Judgment of 18 July 2023 - BVerwG 4 CN 3.22

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Compatibility of section 13b BauGB with EU law

Headnote

Section 13b BauGB is incompatible with article 3 (1) and (5) of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (SEA Directive).

Sources of law

Federal Building Code	BauGB, *Baugesetzbuch*	sections 2 (4), 2a second sentence no. 2, sections 13 (3) first sentence, 13a (2) no. 1, sections 13b, 214 (1) first sentence no. 3, section 215 (1) first sentence no. 1
Directive 2001/42/EC		articles 1, 3 (1) to (5)

Summary of the facts

The applicant, an environmental association recognised pursuant to section 3 of the Environmental Appeals Act (UmwRG, *Umwelt-Rechtsbehelfsgesetz*) is bringing judicial review proceedings to challenge a (binding) zoning plan (*Bebauungsplan*) of the respondent, a municipality.

The zoning plan, which was originally announced in November 2019 and amended in two supplementary procedures, concerns the development of an area measuring approximately 3 hectares at the south-western edge of the respondent's territory; the plan provides for a general residential area. The zoning plan was not drawn up by way of standard procedure, but by way of accelerated procedure pursuant to section 13b of the Federal Building Code (BauGB, *Baugesetzbuch*) without an environmental assessment.

The Higher Administrative Court (*Verwaltungsgerichtshof*) dismissed the application for judicial review (*Normenkontrollantrag*) as unfounded. In particular, it was of the opinion that section 13b BauGB was in conformity with EU law and that the zoning plan procedure had been carried out in the proper form. The applicant's appeal on points of law is directed against this.

Reasons (abridged)

7 The appeal on points of law is well-founded. The judgment of the Higher Administrative Court breaches the law subject to an appeal on points of law (section 137 (1) of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)). The zoning plan (...) is ineffective. It has procedural errors, which are relevant pursuant to section 214 (1) first sentence no. 3, section 215 (1) first sentence no. 1 BauGB and result in its ineffectiveness (section 144 (3) first sentence no. 1 VwGO).

8 1. It was not permissible for the zoning plan to be issued without environmental assessment (section 2 (4) BauGB) and an environmental report (section 2a second sentence no. 2 BauGB). The provisions regarding the accelerated procedure pursuant to section 13b first sentence in conjunction with section 13a BauGB do not support the procedure followed. Section 13b BauGB is incompatible with EU law and is therefore not applicable because it allows the preparation of a zoning plan of undesignated outlying areas on the basis of an impermissible standardisation without environmental assessment.

10 This provision does not meet the requirements of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ L 197 p. 30) - SEA Directive.

11 a) Pursuant to article 1, the objective of the SEA Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development. To that end, article 3 (1) of the SEA Directive provides that an environmental assessment, in accordance with articles 4 to 9 of the SEA Directive, shall be carried out for plans and programmes referred to in article 3 (2) to (4) of the SEA Directive which are likely to have significant environmental effects. While article 3 (2) of the SEA Directive identifies plans and programmes that are always subject to an environmental assessment based, on the one hand, on whether the project in question has to be made subject to an environmental impact assessment

(article 3 (2) (a) of the SEA Directive) and, on the other, on the need for an assessment in accordance with the Habitats Directive (article 3 (2) (b) of the SEA Directive), the reservation pursuant to article 3 (3) of the SEA Directive requires plans and programmes referred to in subsection 2 which merely determine the use of small areas at local level or provide for only minor modifications to be subjected to an environmental assessment only where the Member States determine that they are likely to have significant environmental effects. The same applies pursuant to article 3 (4) of the SEA Directive to other plans and programmes. Both in relation to plans and programmes referred to in article 3 (3) and to those referred to in article 3 (4) of the SEA Directive, Member States shall take this decision pursuant to article 3 (5) first sentence of the SEA Directive either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by the Directive (article 3 (5) second sentence of the SEA Directive).

12 Member States have a margin of discretion when implementing these requirements. However, this discretion is limited. On the substance, Member States must make sure that all plans and programmes likely to have significant environmental effects are subject to an environmental assessment (CJEU, judgments of 22 September 2011 - C-295/10 [ECLI:EU:C:2011:608] - para. 46, 53, of 10 September 2015 - C-473/14 [ECLI:EU:C:2015:582] - para. 47 and of 21 December 2016 - C-444/15 [ECLI:EU:C:2016:978] - para. 53; see also opinion of Advocate General Kokott of 8 September 2016 - C-444/15 - para. 42). While, therefore, there is a strict requirement to meet the objective laid down in article 3 (1) of the SEA Directive, when it comes to the way in which this objective is to be met, Member States are free to choose from the alternatives listed in the Directive, i.e. case-by-case examination, by specifying types of plans or programmes or by combining both approaches. If the mechanisms referred to in article 3 (5) of the SEA Directive are aimed at ensuring that no plan that is likely to have significant effects on the environment is exempted from the requirement of environmental assessment (CJEU, judgment of 22 September 2011 - C-295/10 - para. 53), strict standards must be met when specifying types of plans. They are only met if, in view of the qualitative conditions applicable to a particular type of plan in accordance with the relevant criteria laid down in article 3 (5) second sentence of the SEA Directive in conjunction with Annex II to the Directive, it can be assumed that there are no significant effects on the environment "*a priori*", i.e. from the outset (CJEU, judgment of 18 April 2013 - C-463/11 [ECLI:EU:C:2013:247] - para. 39). When specifying a type of plan, it is therefore essential to ensure by describing the requirements - in broad and comprehensive terms - that significant environmental effects are excluded by the plan for each possible individual case (...). Specifying a type of plan through which the objective of article 3 (1) of the SEA Directive is only achieved by way of a standardised or generalised approach, i.e. using generalisations and fixed rules while at the same time allowing for exceptions, is inadequate.

13 section 13b BauGB is not compatible with those requirements. (...)

14 b) The legislature has (...) opted to specify certain types of plans pursuant to article 3 (5) first sentence second alternative of the SEA Directive. These are (...) characterised by a quantitative requirement (restriction of the floor area) and two qualitative requirements (limitation to residential use and connection of the area for which a zoning plan is being prepared and which is located in the undesignated outlying area to built-up areas). However, this is insufficient. This is because, as far as the plans set out above are concerned, significant environmental effects cannot be ruled out in every case - nor would it appear that they can typically be ruled out. Even in the case of a residential development within an area restricted in size and adjacent to a built-up area, the access to undesignated outlying areas made possible by section 13b BauGB does not rule out the possibility that zoning plans that are likely to have significant environmental effects can be issued using the accelerated procedure. This is true, among other things, by virtue of the large variety of previous uses of the potentially affected areas and the range of their ecological significance (see Annex II to the SEA Directive no. 1, first, third and fourth indent). Meadows in all their various forms (such as wet meadows or meadows on poor soil), for instance, can provide a habitat for numerous species of fauna and flora and thus contribute to biodiversity. (...) The fact that the undesignated outlying areas, for which a zoning plan may be prepared, must be adjacent to a built-up area does not lead to a different result. This follows from the fact that the existing development says nothing about the environment-related characteristics of the adjacent undesignated outlying areas. It is not possible to rely on the argument that an

alleged influence on the character of the area due to the adjacent development would result in the undesignated outlying areas losing their worthiness of protection. Moreover, undesignated outlying areas that are particularly worthy of protection may mark the boundary for any new settlement activities.

15 Unlike in the context of inner urban development which is given privileged treatment by virtue of section 13a BauGB (see CJEU, judgment of 18 April 2013 - C-463/11 - para. 39), it is therefore not possible to define types of plans and programmes for the development of undesignated outlying areas - as permitted by section 13b BauGB - that are *a priori* unlikely to have significant environmental effects. (...)

16 c) A conflict between national law and EU law must be resolved in accordance with the principles on the primacy of application of EU law (see CJEU, judgment of 15 July 1964 - C-6/64 [ECLI:EU:C:1964:66], Costa/E.N.E.L. -). If there is a conflict between EU law and national law, it is for the national court to the full extent of its discretion under national law, to interpret and apply domestic law in conformity with the requirements of EU law and, where this is not possible, to disapply any incompatible domestic provisions (CJEU, judgments of 18 March 2004 - C-8/02 [ECLI:EU:C:2004:161], Leichtle - para. 58, of 13 July 2016 - C-187/15 [ECLI:EU:C:2016:550], Pöpperl - para. 43 et seqq. and, most recently, of 24 July 2023 - C-107/23 [ECLI:EU:C:2023:606], PPU - para. 95).

17 The interpretation of section 13b BauGB in conformity with EU law, which must be given priority according to the above principles, is not possible. It is not a matter for the Senate to replace an unambiguous legal provision *contra legem* with a different provision in order to realise the legislative objective of having a simplified procedure (...).

18 Due to the inapplicability of section 13b BauGB, the reference in the first sentence to section 13a BauGB comes to nothing. This applies in general and does not only relate to section 13a (2) no. 1 in conjunction with section 13 (3) first sentence BauGB. (...)

19 2. Choosing the accelerated procedure pursuant to section 13b first sentence in conjunction with section 13a (2) no. 1, section 13 (3) first sentence BauGB instead of the appropriate standard procedure meant that the respondent unlawfully refrained from carrying out an environmental assessment within the meaning of section 2 (4) BauGB and to prepare an environmental report pursuant to section 2a second sentence no. 2 BauGB, which must, pursuant to section 3 (2) first sentence BauGB, be publicly displayed as part of the reasoning (section 2a third sentence BauGB) together with the draft development plan and which, in accordance with section 9 (8) BauGB, must be attached to the reasoning. This constitutes a relevant procedural error pursuant to section 214 (1) first sentence no. 3 BauGB, which the applicant may object to pursuant to section 4 (2) and (4) UmwRG.

20 The applicant complained about the lack of environmental assessment within one year in accordance with section 215 (1) first sentence no. 1 BauGB (...).

21 This procedural error leads to the overall ineffectiveness of the zoning plan.