



## Press release

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### Section 13b BauGB is incompatible with EU law

For open spaces outside of the settlement area of a municipality a (binding) zoning plan (*Bebauungsplan*) may not be prepared by way of accelerated procedure pursuant to section 13b first sentence of the Federal Building Code (*BauGB, Baugesetzbuch*). That was decided by the Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*) in Leipzig today.

The applicant, an environmental association recognised pursuant to section 3 of the Environmental Appeals Act (*UmwRG, Umwelt-Rechtsbehelfsgesetz*) is bringing judicial review proceedings (*Normenkontrollverfahren*) to challenge a zoning plan of the respondent. This plan relates to an area measuring approximately 3 ha, and designates a (limited) general residential area on the south-western edge of the municipality's territory within an undesignated outlying area in terms of planning law. The zoning plan was drawn up by way of accelerated procedure pursuant to section 13b BauGB. The Higher Administrative Court (*Verwaltungsgerichtshof*) dismissed the application for judicial review as unfounded. It held that the conduct of the accelerated procedure did not give rise to any objections. Section 13b BauGB was compatible with the SEA Directive; the constituent elements of the former were met.

The Federal Administrative Court set aside the judgment and declared the zoning plan ineffective. The plan has a relevant procedural error in the sense of section 214 (1) first sentence no. 3 BauGB. It was wrongly issued by way of accelerated procedure pursuant to section 13b first sentence BauGB. The provision breaches article 3 (1) in conjunction with (5) of the SEA Directive. Article 3 (1) of the SEA Directive requires an environmental assessment for all plans referred to in subsections 2 to 4 which are likely to have significant environmental effects. Whether this is the case shall be determined by the Member States for the plans referred to in subsections 3 and 4 either through case-by-case examination or by specifying types or by combining both approaches (article 3 (5) of the SEA Directive). In section 13b BauGB, the national legislature has opted in favour of specifying types of plans. According to the case-law of the Court of Justice of the European Union, which is responsible for the interpretation of EU law, this approach must ensure that significant environmental effects are ruled out from the outset in every case. Consequently, the legislature must not content itself with a standardised or generalised approach.

Section 13b first sentence BauGB does not meet this unambiguous and strict standard. In contrast to zoning plans for inner urban development in accordance with section 13a BauGB, which are intended to prevent the use of land outside the settlement area, section 13b BauGB permits the preparation of zoning plans for exactly those areas. The constituent elements of section 13b first sentence BauGB - area restriction, limitation to residential use and connection with a built-up area - are not suitable to rule out significant environmental effects from the outset in every case. This is true, among other things, by virtue of the large variety of previous use of the potentially affected areas and the range of their ecological significance.

Due to the primacy of EU law, section 13b BauGB must therefore not be applied. In accordance with the regulations for the standard procedure for drawing up a zoning plan, the respondent should therefore have carried out an environmental assessment and prepared an environmental report and attached it to the reasoning for the zoning plan. This relevant procedural error, which the applicant complained about within the prescribed time limit (section 215 (1) first sentence no. 1 BauGB), results in the overall ineffectiveness of the zoning plan.

**BVerwG 4 CN 3.22 - judgment of 18 July 2023**