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Making land available. Cultural legal comparison of the German Building Land Mobilisation Act and the partial revision of the Swiss Spatial Planning Act

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Abstract

Planning practice is confronted with seemingly contradictory challenges, such as the qualitative and quantitative provision of housing paired with reducing land consumption. To address this apparent dilemma, legislators are increasingly relying on densification. However, a fundamental prerequisite (and often a significant challenge) for this is the availability of the land required. Recent planning law reforms in Germany and Switzerland aim to increase the effectiveness and speed at which land is made available for inner development, thus meeting the seemingly conflicting planning policy goals. This paper compares recent legislative efforts in Germany and Switzerland using the comparative law method. The German Building Land Mobilization Act includes amendments to the Building Code (*Baugesetzbuch*) and the Building Use Ordinance (*Baunutzungsverordnung*), intended to enable faster activation of building land and the creation of more affordable housing. To this end, the amendment expands existing instruments for the activation of building land and introduces simplifications to the planning law. In Switzerland, the Spatial Planning Act has been partially revised to achieve inner urban development through precise regulations on the expansion of building zones and instruments to ensure the implementation of zoning plans.

Keywords: Planning Law ▪ legal innovations ▪ use and disposal rights ▪ cultural legal comparison

Flächen mobilisieren. Ein kultureller Rechtsvergleich des deutschen Baulandmobilisierungsgesetzes und der Teilrevision des schweizerischen Raumplanungsgesetzes

Zusammenfassung

Die planerische Praxis ist mit scheinbar widersprüchlichen planungspolitischen Herausforderungen konfrontiert, wie beispielsweise die qualitative und quantitative Bereitstellung von Wohnraum bei gleichzeitiger Reduktion der Flächeninanspruchnahme. Um dem scheinbaren Dilemma zu begegnen, setzt der Gesetzgeber zunehmend auf Verdichtung. Eine Grundvoraussetzung (und häufig große Herausforderung) dafür ist jedoch die tatsächliche Verfügbarkeit der benötigten Flächen. Jüngste Reformen des Planungsrechts zielen sowohl in Deutschland als auch in der Schweiz darauf eben diese Baulandverfügbarkeit zu fördern, um so die benötigten Flächen für die Innenentwicklung effektiver und schneller verfügbar zu machen, um den scheinbar konträren planungspolitischen Zielen zu entsprechen. Dieser Beitrag vergleicht die jüngsten gesetzgeberischen Bemühungen in Deutschland und der Schweiz mit Hilfe der Methode der Rechtsvergleichung. Das deutsche Gesetz zur Mobilisierung von Bauland (Baulandmobilisierungsgesetz) enthält Änderungen des Baugesetzbuchs und der Baunutzungsverordnung, die eine schnellere Aktivierung von Bauland und die Schaffung von mehr bezahlbarem Wohnraum ermöglichen sollen. Dazu werden die bestehenden

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Instrumente zur Baulandaktivierung erweitert und planungsrechtliche Vereinfachungen eingeführt. In der Schweiz wurde das Raumplanungsgesetz teilrevidiert, um eine Siedlungsentwicklung nach innen durch präzise Regulierungen bei der Ausweitung der Bauzone sowie Instrumente zur Sicherstellung der tatsächlichen Umsetzung der Nutzungszonenplanung zu erwirken.

Schlüsselwörter: Planungsrecht ▪ Rechtsneuerungen ▪ Nutzungs- und Verfügungsrechte ▪ Kultureller Rechtsvergleich

1 Housing supply and reducing land take: An ostensible contradiction

Planning practice is confronted with seemingly contradictory planning policy challenges. On the one hand, the issue of housing provision has once again become urgent in many countries, both in terms of general, quantitative provision of housing in certain regions (e.g. in metropolitan areas) and in terms of qualified provision (e.g. in terms of housing affordability) (Debrunner/Hengstermann/Gerber 2020). On the other hand, controlling the ongoing sealing of green spaces is a traditional and more pressing planning challenge to combat climate change. Regardless of the exact definition and concrete measurement of this new land take (Jaeger/Schwick 2014; Decoville/Schneider 2016; Barbosa/Vallecillo/Baranzelli et al. 2017; Maron/Brownlie/Bull et al. 2018; Marquard/Bartke/Gifreu i Font et al. 2020), it should be noted that a reduction to 'net zero' includes both the protection of green spaces and the activation of inner development potentials.

The European Union (Hennig/Schwick/Soukup et al. 2015; Vrebos et al. 2017) and also some Member States have added (more or less) concrete legal objectives to their policy goals in this regard (Schatz/Bovet/Lieder et al. 2021), such as Belgium (Halleux/Marcinczak/van der Krabben 2012; Buitelaar/Leinfelder 2020), France (Jehling/Hecht 2022), Austria (Meinel/Schumacher/Behnisch et al. 2019; Kanonier 2020), Poland (Stacherzak/Hełdak/Hájek et al. 2019) and the Czech Republic (Vejchodská/Pelucha 2019).

The topic is also established as a political issue in Germany and Switzerland. In its sustainability strategy, Germany stated that new daily land take should be reduced from 120 ha to 30 ha (Bundesregierung 2002: 99). Effectively, it has been possible to reduce land take (to about 55 ha per day),[1] but the original target has been postponed from 2020 to 2030. In addition, there are demands to implement net-zero take-up by 2050, e.g. by the European Commission, the German Council for Sustainable Development (RNE), the German Council of Environmental Advisors (SRU) and the Nature and Biodiversity Conservation Union (NABU). At the same time, there is a cross-party tradition of promoting housing, most recently the 400,000 housing target of the current government (Bundesregierung 2021: 88). In Switzerland, the origin of spatial planning lies in protecting agrarian landscapes (Griffel 2017b: 21). In recent times, legislators have also come under pressure to increase the effectiveness of spatial planning from various popular initiatives (Hengstermann/Gerber 2015; Aemisegger/Moor/Ruch et al. 2016a), such as the "Landscape Initiative" (2008), the "Second Homes Initiative" (2012), the "Urban Sprawl Initiative" (2019) and currently the "New Landscape Initiative" (pending). While affordability is a focus, there is also a political effort to promote the provision of housing in general.

What all approaches have in common is that expanding housing supply while economising on land take constitutes an apparent dilemma. This, however, can be resolved through dense construction and consistent inner development. The greatest challenge of such a strategy is, again, accessing the required land, the availability of which is determined by the buildability of an area in planning and legal terms, and the willingness of the landowners to build. The logic of plan-led planning is based on the fact that capitalisation of the land rent encourages building. While the mechanism works in the vast majority of cases, in individual cases it can be seen that even in economically attractive locations some of the suitable land remains effectively unavailable for building development. Certain owners resist the economic added value of building development and leave their land underused or unused, despite it being designated as suitable for development (Colsaet/Laurans/Levrel 2018; Botticini/Auzins/Lacoere et al. 2022). In terms of the plan-led planning system, owners thus have a veto position in the implementation of land-use planning, which counteracts the increasing performance-based orientation of spatial planning (Gerber 2016). Only if the landowners become active through building or selling their property is the plan's actual implementation possible.

Improving building land availability is called the mobilisation of building land. This can be achieved both through a property's legal status as a buildable area and by increasing the willingness of property owners to build (or their willingness to sell to owners willing to build).

Recent – and in part innovative – reforms of planning law in various countries aim to increase the availability of building land, making the land necessary for inner development available more effectively and quickly. The seemingly contradictory planning policy goals (reducing land

[1] https://www.destatis.de/anstieg-suv.html (30.12.2022).

take and providing housing) are thus reconciled through effective planning and dense construction. In legal theory, this means that the actions of public authorities regulate the rights to use land, while the rights to dispose of land are to be influenced by public policy.

The structure of this paper follows our methodological approach (as described in Section 3). Section 1 has already outlined the substantive problem in the two selected countries. Section 2 explains the corresponding legal-theoretical background. Section 3 explains the methodological approach using cultural comparative law. Sections 4 and 5 show the most recent regulatory changes made by the respective national legislators. Finally, a systematic legal comparison is undertaken in Section 6.

2 Gaps and urban sprawl as a challenge for planning

In legal terms, land is a commodified good (Davy 1996; Gerber/Gerber 2017). Accordingly, property is not a legal relationship between a person and a thing but a triangular legal relationship between different persons, which in turn is protected by state institutions (Bromley 1992: 15). The legal relationship consists of several elements, metaphorically called "bundles of rights" (Demsetz 1974: 163). The exact classification of these bundles depends on the context (Thiel 2008; Slaev 2016).

According to Bracke (2004), however, a simplified distinction can be made between the rights of disposal and the rights of use. Rights of disposal include rights that involve a transfer of the object (e.g. provisions on sale, purchase, rental, leasing, inheritance). Lending is also classified as a right of disposal. The rights of disposal are determined by public and private law. The rights of use comprise the rights that determine and limit the manner of use of the object. This includes, in particular, how the property can be used within the legal framework, as determined by public law. For this purpose, substantive and restrictive provisions are enacted. In addition, there are easements (rights of way, pipeline and access rights) which, however, play a subordinate role. These can also be designed as concrete individual agreements or general abstract regulations.

Spatial planning is traditionally land-use planning that acts passively by regulating rights of use (Davy 1999; Hartmann/Spit 2015). The central planning question has remained unchanged since von Justi's time: "It is essential to the state that the immovable assets, and in general the land of the country, are used in the best possible way" (von Justi 1760; in: Davy 1996: 194). Accordingly, the purpose of planning procedures is to determine the best possible use – and thus the legal regulation of rights of use, e.g. by determining the type and extent of permissible building use within the framework of binding urban land-use planning (zoning plan) in the form of plan-led planning.

Issues concerning the best possible land distribution are called land reform issues, Effectively, they are hardly regulated in building and planning law. Some land management instruments serve to resolve problems that arise from contradictory situations within use and disposal rights. For example, (public) land readjustment ensures the alignment of the plot layout with the planning specifications to enable the plan's realisation (Davy 2007). Building obligations (Hengstermann 2017; Hengstermann/Gerber 2017), ground land leases (Gerber/Nahrath/Hartmann 2017) and urban expropriation/regulatory takings (Alterman 2010) have a similar effect, even though these instruments are discussed more widely in planning theory than they are used in planning practice.

Spatial planning as land-use planning acts according to land-use law, which allows developments to be framed and undesirable effects prevented. Still, the guarantee of plan implementation remains with the owners. In political science, this is referred to as an incoherent regime (Nahrath 2003: 397), as contradictions can arise between the levels of rights of use and rights of disposal. As a rule, this limit on possible control does not pose a problem as long as the public interests are largely congruent with the interests of the private landowner and the (primarily economic) incentives of building on an area lead to its actual use. In individual cases, individual property rights may nevertheless lead to areas suitable for planning being deemed buildable under building law but then not being physically built over (Blomley 2017; Jacobs/Paulsen 2009). Despite the incentive (capitalisation of land prices), there is no exploitation because the owners pursue other, non-economic goals. The possibilities of planning authorities to ensure the actual availability of land are typically limited in such cases. Against this background of planning and legal theory, this article's central question concerns the instruments of utilisation and disposal law that legislators in Germany and Switzerland are trying to use to promote the mobilisation of building land.

3 Cultural legal comparison

This paper is based on the approach of so-called cultural comparative law (Zweigert/Kötz 1998). Comparative law relates different legal solutions to a variety of similar problems in order to enable reflection on legal practice, and, if necessary, to facilitate the reception (Kunz 2006: 39) or transplanting (Watson 1974) of legal solutions from elsewhere. A distinction is made between functional and cultural legal comparisons. While functional legal comparisons

are descriptive and use pure knowledge of foreign law to identify possible effects on domestic subjects, cultural legal comparisons follow the approach that national law is an expression and manifestation of the culture of a society (Michaels 2012). Accordingly, the analysis of law focuses on the underlying mechanism of impact – also called mentality – and is therefore not limited to a narrow interpretation of the legal text (black letter law).

Following the approach of cultural comparative law, the analysis comprises three essential steps (Zweigert/Kötz 1998). Firstly, defining the substantive problem that was the political trigger and is to be solved primarily by the legal systems. Secondly, identifying the regulations in national law that are intended to solve the politically substantive problem previously defined. Thirdly, comparing the rules, i.e. an elaboration of functional differences and the development of a system.

The results obtained in the context of cultural comparative law are not only interesting from a comparative law perspective. Rather the article's methodology also enables legal practitioners and decision-makers in many countries to sharpen their view of legislative efforts to mobilise building land and create compact settlement structures.

4 German Building Land Mobilisation Act (2021)

After decades of controversial land policies, the Building Land Mobilisation Act[2] is an attempt to facilitate the provision of building land as a central prerequisite for housing construction and to push for physical construction to counteract the existing housing shortage. The decisive factor was the government's coalition agreement of 12 March 2018, in which the coalition parties agreed to support municipalities to activate building land and secure affordable housing (Bundesregierung 2018: 109). Accordingly, within the framework of the Housing Summit on 21 September 2018, with approximately 120 participants from all 16 federal states, various measures to intensify housing construction and improve housing affordability were determined, and, as a result, a joint housing offensive was adopted by the federal government, the federal states and the municipalities. In addition, an expert commission for sustainable building land mobilisation and land policy (*Baulandkommission*) was established to deal with this issue in depth (Breuer 2022: 585). Members of the commission were representatives of the government factions, the states, the municipal umbrella organisations, housing and urban development policy associations, trade unions and construction industry associations, as well as experts from academia and municipal practice.[3] On 2 July 2019, the commission presented its recommendations, which became the basis for the draft bill of 9 June 2020 for changing the Building Code[4] and the Building Use Ordinance.[5] These amendments are collectively referred to as the Building Land Mobilisation Act, which came into force on 23 June 2021.

4.1 Reform's context

In the area of public building law, the legislative competence lies with the states, insofar as the German Constitution[6] does not expressly assign legislative powers to the federal government (Art. 30 GG, Art. 70 GG). For areas of concurrent legislation, the states have the power to enact laws only as long as and insofar as the federation has not made use of its competence by means of laws (Art. 72 Para. 1 GG). Under Article 74 Paragraphs 1 and 18 of the Constitution, this also applies to the area of planning law. Here, the federal government has used its legislative competence by enacting the Building Code (BauGB) and legal ordinances based on it (BauNVO and others), thus providing the municipalities with a legal basis for regulating land use. Within the resulting legal framework, however, the municipalities have the right to regulate all matters of the local community themselves (Art. 28 Para 2 of the German Constitution). With the enactment of the *Baulandmobilisierungsgesetz*, the federal government intended to strengthen the municipalities' scope for action regarding the creation of housing.

German planning law distinguishes between three areas in which buildings can be constructed: the (fully or partially) planned area (§30 BauGB), the unplanned inner area (§34 BauGB) and the unplanned outer area (§35 BauGB). A clear distinction must be made between the different unplanned areas, as the inner area may be built upon under

[2] Gesetz zur Mobilisierung von Bauland (Baulandmobilisierungsgesetz) vom 14. Juni 2021 (BauMobG).

[3] https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2018/11/baulandkommission.html (02.01.2023).

[4] Baugesetzbuch (BauGB) in der Fassung der Bekanntmachung vom 3. November 2017 (BGBl. I S. 3634), das durch Artikel 2 des Gesetzes vom 4. Januar 2023 (BGBl. I Nr. 6) geändert worden ist.

[5] Baunutzungsverordnung (BauNVO) in der Fassung der Bekanntmachung vom 21. November 2017 (BGBl. I S. 3786), die durch Artikel 3 des Gesetzes vom 4. Januar 2023 (BGBl. I Nr. 6) geändert worden ist.

[6] Grundgesetz für die Bundesrepublik Deutschland (GG) in der im Bundesgesetzblatt Teil III, Gliederungsnummer 100-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 1 des Gesetzes vom 19. Dezember 2022 (BGBl. I S. 2478) geändert worden ist.

certain conditions while the outer area is to be kept free of any building development as a matter of principle.

The amendments to the *Baulandmobilisierungsgesetz* are intended, on the one hand, to create opportunities to make land available for housing construction more quickly or efficiently, e.g. by extending the possibilities for exemption from development plans and making it easier to build in inner and outer areas. On the other hand, the development of previously unused areas is to be promoted. This is done primarily by expanding the scope of the application of municipal pre-emption rights and the building order for areas with tight housing markets.

Some of the amendments in the *Baulandmobilisierungsgesetz* aim to facilitate or accelerate the possibility of building and thus have an effect at the usage rights level. Other regulations, however, are intended to promote physical construction and thus have affect disposal rights. The most important innovations of the *Baulandmobilisierungsgesetz* – differentiated according to their effect level – are presented below.

4.2 Components affecting the usage rights level

The following innovations concern both the planned and unplanned inner area as well as the unplanned outer area and are intended to make it easier to mobilise building land.

4.2.1 Urban development concept to strengthen inner development (§176a BauGB)

The introduction of §176a BauGB is intended to make it easier for municipalities to use municipal areas with dispersed and undeveloped brownfield sites for construction purposes. The aim is to make it easier to utilise land for housing. However, the preparation of such a development concept does not have a direct external effect on property owners or other persons but is rather intended to justify the necessity of urban development planning and measures (Rixner/Dürsch 2022: 1306).

4.2.2 Exemptions from the land-use plan in favour of housing development (§31 para. 3 BauGB)

§31 BauGB offers a municipality the possibility of making exceptions and exemptions from the land-use plan. With the new §31 para. 3 BauGB, a further case of exemption in favour of housing construction was included in the Building Code. For this exemption to apply at all, the project must be located in an area with a tight housing market and must be designated as such by a corresponding legal ordinance of the state government according to §201a BauGB (Charlier 2022: 436). An area is defined as a tight housing market if there is a risk that the population in a municipality or part of a municipality cannot be supplied with rental housing on reasonable terms (§201a BauGB). The regulation is limited until 31 December 2026. According to this provision, an exemption is also possible in individual cases if the basic principles of planning are affected (Charlier 2022: 431). This innovation thus opens up the possibility of creating housing under certain conditions on land previously not intended for housing construction.

In addition to this regulation, further innovations facilitate the approval of residential construction projects in individual cases. For example, the "residential needs of the population" are now explicitly cited as being of public interest and grounds for exemptions from the provisions of the land-use plan (§31 para. 2 no. 1 BauGB). Furthermore, in the case of the construction of buildings for residential purposes it is now possible not only to deviate from the requirement of fitting into the character of the immediate surroundings in individual cases, but also in a number of comparable cases (§34 para. 3a BauGB). Finally, the amended §35 BauGB contains further modifications intended to simplify the creation of residential space in outlying areas.

4.2.3 Introduction of a new sectoral land-use plan type for (social) housing (§9 para. 2d BauGB)

This sectoral land-use plan for the provision of housing, newly introduced by the *Baulandmobilisierungsgesetz* (§9 para. 2d BauGB), is intended to promote the creation of subsidised housing, particularly in unplanned inner areas (§34 BauGB) (Bothe 2022: 200). With such a land-use plan, the use of land can be restricted to residential buildings that meet the standards of social housing promotion or for which the developer has entered into an urban development contract to comply with the promotion conditions of social housing (Deutscher Bundestag 2020: 19). This regulation primarily serves to speed up the preparation of specific areas under planning law, as certain participation steps can be omitted in the plan preparation procedure. This subplanning is also possible even if overall planning has not yet been completed. The possibility of drawing up a sectoral land-use plan is limited until 31 December 2024.

4.2.4 Revision of §17 BauNVO: The previous upper limits for the extent of building use become orientation values

The values for the extent of building use, previously defined as upper limits in §17 BauNVO, are converted into orientation values by the new version of the regulation. The previous regulatory system stipulated compliance with the upper limits in urban land-use planning so that exceeding these limits was only possible as an exception requiring justification. This approach has been abandoned. There is no longer an obligation to compensate, as previously regulated

in §17 para. 2 BauNVO as a prerequisite for exceeding the upper limits according to §17 para. 1 BauNVO. This considerably expands the municipalities' scope for decision-making about the stipulations in the land-use plan on the extent of building use, so that in the existing building areas it is possible to build more densely than before (Deutscher Bundestag 2020: 34).

4.2.5 Introduction of a new building area category (§5a BauNVO)

On the commission's recommendation, "rural residential area" is included in the *Baunutzungsverordnung* as a new residential area category (Fimpel/Müller 2022: 19). Such areas serve residential purposes as well as the accommodation of part-time agricultural and forestry businesses and commercial enterprises that do not cause a significant disturbance (§5a BauNVO). Unlike village areas (§5 BauNVO), such areas are not characterised by full-time agricultural businesses but by the coexistence of housing, part-time businesses and non-disturbing commercial uses. This means that a land-use plan can now be drawn up for additional areas previously assigned to the unplanned external area according to §35 BauGB.

4.2.6 Extension of §13b BauGB

The regulation §13b BauGB includes the possibility of including outer areas in an accelerated procedure, thus facilitating building in unplanned outer areas. The provision was introduced in 2017 to be able to create housing for refugees as quickly as possible and was initially limited until 31 December 2019. Now, in the course of the *Baulandmobilisierungsgesetz*, it has been extended until the end of 2022 on the grounds of the existing housing shortage. However, the norm contradicts the protection of the outer area and the priority of inner-urban densification (Kment 2020: 180).

4.3 Components affecting the disposal rights level

The following innovations are intended to strengthen the actual land mobilisation by the municipalities.

4.3.1 Strengthening the municipal right of pre-emption (§§24, 25 BauGB)

German building law provides for a municipal right of first refusal. In planning practice, however, this has so far only played a subordinate role. The *Baulandmobilisierungsgesetz* is intended to increase the applicability of pre-emption rights under §§24, 25 BauGB. Purely speculative properties are to be withdrawn from the market by making them available for development after a building order (§176 BauGB), either on the part of the owner or on the part of the municipality through a resale in connection with building orders (Fimpel/Müller 2022: 20).

In particular, it is clarified that meeting a housing need in the municipality and promoting inner development based on an urban development concept are public welfare concerns that can justify the exercise of the right of first refusal (§24 para. 3 p. 2 BauGB). In addition to undeveloped areas, properties which are already slightly developed are now also eligible for the exercise of pre-emptive rights (§24 para. 1 p. 1 no. 6 BauGB). In addition, new municipal pre-emptive rights are introduced for properties in a deplorable (urban development) state (§24 para. 1 p. 1 no. 8 BauGB) and for undeveloped or marginally developed and derelict properties in municipalities with tight housing markets as defined in §201a BauGB (§25 para. 1 p. 1 no. 3 BauGB).

4.3.2 Extension of the building order for areas with a tight housing market (§176 para. 1 no. 3 (new) BauGB)

In principle, building planning law only defines the framework of permissible development, but it does not create any obligation to physically construct the permissible development. In certain cases, however, the municipality can issue a building order against the owners to force the implementation of a building measure. However, high legal requirements are attached to this, which is why the instrument has received more academic than practical attention.

The existent building order was extended by the *Baulandmobilisierungsgesetz* in that it is now possible for municipalities to order owners in areas with tight housing markets to build on their land with residential units, provided that residential use is permitted in the land-use plan (§176 para. 1 no. 3 BauGB). The limit for this is the economic reasonableness for the owner. What is new here is that even sites with minor development are now considered undeveloped, which extends the applicability of the building order. If the owner is unable to comply with the building order, they can demand that the municipality take possession of the land in question for the benefit of third parties, whereby the land may only be transferred to municipal housing associations, non-profit housing construction companies, cooperatives or foundations. In this case, it is contractually stipulated as a condition and requirement that the specific project be realised within a period to be determined.

4.4 Effect of *Baulandmobilisierungsgesetz* on mobilising building land

The *Baulandmobilisierungsgesetz* aims to strengthen the municipalities' abilities to activate building land more quickly and secure affordable housing, thus counteracting

the tight housing market in German cities. It is questionable whether this has been achieved with these amendments.

The new regulations focus on measures that purely impact usage rights and have little or no influence on the physical development of the land. In addition, the amendments often only affect individual cases, such as the amended exemption options under §31 para. 2 and 3 BauGB. The new regulations with an effect on disposal rights, on the other hand, are only selectively related to individual detailed aspects. The amendments to the pre-emption rights in §§24, 25 BauGB expand the existing legal options of the municipalities. Still, it is questionable whether they can help ease the situation in the housing market since they are purely reactive instruments and the municipalities cannot act on their own initiative (Kment 2020: 181).

The amendments to the building order (§176 BauGB) expand the regulation's field of application, but the extent to which they can make a real contribution to the mobilisation of building land remains to be seen. Even in previous planning practice, the building order did not play a significant role, as it was considered too "complicated and court-heavy" (Parzefall 2020: 27), a "blunt sword" (Krautzberger/Stüer 2021: 37) with too many obstacles to enforceability.

In summary, it can be said that apart from new possibilities to improve buildability, there are still hardly any instruments available to enforce physical development. It remains to be seen whether the legislative changes listed here can fulfil the legislators' intentions. The Building Land Mobilisation Act currently seems to be only one step on the long way to effective building land mobilisation.

5 First partial revision of the Swiss Spatial Planning Act (2012)

In 2012, the Federal Assembly passed a partial revision of the Spatial Planning Act (RPG).[7] The change represents the most significant amendment to Swiss planning law since the original codification in 1979 (Knoepfel/Csikos/Gerber et al. 2012: 417–418). On the mobilisation of building land, there are two major changes. Firstly, Article 15 RPG specifies the provisions that are binding under federal law when expanding the building zone, implicitly enlarging the criteria catalogue for land-use designation. Secondly, explicit provisions to promote the availability of building land were added and incorporated into the law in a new Article 15a RPG. In addition, the prescriptions for compensating added value (Art. 5, Art. 38a RPG) and for structure planning (esp. Art. 8a RPG) were reformed as well, although these mechanisms of action do not directly affect the mobilisation of building land.

5.1 Reform's context

Since 1969, spatial planning has been explicitly listed in the catalogue of state responsibilities in the Swiss Constitution (BV).[8] Since then, public institutions have been empowered and obliged "to ensure the appropriate and economical use of the land and its properly ordered settlement" (Art. 75 para. 1 BV). Achieving this constitutional objective is the responsibility of the cantons (Art. 3, 42, 43 and 75 BV). However, within the framework of limited regulatory power, the Confederation can also define principles and even conclusively regulate individual sub-areas (Griffel 2017a). In Swiss spatial planning, a legal system has developed in which the federal government regulates the overarching objectives and principles and conclusively regulates their application in selected areas (especially construction outside the building zone). In essential areas (especially construction within the building zone), the cantons are given framework conditions, the implementation of which remains within their decision-making and legislative sovereignty.

The main body of federal law is the 1979 Spatial Planning Act (RPG) and the principle of separation contained therein, i.e. the division of land into the building zone and the non-building zone. The former can be further differentiated by cantonal law, while the latter is conclusively regulated by federal law (Hänni 2016: 255; Griffel 2017b: 58, 137). In the building zone, there is freedom to build, although a building permit is required upfront to ensure conformity with planning and building law (Aemisegger/Moor/Ruch et al. 2016a: 289). In the non-building zone, there is no freedom to build as long as there is no explicit exception under federal law (e.g. for agricultural buildings, infrastructure, or other place-related issues) (Griffel 2017b: 22). In addition, the main procedural instruments for planning within the building zone are predefined in the Spatial Planning Act, such as the structure plan (usually at the cantonal level) and the zoning plans (usually at the communal level). While the structure plan is only binding for the authorities, the zoning plans are directly binding for the owners: thus, they form the legal basis for building permits (Aemisegger/Moor/Ruch et al. 2016b: 65). The federal government merely lays down abstract conditions about which aspects

[7] Bundesgesetz über die Raumplanung (Raumplanungsgesetz) (RPG) vom 22. Juni 1979, Stand am 1. November 2012.

[8] Bundesverfassung der Schweizerischen Eidgenossenschaft (BV) vom 18. April 1999, Stand am 13. Februar 2022.

must be considered in zoning planning. The concrete decision is the responsibility of the municipalities.

The system aims to legally define the limits and restrictions on the owners' land use (Berisha/Cotella/Rivolin et al. 2021: 195). The actual implementation of construction work is a decision made by the owners. In this respect, the system is passive (Hengstermann 2019). Building use of the land is made possible and the corresponding incentives are created. However, the planning authorities cannot guarantee the physical implementation of building work, so the property owners have a veto. Despite the economic incentives, considerable areas remain unused or underused, even in high-priced locations. Precise quantification is difficult, but estimates suggest that Switzerland's building land reserves could provide additional housing for 0.7 to 1.94 million inhabitants (Nebel 2014: 146). However, if the development pressure is instead met by expanding the building zone, then this will result in precisely those sprawling spatial structures that contradict the constitutional goals and the entire political legitimacy of spatial planning. Promoting the mobilisation of building land thus serves the achievement of objectives and is not only sensible in planning terms but legally required.

However, the fact that the system does not work so effectively in everyday political life became clear to politicians and the electorate through the so-called Galmiz case (Hengstermann/Gerber 2015). Although the planning and nature conservation regulations stipulated otherwise, a 55-ha area in the municipality of Galmiz in the canton of Fribourg was zoned to enable an industrial development to satisfy economic policy. The procedure is questionable for legal reasons. Politically, however, it shows the weakness of spatial planning: the planning system cannot prevent urban sprawl if it primarily tries to prevent external development (negative planning) (Koll-Schretzenmayr 2021). What is needed is effective inner development (positive planning), which requires assertive spatial planning and instruments for mobilising building land. This realisation is the main motive behind the partial revision of the planning law (so-called RPG1-reform), which the Federal Assembly enacted in 2012, which was approved by the electorate in 2013 with 62.9 % in favour, and which entered into force on 1 May 2014.

5.2 Components affecting the usage rights level

The RPG-1 reform aims to increase the effectiveness of spatial planning. In addition to Article 8a RPG (cantonal planning) and Article 5 RPG (compensation for added value) (Hengstermann/Scheiwiller 2021), Article 15 RPG (building zones) was reformed as well. This contains the federal requirements for the local planning authorities (usually the municipalities). However, it is also indirectly essential for property owners, as it determines which building zone their property belongs to and thus whether it can be built on.

In the old version, Article 15 RPG included three criteria that must be fulfilled for land to be eligible to be assigned to the building zone by municipal planning (so-called zoning). The land must be suitable, be serviced by the municipalities within the next 15 years and be expected to be needed within the same period (Art. 15 para. 2 RPG old version). In comparison, the new wording of the same article includes further quantitative and qualitative general principles of the building zone (Art. 15 para. 1, 2, 3 and 5), as well as five cumulative criteria under which conditional land can be newly assigned to the building zone (see Table 1).

The quantitative dimensions of the building zone must (as in the old version) be based on the anticipated demand for the subsequent 15 years (Art. 15 para. 1 RPG). If the existing building zone already exceeds this anticipated demand, there is now an obligation to reduce it (Art. 15 para. 2 RPG) (Huser 2019: 107). In addition, the calculation of this requirement is regulated in detail and made binding in the form of a technical guideline (Art. 15 para. 5 RPG). The municipalities are also explicitly bound by planning law requirements regarding the quality of the building zone (Art. 15 para. 3 RPG). Explicit reference is made to the binding conformity with the objectives and principles of planning (Art. 1 and 3 RPG). In addition, the principle of functional, i.e. cross-border planning, applies (Art. 15 para. 3 RPG) (Aemisegger/Moor/Ruch et al. 2016a). Taken as a whole, these new regulations result in the general principles of building zones being defined much more precisely (Griffel 2017b). They also result in legally binding framework conditions within which municipal zoning must take place.

Since the reform, five cumulative criteria must be fulfilled when assigning land to the building zone (Art. 15 para. 4 RPG): (i) suitability, which refers to both technical and legal aspects; (ii) need, servicing and development within the next 15 years; (iii) the reservation that cultivated land is not fragmented; (iv) the legal guarantee of actual availability; and (v) compliance with the requirements of the structure plan. With this catalogue of criteria, the federal legislature has now given the municipalities more precise guidelines for their spatial development, which they must translate into binding specifications for the type and extent of permissible building use of land.

Overall, the density of land-use regulations has increased significantly. While Article 15 RPG in the 1980 version served to provide an initial, nationwide, uniform definition of building zones, the cantons now have significantly more precise requirements under federal law regarding the quan-

Table 1 Comparison of Article 15 RPG old and new versions of Swiss Spatial Planning Act (RPG)

Art. 15 RPG Version in force 1980-2014	Art. 15 RPG Version in force since 2014
Building zones shall include land that is suitable for development and a) is already largely developed, or b) will probably be needed and developed within 15 years.	[1] Building zones must be defined in such a manner that they meet the anticipated needs for the following 15 years. [2] Excessively large building zones must be reduced in size. [3] The location and size of the building zones must be defined in a manner not restricted by communal boundaries, respecting the aims and principles of spatial planning. In particular, crop rotation areas must be maintained and nature and landscape preserved. [4] Land may be assigned to a building zone for the first time if: a. it is suitable for development; b. it will probably also be needed, made ready for development and developed within the next 15 years even though internal use reserves in existing building areas have been exploited to their full potential; c. arable land is not fragmented as a result; d. its availability is guaranteed by law; and e. the requirements of the structure plans are met thereby. [5] The Confederation and cantons shall together draw up technical guidelines for assigning land to building zones, and in particular for calculating the area required.

Official translation in Fedlex, provided by the Federal Chancellery

tity, quality and conditions for expanding the building zone. The cantons' scope for interpretation (e.g. the interpretation of the anticipated demand) and legal loopholes (e.g. the compensation of planning-related added value) have been reduced as a result, even though this can lead to an increase in requirements and considerable additional expenditure in local planning practice.

5.3 Components affecting the disposal rights level

The RPG-1 reform also includes new provisions that affect the level of disposition law. For example, actual availability is explicitly mentioned in Article 15 RPG for new building zones and is even extended to old building zones with the contemporary Article 15a RPG.

The aforementioned legally binding cumulative criteria for expanding the building zone also include actual availability (Art. 15 para. 4 lit. a and d RPG new version). First, the technical and legal suitability of the land for building on (Art. 15 lit. b RPG old version) is adopted from the old regulation as a mandatory criterion. In addition, it is now compulsory that the land is needed, serviced and built on within the next 15 years (Art. 15 para. 4 lit. b RPG new version). In this list, the legislator thus adds a "de facto building obligation" (Hengstermann/Gerber 2017) to the existing infrastructure service obligation and the anticipated need. Accordingly, municipalities must legally ensure that the land they want to assign to the building zone is actually built on. They must also legally ensure this outcome (Art. 15 para. 4 lit. d RPG new version), which can be achieved through general building code regulations or individual contracts with the landowners. The latter means linking zoning decisions to the consent and contractual agreement of the landowners. The concrete building intention, schedule and consequences in the event of non-occurrence are then laid down in the contract. If applied, the legal consequence is most often the takeover of the land by the municipality so that the implementation of the zoning plans is also ensured, under the law of disposal if necessary.

All in all, these two regulations (Art. 15 para. 4 lit. a and d RPG new version) mean that in addition to the rights of use, the zoning process now also includes deadlines with an obligation to use the land, thus preventing future building land from being hoarded. If physical development does not occur within the time limit, the original zoning becomes null and void. It is thus withdrawn without compensation (non-zoning) or the land is taken over by the municipality at the general market value (expropriation) and used for development.

Not included in the provisions of Article 15 RPG is building land under the old law, i.e. land that had already been assigned to the building zone when the partial revision came into force in 1980. To promote the availability of this land, the legislator has added the new Article 15a RPG and established two essential mechanisms in the process. The article states: "The cantons shall work with the communes to take the measures that are required so that building zones are used for their assigned purpose" (Art. 15a para. 1 RPG new version). Apart from a reference to building land readjustment (according to Art. 20 RPG), the concrete measures are not defined. Moreover, the idea of a building obligation is also taken up. Accordingly, the cantons must enact concrete, applicable regulations with which building obligations can be imposed (Art. 15a para. 2 RPG new version) (Hengstermann/Gerber 2017: 16–17). Compared to Article

15 RPG, the provisions in Article 15a RPG are thus much more abstract and formulated as performance-based regulations (Hartmann/Albrecht 2014: 246–248). There is no direct applicability of federal law (Griffel 2017a: 30–32). Instead of the basic competence of the Confederation, the legislator has instead specified binding objectives in Article 15a RPG which the cantons must achieve. The exact way in which the objectives are accomplished remains within the decision-making competence of the cantons.

5.4 Effect of the RPG revision on mobilising building land

Similar to the German Building Land Mobilisation Act, the partial revision of the Spatial Planning Act with several regulations aims to ensure actual availability of building land. In contrast to the German law reform, however, the political motivation lay less in creating affordable housing. Instead, the legislative reform was legitimised with the goal of reducing the conversion of agricultural land via effective inner urban development and ultimately putting a stop to urban sprawl.

The reform is characterised by new regulations that affect both the level of land-use law and the level of land disposal law. The federal requirements that affect land-use law were specified to enable the municipalities (as primary planning authorities) to allow inner development through stipulating land use. In addition to this traditional planning approach, the Swiss reform took into account the dimension of disposal rights (property rights) for the first time. To ensure physical development, availability was included as a mandatory criterion for new zoning and a de facto building obligation was also introduced. In addition, a binding legislative mandate was formulated so that the cantons can use further measures to promote the availability of building land governed by the old legislation.

In order to ensure output-legitimacy, the democratic decisions concerning future settlement development should not be made impossible by the veto of individual property owners. Accordingly, the reform is to be understood as an essential step from pure land-use planning, which relies on the possibility of building during the implementation of the plan, to a land policy that also takes property rights into account (Hengstermann 2019). Ultimately, this also includes the intensified implementation of spatial planning using instruments under private law, such as civil law building rights (Gerber/Nahrath/Hartmann 2017: 1699–1700).

6 Discussion: Comparison of crucial aspects of the two reforms

The comparison of legislative activities reveals some similarities and differences between the recent planning law reforms in Germany and Switzerland.

6.1 Comparison of the factual problem definitions

In both Germany and Switzerland, it can be observed that spatial planning and land policy have received increased political attention, which has ultimately led to remarkable legislative activities. In both countries, the relationship between increasing housing supply and simultaneously reducing land consumption is of central importance and represents the factual problem definition in both cases. However, the individual priorities differ in the two countries. In Germany, political activities are mainly legitimised by public debates on the provision of (social) housing. Although many of the measures also aim at inner development (e.g. §176a BauGB as a masterplan for the promotion of inner development; see Spannowsky/Uechtritz 2022: 1846–1848) and the reduction of land consumption is a clear political goal (Deutscher Bundestag 2020: 22), the expert discussion on these points takes a back seat to the housing issue.

In Switzerland, this relationship is reversed. The protection of land against urban sprawl is the dominant political motive, while at the same time the provision of housing is discussed only in certain areas (among the professional public and in some Swiss cities). However, the different discursive starting points lead to a similar challenge for the planning systems in both countries: the difficulty of mobilising the corresponding land demand for inner development.

6.2 Comparison of the building land mobilisation innovations

In their concrete legislative activities to improve the availability of building land, the two legislatures initially proceeded similarly, focusing on enhancing the provisions affecting the usage rights. The German *Baugesetzbuch* amendment contains a whole series of such regulatory changes creating, for example, the possibility of an exemption from the provisions of the development plan in favour of housing construction (§31 para. 3 BauGB), the option of drawing up a sectoral development plan for (social) housing construction (§9 para 2 lit. d BauGB), and the extension of the regulation on development in the outer area (§13b BauGB). In Switzerland, the provisions on the building zone were concretised (Art. 15 RPG) by introducing qualitative and

quantitative principles and cumulative criteria for the expansion of the building zone.

It is noticeable that the weighting of provisions affecting disposal rights varies considerably in the legal reforms. The German legislator has attempted to increase the practical applicability of two instruments affecting disposal rights: the municipal right of pre-emption and the building obligation. For this purpose, the legal description of the cases of applicability has been expanded, particularly by explicitly listing the need for housing as a public interest and by listing unused and underused land as the application's object. In both instruments, however, the new regulations only tackle some of the obstacles witnessed in planning practice, so it remains to be seen whether application of the instruments will actually increase. The Swiss legislator has attempted to enact much more far-reaching disposal rights provisions that guarantee the actual development of land suitable for planning purposes. The provisions are intended to prevent future undesirable developments and correct past undesirable developments retroactively. In the former case, detailed provisions have been enacted which suggest that spatial planning can effectively prevent urban sprawl in the future. Therefore, the individually justified possibility of building on a plot of land is linked to a publicly justified obligation of use – with corresponding restrictions under disposal rights in case of non-compliance.

The retroactive provisions are politically ambitious but legally much less detailed. Here, Article 15a RPG constructs a far-reaching planning competence but merely formulates a binding legislative mandate for the cantons with a building obligation and further measures.

In comparing the two approaches, it can thus be stated that both legislatures pursue similar planning policy goals but choose different focal points for the legislative mechanisms. The changes in German law aim to promote the mobilisation of building land by simplifying the buildability of areas suitable for development from a planning perspective. The changes in Swiss law also aim to promote the mobilisation of building land by increasing the owners' willingness to build or by presenting regulations that ensure actual development if there is no willingness to build.

6.3 Functional differences and systematisation

These differences are profound in terms of planning theory. They can be related to two differences between the German and Swiss planning systems despite all their similarities.

Municipalities in both countries are probably the essential public planning authorities. However, their political position and respective property owners differ, partly due to different planning law requirements. In Switzerland, zoning plans are revised when conditions have changed significantly (usually every 15 years) (Art. 21 para. 2 RPG). It is possible to politically re-debate past planning decisions and make different decisions – by rezoning and dezoning for example. In this respect, the municipality has a firm negotiating position every 15 years or so from which to find a suitable solution with the owners – or expressed in planning theory terms: to bring land-use planning in line with property rights. In Germany, this possibility does not exist in the same form (Feiertag/Schoppengerd 2022). After a plan is issued in the first place, there is no longer a regular review of the zoning.

The German planning system is based on the pure provision of development options (right-of-use level), as the coupling of planning policy plans and private law intentions is fundamentally prohibited (prohibition of coupling). Apart from some pragmatic solutions (e.g. by using urban development contracts according to §11 BauGB or strategic instruments like the urban development measure according to §§165-171 BauGB), the municipality cannot discuss the realisation of buildability with the owners. The German legislator has reacted to this situation by increasing the flexibility of the regulations. Thus, the plans themselves are not reformed, but they do allow reformed land uses. In contrast, the Swiss legislator has stuck to rigid instruments and developed a kind of coupling requirement. Following the primacy that the democratically determined plan needs to be implemented, public law and private law provisions are to be harmonised. The expansion of the building zone only makes sense in planning terms if the availability of the land is legally guaranteed, and only then is it lawfully permissible. Such a coupling has not been compatible with German planning law (§56 para. 1 p. 2 VwVfG).[9]

7 Conclusion: Comparison of approaches to promoting the availability of building land in Germany and Switzerland

Planning authorities are confronted with demands that seem to contradict each other, such as reducing land take while at the same time providing generous amounts of housing. To address this dilemma, legislators in various countries focus

[9] Verwaltungsverfahrensgesetz in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 24 Absatz 3 des Gesetzes vom 25. Juni 2021 (BGBl. I S. 2154) geändert worden ist.

on densification in inner areas, which in turn creates the challenge of mobilising the corresponding land.

Since this involves both the property's legal status under planning law and the need to increase property owners' willingness to build or sell to owners willing to build, dimensions related to reforms of both use and disposal rights were examined in this paper. Despite a comparable starting point, the focus of the legislators differed. In Germany, the legislative focus was clearly on instruments with usage rights that were intended to promote the buildability of land. The reform components that affect disposal rights play a subordinate role. In Switzerland, on the other hand, the legislator has been intensively active in the area of usage rights as well as disposal rights. Including the dimension of disposal rights makes it possible to dissolve the owners' veto position in the planning system and ensure the implementation of the democratically legitimised zoning plan.

With this approach, the Swiss legislator prioritises the containment of urban sprawl through consistent inner development. Conversely, the German legislator focuses on activating the potential for inner development by making usage rights more flexible. In both cases, it remains to be seen to what extent the intended effects of protecting green spaces and activating inner development potential will be achieved in planning practice.

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