



## Judgment of 25 June 2020 -

### BVerwG 4 CN 5.18

ECLI:DE:BVerwG:2020:250620U4CN5.18.0

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## Impermissible choice of accelerated procedure to amend a zoning plan

### Headnote

(...) The applicability of the accelerated procedure under section 13a (1) first sentence BauGB essentially depends on the actual circumstances and not on the status under planning law of the land for which a zoning plan is to be prepared.

### Sources of law

Code of Administrative Court Procedure	VwGO, <i>Verwaltungsgerichtsordnung</i>	sections 47 (2) first sentence, 137 (1) and (2)
Federal Building Code	BauGB, <i>Baugesetzbuch</i>	section 1 (6) no. 4, sections 2 (4), 2a second sentence no. 2, sections 3 (2) first sentence, 9 (8), 10 (3), 13 (3) first sentence, 13a (1) first sentence, (2) no. 1 and 4, (4), 34 (1), 214 (1) first sentence no. 3, section 215 (1) first sentence no. 1
SEA Directive		article 3 (5) first sentence, Annex II no. 1 third indent

## Summary of the facts

Subject of the proceedings is the third amendment to the (binding) zoning plan (*Bebauungsplan*) "Marrbacher Öschle (Marrbachöschle)" adopted in the accelerated procedure under section 13a of the Federal Building Code (BauGB, *Baugesetzbuch*).

The Marrbachöschle zoning plan dating back to the year 1983 covers a total area of 6.1 hectares. It determines a village area for the northern part of the planning area and a general residential area for the remaining area. The majority of the planning was not implemented.

The applicants are owners of the undeveloped plot of land, plot no. ...1, which is located within the scope of application of the zoning plan. Furthermore, the applicant no. 2 is the owner of the plot of land, plot no. ...0, also located within the scope of application of the zoning plan, with residential buildings and buildings formerly used for agriculture for which the zoning plan determines a village area.

By means of the third amendment, the zoning plan Marrbachöschle is amended on an area covering 4.2 hectares with the exception of an area comprising the plot of land, plot no. ...0, in the north and another partial area in the south along the B...straße, which has meanwhile been developed. The plan determines a general residential area for its entire scope of application and revises the internal provision of infrastructure.

The Higher Administrative Court (VGH, *Verwaltungsgerichtshof*) dismissed the applicants' application for judicial review (*Normenkontrollantrag*) of the third amendment. In its view, the admissible application for judicial review was unfounded. It argued that the choice of the accelerated procedure under section 13a BauGB was unobjectionable since the third amendment was a zoning plan of inner urban development.

The applicants' appeal on points of law was successful. The Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*) declared the third amendment to the zoning plan to be ineffective.

## Reasons (abridged)

- 11 The appeal on points of law is well-founded. (...) The judgment of the Higher Administrative Court violates 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 "Marrbacher Öschle (Marrbachöschle)" - third amendment of 23 July 2013, announced on 28 July 2016 ("amended zoning plan"), is ineffective (...).
- 21 B. The application for judicial review is well-founded. The amended zoning plan suffers from formal errors (1.), which, under section 214 (1) first sentence no. 3, section 215 (1) first sentence no. 1 BauGB are relevant and lead to the ineffectiveness of the amended zoning plan (2.).

- 22 1. The amended zoning plan must not be drawn up in the accelerated procedure; the requirements of section 13a (4), (1) first sentence BauGB were not met.
- 23 Under section 13a (1) first sentence BauGB, a zoning plan for the rehabilitation of land, densification or other measures of inner urban development (zoning plan of inner urban development) can be drawn up in the accelerated procedure. That applies accordingly to the amendment of and supplements to a zoning plan (section 13a (4) BauGB).
- 24 In the view of the lower instance, subject of the amended zoning plan was a measure of inner urban development. Due to the preparation of the zoning plan in 1983, the planning area was legally no longer to be categorised as part of the undesignated outlying area under section 35 BauGB, but part of the settlement area; in this respect, the actual circumstances were not relevant. This interpretation of the constituent element inner urban development breaches the law that is subject to an appeal on points of law. In principle, the distinction between inner urban development and the development of undesignated outlying areas is based on the actual circumstances and not on the land's status under planning law (see also VGH Kassel, judgments of 27 October 2016 - 4 C 1869/15.N - (...) para. 28 et seq. and of 6 April 2017 - 4 C 969/16.N - (...) para. 52; Berlin-Brandenburg Higher Administrative Court (OVG, *Oberverwaltungsgericht*), judgment of 21 March 2019 - OVG 2 A 8.16 - (...) para. 33; (...)).
- 25 a) The concept of inner urban development is not legally defined. It consciously does not take up the traditional distinction between built-up areas and undesignated outlying areas, but is assumed by the legislature to be a given urban development term. Its interpretation by the municipality is subject to unlimited judicial review; the municipality does not have a margin of appreciation (BVerwG, judgment of 4 November 2015 - 4 CN 9.14 - Rulings of the Federal Administrative Court (BVerwGE, *Entscheidungen des Bundesverwaltungsgerichts*) 153, 174 para. 22).
- 26 The legislature bases section 13a (1) first sentence BauGB on the older land protection clause of section 1a (2) first sentence BauGB, which stipulates that land is to be used in an economical and careful manner and that the possibilities of the development of the municipality are to be used to reduce the additional usage of land for building use, in particular by using measures of inner urban development and limiting land sealing to the necessary degree. The legislature distinguishes zoning plans of inner urban development from zoning plans that target the development of undesignated outlying areas and in section 13a (1) BauGB aims to promote plans that serve to conserve, renew, further develop, adapt and converse existing urban districts (see section 1 (6) no. 4 BauGB). As examples of areas that may be considered for zoning plans of inner urban development, it names built-up areas within the meaning of section 34 (1) BauGB, wasteland within the settlement area and areas within the settlement area with a zoning plan that is to be amended or replaced by a new zoning plan due to necessary adaptation measures (Bundestag printed paper (BT-Drs., *Bundestagsdrucksache*) 16/2496 p. 12 on no. 8 and subsection 1). By means of the accelerated procedure and the associated procedural simplifications, *inter alia*, not carrying out an environmental assessment (section 13a (2) no. 1 in conjunction with section 13 (3) first sentence BauGB), and the legal fiction of compensating interventions of section 13a (2) no. 4 BauGB for cases falling under section 13a (1) second sentence no. 1 BauGB, the legislature aims to give municipalities an incentive not to use new land by preparing a zoning plan and excessively dispersing undesignated outlying areas (...) and to refrain from the outward expansion of existing settlement areas (BVerwG, judgment of 4 November 2015 - 4 CN 9.14 - BVerwGE 153, 174 para. 24).
- 27 b) This legislative intention is reflected in section 13a (1) first sentence BauGB through the specification of rehabilitation of land and densification as examples of specific measures of inner urban development. However, "other measures of inner urban development" are also specified. "Inner urban development" is thus the generic term (...) enabling the accelerated procedure to be applied. Thus, the applicability of the accelerated procedure in accordance with section 13a (1) first sentence BauGB does not depend on how the municipality refers to the measures intended by the zoning plan but solely on whether it carries out "inner urban development" within the meaning of that provision (BVerwG, decision of 20 June 2017 - 4 BN 30.16 - (...) para. 4).

- 28 The spatial scope of application of section 13a (1) first sentence BauGB is limited by the constituent element of inner urban development. Inner urban development is only permissible within the settlement area; as shown in the explanatory memorandum that also applies to the amendment or adaptation of zoning plans (BT-Drs. 16/2496 p. 12). It is permissible to prepare a zoning plan for land surrounded by a settlement area that has the significance of a built-up area. The external boundaries of the settlement area may not be extended into the undesignated outlying area by the zoning plan (BVerwG, judgment of 4 November 2015 - 4 CN 9.14 - BVerwGE 153, 174 para. 22 et seq.). The boundaries of the settlement area are not determined by planning; planning has to build on the characteristics of the respective location. The fact that the actual circumstances are relevant when determining the boundaries of the settlement area is demonstrated - alongside the cases of application described in the explanatory memorandum - by the legal examples of rehabilitation of land and densification linked to former or current building stock. These suggest that land, that was previously used for construction and that has already at least partly lost its worthiness of protection under land law due to concomitant sealing of soils, is to be used for inner urban development. The legislative history of the provision is another argument in favour of this narrow understanding. According to the draft act of the Federal Government, the accelerated procedure was intended to apply to a zoning plan that "serves inner urban development" (BT-Drs. 16/2496 p. 5). The wording in the legislative procedure has been amended to ensure that zoning plans are not deemed to be plans for inner urban development if they designate building land in what was hitherto an undesignated outlying area and thus have an indirect positive effect on inner urban development (see BT-Drs. 16/3308 p. 17).
- 29 c) An interpretation of the concept of inner urban development based on the actual circumstances is compatible with EU law.
- 30 With section 13a (1) second sentence no. 1 BauGB, the national legislature made use of the second variant of article 3 (5) first sentence 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 197/30 of 21 July 2001; hereinafter SEA Directive) and laid down in abstract, general terms that, exceptionally, certain plans may be adopted in the accelerated procedure and thus under section 13a (2) no. 1 in conjunction with section 13 (3) first sentence BauGB without an environmental assessment under section 2 (4) BauGB (BT-Drs. 16/2496 p. 13). Such an abstract provision is permissible because it is possible to envisage that a particular type of plan which meets certain qualitative conditions is not necessarily likely to have significant effects on the environment, since that condition ensures that such a plan meets the relevant criteria laid down in Annex II to the Directive (see BVerwG, decision of 31 July 2014 - 4 BN 12.14 - (...) para. 10; Court of Justice of the European Union (CJEU, hereinafter Court of Justice), judgment of 18 April 2013 - C-463/11 [ECLI:EU:C:2013:247] - para. 39). The goal pursued by zoning plans for inner urban development of limiting usage of land and avoiding intervention in nature and landscape, also justifies the legal fiction of compensating interventions pursuant to section 13a (2) no. 4 BauGB for cases falling under section 13a (1) second sentence no. 1 (see BT-Drs. 16/2496 p. 15). With this goal, the zoning plan of inner urban development also contributes to promoting sustainable development within the meaning of Annex II no. 1 third indent of the SEA Directive (BVerwG, judgment of 4 November 2015 - 4 CN 9.14 - BVerwGE 153, 174 para. 24; see BT-Drs. 16/2496 p. 1). However, for land consumption and the quality of intervention it is insignificant whether or not a zoning plan has already been prepared for undeveloped land. In particular, the situation that for an area has already been prepared a zoning plan does not justify the conclusion that, in case of usage of this land, significant effects on the environment are no (longer) likely. That applies particularly when, as in the present case, the first preparation of a zoning plan was done without an environmental assessment.
- 31 d) The Higher Administrative Court found, with binding effect on the Senate (section 137 (2) VwGO), that the planning area was not developed prior to adoption of the amended zoning plan, despite the preparation of the zoning plan in 1983. The new planning thus shifts the boundary of the defendant's settlement area (...) into the previously undeveloped area. According to the findings of the Higher Administrative Court, the planning area cannot be regarded as part of the adjoining development to the south (...) and west (...), if only in view of its size of approximately 4.2 hectares, particularly since in principle even an influence on the character of the planning area by the surrounding development is unable to justify the usage of undesignated outlying areas (see BVerwG, judgment of 4 November 2015 - 4 CN 9.14 - BVerwGE 153, 174 para. 25). While it may appear self-evident that the usage of land for which the amended zoning plan was prepared may have

a positive effect on the defendant's inner urban development, that is not sufficient to justify implementation of the accelerated procedure. Thus, this is not a case of inner urban development within the meaning of section 13a (1) first sentence BauGB.

- 32 2. The amended zoning plan suffers from relevant shortcomings due to the choice of the accelerated procedure.
- 33 In any procedure to amend a zoning plan, the municipality is required under section 1 (8) in conjunction with section 2 (4) BauGB to perform an environmental assessment in the interest of environmental protection under section 1 (6) no. 7 and section 1a BauGB. In accordance with section 2a second sentence no. 2 BauGB, an environmental report must also be drawn up in which the effects on the environment envisaged to be significant are ascertained and evaluated. The environmental report is to be publicly displayed together with the draft zoning plan under section 3 (2) first sentence BauGB and attached to the reasoning in accordance with section 9 (8) BauGB. The defendant breached these provisions because it neither performed an environmental assessment nor compiled an environmental report.
- 34 This error is relevant under section 214 (1) first sentence no. 3 BauGB (BVerwG, judgment of 4 November 2015 - 4 CN 9.14 - BVerwGE 153, 174 para. 29). Section 214 (2a) no. 1 BauGB, old version, does nothing to change this. The provision was repealed by article 1 no. 30 of the Act to Strengthen Inner Urban Development in Cities and Municipalities and Further Development of Urban Planning Law (*Gesetz zur Stärkung der Innenentwicklung in den Städten und Gemeinden und weiteren Fortentwicklung des Städtebaurechts*) of 11 June 2013 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 1548) with effect as from 20 September 2013; it was previously not applicable (any longer) because it was incompatible with EU law (CJEU, judgment of 18 April 2013 - C-463/11 - (...) para. 44; BVerwG, judgment of 4 November 2015 - 4 CN 9.14 - BVerwGE 153, 174 para. 27).
- 35 The applicants complained about the shortcoming within one year in accordance with section 215 (1) first sentence no. 1 BauGB. This shortcoming leads to the overall ineffectiveness of the amended zoning plan.