

PLANNING APPROVAL OF PUBLIC INFRASTRUCTURE PROJECTS IN
GERMAN ADMINISTRATIVE PROCEDURE LAW

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The author examines the sequence of administrative procedures in course of implementation the planning approval of public infrastructure projects in Germany.

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I. Introduction

Public Infrastructures are vital for a modern society. The dependable and sustainable provision of the services which these infrastructures convey is a fundamental precondition for a country's economic development, society's well-being and political stability. Thus, the public authorities are responsible for providing the public with adequate infrastructures such as roads, railways, power nets, waterways, airports, etc.¹ Planning approval is the administrative key tool to ensure the fulfillment of that responsibility.² Public infrastructure projects will almost always have spatial impacts and numerous other effects. Especially environmental effects and effects on the property of institutions and individuals are connected with almost any sectoral planning decision. The purpose of sectoral planning is therefore to determine whether a particular infrastructure is to be permitted to proceed despite its various effects. The procedure provides a reliable basis for ensuring that the affected public and private interests are sufficiently taken into account. However, this does not mean that the decision to realize a project needs the approval of those affected by the project. On the contrary the planning approval is the only permission in German administrative law which allows – unlike the building permission or the permission to erect an industrial plant – to overcome the legal position of third parties. With the words of the Federal Administrative Court of Germany the 'planning approval authority is vested by law with the authority to bring private and public interests into balance and overcome the interests if necessary in order to realize a specific project that serves the public good.'³

Planning approval includes all of the other required decisions by public authorities (e.g., licences, permits, concessions, consent) and regulates all public-law relationships between the developer and those affected by the project. The outcome of planning approval procedure is a legally binding decision, called planning approval. In the following overview of the procedure from the beginning of the planning process to the final, legally binding decision is given. A short description of judicial review of planning approval decisions will complete the report.

II. Statutory regulations

Planning approval procedure is applicable only in cases where sectoral planning is specifically provided by law. For most public infrastructure projects the planning approval procedure is governed by specific federal or state laws

1 <http://www.bmi.bund.de/SharedDocs/Bilder/EN/Themen/07-Bevoelkerungsschutz/Kritis.html>

2 Steinberg/ Wickel/Müller, Fachplanung, 4th ed. 2012, p.27;

3 D. f. 11.4.1986 - 4 C 51.83 - BVerwGE 74 p.124, 133.

e.g. the Federal Highway Act or the Federal Railway Act in connection with the general principles of planning approval procedure which have been defined in the Federal Administrative Procedure Act of 1976.⁴ In fact the Federal Administrative Procedure Act can be characterized as the basic pattern of all approval procedures. But the federal level does not have sole authority to pass legislation on administrative procedures. As far as the German states enforce state laws, they also have authority to pass legislation on administrative procedures. However, federal and state laws on administrative procedures are largely the same, so this report deals only with the federal level and the principles laid down in the (Federal) Administrative Procedure Act.

In sec. 9 of the General regulations of the Federal Administrative Procedure Act administrative procedure is defined as the activity of authorities having an external effect and directed to the examination of basic requirements, the preparation and adoption of an administrative act or to the conclusion of an administrative agreement under public law; it shall include the adoption of the administrative act or the conclusion of the agreement under public law. Unlike the general procedure, which is not tied to specific forms (sec. 10), the planning approval procedure in part V sec. 72 to 78 is subject to detailed rules concerning especially the hearing procedure (sec. 73, 74).

In addition to sec. 72 to 78 and the specific sectoral planning laws planning procedure in Germany is subject to a variety of environmental regulations based on EU law. A central role plays the Council Directive 85/337 on the assessment of the effects of certain public and private projects on the environment⁵ and the Council Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora⁶ and the Directive 2009/147/EC on the conservation of wild birds.⁷ The environmental impact assessment represents an integral part of procedures applied by authorities when deciding upon the approval of projects. Environmental impact assessment comprises identification, description and assessment of a project's effects on human beings, animals and plants, soil, water, air, climate and landscape, including the individual interaction that may occur, cultural goods and other material assets.

4 In the following paragraphs without stating a law are those of the Administrative Procedure Act.

5 OJ L 175, 27.6.1985, replaced by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment which replaces the Directive 85/338/EC, amended by Directive 2014/52/EU of 16.4.2014, OJ L 124/1, 25.4.2014.

6 OJ L 206, 22.7.1992, p.7-50.

7 OJ L 20/7, 26.1.2010

III. Planning approval procedure

1. Developing of the plan and hearing procedure

According to sec. 73 para.1 planning procedure starts with the submission of the plan to the hearing authority by the project developer. The plan shall comprise the drawings and explanations to clarify the project, the reasons behind it and the land and structures affected. The documents must satisfy the informatory purpose and be sufficiently specific; the hearing authority has to review the plan with regard to completeness. The fact, that a complete plan has to be submitted from the project developer indicates clearly that the legally regulated procedures in the Federal Administrative Procedure Act cover only the final stage of planning activity. Before submitting the plan to the hearing authority the project developer shall regard all regard requirements and planning limits. For this purpose he has to obtain all necessary information. To accomplish the requirements of the legal binding norms of the environmental law in virtually all cases an expert assessment is necessary. In addition the developer has to consider and evaluate previous planning decisions like spatial development plans and all reasonable alternatives and – finally – has to weigh the public and private rights and interests affected by the planning decision.

This raises the currently much discussed question⁸ what impact the subsequent participation and hearing procedure may still have. The question gains even more importance since not only the plan is already completed when it is submitted to the hearing authority to start the formal approval procedure but in practice numerous discussions and meetings between the hearing authority and the project developer are held before the plan is formally handed in. However informal procedures in the pre-application phase are not prohibited as long as there are no binding agreements or commitments of the authorities involved.

2. Hearing procedure

a) Disclosing of the plan

If the plan submitted fulfills all the requirements hearing procedure starts. The hearing procedure aims at disclosing the plan with the objective to involve the parties concerned, to obtain the opinions of the responsible bodies of public concerns and to clarify matters in terms of environmental law. In this context parties concerned have the possibility to raise objections against the plan.⁹ Objections in

⁸ Ziekow, in Ziekow, Handbuch des Fachplanungsrechts, 2ed 2014, p. 17; Steinberg/Wickel/Müller, Fachplanung, 4th ed 2012, p 139; Schink, Öffentlichkeitsbeteiligung – Beschleunigung – Akzeptanz, DVBl. 2011, 1377; Böhm, Bürgerbeteiligung nach Stuttgart 21: Änderungsbedarf und Perspektiven, NuR 2011, 614.

⁹ http://www.stadtentwicklung.berlin.de/verkehr/politik_planung/planfeststellungen/index_en.shtml

the planning approval procedure have to be objective counter-arguments, which aim at the prevention or modification of the project applied for whereas a mere “no”, a non-specified protest and the simple information that no objections will be raised without giving a specified explanation within the objection period, are not considered as objections.¹⁰ The objection must at least generally determine the object of legal protection, and explain the fear of interference with personal interests.¹¹

aa) Public authorities

Within one month after receiving the complete plan the hearing authorities are to gather the opinions of those public authorities whose spheres of competence are affected by the project (sec.73 para 2). These authorities shall report their opinions within a period to be stipulated by the hearing authority, and is not to exceed three months. Comments made after the date set for discussion shall be disregarded, unless the matters raised are already or should already have been known to the planning approval authority or have a bearing on the legality of the decision (sec. 73 para 3a).

bb) Citizen’s participation

The second key element of the hearing procedure is citizens’ participation. The participation of the public in the planning of infrastructure projects is of high priority in our society and plays an important role in the approval procedure. It starts with the disclosing of the plan in those communities (municipalities) on which the project is likely to have an impact. The communities shall make the plan available for inspection for a period of one month. This procedure may be omitted where those affected are known and are given the opportunity to examine the plan during a reasonable period (sec. 73 para 2, 3). Any person whose interests are affected by the project may lodge objections against the plan in writing or in a manner to be recorded with the hearing authority or with the community (sec. 73 para 4 sen. 1).

cc) Environmental organizations

The participation of recognized environmental organizations has been provided in the German nature conservation law for some time. The aim is to mobilize the expertise of these organizations. The position of the organizations in the planning procedure had not been clearly defined in the past until they were treated by the Administrative Procedure Act as part of the public. Thus, they are subject to the same rules as citizens.

10 Federal Administrative Court (BVerwG) D.f. 3.3.2011 - 9 A 8.10 - BVerwGE 139, 150 note 25.

11 http://www.stadtentwicklung.berlin.de/verkehr/politik_planung/planfeststellungen/index_en.shtml

dd) Preclusion

Objections shall be lodged to the hearing authority within two weeks after the end of the inspection period. Following the closing date for lodging objections, no objection shall be allowed except those which rest on specific titles enforceable under private law (sec. 73 para 4 sen. 3).

This preclusion-rule is based on the assumption that to ensure the competitiveness of the business location Germany it was necessary to streamline administrative procedures for approval of infrastructure projects.¹² It is of great practical importance since it does not only limit the extent of scrutiny of the planning approval authority, but also limits the scope and intensity of judicial review by the courts. Because of the far reaching consequences the preclusion only applies if is noted in the announcement of the inspection period or in the announcement of the closing date for lodging objections (sec. 73 para 4 sen. 3).

Preclusion is problematic with regard to the requirement of effective legal protection as guaranteed in Art. 19 para. 4 of our Constitution (see V). However, the Federal Constitutional Court confirmed preclusion as constitutional: Public interest to obtain legal certainty as to the existence of a permit within a reasonable period of time on the one hand and the strengthening of the legal position of the objectors by the hearing procedure justifies the preclusion.¹³ Recently the preclusion in § 73 para 4 has been questioned by the European Commission. The Commission doubts that the preclusion is in line with European law as far as members of the public are concerned. The Commission is of the opinion that Art. 11 of Environmental Impact Assessment Directive (Directive 2011/92 EU)¹⁴ requires Member States to ensure a full review of the decisions without limiting the reasons that are to be submitted to the court. Therefore, an infringement procedure against Germany is currently pending at the European Court of Justice.¹⁵

b) Hearing

Following the closing date for lodging objections, the hearing authority shall discuss the objections made to the plan in good time as well as the opinions of the authorities with regard to the plan with the project developer, the authorities, the people affected by the plan and those who have lodged objections to it. The date

12 See Ziekow, *Fachplanungsrecht*, 2nd ed. 2014, p. 65; Steinberg/Wickel/Müller, *Fachplanung*, 4th ed, 2014, p. 173-175.

13 Federal Constitutional Court (BVerfG), D. f. 8.7.1982 - 2 BvR 1187/80, BVerfGE 62 p. 83, 114; Federal Administrative Court (BVerwG) D.f. 14.7. 2011 9 A 12.10, BVerwGE 140, 140 note19-26.

14 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment which replaces the Directive 85/338/EC, see also footnote 5.

15 EU-Infringement procedure No. 2007/4267.

of the meeting for discussion must be announced at least one week beforehand according to local practice (sec. 73 para 6). The public hearing and specially the discussion are seen as the central and core element of hearing procedure. Its aim is to ensure transparency, to increase acceptance of the project and to avoid litigation. In particular to achieve the latter objective, it is essential to exchange arguments and to discuss the pros and cons of various solutions without inappropriate time pressure.¹⁶ This raises the question as to whether it is possible or likely to solve conflicts between the parties concerned via a meeting and discussion at that late stage of the project. The assumption that the developer will not be very willing to change the plan is not far-fetched and in quite some constellations the project developer will not be able to do so without jeopardizing the whole project. These questions were discussed intensely in the aftermath of partially violent protests against the conversion of the main train station in the city of Stuttgart a few years ago.¹⁷ Meanwhile the legislature has responded with the introduction of an early public participation prior to submission of the plan to the hearing authority in Sec. 25 para 3. But this early participation of the public is not compulsory so it is up to the developer whether he makes use of it. In addition to an early citizen participation referendums and mediation procedures are discussed. These instruments raise a number of questions that cannot be discussed here. In Stuttgart, eventually, both took place, a legally not intended and non-binding mediation as well as a referendum provided for in the State Constitution.¹⁸

c) Alteration of a plan

Since the purpose of the consultation process is to obtain additional information about the project and its impacts, it is obvious that the public hearing can lead to changes in the plan. Procedural law must therefore give an answer on how to deal with such modifications.¹⁹ If the modification affects the project as a whole or in a fundamental way the answer can only be an entirely new procedure. In other cases if the modification concerns only a certain part of the plan such an obligation would be counterproductive. The incentive to incorporate newly gained better knowledge into the plan would be small.²⁰ Sec. 78 para 8 gives the answer to this dilemma: If a plan already open for inspection is to be altered, and if this means

16 See Wickel, in Ehlers, Ehlers/Fehling/Pünder, *Besonderes Verwaltungsrecht*, 3 ed. 2013, Vol. 2 § 39 Note 39.

17 The total cost of the project Stuttgart 21 are now estimated at 6 billion euro; the planning approval decision from 2005 was challenged only by a few opponents

18 In the statewide referendum 58.9% voted against the withdrawal from the project financing and 48, 2% for it. The voter participation was rather high at 48, 3 %.

19 Wickel, (footnote 16) § 39 note 42

20 Wickel, (footnote 16) § 39 note 42.

that the sphere of competence of an authority or the interests of third parties are affected for the first time or more greatly than hitherto, they shall be informed of the changes and given the opportunity to lodge objections or state their points of view within a period of two weeks. If the change affects the territory of another community, the altered plan shall be made available for inspection in that community.

d) Statement of the hearing authority

The last step of hearing procedure is made by the hearing authority. It shall issue a statement concerning the result of the hearing and shall send this together with the plan and the opinions of the authorities as well as those objections which have not been resolved to the planning approval authority, sec, 73 para 9. The final report of the hearing authority shall as notification of the result of the hearing procedure enable the planning authority to make a decision on the project.

IV. Decisions on planning approval

After the plan and the statement concerning the result of the hearing is submitted to the planning approval authority, this authority has to consider and decide on the plan (sec. 74 para 1). The deciding procedure is not defined in detail in the Administrative Procedure Act. But it is clear that solely the project of the developer, as it was submitted to the hearing authority and with alterations made during the hearing procedure, is subject to the review of the planning authority. By no means the planning approval authority has the right to modify or supplement the project and the plan. If the plan does not fit the legal requirements, the planning approval authority may ask the project developer to submit in good time any documents still missing or required to decide upon the plan.

In a first step the planning authority shall consider whether the legal requirements of the spatial planning law and other compulsory legal norms such as environmental law are fulfilled. In a second step the planning approval authority has to check whether the weighing (consideration) of both the interests of the developer and the public or private interests which might be affected by the project was sufficient. However, it is not for the planning authority to substitute their choice as to how the planning discretion ought to have been exercised. The planning authority only has to retrace the consideration of the project developer. In the course of this, the planning authority has to decide whether the plan meets the compulsory legal requirements and whether consideration has been sufficient.

The planning approval decision shall contain the decision of the planning approval authority concerning the objections on which no agreement was reached during discussion before the hearing authority. It shall impose upon the project developer the obligation to take measures or to erect and maintain structures or

facilities necessary for the general good or to avoid detrimental effects on the rights of others. Where such measures or facilities are impracticable or irreconcilable with the project, the person affected may claim reasonable monetary compensation (sec. 74 para 2).

The planning approval authority shall deliver the plan approval decision as well as advice on legal remedies to the project developer, to people known to be affected by the project and to those people whose objections have been dealt with. The decision will be made publicly available after notification (sec. 74 para 4). If more than 50 notifications have to be delivered to private objectors, the delivery can be substituted by a public notice.

A copy of the plan approval decision including advice on legal remedies and a copy of the approved plan has to be made publicly available for examination within the communities for a period of two weeks. Place and time of the public notice have to be announced to the public according to local practice. With the end of the inspection period, the other parties affected shall be regarded as having been notified, which fact shall be made known in the announcement.

V. Judicial Review of planning approval decisions

1. Access

In Germany federal and state laws on judicial review before a court of law play a key role in ensuring effective administration and the rule of law. Fundamental principles governing the judicial review are the constitutional guarantee of effective judicial protection and the Administrative Court Act. Art. 19 para 4 sentence 1 of the German Constitution (Basic Law) guarantees that if any person's rights are violated by public authority, there has to be a recourse to the courts.²¹ The guarantee is comprehensive and covers all acts of the executive. The Administrative Procedure Code states in a General Clause that 'the rescission of an administrative act (rescissory action), as well as sentencing to issue a rejected or omitted administrative act (enforcement action) can be requested by means of an action (sec. 42 para 1). Thus, the access to administrative court review in Germany does not depend on the existence of an explicit provision in the law relevant to the specific case. But only an administrative act that produces discernible effects in someone's legally defined rights or the refusal or omission of an administrative act will be reviewed by the courts. No action is admissible against mere preparatory acts or intermediate decisions and against the infringement of interests which are not legally protected. An exception to this principle applies to recognized environmental organizations.

²¹ Oster, *The Scope of Judicial Review in German and U.S. Administrative Legal System*, German Law Journal, Vol. 09 No. 10 (2008) p. 1267, 1274

They may for instance challenge the substantive or procedural legality of an infrastructure project independently of whether their inherent rights are violated or not. Their standing only presupposes that the interest of nature or any other environmental interest is affected and the organization has taken part in the administrative procedure.²² These special regulations have come into effect only a few years ago. They result from obligations under European law, in particular from the implementation of the Directive on the Assessment of the effects of certain public and private project on environments.²³

2. Scope and intensity of judicial review

In line with the constitutional provisions, most legal norms in German administrative law are conditionally structured. They consist of prerequisites on the one side and the legal consequences of the other side (“if . . . then”). This structure allows and obliges the courts to fully review the administrative decision concerning questions of fact and of law. Most of the environmental norms and the norms of the various Pollutions Control Acts are conditionally structured. However, if the legislative grants discretion the state authorities courts may only control whether the administrative decision includes discretion mistakes.²⁴ Courts may not substitute administrative discretion with their own preferences.

The planning approval authority has to comply with conditional and final structured legal norms. Final clauses set only a purpose and a limited number of decision making criteria for the public authority. Planning rules are typically final structured. They require only procedures of balancing and weighing between different public and private interests and concede planning discretion to the plan developer and the planning authority. Thus, it is not for the courts to substitute the planning decision. On the other hand it is clear there shall be some judicial control of the planning discretion. To solve that predicament the Federal Administrative Court has developed a test which takes into account planning discretion while ensuring effective judicial protection: Courts may review whether there was disuse of consideration, consideration deficit or consideration disproportionality. This test is similar to the judicial review of discretion.²⁵

22 see Eckertz/Höfer, 2010, The judicial review of Administrative Decisions in Germany http://www.bverwg.de/medien/pdf/rede_20100302_australian_national_conference.pdf

23 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment which replaces the Directive 85/338/EC.

24 Sec. 40 of the German Administrative Procedure Act states: „Where an authority is empowered to act at its discretion, it shall do so in accordance with the purpose of such empowerment and shall respect the legal limits to such discretionary power“.

25 Oster (21) Note p. 1270, 1271.

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