Urban contracts following the German National Building Law (Art. 11 BauGB)
Structure

• Motivation
• Legal objectives
• Important legal principles
• Economic efficiency
• Conclusion
Problems

• The quantity of flats for singles has tripled between 1950 and 1990, nowadays a percentage of around 37% of all flats
• Flats for two persons: Similar development
  → Increasing living space per person

• Many people moved to the suburbs
  → The development pressure in the surroundings is higher than in the city centres
Problems

- Hoyerswerda: - 23,6 % (City without surroundings)
- Leipzig: City - 11,8 %; Surroundings: + 21,5 %
- The eastern European expansion of the EU will only increase the development pressure in the urban agglomerations in Southwestern Germany
  → The migration movements increase the development pressure in Southwestern Germany
Problems

Population development:

The low birth rate in addition to the big migration movements cause big troubles in Eastern Germany

Source: Statistisches Bundesamt
Consequences

- Development pressure in Southwestern Germany (especially in the surroundings of agglomerations)
  → Urban contracts following Art. 1

- Vacancies in Eastern Germany and the „Ruhrgebiet“
  → Urban redevelopment following Art. 171 ff.

Source: http://maps.mygeo.info/landkarten_eu_de.html
Further motivation

**Price increase of building land in the development process**

- Mandatory procedure: the surplus value caused by the planning remains to the land owner, the part caused by the reallocation and new infrastructure remains to the Municipality
- Cooperative procedure: The Municipality is able to make a grab at the part which is caused by the planning
Art. 11 Paragraph 1 Number 1: Contracts of measures

- Contracts of planning (e.g. the draft of the preparatory and/or legally binding land-use plan of the Municipality, but it is not allowed to transfer sovereign (mandatory) resolutions)
- Contracts to prepare the building activities (e.g. voluntary reallocation of land property, uncovering the plot (demolition of old buildings, elimination of plants), remediation of contaminated plots)
Art. 11 Paragraph 1 Number 2:
Contracts of realization of constructions

• Use of the plot (regulation of type and degree of building and land use, obligation to realize constructions within a fixed period, condition or limitation of the building permission)
• Ecological Compensation
• Flats or plots for population groups which have extraordinary problems to find adequate living space (e.g. social housing supply)
• Supply of plots for locals
Art. 11 Paragraph 1 Number 3: Contracts to cover follow-up costs

It concerns costs
• of the Municipality
• in the past or future
• for urban measures.
• The costs must be condition or consequence of the development of the area.
Art. 11 Paragraph 1 Number 4: 
Contracts of use

• The Municipality can obligate the owners of the plots to use a determined energy supply (e.g. solar energy)
Other terms of contract:
Safeguarding of the fulfilment of the contract

• Clauses (right to information, control and/or sanctions)
• Personal servitudes (especially for ecological compensations)
• Mortgages (payment obligations)
• Right of repurchase (flats or plots for special groups)
Exclusion of arbitrary tying arrangements

- there has to be a strict objective connection between the obligation of the contractual partner of the Municipality and the development of the area
- the Municipality has no right to “sell” sovereign (mandatory) resolutions
- the Municipality has no right to make the building permission dependent on the conclusion of the contract if there already exists the right of approbation of the building following the legally binding land-use plan
Example 1

The Municipality demands 25 € per m² living space which will be constructed by the contractual partner to cover the general follow-up costs of the development of the area (e.g. Kindergarten, school).

- a „general“ connection is insufficient
- the causality has to be proved in a formal manner
→ This formulation of the contract would be legally void
The Municipality commissions a report to evaluate the consequences of the location of a new shopping centre. Following the expert opinion, a new turning lane is needed due to the expected traffic volume. Furthermore, after the construction of the shopping centre, the capacity of the road network will be exhausted so that an existing roundabout has to be amplified to enable future settlements.

- the Municipality may shift the costs of the expert opinion
- the Municipality may shift the costs of the turning lane
- the Municipality does not have the right to shift the costs of the amplification of the roundabout (consequence of future measures)
Example 3

An investor plans to construct 1000 flats. The Municipality will only enact the corresponding binding land-use plan if the investor will absorb the costs of the amplification of the Kindergarten for 25 children.

- the Municipality has to prove statistically the causality of the amplification (taking into account the probable structure of the future residents of the flats)
- if necessary, the costs have to be split
An investor plans to construct 500 flats. The Municipality will only enact the corresponding binding land-use plan if the investor will provide a plot to construct a Kindergarten. On the other hand, in the next 5 years the Municipality will not have the financial resources for the construction.

- The causality includes also a temporal component. In a typical new settlement (families with little children) the demand exists mainly in the first years.

→ This formulation of the contract would be legally void
Example 5

The Municipality just enacted the legally binding land-use plan to develop a new area when it recognized that an amplification of the Kindergarten is needed. For this reason, the Municipality concludes a contract with the investor that he will absorb the resulting costs.

- there already exists the right of approbation of the building activities following the legally binding land-use plan
- → The contract is legally void (Art. 11 Paragraph 2)
- → The contract should be concluded shortly before the enacting of the legally binding land-use plan (There already exists a concrete planning to evaluate the causality of the cost transfer, but the right of approbation of the building activities does not exist yet)
The principle of adequacy

- is not negotiable
- the “principle of voluntariness” in reference to the contract conclusion is not applicable in this case (because of the monopoly of the Municipality concerning the development of building land)
- not helpful: „no unacceptable burden“, „in adequate relation to the total value“
Criterion „Investment versus cost transfer“

- This criterion disregards the profit of the investor
- The adequate transfer would increase with the increase of the volume of construction
- → This criterion is not helpful
Criterion „Yield versus cost transfer“

- if the investor realizes the construction of the buildings and the development of the terrain there would be a mixture of those two balances
- the yield of the construction could cover a loss-making development of the terrain
- the burdens of profitable projects would be higher than burdens of unprofitable projects
- This criterion is neither helpful
Criterion „Increase of land value (Surplus value) versus cost transfer“

• An “open” calculation of profitability is needed (that is with participation of the investor as well as the Municipality)

• the maximally permitted absorption of the surplus value of a developed terrain is controversial discussed (at least 50 %, 67 % in the “Model Munich”)

• → Admissible: Absorption of 50 % of the surplus value to achieve an objective following Art. 11 BauGB, if the contract is concluded before the enacting of the legally binding land-use plan. A higher admissible absorption depends on the particular case.
Tool to check the economic efficiency

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<th></th>
<th>1. Year</th>
<th>2. Year</th>
<th>3. Year</th>
<th>4. Year</th>
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(Source: following Dransfeld, Finanzwirtschaft, 1/1999)
Conclusion

- Urban contracts are very important in order that the Municipalities may transfer a big part of the costs of development of new building areas to an investor or the owners of the plots
- Exclusion of arbitrary tying arrangements: proof of the strict objective connection between the obligation of the contractual partner and the development of the area, contract before the enacting of the legally binding land-use plan
- The principle of adequacy: is not negotiable, “open” calculation of profitability, absorption up to 50 % is inoffensive

Dr. Andreas Hendricks
Thank you very much for your attention! Questions?