

The Plan Without an Opponent. Legal Remedies Against Land-Use Zoning in Austria

Thomas Schödl, Syntagma Forschung Wien

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Abstract

An Austrian land-use plan is a regulation capable of multiplying or destroying the value of a plot without facing any procedural opponent. This paper examines the architecture of legal remedies against such plans and finds three interlocking asymmetries. Participation in the drafting procedure confers no right to a reply. Direct access to the Constitutional Court is narrowed by a subsidiarity requirement to the point where the standard route runs through a self-generated triggering case. And a successful challenge does not restore the prior state, because under settled case law earlier zoning provisions do not revive after annulment. Whoever wins gains time, not outcome. A federal inequality compounds this: the only route to review without a triggering case — an institutional application by a provincial ombudsman under Art 139(1)(6) of the Federal Constitution — does not exist in every province. The paper places this finding within the risk-disposition asymmetry (ρ/δ) and sets out a falsifiable research agenda.

Keywords: land-use plan · review of regulations · Art 139 B-VG · individual application · subsidiarity · non-revival · spatial planning law · provincial ombudsman

1 • The question

Rezoning agricultural land as building land can raise a plot's market value several times over. A downzoning can remove that value just as thoroughly. Both are the same legal act: a regulation of the municipal council, issued within the municipality's own sphere of competence under Art 118(3)(9) B-VG, effective upon approval by the provincial supervisory authority and publication.

The question of this paper is: **who can challenge that act, on what conditions, and what do they gain if they win?**

The answer is more sober than the economic weight of the act would suggest. It can be stated in three sentences, which carry the structure of the paper:

1. In the procedure anyone may speak; no one is entitled to an answer (section 3).
2. Before the court only those arrive who have a triggering case or create one (section 4).
3. Whoever wins obtains a fresh procedure, not the earlier state (section 6). That follows from the silence of Art 139(6) B-VG, not from a special rule for zoning.

This is sub-paper U3 of the principal work “Zoned Ground” and examines the remedies side of the asymmetry described there as a whole. It makes no claim to a complete account of spatial planning law; it follows a single line: the procedural position of those affected by a zoning decision they did not take.

2 • The object: a finally determined regulation

The land-use plan is not a collection of individual decisions but a general norm. That is the switch from which everything else follows: to attack it one needs review of the norm, not an appeal against an administrative decision.

As a regulation the plan is subject to the principle of legality in Art 18(2) B-VG. Since **VfSlg 8280/1978** the Constitutional Court has held in settled case law that planning norms can by their nature only be determined **finally** — that is, through planning objectives to be achieved rather than through conditional if-then provisions. At the same time it holds that the **zoning categories themselves** must be laid down by statute. A municipality may not invent categories; it selects from a catalogue set by the provincial legislature.

This construction has an immediate consequence for remedies. Because the substantive determination is final and therefore broad, the Court cannot review the planning merits — that would be a review of discretion for which no standard exists. What it can review is **whether the issuing authority went through the procedure towards the objective at all**: whether facts were established, interests weighed, reasons given and publication carried out in due form.

The result is a shift of the entire remedy into the procedural domain. Whoever wishes to defeat a zoning decision does not argue that it is bad, but that it came about badly. This is not a weakness of the system but the consistent consequence of final determination. It does, however, move the conditions of success away from being affected and towards knowing the file. Whoever does not know the file cannot mount the only viable attack.

3 • The first asymmetry: participation without entitlement

In all nine provinces the zoning procedure provides for public display of the draft with a period for comment. Anyone may submit a comment.

Such a comment confers **no party status**. There is no entitlement to a substantive reply, none to reasons for its rejection, and no remedy against being passed over. The municipal council

must include the comments received in its weighing of interests — that step is reviewable — but the individual objector has no enforceable right that their particular objection be addressed.

Nor is there any **subjective right to a particular zoning**. Neither the owner nor the neighbour can demand that an area be zoned, or not zoned, in a particular way. An owner's application to amend the plan is legally a suggestion; the municipality decides within its planning discretion.

The combination deserves precise naming: there exists a **form of participation without a corresponding right**. Constitutionally this is unobjectionable — participation is an element of the norm-making procedure, not a party relationship. But it has a structural consequence: those who bear the consequences of the zoning may speak; those who dispose of it need not answer. This is the procedural form of the ρ/δ asymmetry.

For practice one point is often overlooked: the comment is nonetheless not worthless. It is the only way of documenting in the file that a particular consideration was known. If it is later not visibly addressed in the reasoning, that becomes a point of attack under section 5. The comment therefore operates not as a remedy but as **evidence for a later proceeding**.

4 • The four routes

4.1 Route 1 — individual application under Art 139(1)(3) B-VG

An application may be brought by anyone claiming to be directly infringed in their rights by the unlawfulness of the regulation, provided the regulation became effective for them **without a court decision and without an administrative decision**.

The conditions are cumulative and strictly applied:

Directness. The regulation must intervene in the legal sphere without an intermediate act. For a zoning plan this is not self-evident: its effect typically unfolds only through the building permit procedure.

Current infringement — and the concrete intention to build. A merely potential or future effect does not suffice. For landowners, settled case law additionally requires a **concrete intention to build**, that is, construction intended within the foreseeable future (VfSlg 15.144/1998, 15.234/1998, 15.947/2000, 19.075/2010).

This condition has a direction that is rarely named. It can be satisfied by someone who wants to build, and regularly cannot be satisfied by someone who does not — by the neighbour, that is, who objects to the buildability of adjoining land. The only direct route to the Constitutional Court is therefore tied to an intention that the party bearing the consequences typically does not hold.

Subsidiarity. This is the decisive hurdle. The individual application is a subsidiary remedy. If another reasonable route is open — normally obtaining an administrative decision and appealing against it — the application is inadmissible. A detour is unreasonable only in special, exceptional circumstances; the classic example in the case law is that no one is required to provoke a penal decision in order to challenge a norm.

Burden of demonstration. The applicant must establish the procedural prerequisites themselves. A failure here leads to rejection without examination of the substance.

Formal requirements. Individual applications require legal representation under § 17(2) VfGG. Lawyers must file electronically under § 14a(4) VfGG; submission by e-mail is inadmissible.

Object of challenge. In **VfGH 22 September 2022, V 129/2021** (Ludesch) the Court clarified that only the regulation **in its currently applicable version** can be the object of a challenge — specifically designated as it relates to particular plots. The amending regulation that produced the current legal position cannot be challenged. This is practically consequential: an application attacking the historical rezoning regulation rather than the current plan fails already on the designation of the object.

The result: an individual application against a land-use plan is **rarely admissible**. Subsidiarity systematically channels those affected into route 2.

4.2 Route 2 — through the administrative decision

The practical standard route is indirect:

1. A decision is issued that rests on the zoning — typically the grant or refusal of a building permit.
2. Appeal to the provincial administrative court.
3. Complaint against its ruling to the Constitutional Court under Art 144 B-VG, claiming that it rests on an unlawful regulation.
4. The Court initiates ex officio a review of the regulation under **Art 139(1)(1) B-VG**.

This route has two structural properties that are rarely named.

First, it presupposes a **triggering case**. Whoever lacks one must generate one. The neighbour who considers a zoning unlawful must wait until the beneficiary builds — or initiate proceedings of their own in which the zoning question becomes preliminary. Either way the initiative shifts to a point in time at which facts on the ground are already being created.

Second, it **operates late**. By the time of the final ruling, construction has regularly advanced or been completed. Buildings already erected are as a rule unaffected by annulment of the zoning.

4.3 Route 3 — judicial referral under Art 139(1)(1) and (2) B-VG

If an administrative court or an ordinary court has doubts about the lawfulness of a zoning it must apply, it refers the matter ex officio to the Constitutional Court. A documented example is the **Constitutional Court's review order of 6 December 2021 in E 4240/2020**, concerning the zoning section of an Upper Austrian municipality, whose facts touch on a neighbour's party status in the building permit procedure.

Those affected cannot steer this route — they can suggest it but not compel it. It matters nonetheless because it detaches review from the admissibility doctrine of the individual application.

4.4 Route 4 — institutional application under Art 139(1)(5)–(7) B-VG

Abstract review without a triggering case is open to certain organs: the Federal Government, the provincial governments, the Ombudsman Board — and, where established under provincial constitutional law, the **provincial ombudsman** under Art 139(1)(6) B-VG.

This institution is the practically most important special case in Austrian zoning remedies.

Vorarlberg has a provincial ombudsman with standing of his own; he used it in **V 129/2021**, applying for partial annulment of a municipality's land-use plan.

Vorarlberg therefore offers access to zoning review that requires **neither individual infringement nor a triggering case**. In provinces without such an institution this access does not exist. The federal Ombudsman Board (subpara 5) may challenge regulations of provincial authorities but is not specialised in municipal spatial planning and rarely acts in this field.

The finding is therefore: **the only access to review without a triggering case is unevenly distributed across the federation**. A plot in Ludesch stands under a form of control that an equivalent plot elsewhere does not. This is not an enforcement deficit but a matter of provincial constitutional order — and thus a structural finding.

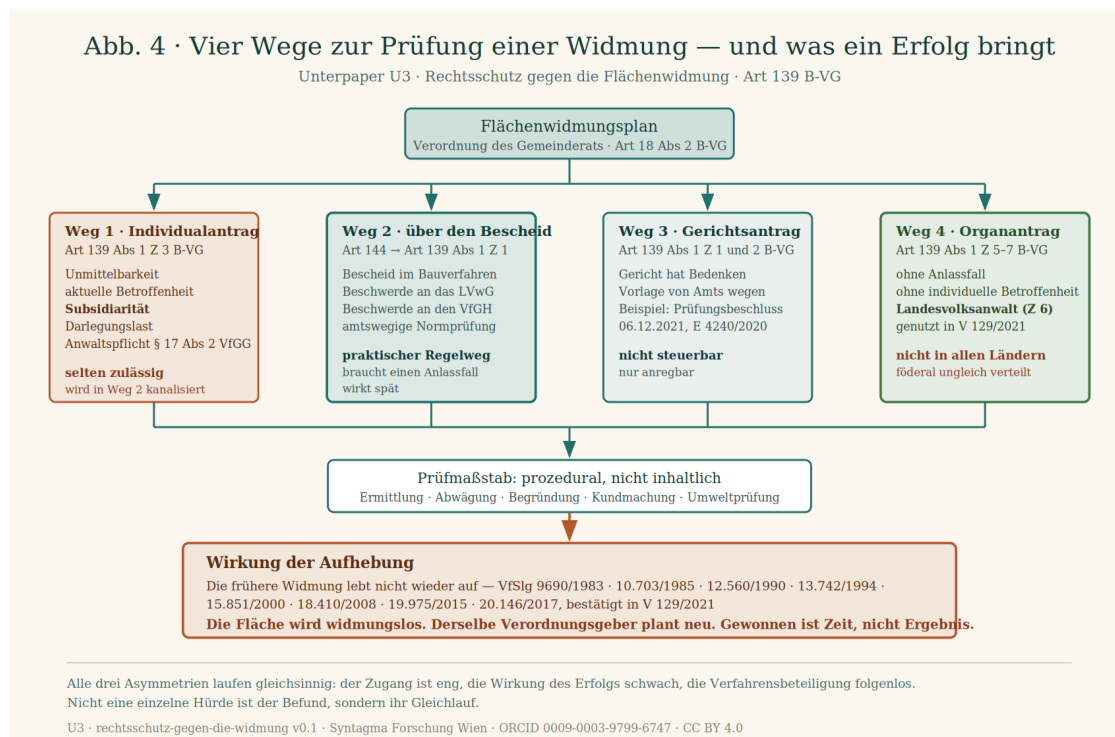


Figure 1: Four routes to review of a zoning plan, and the effect of annulment

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5 · The standard of review: procedural, not substantive

The Constitutional Court does not examine whether the zoning was sound in planning terms. It examines:

Standard	Legal basis	Typical defect
sufficient statutory predetermination	Art 18(2) B-VG, VfSlg 8280/1978	category not in the statutory catalogue
inclusion of statutory planning objectives	provincial planning act	objectives not addressed in the file
establishment of the factual basis	provincial planning act	no or undocumented baseline research
reasoning that reveals the weighing	settled case law	boilerplate reasoning
procedural and publication rules	provincial planning act	defective display or publication
environmental assessment	Dir 2001/42/EC with provincial law	SEA screening without traceable criteria
equality, prohibition of arbitrariness	Art 7 B-VG	extraneous motives, unjustified unequal treatment

The practically most successful line of challenge is therefore the **deficit in establishing facts and giving reasons**. This has a notable consequence for the distribution of prospects of success: they depend less on how severely someone is affected than on how well the file was kept and whether the challenger knows it. Whoever has file access and expert evaluation holds a structural advantage over the more severely affected party without that possibility.

6 • The second asymmetry: annulment without restoration

Under settled case law, **earlier provisions of a land-use or development plan do not revive after their annulment by the Constitutional Court**. The Court has maintained this over four decades; the chain runs from VfSlg 9690/1983 through 10.703/1985, 12.560/1990, 13.742/1994, 15.851/2000, 18.410/2008, 19.975/2015 to 20.146/2017, and is confirmed again in V 129/2021.

6.1 Where the difference actually lies

The cause of this rule lies **in the constitutional text**, not first in planning doctrine. **Art 140(6) B-VG** expressly orders, for the annulment of a statute, that the previously displaced provisions come back into force. **Art 139(6) B-VG** — the parallel provision for regulations — contains **no such order**. It governs only the binding effect of the ruling on courts and administrative authorities, continued application to facts realised before the annulment other than the triggering case, and the effect of any time limit set.

The Constitutional Court fills that silence. It does so **not specifically for zoning**: non-revival is the general rule for regulations, and VfSlg 9690/1983 is its leading decision — it merely happened to concern a land-use plan. There is also a **counter-exception**: where the newer regulation would not have derogated from the older one without an express repealing provision, the older one may come back into force (VfSlg 11.024, 16.987).

Correction to v0.1 of this paper. The first version presented non-revival as a peculiarity of zoning law. That is incorrect. It is the general rule for regulations. The planning-law finding shifts accordingly: it is not the rule that is zoning-specific but **its effect**. With an ordinary regulation, annulment usually leaves a regulatory gap that general norms absorb. With a land-use plan it produces an **unzoned area** — a condition the legal order does not recognise and which necessarily requires a fresh planning procedure. The severity comes from the object, not from the norm.

The consequences for remedies are nonetheless considerable:

- After annulment an **unzoned area** arises. A fresh planning procedure must be conducted for it.
- That procedure is conducted by the **same issuing authority** that adopted the annulled zoning. It may — without procedural error — arrive at the same result.
- The challenger therefore gains **time and a second procedure**, not the earlier outcome.
- Building rights already exercised generally remain.

One can state this neutrally: here the corrective instrument of the constitutional state does not restore an earlier condition but opens a procedure. That is a deliberate doctrinal choice and not a gap. Its distributive effect is nonetheless unambiguous — it favours the side that controls the procedure.

6.2 The comparison with forestry law

Forestry law provides the opposite order for a structurally similar situation: after a permanent clearing permit, the status of forest returns automatically if the purpose of the clearing is changed within ten years (§ 5 in conjunction with § 1a ForstG).

From this **no** general rule about the direction of revival provisions can be derived. That conjecture was tested and the test came out **negative**: the difference is explained by the **level of norm** — the constitution orders revival for statutes and is silent for regulations, while the ordinary legislature may order it expressly for individual fields such as forestry law. An overarching logic of who benefits is therefore not established and is not asserted here.

Structural observation (link to U7). A different figure — unlawfulness established, condition left standing, repair through a constructed intermediate concept — recurs at an entirely different point of Austrian land law: in the agrarian communities. The Constitutional Court described the transfer of municipal common land to agrarian communities as manifestly unconstitutional, yet excluded restitution of ownership and instead assigned the substance value to the municipality. In both cases the disposition remains as it stands, and the correction runs through a new category rather than through restitution. Whether this is the same legal figure or a structural parallel deserves its own investigation; here the observation is only recorded.

7 • Comparison: how narrow is narrow?

The Austrian finding gains contour only by comparison.

Germany provides, in § 47 VwGO, principal review of the development plan before the Higher Administrative Court. Standing lies with anyone claiming to be infringed in their rights by the provision or its application, or to be so within a foreseeable period; the time limit is one year. There is no obstacle comparable to the Austrian subsidiarity requirement. Access is therefore **markedly lower-threshold**, without Germany being regarded as unstable in planning terms as a result.

Switzerland allows challenges to land-use planning in cantonal proceedings with subsequent appeal to the Federal Supreme Court, alongside an association right of appeal for environmental organisations in environmental law.

The comparison supports a claim pursued further in the principal work: the narrowness of Austrian access is not a necessity of regulatory review but a specific design. It follows from the combination of the plan's regulatory character, the subsidiarity of the individual application and the concentration of norm review in the Constitutional Court — not from the nature of planning.

8 • Placement in the p/δ framework

The principal work describes five asymmetries between disposition (δ) and the bearing of consequences (ρ). This paper substantiates three of them:

Asymmetry	Finding of this paper
A2 procedural	participation without entitlement to a reply; no subjective right to a zoning (section 3)
A3 remedies	subsidiarity, mandatory representation, current infringement, federally uneven review without a triggering case (section 4)
A4 corrective	non-revival; the gain is time, not outcome (section 6)

What is decisive about this result is its direction. One would expect procedural disadvantages at one point to be offset by advantages at another — narrow access paired with strong effect of success, or the reverse. Here access is narrow **and** the effect of success is weak **and** participation is without consequence. That is the actual finding of this paper: not a single hurdle, but their alignment.

9 • Falsifiable propositions

Three propositions are empirically testable; their refutation carries or topples the thesis.

P1. The share of successful third-party challenges against land-use plans is markedly lower than the share of successful challenges in comparable fields of administrative law. *Falsified* by a comparable or higher success rate.

P2. The predominant share of successful challenges rests on procedural defects (fact-finding, reasoning, publication, environmental assessment) rather than on substantive unlawfulness. *Falsified* by a majority of substantively reasoned annulments.

P3. In provinces with an institution under Art 139(1)(6) B-VG, zoning plans are reviewed more often and earlier than in provinces without one. *Falsified* by comparable review frequency in the absence of such an institution.

Survey design. Full survey of regulatory review proceedings concerning land-use and development plans from 2000 onwards, drawn from the RIS case-law documentation and coded by route of challenge (subparas 1 / 2 / 3 / 5–7), applicant, province, ground of annulment, outcome and duration. This survey is outstanding and is recorded as blocker B4 in the principal work.

10 • Clause of candour

This paper describes an architecture of remedies, not misconduct. Every hurdle examined results from an intelligible doctrinal choice: subsidiarity protects the judiciary from *actio popularis*, non-revival protects the coherence of the plan, final determination makes planning possible at all. Each individual rule has good reasons.

The finding concerns their **interaction**, not their individual justification. And it is confined to one perspective: the procedural position of those affected. It does not address the achievements of well-conducted planning practice, the quality of baseline research in properly run procedures, the planning discipline's own perspective, or the interests of those who depend on planning certainty. The asymmetry analysis is a cut through the object, not an overall assessment of Austrian planning law (anti-world-formula clause, FORSCH-0059).

No persons are evaluated and no proceedings described as abusive. Where decisions are referred to, this is done by citation and by the content established by the Court.

11 • Declared methodological condition

The author is regularly concerned with zoning questions as a resident in the Tullnerfeld and through event-technical practice (site approvals, compatibility of event areas with zoning). This condition is declared, not neutralised.

Case law

VfSlg 8280/1978 · VfSlg 15.144/1998 · VfSlg 15.234/1998 · VfSlg 15.947/2000 · VfSlg 19.075/2010 · VfSlg 9690/1983 · VfSlg 10.703/1985 · VfSlg 12.560/1990 · VfSlg 13.742/1994 · VfSlg 15.851/2000 · VfSlg 18.410/2008 · VfSlg 19.975/2015 · VfSlg 20.146/2017 · VfSlg 11.024 · VfSlg 16.987 (counter-exception to non-revival) · VfGH 22 September 2022, V 129/2021 (Ludesch) · Constitutional Court review order 6 December 2021, E 4240/2020 (Jeging) · VfGH 1 October 2020, V 429/2020

Legal sources

B-VG: Art 7, Art 18(2), Art 118(3)(9), Art 139 (esp. para 6), Art 140(6), Art 144 · VfGG: §§ 14a, 15, 17, 17a, 57–61a · spatial planning acts of the nine provinces · Directive 2001/42/EC · for comparison: § 47 VwGO (Germany), Federal Act on Spatial Planning (Switzerland)

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