lesser role than in the United States where a few sparse clauses have permitted the development of far-reaching constitutional principles by the courts. At the same time, the more extensive language in the German Basic Law has in the pattern of Civil Law scholarship led to a substantial literature on the meaning and intent of the provisions of the Basic Law.[32]

Article 14 of the Basic Law is entitled "Property, Right of Inheritance, Expropriation." It states in *Section 1:* "Property and the right of inheritance are guaranteed." This unequivocal declaration of principle is modified by the following sentence: "Their content and limits shall be determined by statute." To American lawyers this qualifying language would seem to open a veritable Pandora's Box of constitutional litigation. Is the first sentence self-executing or does it *require* statutory implementation? In what way are implementing statutes limited by the first sentence, or do the two sentences together simply authorize substantive legislation which would in fact spell out the extent and limitations of property rights? This may not disturb Civil Law lawyers who assume that legislative explication is a necessary step, not to qualify but to implement the general declaration of goals.

31. *See* n. 2 *supra* concerning the Basic Law.
32. *See supra* n. 7.

Section 2 (of *Article 14*), echoing Locke, Blackstone, and many U.S. Court opinions, declares: "Property imposes duties. Its use should also serve the Public Interest." No statutory implementation is indicated. And one might speculate at length on what kind of duties and what kind of service is indicated. Present-day market-oriented economists, following Adam Smith, might argue that one serves the public good best when one seeks one's own interest! Implicitly, Federal planning legislation derives part of its authority from this concept of the social obligation of property ownership.

Section 3, dealing with expropriation or condemnation ("The Taking Issue"), reads: "Expropriation (condemnation) shall be permitted only in the public interest. It may only occur pursuant to a statute or on the basis of a statute which regulates the basis for and amount of compensation." The idea that expropriation may be for a "public purpose" only is also familiar in American law, and the requirement that "taking" be pursuant to statute is comparable to our "due process" concept as it initially appeared in Magna Carta, *i.e.* "in accordance with the law of the land." The language with respect to the basis for and amount of compensation has weaker normative content than the American "just compensation," particularly as the latter has been interpreted to mean "market price." There is no evidence, incidentally, that German courts construe regulation as likely to become expropriation in the sense of *Pennsylvania Coal Company v. Mahon.*[33]

Section 3 continues: "Such compensation shall be determined by establishing an equitable balance between the public interest and the interest of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the ordinary courts." The "balancing" function with respect to the amount of compensation indicates rather clearly that "market price" is not automatically the determinant. In fact, German courts have rejected market price, pointing out that such a price includes within it socially generated values for which the public ought not to be required to pay. It is interesting to note that while American law (particularly *Pennsylvania Coal Company v. Mahon*) develops the idea of balancing to determine whether land use regulations go too far, permitting substantial diminution of value but not a complete wipeout, a similar approach has not been used in determining value in condemnation cases. The balancing idea has also been introduced in the interpreta-

33. 260 U.S. 393 (1922). For a discussion of this case and its consequences for American land use planning law, see F. Bosselman, D. Callies, and J. Banta, *The Taking Issue,* written for the U.S. Council on Environmental Quality. U.S. Government Printing Office, Washington, D.C. (1973).

tions of the National Environmental Policy Act,[34] but again not as related to valuation. One is led to suggest that perhaps American courts have been too ready to interpret "Just Compensation" as meaning market price, including expectations of profit which might conceivably result from changes in present land uses. It is significant that expectations play no part in German valuations, compensation being determined by present uses, and these in turn being determined by the land use plan.

It is interesting to note that *Article 15* of the Basic Law authorizes the socialization of means of production *with compensation* pursuant to the provisions on this subject of *Article 14.* As a matter of logic, however, one might argue that the "balancing" of individual and public interests could be interpreted by a Socialist regime as requiring only token compensation, the interests of society being weighted most heavily in the balancing.

Freedom of movement, and the rights to choose one's occupation, place of work, and place for fullest personal development are protected in *Articles 1 and 2.* These provisions are similar to our judicially developed doctrine of the "right to travel" as most recently enunciated by a California Federal District Judge in the "Petaluma Decision."[35] There is no evidence, however, that the German Constitutional Court has applied these articles to restrict land use planning.

Important to planning is the way in which the Basic Law allocates authority between the Federal Government and the States. Somewhat similar to the American situation, residual powers (*i.e.* those not specifically delegated) lie with the States. But the provisions (*Article 72* and *Articles 74 and 75*) with respect to "concurrent powers" find no equivalent in American law or practice. *Articles 74 and 75* are a catalog of areas within which the Federal Government may act by establishing guidelines with which the States must then comply. This authority provides the basis for land use planning and *"Raumordnung."*

Among the topics subject to concurrent authority are: enactments on economic matters; enactments concerning expropriation; laws concerning land transfers, natural resources and means of production; laws concerning abuses of economic power; laws promoting agricultural and forest production and the preservation of coastal zones; laws regarding real estate transactions, land law, and housing; laws on transportation and highways; laws on hunting and nature

34. 42 U.S.C. § § 4321-4347.

35. Construction Industry of Sonoma City, et. al. v. City of Petaluma, 375 F. Supp. 574 (1974); cited in 7 *Land Use Digest,* No. 2, at 2 (1974).

protection, care of the countryside, land distribution, regional planning, and water management. (This is only a partial listing.)

In this area of concurrent powers, Federal-State relations would seem to be similar to the situation in the U.S. where a state statute directs and controls local administration; *e.g.* a state may direct county assessors to perform their duties pursuant to specified policies and procedures. It is necessary to have this relationship in mind in considering the two basic planning statutes.

The Statutory Basis for Land Use Planning

German land use planning and control today rests on two fundamental Federal statutes enacted, as indicated above, under the provisions of the Basic Law concerning concurrent jurisdiction. These statutes are, first, the *"Bundesbaugesetz"*[36] (literally but inadequately translated as the Federal Building Statute), and second, the *"Bundesraumordnungsgesetz"*[37] (the Federal Statute on the Ordering of Space). Both of these are outlined below since they are crucial to understanding the scope and approach to land use planning in Germany. At the same time, it should be emphasized that there are numerous other Federal and many more State statutes that contribute significantly to both the process and the substance of land use planning. But the coordinating thrust of these two statutes places them in a kind of superior position with respect to planning and for this reason it is desirable to outline their provisions.[38]

The *"Bundesbaugesetz"* includes the following chief parts:[39]

I. Planning to guide building land uses.
II. Achieving building land use plans.
III. Regulation of construction and related land uses.
IV. Allocation of land to uses; boundary regulation.
V. Expropriation (condemnation).
VI. Development.
VII. Valuation of parcels.
VIII. Administrative procedures.
IX. Procedure before the Council for Building Land Questions.
X. Changes affecting land taxes.
XI. Transitional provisions.

36. *See supra* n. 25.
37. *Id.*
38. Numerous other Federal Statutes (as well as many statutes of the Länder) are important for planning, such as: Naturschutzgesetz, 26 June 1935 (RCB1. I, 821); Flurbereinigungsgesetz, 14 July 1953 (BCB1. I, 591) and 28 August 1969 (BCB1. I, 1513); Bundesfernstrasengesetz, 6 August 1961 (BCB1. I, 1742) and 5 May 1970 (BCB1. I, 465); Wohnungsbaugesetz, 1 September 1965 (BCB1. I, 7); Städtebauförderungsgesetz, 27 July 1971 (BCB1. I, 1125).
39. *See supra* n. 25.

An examination of the details of this statute is beyond the scope of this article. But several provisions require comment. First, the system established is complete; beginning with "raw" or natural land, it moves through several stages until land is designated for a range of purposes, including land suitable for building. And when finalized, use plans become administrative law.

The stages in the planning process are, first, a general plan (*Flächennutzungsplan*) which identifies residential, mixed residential/commercial, industrial, and special use areas. This general plan is suggestive only; it is not legally binding. At the next stage the detail is increased to ten classes: 1) small settlement areas; 2) exclusively residential areas; 3) general residential areas (which include multi-family units and related service shops); 4) village areas; 5) mixed areas; 6) central business areas (business centers); 7) light industry; 8) heavy industry; 9) week-end, recreation homes; and 10) special areas. After appropriate and lengthy procedures have been followed, including provisions for hearings, comments and criticisms, and review by State authorities, this plan becomes legally binding.[40]

It is recognized that the effects of a legally binding land use plan may diminish or increase the value of particular parcels. However, German law does not generally consider regulatory consequences of such a land use plan as involving issues of expropriation, unless the plan includes assignment of land to public uses. An important aspect of this planning process is the authority granted to the planning agencies to freeze existing land uses while the plan is being formulated, for periods up to four years. If the freeze extends beyond four years, damages may be involved. It seems clear that this authority to freeze land uses together with the binding effect of the adopted plan does much to dampen land speculation, even though it does not eliminate the possibility of unearned increments from planning decisions. Another important concept is the emphasis in the law on social necessity as the justification of particular decisions.[41] This requires justification of plans and would appear to be similar to our requirement that plans must be reasonable and not arbitrary, clearly setting forth public purposes (health, welfare and safety of the public).

As already indicated, the statute places initial responsibility for planning on the approximately 24,000 *Gemeinden,* but increasingly planning administration is occurring at higher levels, and substantive

40. In addition to the statutory provisions, administrative orders have been issued which have the effect of law and are called "Baunutzungsverordnung." See *Handwörterbuch,* 175.

41. This is clear both in the law and in the administrative orders.

guiding decisions also come from higher levels. This trend is strengthened by the second law of major importance.

The *"Bundesraumordnungsgesetz"*[42] enacted in 1965, five years after the *"Bundesbaugesetz,"* was a response to the recognition that land planning for the nation had to be goal oriented. Planning procedures were not sufficient. This statute is most important, therefore, for its identification of spatially related planning goals, and its requirement that these goals be explicitly sought by State and local planning authorities. While in tone the specification of goals is not unlike those in our National Environmental Policy Act, they differ in that they apply to the entire government system and must be complied with (and are complied with) by public authorities at all levels. It is as though the National Environmental Policy Act applied to state and local agencies as well as to Federal, and as though agency employees "rushed" to follow the Congressional mandate, obviating the resort to citizen litigation. Just incidentally, compliance in the German system is more or less automatic, being implicit in the way the system has been st up, and the way in which it has worked for many years. This *"Bundesraumordnungsgesetz"* provides:

I. General scope and goals of *Raumordnung.*
   1. Development of the individual personality.
   2. Consideration of German Unification.
   3. Advancement of European cooperation.
   4. Interrelationships of national and local planning goals.

II. Basic Policies for *Raumordnung.*
   1. Healthful living and working conditions; balanced economic and social opportunities; appropriate population densities; development of depressed areas, especially the border zone; improvement of agricultural and forest lands; environmental protection; etc.
   2. Careful balancing of these several objectives and policies is required.
   3. The *"Länder"* are authorized to enact additional consistent policies.

III. Implementation procedures; application of the statute; citizens not directly affected.

IV. Implementation of goals and policies.

V. Mandate to the *"Länder."*

VI. Coordination of functional activities.

VII to XIII. Details on procedure.

Perhaps the most important aspect of this statute is its clear recognition that meaningful land use planning must be goal-oriented, that

42. *See* note 25 *supra.*

land use plans only begin to make sense when they are effectively related to larger purposes with respect to population location and density, economic development and location, transportation, recreation, and other aspects of human activity in a modern society. It is the almost total lack of attention to these relationships in the American pattern of land use control that reveals its arbitrariness and perhaps contributes to its failures. Too often the values being implemented in American plans are those of the planner, never clearly articulated, and never decided by political processes. Early discussions of zoning often suggested that zoning is only reasonable when "in accordance with a master plan," but in fact such relationships are rare.[43]

This essay represents only a beginning review and assessment of German land use planning and control. Much more remains to be researched and written about to complete the story. At the most general level basic concepts—such as the concept of property (*Eigentum*) itself—need to be explored. At the middle-range level, policy development, content, and application—such as the approach to recreation planning—require further explication. At the bottom of the scale, case studies of the actual planning process (including citizen involvement, and the planning and development of "New Towns") need to be prepared. But hopefully this essay has provided a useful introduction to the land use planning experience of the German Federal Republic.

43. Haar, *In Accordance with A Comprehensive Plan*, 68 Harv. L. Rev. 1154 (1955).