

# **LOWER NOISE PROTECTION INTRODUCED IN THE GERMAN FEDERAL CONSTRUCTION LAW – MIXING USES TO ENHANCE CONSTRUCTION EFFICIENCY AND SOIL PRESERVATION**

LESS PROTEÇÃO CONTRA RUÍDO INTRODUZIDA NO DIREITO DO URBANISMO ALEMÃO – MAIOR MISTURA DE FUNÇÕES PARA MELHORAR A EFICIÊNCIA NA CONSTRUÇÃO E A PRESERVAÇÃO DO SOLO NATURAL

## **Summary**

Addressing the city planner's trade-off between separating versus mixing city functions, this paper analyses the new land use type introduced within the reform of the 2017 German Federal Building Code: the “Urban Area”, which admits higher levels of building density and noise and aims at achieving more flexibility for house construction and soil preservation.

The conflict regarding noise levels is addressed by comparing the different measuring methods and upper allowed emission levels, as per the Federal Protection against Noise Ordinance. The Federal Land Use Ordinance defines several profound deviations from the typically foreseen categories, and extends the discretionary powers of the authorities, which can thereby decide in each individual case if transgression of the upper limits is justified. Nevertheless, there are stakeholders in favour of more flexibility, and others in favour of more rigid noise protection levels.

In conclusion, all deviations from the regular types of permitted uses are based on the obligation of duly weighting all interests involved. An example of the implementation of that basic planning strategy is an urban rehabilitation project realised before the introduction of the new “Urban Area” legal instrument. Several related judgements have established everyone's right to having their interests properly addressed.

**Key words:** Protection against Noise; Urban Rehabilitation; Discretionary Powers in Urban Planning; Reform of the 2017 German Federal Building Code; City Planning Law

## **Resumo**

Partindo das alternativas entre separação ou mistura de funções no espaço citadino, este artigo analisa o novo tipo específico de uso do solo, introduzido na reforma do Código Federal do Urbanismo de 2017: a “Área Urbana”, que admite níveis mais altos de densidade de construções e de ruído, intencionando assim uma maior flexibilidade para a construção de casas e promovendo a poupança do solo natural.

O conflito relativo ao ruído é debatido observando os diferentes métodos de medição e os níveis de emissão permitidos. O Regulamento de Construção define vários desvios significativos das categorias regulares previstas e, além disso, amplia os poderes discricionários das autoridades, que podem, assim, decidir em cada caso individual se a transgressão dos limites superiores é justificada. No entanto, existem interessados a favor de uma maior flexibilização e outros defendem níveis mais rígidos de proteção contra o ruído.

Em conclusão, todas as variações dos tipos regulares de usos permitidos são uma concretização da obrigação de ponderar devidamente todos os interesses envolvidos na determinação do uso do solo. A implementação dessa ideia mais básica do planeamento é avaliada com base em vários Acórdãos e num projeto de reabilitação urbana realizado antes da introdução do novo instrumento legal da “Área Urbana”.

**Palavras-chave:** Proteção contra o ruído; Reabilitação Urbana; Poderes discricionários no planeamento urbano; Reforma do Código Federal de Urbanismo da Alemanha de 2017; Direito do Ordenamento do Território

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### **Introduction**

There are four types of functions addressed by city construction: habitation, working, pleasure and moving. These function types were introduced by orientation 77 of the

Charter of Athens, which dates from 1933.<sup>1</sup> The allocation of resources to these functions is usually made on the basis of maximizing savings of time and energy. Habitation is most often the main objective of city construction efforts, as established by orientation 79 of the Athens Charter. City planning philosophy between the 1930's and the 1980's was based on the separation of functions, however during the ensuing decades more progressive voices have arisen that defend a mix of the four function types. This has become apparent in the declaration issued by the Ministers responsible for urban development in the Member States of the European Union: "The strategy of mixing housing, employment, education, supply and recreational uses in urban neighbourhoods has proven to be especially sustainable."<sup>2</sup>

In the present article, we analyse the different options being considered and pursued in selecting the most adequate and just ponderation amongst the four function types. As a highly relevant example, we describe and analyse a concrete legal instrument addressing city planning, which was introduced in 2017 in the German Federal legislation.<sup>3</sup> This legal instrument defines a new category of zoning called "urban area", which symbolises the transition between the Athens Charter and the Leipzig Charter. This new legal instrument is explained in this article, and it is framed within the context of urban planning. As part of the reform of the Federal Building Code of 2017 (abbreviated in this article as FBC), the "urban area" zoning category promotes mixing the uses so as to

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<sup>1</sup> GETTY CONSERVATION INSTITUTE, *apud Congress Internationaux d'Architecture moderne (CIAM), La Charte d'Athenes* or **The Athens Charter**, 1933, Trans J. Tyrwhitt. Paris, France: The Library of the Graduate School of Design, Harvard University, 1946, [http://www.getty.edu/conservation/publications\\_resources/research\\_resources/charters/charter04.html](http://www.getty.edu/conservation/publications_resources/research_resources/charters/charter04.html), last access 7th of February of 2019.

<sup>2</sup> EUROPEAN COMMISSION, **Leipzig Charter on Sustainable European Cities**, 02 May 2007, [http://ec.europa.eu/regional\\_policy/archive/themes/urban/leipzig\\_charter.pdf](http://ec.europa.eu/regional_policy/archive/themes/urban/leipzig_charter.pdf), last access 7th of February of 2019.

<sup>3</sup> For further development see BOTHE, Anja, *Ruído nas áreas metropolitanas e urbanização de solos naturais — promoção da habitação na última reforma do Código Federal do Urbanismo de 2017*, Noise in metropolitan areas and urbanization of natural soils – housing promotion in the context of the latest reform of the 2017 German Federal Code on Urbanization, in *Revista de Direito da Cidade*, **Journal on Law of the City**, May 2018, vol. 10, N.º 2, Universidade do Estado do Rio de Janeiro, p. 755, 760, <http://www.e-publicacoes.uerj.br/index.php/rdc/article/view/32163/24075>; URI: <http://hdl.handle.net/11144/3822>.

enhance construction efficiency,<sup>4</sup> to achieve a more sustainable energy management,<sup>5</sup> to preserve soil diversity and to achieve greater flexibility.<sup>6</sup> Some persistent problems, especially those brought about by the increased urban density and levels of noise which result from the mixed uses in habitation areas, remain controversial.

## 1. Framework in the Federal Urban Planning Law

The German Federal Building Code, FBC, dates from 1960, and the German Federal Land Use Ordinance, in the following text abbreviated as FLUO, dates from 1962. As the author of the FLUO is the Ministry of Environment, Nature Protection, Construction and Nuclear Security, the Federal Building Code transmitted the respective competence for the validity of the FLUO as a Federal Administrative Regulation (§ 9 of the FBC). Basically, there are two types of municipal planning grades: the preparatory land-use plan, § 5 FBC, and the legally binding land-use plan, § 9 FBC.<sup>7</sup> “The preparatory land-use plan shall represent in basic form the type of land uses for the entire municipal territory, arising in accordance with the intended urban development which is proposed so as to address the anticipated needs of the municipality.”, § 5, n.º 1 of the FBC. “The legally binding land-use plan, based on urban-planning grounds, may make designations regarding the type and degree of building and land use”, § 9, n.º 1 of the FBC.<sup>8</sup> The

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<sup>4</sup> BUKOW, Wolf-Dietrich, et. al., in *Initiative Urbanität, Mobilität und kurze Wege, Initiative urbanity, mobility and short distances*, University of Siegen (Germany), *Das “urbane Mischgebiet”*, The “urban mixed area”, [https://www.stadtbaukunst.org/cms/upload/texte\\_zur\\_stadtbaukunst/Bukow\\_Feldtkeller\\_Kiepe\\_vWinning\\_UrbanesMischgebiet.pdf](https://www.stadtbaukunst.org/cms/upload/texte_zur_stadtbaukunst/Bukow_Feldtkeller_Kiepe_vWinning_UrbanesMischgebiet.pdf), last access 7th of February of 2019.

<sup>5</sup> BAUMINISTERKONFERENZ, Reunion of the Ministers of all German Regions, *Kommunale Strategien für die Entwicklung gemischtgenutzter und verdichteter Gebiete – genannt “Grossstadtstrategie”*, **Local strategies for the development of mixed and densified areas - called “Strategy for Larger Cities”**, 28th of September 2015.

<sup>6</sup> DEUTSCHE BUNDESREGIERUNG, German Federal Government, *Ein neuer Aufbruch für Europa Eine neue Dynamik für Deutschland Ein neuer Zusammenhalt für unser Land – Koalitionsvertrag*, A new departure for Europe - A new dynamic for Germany - A new cohesion for our country - **Coalition agreement**, 2018, 119; KRAUTZBERGER, Michael / STÜER, Bernhard, *Entwurf der Städtebaurechtsnovelle 2017, Draft urban development law 2017*, <http://www.stueer.business.t-online.de/aufsatzc/baur0417.pdf>.

<sup>7</sup> For further development see BOTHE, Anja, *A classificação e a qualificação do solo no direito do urbanismo alemão*, Land classification and qualification in the German urban planning law, JURISMAT, Revista jurídica do Instituto Superior Manuela Teixeira Gomes (ISMAT), **Journal of the Institute of Advanced Studies Manuela Teixeira Gomes**, Portimão, n.º 5, November of 2014, p. 271, 278, URI: <http://hdl.handle.net/11144/1071> ; <http://www.ismat.pt/investigacao/70-investigacao->

<sup>8</sup> For further development see BOTHE, Anja, *Urbanismo, Ordenamento do Território e Direito dos Solos em Portugal e na Alemanha*, Urbanism, spatial planning and land law in Portugal and in Germany,

referred types of use are listed in the Federal Land Use Ordinance: four types for the preparatory land-use plan (general residential building areas, general mixed building areas, general commercial building areas, and special building areas), § 1, n.º 1 of the FLUO, and eleven types which further define these four types in the legally binding land-use plan (small residential estate areas, residential-only areas, general residential areas, special residential areas, village areas, mixed use areas, urban areas, core areas, commercial areas, industrial areas, and special areas), § 1, n.º 2 of the FLUO and the regulation of each specific land use area in §§ 2 to 14 of the FLUO.

## 2. The new specific land use type: “Urban Area”

The new type of land use, “Urban Area”, intends to promote a mixture of types, but it is not easily distinguished from the “Mixed use areas” and the “General residential areas”. The table below highlights the similarities and differences between these three urban area development types (the paragraphs quoted are from the Federal Land Use Ordinance):

Mixed use areas, § 6	Urban areas, § 6 a	General residential areas, § 4
(1) Mixed areas are intended	(1) Urban areas are intended	(1) General residential areas are intended
to provide space for housing	to provide space for housing	primarily to provide space for housing.
and to accommodate businesses	and to accommodate businesses,	
	social, cultural and other facilities	
which do not exert a disruptive effect on the residential function.	which do not exert a disruptive effect on the residential function.	
	The mixture of uses does not	

	need to have equal weight	
(2) Permitted developments are	(2) Permitted developments are	(2) Permitted developments are
1. Residential buildings,	1. Residential buildings,	Residential buildings,
2. Business premises and office buildings,	2. Business premises and office buildings,	
3. Retailing operations, public houses and restaurants and businesses providing accommodation,	3. Retailing operations, public houses and restaurants and businesses providing accommodation,	Shops, public houses and restaurants and non-disruptive commercial operations supplying services to the areas
4. businesses of other types,	4. businesses of other types,	
5. local administration buildings and structures for church, cultural, social, health-care and sports facilities	5. local administration buildings and structures for church, cultural, social, health-care and sports facilities	3. Structures for church, cultural, social, health-care and sports facilities
6. market gardens,		
7. filling stations		
8. places of public entertainment within the meaning of § 4 a (3) n.º 2, in those sections of the area characterised predominantly by commercial use.		
(3) In exceptional cases permission may be given for places of public entertainment within the meaning of § 4 a (3) n.º 2, outside the sections of the area described in (2) n.º 8.	(3) In exceptional cases permission may be given for  1. places of public entertainment, where these are not of a nature or on a scale which is	(3) In exceptional cases permission may be given for  1. businesses providing accommodation, 2. other non-disruptive businesses,

	in general permitted only in core areas, 2. filling stations.	3. administrative buildings and structures, 4. market gardens, 5. filling stations.
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The following upper limits for the level of building density, § 17 of the FLUO, and for noise levels, number 6.1 of the Federal Protection against Noise Ordinance, shall not be exceeded. The Federal Protection against Noise Ordinance is a Federal Administrative Regulation emitted with the competences transferred by the Act on the Prevention of Harmful Effects on the Environment caused by Air Pollution, Noise, Vibration and Similar Phenomena,<sup>9</sup> designated in abbreviated form as Federal Emission Control Act or Federal Law for Protection Against Emissions or Federal Control of Pollution Act, more precisely its § 48. The determinations within the Federal Protection against Noise Ordinance are administrative regulations that define in more concrete detail the term “Harmful effects on the environment”<sup>10</sup>. Before these more recent judgements, the Supreme Administrative Court considered the determinations within the Federal Protection against Noise Ordinance anticipated expert opinions.<sup>11</sup> For the legal definition of that term see § 3 clause 1 of the Federal Control of Pollution Act: “Harmful effects on the environment as used herein shall be emissions which, according to their nature, extent or duration, are liable to cause hazards, considerable disadvantages or considerable nuisance to the general public or the neighbourhood.” The measuring methods and the upper allowed emission levels, contained in the Federal Protection against Noise Ordinance, have a direct impact on the licensing of construction projects and have an indirect impact on the planning process by determining the allowable land use types.<sup>12</sup> The aforementioned upper limits for the level of building density and for noise levels are detailed in the table below:

<sup>9</sup> for the English version see: <https://germanlawarchive.iuscomp.org/?p=315>.

<sup>10</sup> BUNDESVERWALTUNGSGERICHT, **Supreme Administrative Court Judgement of the 27th of August of 2007** – 4 C 2.07, <https://www.bverwg.de/290807U4C2.07.0>; and 29th of November of 2012 – 4 C 8.11, <https://www.bverwg.de/291112U4C8.11.0>.

<sup>11</sup> BUNDESVERWALTUNGSGERICHT, **Supreme Administrative Court Judgement of the 18th of May of 1982** – 7 C 42.80, <https://www.iurion.de/urteile/bverwg/1982-05-18/bverwg-7-c-4280/>

<sup>12</sup> SÖFKER, Wilhelm in ERNST, Werner/ZINKAHN, Willy/BIELENBERG, Walter/KRAUTZBERGER, Michael, *Baugesetzbuch, Federal Building Code*, Vol. VI: *BauNVO*, 2018, Federal Land Use Ordinance, 2018, Preliminary note to attachment 4.

§ 17 clause 1 - Specific land use type	§ 17 clause 1 - Site occupancy Index (GRZ)	§ 17 clause 1 - Floor space index (GFZ)	n.º 6.1 Federal Protection against Noise Ordinance
In residential-only areas, general residential areas, holiday-home areas	0.4	1.2	55 dB(A) by day (6 until 22 h)  40 dB(A) at night (22 until 6 h)
In village areas, mixed use areas	0.6	1.2	60 dB(A) by day  45 dB(A) at night
In urban areas	0.8	3.0	63 dB(A) by day  45 dB(A) at night
In core areas	1.0	3.0	60 dB(A) by day  45 dB(A) at night

### 3. Deviation clauses concerning the upper limits of the specific land use types

When examining these rules, one must wonder how it is possible for a country to adequately describe all its uses of land by employing only the eleven defined land use categories. In order to address this concern, the Federal Land Use Ordinance, FLUO, defines a number of profound and widely permitted deviations from the regular foreseen categories, as listed in the following: § 17 (2) of the FLUO: “The upper limits referred to in clause (1) may be exceeded where this is required on special urban and planning grounds.” This clause is used very often because the limits stipulated in § 17 (1) of the FLUO are often not viewed as being realistic, neither in new developments nor in previously existing constructions. Therefore, the quoted clauses establishing the upper limits do not have unchallenged legal strength, but are instead open for interpretation and discretionary modifications.<sup>13</sup> The § 1 clauses (4) to (10) of the FLUO are general rules that admit deviations to all specific land use types regulated in the §§ 2 to 14 of

<sup>13</sup> BAUMINISTERKONFERENZ, *op.cit.* 2015, 14.



the FLUO:<sup>14</sup>

§ 1 (4) FLUO: A horizontal differentiation of types may be stipulated, such that specific land use areas of the types described in §§ 4 to 9 may be designated, in legally binding land use plans, with specifications to structure the area concerned according to:

1. The type of permitted use. 2. The type of businesses and installations and their special requirements and characteristics.

§ 1 (5) FLUO: Designations may be made in a legally binding land use plan to render inadmissible, or to permit only in exceptional cases, certain types of use which are generally permitted under §§ 2 clauses (4) to (9) and (13), provided that the general function of the specific land use area is maintained.”

§ 1 (6) of the FLUO: Specified exceptions in specific land use areas can be excluded or otherwise may be generally permitted.

§ 1 (7) of the FLUO: “[W]here this can be justified on special urban planning grounds...,” a vertical differentiation of types may be foreseen instead.

§ 1 (8) of the FLUO: The modification stipulations mentioned in clauses (4) to (7) above may refer to only portions, rather than to the whole, of specific land use areas.

§ 1 (9) of the FLUO: Certain types of “structures permitted either generally or in exceptional cases within the area” may be designated as “permitted, not permitted or permitted only in exceptional cases.”

§ 1 (10) of the FLUO: In order to preserve already existing constructions, it may be stipulated that “extensions, alterations, changes of use and renovation of these structures are permitted, ...”.

As shown in the previously presented table, in addition to these modifications applicable to all areas, each area may also be allowed to implement exceptional use deviations not also applicable to the other areas, clause (3) of the §§ 2 to 9 FLUO.

The previously described deviation allowances refer to the types of land use. Furthermore, deviation rules may also apply to the construction density limitations: The

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<sup>14</sup> SÖFKER, *op. cit.*, *BauNVO* § 1, annotations 8 to 16.

permitted building area may be exceeded by up to 50 per cent, § 19 (4) of the FLUO. Height limit deviations are also permitted, § 18 (2) of the FLUO. These rules are not meant to be exceptions, but they are intended instead to broaden the application of the rules and thus to extend the discretionary powers of the authorities, which can thereby decide in each individual case if the transgression of the upper limits is justified.<sup>15</sup>

The conclusion that may be drawn from this section is that the eleven specific land use types are not rigidly defined, but allow instead deviations to be applied at the discretion of the planners, in a way that admits a certain natural evolution in the development of the affected neighbourhoods.

#### 4. Noise protection rules

As was stated in the introduction, the trend towards increasingly mixing functions brings with it more conflicts concerning noise. The introduction of lower noise protection clauses in the new legal instrument covering urban areas (see section 2) has become one of the most controversial subjects of the whole legislation process. The following two main themes were discussed: the specific noise upper limits for urban areas defined in the Federal Protection against Noise Ordinance, and the introduction of passive noise protection methods. A characteristic of passive protection methods is that they are to be installed by the one who receives the noise. By way of contrast, the upper limits established by the Federal Protection against Noise Ordinance are the responsibility of the one that produces the noise, who has the obligation to protect the receivers by respecting those upper limits, by implemented a so-called active protection. The debate is focussed on the legal obligation of the receivers of the noise to install the so-called passive protection (see section 5 below for further development of this issue).

As mentioned above (section 2 and number 6.1 of the Federal Protection against Noise Ordinance), the night time limits of noise are 45 dB (A) and the day time limits are 63 dB (A) in the new specific land use type known as the “urban area”. The initial proposal for the night time limit was 48 dB (A),<sup>16</sup> so both values were 3 dB (A) above the limits

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<sup>15</sup> BIELENBERG, Walter in ERNST, Werner/ZINKAHN, Willy/BIELENBERG, Walter/KRAUTZBERGER, Michael, *Baugesetzbuch*, 2018, **Federal Building Code**, Vol. VI: *BauNVO*, Federal Land Use Ordinance, 2018, § 19 annotation 22.

<sup>16</sup> DEUTSCHER BUNDESRAT, German Federal Council, *Drs.*, Printed Matter 806/16 30th of Dec. of 2016 *Gesetzesentwurf der Bundesregierung – Entwurf eines Gesetzes zur Umsetzung der Richtlinie 2014/52/EU im Städtebaurecht und zur Stärkung des neuen Zusammenlebens in der Stadt* -2016, **German Federal**

that apply to the core areas, the village areas and the mixed-use areas. The upper limit of 48 dB (A) at night was lowered, because scientific studies showed that harm to the health of humans could not be ruled out at those levels.<sup>17</sup>

The lowering of the upper noise limits faced some opposition.<sup>18</sup> The opponents argue their case by comparing to the noise levels permitted for residential spaces close to airports, § 2 of the Aircraft Noise Act (*Fluglärmmgesetz*). They also question the logic of using the same upper noise limits for core areas, urban areas and mixed used areas: In core areas the residential function is not primarily intended, § 7 (1) of the FLUO. Places for public entertainment, which are naturally noisier, are regularly permitted within core areas, § 7 (2) of the FLUO, but only in exceptional cases are they permitted within urban areas, § 7 (3) n.º 1 of the FLUO, where residential buildings are primarily intended, § 6 a (1) of the FLUO. At the same time, in urban areas – with housing as a possible main characteristic and public entertainment only exceptionally allowed – the upper noise limit by day is 3 dB (A) higher than in core areas. A similar observation is made when analysing mixed use areas versus urban areas: only in urban areas does housing have a predominant weight. However, the noise protection limit in mixed use areas is higher than the limit allowed in urban areas. The result of these illogical legal determinations may be a loss of practical uses within the new urban area. As an example, the development of residential areas is often not possible because of higher noise levels at night caused by business buildings, especially places of public entertainment and restaurants. For that reason, the introduction of further changes in the Federal Protection against Noise Ordinance is generally recommended.<sup>19</sup>

Nevertheless, other alternatives have been suggested instead of legal changes to the

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**Government Bill – Draft of a Law Implementing Directive 2014/52 / EU on Urban Planning Laws and Strengthening New Urban Coexistence.** <http://dipbt.bundestag.de/dip21/brd/2016/0806-16.pdf>.

<sup>17</sup> DEUTSCHER BUNDESRAT, German Federal Council, *Drs.*, **Printed Matter 708/1/16**, 30th of Dec. of 2016 *Gesetzesentwurf der Bundesregierung – Entwurf eines Gesetzes zur Umsetzung der Richtlinie 2014/52/EU im Städtebaurecht und zur Stärkung des neuen Zusammenlebens in der Stadt* -2016 German Federal Government Bill – Draft of a Law Implementing Directive 2014/52 / EU on Urban Planning Laws and Strengthening New Urban Coexistence, p. 4, [https://www.bundesrat.de/SharedDocs/drucksachen/2016/0701-0800/708-1-16.pdf?\\_\\_blob=publicationFile&v=5](https://www.bundesrat.de/SharedDocs/drucksachen/2016/0701-0800/708-1-16.pdf?__blob=publicationFile&v=5). last access 13th of February of 2019.

<sup>18</sup> BATTIS, Ulrich/MITSCHANG, Stephan/ REIDT, Olaf, *Das Gesetz zur Umsetzung der Richtlinie 2014/52/EU im Städtebaurecht und zur Stärkung des neuen Zusammenlebens in der Stadt (BauGB-Novelle 2017)*, The law transposing Directive 2014/52 / EU on urban planning law and strengthening the new coexistence in the city,(Reform of the FBC 2017) *NVwZ, Journal of New Administration* **2017**, 817, 825.

<sup>19</sup> BATTIS, Ulrich/MITSCHANG, Stephan/ REIDT, Olaf, *ob. cit.*, p. 826.

Federal Protection against Noise Ordinance, as described below:

Concerning the noise protection, the Association of German Lawyers defended shortening the length of the period defined as “night time”: instead of 22 to 6 o’clock, it should be defined as 0:00 to 5:30, because often the development of residential areas is not permitted because of the noise caused by the last and the first truck rides of each day, the noise emitted at night when visitors leave the restaurants, or because of the early morning shop deliveries.<sup>20</sup> The current legal situation is based on noise level measurements during the noisiest hours of the night, which would be eliminated by the proposed redefinition of “night time”.

Some dissenting voices reject lower protection levels, and others defend the substitution of the legal system: instead of judging noise levels based on values stipulated for a specific land use type, the decisions should be made instead based on noise levels associated with concrete land use activities.<sup>21</sup>

## **5. Active versus passive protection**

The ways to measure noise levels were thoroughly discussed: the current Federal Control of Pollution Act, and consequently also the Federal Protection against Noise Ordinance, is based on the premise that the required noise values are reached without introduction of any protective methods installed within the property of who receives the noise. The obligation to respect the noise level limits rests solely with the producers of the noise (active noise protection methods), Article 22 of the Federal Control of Pollution Act:

Obligations of Operators of Installations not Subject to Licensing: Installations not

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<sup>20</sup> DEUTSCHER ANWALTSVEREIN, German Lawyer’s Association, *Stellungnahme des Deutschen Anwaltvereins durch den Ausschuss Verwaltungsrecht zum Referentenentwurf eines Gesetzes zur Umsetzung der Richtlinie 2014/52/EU im Städtebaurecht und zur Stärkung des Neuen Zusammenlebens in der Stadt*, **Statement of the German Lawyers’ Association by the Committee on Administrative Law on the draft on a law implementing the Directive 2014/52 / EU on Urban Planning Law and on Strengthening New Urban Living in the City**, 2016, p. 12, <https://anwaltverein.de/.../sn-35-2016-zur-baugb-novelle?.../anwa>

<sup>21</sup> NATURSCHUTZBUND (NABU), Alliance for Nature Protection, *NABU-Stellungnahme zur Novellierung des BauGB – Gesetzentwurf der Bundesregierung vom 23. Januar 2017*, **NABU Statement on the Amendment to the FBC - Federal Government Bill of 23 January 2017**, p. 1.

subject to licensing shall be established and operated in such a way that 1. harmful effects on the environment which are avoidable according to the state of the art are prevented, 2. harmful effects on the environment which are unavoidable according to the state of the art are kept to a minimum, [...]

Continuing with active noise protection methods, article 5 of the Federal Control of Pollution Act determines the legal obligations for operators of installations that are subject to licensing:

Obligations of Operators of Installations Subject to Licensing (1) Installations subject to licensing shall be established and operated in such a way that 1. this does not involve harmful effects on the environment or other hazards, considerable disadvantages and considerable nuisance to the general public and the neighbourhood, 2. precautions are taken to prevent harmful effects on the environment, in particular by such emission control measures as are appropriate according to the state of the art.

These conditions remained unchanged after the legal changes.<sup>22</sup> These methods, called active protection methods, are an obligation on who produces the noise. The noise level measurement is to be done half a meter behind an open window of the one who receives the noise. With the reform of the Federal Construction Code of 2017, communities may now consider instead passive noise protection methods in their legally binding plans, § 9 (1) of the FBC:

[T]he legally binding land-use plan may, on urban-planning grounds, make designations regarding: [...] 24. protected areas to be kept free from development with their uses, spaces for specific installations **and measures to provide protection against harmful environmental impact within the meaning of the Federal Control of Pollution Act, and the provisions to be made, including building and other technical measures, to provide protection against such impact or to prevent or reduce such impact;**

The portion highlighted in bold was introduced with the reform of 2017. This inclusion of passive protection methods does not mean lowering the legally determined upper limits, which must still be reached independently of the presence of passive protection methods.

Several voices defended introducing the legal possibility of compensating higher levels

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<sup>22</sup> Agrees with that decision: USCHKEREIT, Tim, (*Verpasste Chancen des urbanen Gebiets*, (Missed) opportunities of the urban area, *NJW-Spezial*, **New weekly journal of Law-Special Edition**, 2017, p. 748, 749.

of upper noise limits – applicable to the new specific “urban area” land use type – with a better active protection, in other words, the possibility of satisfying the upper limits by combining passive and active methods of noise protection. But that way of accounting for the active protection methods would be contrary to the quoted §§ 5 e 22 of the Federal Control of Pollution Act.

Therefore, the legal introduction of active protection methods, as per the above quoted § 9 (1), n.º 24 of the FBC, has just a declarative meaning: obviously, even before the reform, active protection methods were already admitted. They did not and do not have any influence on how to calculate the legal upper limits of emissions. The new clause just helped to introduce the higher maximum noise values within the new specific land use type, which is the object of our analysis, the “urban area”. This help resulted in reaching a compromise:

The critics of the higher noise levels determined for the “urban area” argued that the noise protection level should be calculated, and indicated in the legislation, by adding up the active and passive methods of noise protection. But this method would only apply when the following two prerequisites were present: first, when this would be the only way to allow the construction of residential buildings in areas with an already existing noise level that would not allow residential spaces close by without considering active protection methods. And second, there should be a balcony, terrace or at least a window turned to the quiet side of the apartment.<sup>23</sup> The idea is to preserve the right of the inhabitants to get fresh air, not only via the artificial methods which are frequently associated with active protection methods, like ventilators, but at the same time to get fresh air naturally by opening a window or the door of a balcony. The objective of integrating the active protection methods in the calculation of the legally determined noise level is to render the construction of residential spaces possible without fixing higher upper limits for the urban area.

The German Lawyers association bases that same demand, of considering the passive protection methods, on the liberty that habitants should have to either open their window or to install ventilation.<sup>24</sup> Actually, the entities that defend the exclusion of the

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<sup>23</sup> DIE GRÜNEN, Green Party represented in the Federal German Parliament, *Bt Drs. Federal Parliament Printed matter 18/11439*, p. 11, 12 <http://dip21.bundestag.de/dip21/btd/18/114/1811439.pdf>

<sup>24</sup> DEUTSCHER ANWALTSVEREIN, German Lawyer’s Association, *ob. cit.* 2016, p. 13.

passive protection methods from the calculation of the upper noise limits, promote exactly the referred liberty of the habitants: conserving higher protection levels admits an open window without endangering the habitants' health.

Others argue in favour of the exclusion of any further noise prevention to protect the building construction from further duties implying higher costs ().

## **6. From deviation rules to ponderation duties**

The general deviation clauses analysed within the context of the upper limits on density (see section 3 above: § 17 clause (2) of the FLUO, § 1 clauses (4) to (10) of the FLUO) are applicable also on the questions of noise. Moreover, the following deviation rules can be added:

Concerning the noise limitations, there are two more deviation clauses: first, deviations justified on special circumstances, stipulated in § 3.2.2. of the Federal Protection against Noise Ordinance, and second, in the spaces where two or more different specific land use types create a neighbourhood with disturbing emissions emanating from one to another, as per § 6.7 of the Federal Protection against Noise Ordinance.

Following the logic used for the density question, as far as its limits and deviations are concerned, § 3.2.2. of the Federal Protection against Noise Ordinance applies, because there may be individual cases and “special circumstances that are not taken into account in the standard case test, but that can have a significant influence on the type and weight of the assessment as to whether the facility contributes to the development of harmful environmental effects,” and therefore these cases demand a supplementary examination.

The following circumstances which may require a special case examination are considered: a) When noise characteristics of different co-acting systems add up to form a sum noise level, for the determination of the total load, which does not make sense, *(a) Geräuschcharakteristiken verschiedener gemeinsam einwirkender Anlagen, die eine Summenpegelbildung zur Ermittlung der Gesamtbelastung nicht sinnvoll erscheinen lassen)* b) When there are circumstances, e.g. special operational requirements or restrictions on the use of time or on the location of the plant to be assessed, which may affect the acceptance of a noise emission, ..... d) When there exist special aspects of the conventionality and the social adequacy of the noise emission. (§ 3.2.2. of the Federal Protection against Noise Ordinance.)

The aim of § 6.7 of the Federal Protection against Noise Ordinance is to find a compromise, in the form of a deviation clause, when there is a conflict of functions resulting from the location of a specific land use type with higher upper limits next to a specific land use type with lower upper limits. The rule is a kind of neighbourhood compromise. Nevertheless, the compromise value shall not exceed the upper limits determined for village areas, mixed use areas and core areas, as per the second sentence of § 6.7 of the Federal Protection against Noise Ordinance. **The above analysed conditions leading to an exclusive obligation of active protection, meaning that “harmful effects on the environment which are unavoidable according to the state of the art are kept to a minimum”, are to be observed within the application of the referred compromise value applying to two neighbouring specific land use types. Criteria for the deviation value are the feasibility of protection of the areas, the number and extent of residential areas on the one hand and the number and extent of commercial and industrial areas on the other hand, the local historic existence of the noise levels, and the question of which use was established first.**

To conclude the list of possible modifications and deviations within the planning process, it must be mentioned that there might be excluded structures described in the legal types of the typified areas when:

By virtue of their number, location, scale or purpose, they would conflict with the special character of the specific land use area. They are also not permitted if they are likely to give rise to disruption and nuisance of a kind which, in view of the special character of the specific land use area or its surroundings, would lead to they themselves being exposed to such disruption and nuisance. (§ 15 (1) of the Federal Protection against Noise Ordinance.)

The legislative technique of this rule is not the determination of structures permitted or prohibited, it is rather a drawing of limits for the stipulations foreseen in the legal types of the specific land use types, §§ 2 to 14 of the FLUO: “no structure may contradict the character of an area, and unreasonable disturbance is to be avoided”. It is once again a question of adjusting the allowable limits based on the circumstances of each individual case. This perspective cannot be integrated in the general determination of the legally defined land use types.<sup>25</sup> It is important to understand the relation between § 15 of the

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<sup>25</sup> SÖFKER, Wilhelm, *ob.cit.* 2018, § 15 FLUO, annotations 1, 6.



FLUO and the legally binding land use plan: The search for flexibility in the application of § 15 of the FLUO is part of the implementation of the plan and not of the planning process itself. The objective of § 15 is precisely to overcome conflicts that were not resolved within the planning process. Nevertheless, several judgements affirmed that § 15 of the FLUO is not a substitute for correct planning,<sup>26</sup> but it is to be used instead as a kind of last resort when the plan itself has left conflicts unresolved.<sup>27</sup> A frequent situation illustrating this type of conflict is a neighbourhood comprising different specific land use types, but there might be other scenarios that the planners did not intend to leave open.<sup>28</sup> The second clause of § 15 of the FLUO relegates the legal decision to the general ponderation criteria included in the principles of urban land-use planning of § 1 of the Federal Building Code. Even without that, it has to be concluded that the correct application of § 15 (1) of the FLUO involves the general ponderation duty requested in § 1, especially clause (5) of the Federal Building Code:

Land-use plans shall safeguard a sustainable urban development and a socially equitable utilisation of land for the general good of the community, and shall contribute to secure a more human environment and to protect and develop the basic conditions for natural life. In the preparation of land-use plans, attention is to be paid in particular to items number 1 to 10.

These principles of urban land-use planning and the obligation to resolve conflicts are also important in earlier periods of planning, which means that they are to be considered within the application of deviations and exception rules, but the remission is explained only in § 15 clause (2) of the FLUO.

In conclusion, all variations from the regular types of permitted uses - making use of them in the early planning process, or during the implementation of the plans, or even during the process of authorization of the projects - are a concretization of the obligation of duly weighting all interests involved, as described in § 1 of the FBC.

## **7. More flexibility within mixing the uses**

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<sup>26</sup> BUNDESVERWALTUNGSGERICHT, **Supreme Administrative Court Judgement of the 6th of March of 1989** – 4 NB 8.89; VERWALTUNGSGERICHTSHOF Mannheim, **Administration Court of Mannheim, 7<sup>th</sup> of May of 2008** – 3 S 2602/06.

<sup>27</sup> BUNDESVERWALTUNGSGERICHT, **Supreme Administrative Court Judgement of the 12<sup>th</sup> of September of 2013** – 4C 8.12.

<sup>28</sup> BUNDESVERWALTUNGSGERICHT, **Supreme Administrative Court Judgement of 10<sup>th</sup> of January of 2013** – 4 B 48.12.

Before evaluating the new legal instrument, the specific “urban area” land use type, it is important to describe another crucial aspect of that instrument which aims to achieve more flexibility in the development of cities incorporating a wide range of function mixes. Besides the referred permission of more density and higher noise levels, there is another legal aspect unique to the new specific land use type: the mixture of uses does not need to have equal weight, as per § 6 clause 1 *in fine* of the FLUO. That option is a reaction to the jurisprudence used frequently when addressing the specific land use type of mixed use areas,<sup>29</sup> which prohibits an overweight being accorded to either the residential structures or the business structures. In the specific land use type of mixed use areas, one of the functions may have a stronger quality or quantity weight, but some balance between both must nevertheless be maintained. That demand is waived for the new specific land use type, the “urban area”, in order to permit more flexibility. The intention of the new “urban area” is to provide space for housing, for business and for social, cultural and other facilities. As shown in the table included in section 2, the third type of spaces, including social, cultural and other facilities, is not stipulated neither for the mixed-use areas nor for the general residential areas. Concerning the referred question of balance between the different functions, in an “urban area” it is sufficient that another type of space participates in shaping the character of the area.<sup>30</sup>

Again, that new option in the urban area highlights the search for a mixture of types, which is intended to be an advantage, leading to shorter decision and implementation periods, better quality of life, more satisfaction amongst the inhabitants, stronger bonds connecting the local community, and a stronger feeling of identification with the neighbourhood.<sup>31</sup>

The dominant opinion concerning the implementation of urban areas is that their application is exclusively intended for areas which already have a certain degree of mixture and for major cities.<sup>32</sup> Other voices use instead a rather literary interpretation of

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<sup>29</sup> WIENHUES, Sigrid, *Brauchen wir das “urbane Gebiet”?*, Do we need the “urban area”?, *NordÖR Journal of Public Law in Northern Germany*, 2017, p. 313, 316.

<sup>30</sup> BLECHSCHMIDT, Rolf in ERNST, Werner/ZINKAHN, Willy/BIELENBERG, Walter/KRAUTZBERGER, Michael, *Baugesetzbuch, Federal Building Code*, Vol. VI: BauNVO, Federal Land Use Ordinance, 2018, § 6 a BauNVO, annotation 14.

<sup>31</sup> SCHEIDLER, Alfred, *Anpassung der TA Lärm an den neuen Baugebietstypus Urbane Gebiete (§ 6a BauNVO)*, Adaptation of the Federal Protection against Noise Ordinance to the new type of consumer region Urban areas, in VR, *Administration Law Journal* 2017, 397, 399.

<sup>32</sup> SCHINK, Alexander, *Die neue Baugebietskategorie: Urbane Gebiete nach § 6 a BauNVO*, The new land use type: Urban areas according to § 6 a FLUO, in NVwZ *Journal of New Administration* 2017, p. 1641,

the new instrument and consider it applicable also for areas which are urbanized for the first time and for smaller cities and villages.<sup>33</sup> This latter interpretation isn't strictly wrong, but it lacks practical relevance.

The rising of the new urban area is understood as a symbol of the declining old-fashioned perspective of separating land uses. In summary, "those who want to live in a more vivid area are ready to accept more emissions."<sup>34</sup> These inhabitants search the synergy and positive effects resulting from having all kinds of facilities close by.<sup>35</sup>

Several voices defend more radical legal changes: instead of determining upper limits for each specific land use type, one proposal is the elimination of all general upper limits, which in other words means the elimination of § 17 of the FLUO (Upper limits for determining the level of building coverage), and of § 6.1 of the Federal Protection against Noise Ordinance (orientation values of the upper limits for emission situations outside buildings.) As a consequence of that proposal, any permission of projects would be exclusively based on the concrete emissions that are inherently expected for each particular land use.<sup>36</sup> ()

The elimination of § 17 FLUO is partly seen as a demand for taking the Leipzig Charter seriously.<sup>37</sup>

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1650; KRAUTZBERGER, Michael / STÜER, Bernhard, *Entwurf der Städtebaurechtsnovelle 2017, Draft urban development law 2017*, p. 474, 481, <http://www.stueer.business.t-online.de/aufsatzc/baur0417.pdf>

<sup>33</sup> FRANSSEN, Yvonne, "Urbane Gebiete" und Auswirkungen auf Stadtentwicklung und Umwelt, "Urban areas" and impacts on urban development and the environment, in ZUR, *Journal of Environmental Law*, 2017, p. 532, 536.

<sup>34</sup> BUNDESVERBAND FREIER IMMOBILIEN- UND WOHNUNGSUNTERNEHMEN, Federal Association of Free Real Estate and Housing Companies, *Stellungnahme zum Entwurf zur Änderung der Sechsten Allgemeinen Verwaltungsvorschrift zum Bundesimmissionsschutzgesetz (Technische Anleitung zum Schutz gegen Lärm), Opinion on the draft amending the Sixth Federal Control of Pollution Act (Federal Protection against Noise Ordinance)*, 27<sup>th</sup> of July of 2016, p. 3, <https://www.bfw-bund.de/api/downloads/view/14269>.

<sup>35</sup> WIENHUES, Sigrid / KNICKMEIER, Sönke, *Von der "Charta von Athen" zur "Leipzig-Charta"*, From the "Charter of Athens" to the "Leipzig Charter", in *Zeitschrift des vhw – Bundesverband für Wohnen und Stadtentwicklung, Journal of the vhw - Federal Association for Housing and Urban Development* 3/ May – June 2017, p. 129, 130.

<sup>36</sup> NATURSCHUTZBUND (NABU), Alliance for Nature Protection, 2017, *ob. cit.*

<sup>37</sup> WALTER, Jörn, *Bau und Überbau – Kommentar zur Ergänzung der BauNVO*, Construction and superstructure - comment to supplement the FLUO, in *Bauwelt, Journal of Construction*, 35.2016, p. 30, 33, <https://www.bauwelt.de/themen/betrifft/Produktive-Stadt-Bau-und-Ueberbau-Ergaenzung-BauNVO-Kommentar-Joern-Walter-2659316.html>.

## 8. Before and after the introduction of the new urban area instrument

Within the investigation and evaluation of the new urban area instrument as a specific land use type, it is important to understand how the planning authorities acted before the introduction of that new instrument, especially how they dealt with the objectives which are shared with the new instrument. In particular, how they viewed the increase and development of urbanized areas incorporating the construction of more residential, business, social and cultural spaces where noisy uses were traditionally present.

“A contemporary trend to locate housing, working, business, industry and entertainment next to each other”<sup>38</sup> was reported in Munich, at a time when the new Federal Urban Planning legislation changes of 2017 were still being debated. The concept proponents were able to convince the owners and the planning authorities, using among others the following arguments: the reactivation of the structures that remained from the industrial past of the *Werksviertel* neighbourhood, the assurance to benefit the facilities that had been installed years ago but had always been considered as just temporary, especially business and entertainment, and the project of constructing houses for 2,500 inhabitants.<sup>39</sup> The implementation of the specific land use areas without the existence of the new legal urban area land use type, resulted in a core area, in this specific case an informally called cultural area, general residential areas and commercial areas, complemented with public spaces for education, social infrastructure and green spaces. “The conflicts resulting from the coexistence of these neighbourhoods became the central subject of the future legally binding land use plan”<sup>40</sup> The resulting noise problems, as well as the question of density, constitute the precise motivation for the legal changes: find ways to harmonize a neighbourhood comprising commercial and residential areas in terms of noise protection. The solution found in the related case of urban rehabilitation corresponds to one of the proposals analysed: taking into account the active and the passive noise protection methods. In other words, the emissions from the commercial areas were limited technically and legally, and the emissions received in the residential areas were taken into account in the way the houses were constructed.

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<sup>38</sup> *Bund Deutscher Architekten Bayern, Alliance of German Architects in Bayern, BDA talk – Ihre Meinung bitte!*, Your opinion please, 7<sup>th</sup> of March of 2017, <https://www.bda-talk.de/die-ergaenzungs-der-baunutzungsverordnung-durch-urbane-gebiete-ein-zu-zoegerlicher-vorschlag-um-zeitgemaesse-stadtentwicklung-zu-ermoenlichen/>.

<sup>39</sup> ERNST, Johannes, *ibidem*.

<sup>40</sup> MERK, Elisabeth, *ibidem*.

The correct house design thus addresses what the referred proposal demands, in the form of a prerequisite for taking appropriate passive noise protection methods into account. The architecture of the residential spaces may therefore include less protected parts, as long as there are at the same time more protected spaces such as, for example, parts of the residences that are turned into silent courtyards.

Concerning the construction densities in the above-mentioned rehabilitation project of the *Werksviertel* neighbourhood, the upper noise limits for the existing building coverage were clearly exceeded (). The arguments supporting these transgressions were the following “special urban planning grounds” covered within the meaning of § 17 clause (2) of the Federal Land Use Ordinance: the excellent location close to the centre of the city, being very well equipped with extensive supporting infrastructure, the aim of making optimal use of the very few spaces still available in the city, the huge need for additional residential spaces in Munich, and the commitment to preserve the existing soil areas. Additionally, and to prove that the principles of urban land-use planning were being respected, in particular “the general requirement for living and working conditions which are conducive to good health, and the safety of the population at home and at work,” as stipulated in § 1 clause (5) number 1 of the Federal Building Code, detailed examinations were presented regarding the exposure to natural sun light and regarding noise emissions.<sup>41</sup>

The following conclusions can be drawn from the Munich experience, which preceded the introduction of the new urban area legal instrument. The flexibility necessary to get the different land use functions together was possible, even with the existing land use types and the clauses that allow the transgression of the upper limits which existed before the legal reform of 2017. The terms of the Federal Control of Pollution Act that exclusively establish obligations for the emitting structures to protect the receivers against the noise were not immune to being challenged: when the different parties involved wanted the realization of a planned neighbourhood, all efforts were exercised to make it possible, both legally and technically. Legally, contracts were drawn covering the right to produce noise and the duties to receive it, and technically it was demonstrated that effective passive protection methods could be implemented within

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<sup>41</sup> MERK, Elisabeth, in *Bund Deutscher Architekten Bayern, Alliance of German Architects in Bayern*, 2017, *ob. cit.*

reasonable cost and schedule. The urban rehabilitation plan was achievable because the housing and working conditions created respected the principles of urban land-use planning, although they violated the concrete limits stipulated in the Federal Land Use Ordinance and in the Federal Protection against Noise Ordinance. Besides the fact that the basic principles of healthy working and living conditions were observed, it is especially important to mention the economic gains involved in the stabilization of that neighbourhood: houses constructed for 2,500 habitants, as well as business and entertainment spaces near the centre of Munich, represented a creation of value of the type that makes this sort of compromises possible.

### **Final considerations**

In summary, the principal questions that must be analysed in the context of the new “urban area” specific land use type are: Is it best to combine or to separate the different land use functions? How to deal with concrete upper density and noise level limits? How to measure urban density and noise levels? Regarding noise levels, how best to weight the rights of protection versus the duties to protect?

“The characteristics that define and differentiate a city are density, variety and the ability to deliver surprises.”<sup>42</sup> “Urbanity does not easily accept control.” “We do not want to get ready, this is a process that is never finished, it needs to evolve constantly and to adapt to changing circumstances.” “The city jungle must be allowed to proliferate.”<sup>43</sup> These phrases originated from the architects and managers responsible for the experience of Munich urban rehabilitation described in this paper. Certainly, when contrasting against the classic perspective of urbanity which resulted in the boring sleeping neighbourhoods planned before the function separation perspective was questioned in the 1980’s, the search of vibrant varied neighbourhoods comes out as the clear winner.

However, the idea of embracing anti-control, anti-stability, defending liberty and adopting never ending processes, cannot be easily harmonized with the values of a welfare state and of a constitutional state. The property tycoons and real estate sharks might thrive and create surprises, but no small property owners would survive. While

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<sup>42</sup> ERNST, Johannes, in *Bund Deutscher Architekten Bayern, Alliance of German Architects in Bayern*, 2017, *ob. cit.*

<sup>43</sup> ECKART, Werner, *ibidem*.

getting these opposing views down into concrete debates, it is presupposed that an effective legal and administrative control is nevertheless desired. As a starting point, it is necessary to reflect on the objectives of the proposed legal changes: to achieve more flexibility to construct more and more economic houses where certain facilities emitting noises already exist and where the urban density resulting from the new constructions is higher than ideal. The legal changes are supported by strong social and ecological necessities, which have already been present and building up for several decades and have now reached a level of high priority – the right of residence and of establishing a family home and the duty of ensuring a sustainable use of natural resources like soil. This conclusion was supported and concretized by the German Federal Parliament in its Strategy for Sustainability,<sup>44</sup> and it was reached at the same time as the necessity arose for the construction of 350,000 houses per year.<sup>45</sup> The need for more houses but less soil consumption leads logically to increasing the density of already urbanized areas. Integrating residential spaces within other already existing land use functions requires taking into account the rights of the ones that came first and thus deserve protection and continuity for their investments. However, at the same time, residential spaces deserve the level of protection required due to its particular sensitivities, which were detailed as “the general requirement for living and working conditions which are conducive to good health, and the safety of the population at home and at work”, § 1 clause (5) number 1 of the Federal Building Code. During the elaboration of the legal reform, several studies were considered,<sup>46</sup> and the initially proposed night noise limit value was lowered from 48 dB to 45 dB.<sup>47</sup>

The proposal of legally introducing the need for passive protection methods needs to be evaluated. The strong political wish to create more residential spaces while not

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<sup>44</sup> DEUTSCHER BUNDESTAG, German Federal Parliament, WD 7 -3000 -163/17 *Flächenverbrauch in Deutschland, Area consumption in Germany*, 2017, <https://www.bundestag.de/blob/538838/79607ff081975e3196cd76588334e2c1/wd-7-163-17-pdf-data.pdf>.

<sup>45</sup> DEUTSCHER BUNDESTAG, **German Federal Parliament Printed Matter 18/11439 of 8th of March 2017**, *Beschlussempfehlung und Bericht des Ausschusses für Umweltrecht, Naturschutz, Bau und Reaktorsicherheit zum dem Gesetzentwurf der Bundesregierung – Drs. 18/10942, 18/11181, 18/11225 N.º 7*, Decision, recommendation and report of the Committee for Environmental Law, Nature Conservation, Building and Nuclear Safety on the bill of the Federal Government – Printed Matter 18/10942, 18/11181, 18/11225 N.º 7

<sup>46</sup> German Federal Council, **Printed Matter 708/1/16**, *ob. cit.*, p. 4,

<sup>47</sup> SCHEIDLER, Alfred, *Anpassung der TA Lärm an den neuen Buagebietstypus Urbane Gebiete (§ 6a FLUO)*, Adaptation of the Federal Protection against Noise Ordinance to the new type of consumer region Urban areas, in *VR, Administration Law Journal* 2017, p. 397, 402.

consuming soil, and at the same time to protect the housing function, has resulted in the following ruling: the housing that is integrating itself in other noise-producing pre-existing functions must protect itself against the noise. Considering this concrete type of city development, arguing in favour of passive noise protection methods makes sense. But it would not have been a socially just policy to ignore the basic demand that obliges the noise producer to always use the most effective available methods to prevent high levels of noise pollution, §§ 5, 22 of the Federal Law for Protection against Emissions. This also implies not measuring the noise from half a meter distance outside the window of the residence, but measuring it instead from the inside of the house taking into account the better noise protection obtained when active noise protection methods are also used. On the one hand, there are residential construction projects realized using deviation clauses and a compromise amongst the different parties involved, such as the pioneering Munich neighbourhood described in the paper. On the other hand, there exists jurisprudence and scientific literature that support opposing possibilities: either legally establishing upper noise limits in the form of a recommendation, as per number 6.1 of the Federal Protection against Noise Ordinance (*Immissionsrichtwerte*), or imposing binding requirements on urban planners. As a relevant case, the Federal Administrative Court prevented the building of a residential construction next to an already existing noisy business, although passive noise protection methods would have lowered the noise emissions to levels within the limits of number 6.1 of the Federal Protection against Noise Ordinance. This decision is often quoted to demonstrate the superiority of the Federal Protection against Noise Ordinance in its relationship with the binding urban plan.<sup>48</sup> Other legal judgements support a relationship based on linking the Federal Protection against Noise Ordinance to the binding urban plan: on the one hand, the Federal Law for Protection against Emissions describes the neighbourhood in more concrete terms, which results in rights within the binding urban plan. On the other hand, the level of protection against noise pollution is a result of the intended type of land use in the urban area being planned, and of the upper limits that type of land use places on emissions. As a result of both perspectives, it was concluded that the Noise Protection Law does not invalidate a local plan that does not comply with the Federal Protection

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<sup>48</sup> BUNDESVERWALTUNGSGERICHT, **Federal Administration Court 29<sup>th</sup> of November of 2012 - 4 C 8.11**, <https://www.bverwg.de/291112U4C8.11.0>.



against Noise Ordinance.<sup>49</sup>

In any case, a binding urban plan can only be valid when the authorities have observed their duty of resolving conflicts of functions, which generally includes overcoming the problems inherent in any noise pollution problems.<sup>50</sup> It should be noted that § 15 of the FBC is only to be applied if the plan leaves any conflicts open. The upper limits established in number 6.1 of the Federal Protection against Noise Ordinance are just an orientation to help the authorities define what is seen as a “considerable” nuisance, within the sense of Article 3 clause (1) of the Federal Control of Pollution Act: “Harmful effects on the environment as used herein shall be emissions which, according to their nature, extent or duration, are liable to cause hazards, considerable disadvantages or considerable nuisance to the general public or the neighbourhood.”<sup>51</sup> The planning authorities may also disregard the limit values of the Federal Protection against Noise Ordinance, when the concrete task necessary to respect the rights and duties involved leads to higher or lower limits. This is legally expressed in the basic § 1 clause (7) of the FBC: “In preparing land-use plans, public and private interests are to be duly weighted.”<sup>52</sup> Jurisprudence confirms this criterion, by according special relevance to factors such as which land use was present first and whether there are other functions possessing concrete special sensitivities that must be respected.<sup>53</sup>

Related to the requirement of introducing passive protection methods when residential spaces are to be constructed in an already existing noise polluting neighbourhood, is the requirement that a portion of the residence must provide silence to compensate for other portions for which noise protection has been lowered. Once again, the requirement for ensuring living conditions conducive to good health is generally preserved by the

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<sup>49</sup> BUNDESVERWALTUNGSGERICHT, **Federal Administration Court 14<sup>th</sup> of April of 1989**, 4 C 52.87 <https://www.jurion.de/urteile/bverwg/1989-04-14/bverwg-4-c-5287/>.

<sup>50</sup> WIENHUES, Sigrid, 2017, *ob. cit.*, p. 313, 325; BATTIS, Ulrich/MITSCHANG, Stephan/ REIDT, Olaf, *Das Gesetz zur Umsetzung der Richtlinie 2014/52/EU im Städtebaurecht und zur Stärkung des neuen Zusammenlebens in der Stadt (BauGB-Novelle 2017)*, The law transposing Directive 2014/52 / EU on urban planning law and strengthening the new coexistence in the city, (Reform of the FBC 2017) *NVwZ, Journal of New Administration* 2017, 817, 822.

<sup>51</sup> BUNDESVERWALTUNGSGERICHT, **Federal Administration Court 14<sup>th</sup> of April of 1989** – 4C 52.87., <https://www.jurion.de/urteile/bverwg/1989-04-14/bverwg-4-c-5287/>.

<sup>52</sup> SÖFKER, Wilhelm in ERNST, Werner/ZINKAHN, Willy/BIELENBERG, Walter/KRAUTZBERGER, Michael, *Baugesetzbuch, Federal Building Code*, Vol. I § 9, annotations 211, 212, §1 annotation 224, 2018.

<sup>53</sup> BUNDESVERWALTUNGSGERICHT, **Federal Administration Court, 18<sup>th</sup> of Dezember of 1990** – 4N 6.88, idem 30<sup>th</sup> of November of 1988 – 1 BvR 1301.84 [https://www.tierheim-feucht.de/downloads/Einwendungen\\_Bebauung.pdf](https://www.tierheim-feucht.de/downloads/Einwendungen_Bebauung.pdf).

application of this compromise. This may be a good way of creating a vibrant mixed use environment. As a rule, it is preferable not to impose general rules regarding this issue, since concrete situations in which fragile tenants are exposed only or mainly to the more noise polluted part of the residence do occur, and they require the use of compromise in the application of the law.

Another focus of analysis is the revised last portion of number 24 of § 9 clause (1) of the Federal Building Code, i.e., the new declarative clause stipulating that passive protection methods can be specified in binding urban plans, but that any higher protection level reached by these passive protection methods is excluded from the legally exceeded upper noise limits of number 6.1 of the Federal Protection against Noise Ordinance. Actually, this added alternative does not result in either harm or benefit and doesn't even contribute to clarify anything about the debated relationship between the Urban Planning Law and the Noise Protection Law.<sup>54</sup>

The message broadcast by the introduction of the new specific “urban area” land use type is the need for prudence: the new land use type is conservative in the sense of not giving up basic terms of protection, while at the same time acknowledging the urban reality by enabling a prudent implementation of positive projects requiring less noise protection than would have been implied within the legal reform of number 6.1 of the FLUO. The upper limits associated with the different specific land use types are not blindly enforced, and instead they are complemented with criteria that enable the implementation of concretely reasonable plans. Regarding this decisive issue, every party involved has the subjective right of having his or her interests properly addressed and duly weighted. The fundamental right of property is thus not violated by legislation that does not consider and properly weight the interests of all parties. The German Federal Constitutional Court decided that the previous concretization of the rules is not practical and would in fact even prevent the decisive and just ponderation of all participating interests.<sup>55</sup>

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<sup>54</sup> BATTIS, Ulrich/MITSCHANG, Stephan/ REIDT, Olaf, *op. cit.*, p. 822.

<sup>55</sup> BUNDESVERWALTUNGSGERICHT, **Federal Administration Court of 5<sup>th</sup> of August of 1983, 4 C 53** <https://www.jurion.de/urteile/bverwg/1983-08-05/bverwg-4-c-5381/>.

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