H e a d n o t e s

to the judgment of the First Senate of 17 December 2013

1. **Pursuant to Art. 14 sec. 3 of the Basic Law (*Grundgesetz* – GG), an expropriation can only be justified by a sufficiently weighty public interest objective, the determination of which is reserved for the parliamentary legislature.**

   The law must stipulate sufficiently precisely for which purpose, under what conditions, and for what kind of projects expropriations are permissible. The mere authorisation of an expropriation for "a project serving the common good" is not sufficient.

2. **If an expropriation serves a project that is to further a public interest objective pursuant to the first sentence of Art. 14 sec. 3 GG, the expropriated good must be indispensable for the realisation of the project.**

   A project is necessary within the meaning of Art. 14 sec. 3 GG if it may reasonably be required for the public good because it substantially contributes to achieving the public interest objective.

3. **An expropriation requires an overall balancing of, on the one hand, all public and private interests that exist in favour of the project, and, on the other hand, the public and private interests affected by its realisation.**

4. **The requirements for guarantee of effective legal protection against violations of the right to property are only met if legal protection against the taking of property is available so early that, with regard to preliminary determinations or the actual execution of the project, one can still realistically expect an open-ended review of all expropriation requirements.2**

5. **The fundamental right to freedom of movement does not grant a right to take up residence and to remain in places in those parts of the Federation's territory where regulations on real estate or land use conflict with a permanent residence, as long as they apply generally and are not intended to specifically target the freedom of movement of certain persons or groups of persons.**

6. **Art. 14 GG also protects the existence of specific (residential) property with regard to its established social and urban relations, as long as these relations are tied to land-connected property rights.**

Art. 14 GG grants those whose property rights are affected by extensive resettlement projects a right to have the specific scale of the resettlements and the ensuing hardships for the various persons affected to be taken into consideration in the overall balancing.

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 3139/08 -

- 1 BvR 3386/08 -

Released

on 17 December 2013

Wagner

Amtsinspektorin

as Registrar of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on the
constitutional complaints

I. of Mr P…,

- authorised representative: Rechtsanwälte Philipp-Gerlach, Tessmer, Niddastrasse 74, 60329 Frankfurt -

against a) the order of the Federal Administrative Court (*Bundesverwaltungsgericht)*

of 29 September 2008 - BVerwG 7 B 20.08 - ,

b) the judgment of the Higher Regional Court (*Oberverwaltungsgericht*) for the *Land* (federal state) of North Rhine-Westphalia

of 21 December 2007 - 11 A 1194/02 -,

c) the judgment of Aachen Administrative Court (*Verwaltungsgericht*)

of 10 December 2001 - 9 K 691/00 - ,

d) the ruling on objection by the *Land* Mining Office (*Landesoberbergamt*) of North Rhine-Westphalia

of 24 February 2000 - 07.1-1999-174 - ,

e) the approval decision of the Düren Mining Office

of 22 December 1997 - g 27-1.2-3-1 -

- 1 BvR 3139/08 -,

II. of the *Bund für Umwelt und Naturschutz Deutschland Landesverband Nordrhein-Westfalen e.V.*,
(Friends of the Earth Germany, North Rhine-Westphalia *Land* Association)
represented by its executive board, in turn represented by its Chairman Holger Sticht,
Merowingerstrasse 88, 40225 Düsseldorf,

- authorised representatives: Rechtsanwälte Philipp-Gerlach, Teßmer, Niddastrasse 74, 60329 Frankfurt -

1. directly against

a) the order of the Federal Administrative Court

of 26 November 2008 - BVerwG 7 B 52.08 (7 B 21.08) -,

b) the order of the Federal Administrative Court

of 20 October 2008 - BVerwG 7 B 21.08 -,

c) the judgment of the Higher Regional Court for the *Land* of North Rhine-Westphalia

of 21 December 2007 - 11 A 3051/06 -,

d) the judgment of the Düsseldorf Administrative Court

of 6 June 2006 - 3 K 3061/05 -,

e) the order of condemnation (*Grundabtretungsbeschluss*) of the Arnsberg district government

of 9 June 2005 - 81.04.2 r 204-1-1 -,

2. indirectly against

§ 77 and § 79 of the Federal Mining Act (*Bundesbergbaugesetz* – BBergG)

- 1 BvR 3386/08 -

the First Senate of the Federal Constitutional Court

with the participation of Justices

Vice-President Kirchhof ,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

Britz

on the basis of the oral hearing of 4 June 2013 has decided by

Judgment

as follows:

1. **The constitutional complaint 1 BvR 3139/08 is rejected.**
2. **The order of condemnation from the Arnsberg district government of 9 June 2005 - 81.04.2 r 204-1-1-, the judgment of Düsseldorf Administrative Court (*Verwaltungsgericht*) of 6 June 2006 - 3 K 3061/05 -, the judgment of the Higher Administrative Court (*Oberverwaltungsgericht*) for the *Land* of North Rhine-Westphalia of 21 December 2007 - 11 A 3051/06 - and the order of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 20 October 2008 - BVerwG 7 B 21.08 - in the proceedings 1 BvR 3386/08 violate the complainant's fundamental rights under Article 14 section 1 sentence 1 and Article 19 section 4 sentence 1 of the Basic Law (*Grundgesetz* – GG).**
3. **The *Land* of North Rhine-Westphalia must compensate the complainant in proceedings 1 BvR 3386/08 for three-quarters of its necessary expenditures for the constitutional complaint proceedings, and the Federal Republic of Germany must compensate it for one-quarter of those expenditures.**

Reasons:

The constitutional complaints are directed against government and judicial decisions in connection with the realisation of a project for an opencast lignite mine project in North Rhine-Westphalia. The complainant in proceedings 1 BvR 3139/08 challenges the approval of the framework operating plan for the Garzweiler I/II opencast mine, while the complainant in proceedings 1 BvR 3386/08 challenges a condemnation order against a property it owns. 1

A.

I.

1. Lignite coal in Germany is mined in large opencast mines. The economically reasonable implementation of projects regularly necessitates making use of settled areas and thus also the resettlement of entire localities. By far the largest part of the lignite thus mined is used for generating electricity. Lignite's share of power generation in Germany has been greater than 20 per cent for years. 2

2. In North Rhine-Westphalia, lignite is mined on the statutory basis of the *Land's* planning laws and the mining laws. 3

a) The *Land* Planning Act (*Landesplanungsgesetz* – LPlG) in the version largely relevant to the constitutional complaints, based on the new promulgation of 29 June 1994 ([…] hereinafter the "LPlG 1994"), establishes a special form of state planning for mining lignite, in the form of "lignite plans" (*Braunkohlenpläne*). 4

Within the lignite planning area, the lignite plans specify the goals for regional development and *Land* planning to the extent necessary for orderly lignite planning. […] In preparing a lignite plan, as a general rule an environmental impact assessment […] and a social impact assessment must be performed […]; additionally, there is to be formal involvement of the public […]. Lignite plans are subject to the approval of the *Land*'s planning authority in concert with the ministries responsible for the specialties involved, and in consultation with the committee of the *Landtag* (*Land* parliament), that is responsible for *Land* planning […]. 5

b) aa) Under § 3 sec. 2 of the Federal Mining Act (*Bundesberggesetz* – BBergG) of 13 August 1980 […], lignite is a mineral resource that is separate from surface property rights (*bergfreier Bodenschatz*). Anyone desiring to mine lignite must obtain […] an authorisation or proprietary mining rights. 6

Mining operations may be conducted only under plans prepared by the entrepreneur and approved by the competent authority […]. Main operating plans (*Hauptbetriebspläne*) must be prepared for building and conducting an operation for a period that is generally not to exceed two years […]. The competent authority may require framework operating plans to be prepared for a specified longer length of time that depends on the particular circumstances; these plans must include general information about the intended project, its technical implementation and its prospective time schedule […]. Approval of an operating plan […] depends on the fulfilment of […] requirements intended primarily to protect against operational hazards, and also depends on compliance with general prohibitions and restrictions […]. 7

The compulsory claiming of a property for mining purposes proceeds by way of condemnation (*Grundabtretung*). According to § 79 sec. 1 BBergG, such condemnation is permissible if it serves the common good, specifically by ensuring the market's supply of raw materials, maintaining mining employment, preserving or improving economic structure, or bringing about a reasonable and planned extraction of deposits. 8

bb) Provisions essential to the constitutional complaints are § 48 BBergG, which must be complied with in approving operating plans, as well as the requirements for condemnation under § 77 sec. 1 and 2, § 79 sec. 1 and 2 BBergG, which are indirectly challenged by constitutional complaint 1 BvR 3386/08. […] 9

[…] 10-12

II.

1. The “Garzweiler” lignite opencast mine is named after the former Garzweiler district of the municipality of Jüchen, which was situated in the mined area. The first segment of the overall project was based on the Frimmersdorf lignite plan (Garzweiler I) from the year 1984. In 1987, Rheinbraun AG – a legal predecessor of RWE Power AG, the entity joined as party to the initial proceedings – applied for the preparation and approval of a lignite plan for the Garzweiler II mining area. 13

2. a) By resolution of 20 December 1994, the Lignite Committee established the Garzweiler II lignite plan. This plan was approved by the Ministry for the Environment, Regional Development and Agriculture of the *Land* of North Rhine-Westphalia on 31 March 1995. 14

[…] 15

An environmental impact assessment and a social impact assessment were performed in the proceedings for the preparation of the Garzweiler II lignite plan. The latter review resulted in a more detailed resettlement plan for the localities that would be affected by mining up to approximately 2008. As part of the plan preparation procedure, the public was given the opportunity to provide comments during a period of several weeks in March 1994. 16

b) As a regional development goal, the Garzweiler II lignite plan establishes that mining lignite will normally take priority over other claims on use or functions in the mining area, the general size and approximate geographical location of which are defined by the graphically presented mining boundary. The mining area thus outlined includes the Immerath district of the town of Erkelenz. […] 17

c) In a decision of 16 February 2005, the Ministry of Transport, Energy and State Planning of the *Land* of North Rhine-Westphalia approved the “Immerath-Pesch-Lützerath Resettlement” lignite plan, which further outlined the resettlement of these localities on the basis of the Garzweiler II lignite plan. […] 18

3. Almost contemporaneously with the application for the preparation and approval of a lignite plan for the Garzweiler II mining area, the joined party’s legal predecessor presented to the then Cologne Mining Office a “Garzweiler I/II” framework operating plan conceived for the 1997-2045 mining period. In light of the ongoing lignite plan proceedings, Rheinbraun AG applied for a partial approval for areas located in the Frimmersdorf (Garzweiler I) mining area in 1992. This partial approval was granted in 1994. 19

III.

[Excerpt from press release no. 76/2013 of 17 December 2013]

The complainant in proceedings 1 BvR 3139/08 owns a piece of land in the mining area, namely in the Immerath part of the town of Erkelenz. He lives in a house built on this land. His constitutional complaint challenges the official approval decision from the Düren Mining Office on the approval of the framework operating plan for the Garzweiler opencast mine of 22 December 1997, as well as the decisions by the authorities and administrative courts that affirmed that approval.

[End of excerpt]

1. […] 20-43

2. […] He claims a violation of his fundamental rights under Art. 11 sec. 1, Art. 14 sec. 1, Art. 2 sec. 2 sentence 1 and Art. 19 sec. 4 sentence 1 GG. 44

[…] 45-48

IV.

[Excerpt from press release no. 76/2013 of 17 December 2013]

The complainant in proceedings 1 BvR 3386/08 is a nature conservation association recognised in North Rhine-Westphalia. In 1998, it bought a piece of land that had been scheduled to be utilised for the mining project. By order of 9 June 2005, the Arnsberg district government expropriated the association's property and transferred it to the project developer. The complainant's constitutional complaint challenges the order of condemnation (*Grundabtretungsbeschluss*), as well as the court decisions that affirmed this order.

[End of excerpt]

1. […] 49-82

2. […] The complainant claims a violation of its rights under Art. 14 sec. 1, sec. 3 sentence 1, Art. 19 sec. 4 sentence 1 and Art. 103 sec. 1 GG. 83

[…] 84-102

V.

[…] 103-145

VI.

[…] 146

B.

The constitutional complaint of the *Bund für Umwelt und Naturschutz Deutschland Landesverband Nordrhein-Westfalen e.V.* association (1 BvR 3386/08 – Condemna- 147

tion) is substantially admissible (I.) and in part well-founded (II.).

I.

148 The constitutional complaint, which directly challenges the order of condemnation and the court decisions upholding its legality, and indirectly challenges the statutory provisions of §§ 77 and 79 BBergG which form the basis for the order of condemnation , is admissible insofar as the complainant claims a violation of its fundamental right to property and the guarantee of effective legal protection that is equivalent to a fundamental right. Insofar as the complainant claims that the Federal Administrative Court's order on the complaint against the denial of leave to appeal violates Art. 103 sec. 1 GG, the constitutional complaint does not meet the substantiation requirements of § 23 sec. 1 sentence 2 and § 92 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG).

149 1. It does not argue against the admissibility of the constitutional complaint that the complainant – even though it had leave to do so from the adjudicating court – did not lodge an appeal on points of law against the judgment of the Higher Administrative Court for the *Land* of North Rhine-Westphalia of 7 June 2005 (11 A 1193/02), which denied its complaint against the approval of the framework operating plan for the Garzweiler I/II opencast lignite mine, an approval that was not challenged in the present constitutional complaint.

150 However, the principle of subsidiarity of a constitutional complaint, expressed in § 90 sec. 2 BVerfGG, requires complainants to make use of all available legal remedies in order to prevent or eliminate the claimed violation of fundamental rights through regular court proceedings (cf. Decisions of the Federal Constitutional Court – *Entscheidungen des Bundesverfassungsgerichts,* BVerfGE 107, 395 <414>; 112, 50 <60>; Federal Constitutional Court, order of the First Senate of 16 July 2013 - 1 BvR 3057/11 -, Neue Juristische Wochenschrift – NJW 2013, p. 3506 <3507 [para. 27]>). To comply with the principle of subsidiarity, it may also be necessary to exhaust legal recourse against a state measure that precedes the challenged one, if the former is the basis for the burden that is objected to later. Although, due to a lack of advance effects under expropriation law, the approval of a framework operating plan contains no legally binding advance decisions that could not be challenged by court action against the order of condemnation (cf. II. 3. d aa (3) and C. II. 2. b aa below), a condemnation would have no foundation without the framework operating plan.

151 All the same, the complainant was not required for reasons of subsidiarity of the constitutional complaint to lodge an appeal on points of law against the lower court's judgment in the proceedings on the approval of the framework operating plan, because at that time the complainant had good reason to believe that such an appeal had no prospect for success. At the time of the challenged judgment, it was established jurisprudence of the Federal Administrative Court that the approval of a framework operating plan was incapable of violating the right to property of a landowner affected by an opencast mine, because the provisions of the Federal Mining Act

governing the framework operating plan and its approval had no third-party protective effect for property owners; it was held that only the order of condemnation affected the owners' legal position (cf. in particular Federal Administrative Court, judgment of 14 December 1990 - BVerwG 7 C 18.90 -, Neue Zeitung für Verwaltungsrecht – NVwZ 1991, p. 992; Higher Administrative Court for the *Land* Brandenburg, order of 28 September 2000 - 4 B 130/00 -, juris para. 28; each with further references). Lodging an at that time obviously hopeless appeal against the claimed violation of the right to property was required by neither the subsidiarity principle nor the principle of exhaustion of remedies – at least in the present case configuration, where the appeal proceedings would have not referred to the actual subject matter challenged by the constitutional complaint (cf. Federal Constitutional Court, order of the First Senate of 16 July 2013 - 1 BvR 3057/11 -, NJW 2013, p. 3506 <3507 [paras. 22-23]>). The Federal Administrative Court meanwhile abandoned its past line of jurisprudence in a judgment of 29 June 2006 (Decisions of the Federal Administrative Court – *Entscheidungen des Bundesverwaltungsgerichts,* BVerwGE 126, 205), which was rendered in the initial proceedings for constitutional complaint 1 BvR 3139/08, which is also the object of this decision; the Federal Administrative Court now takes the view that the provisions on the approval of a framework operating plan do have an effect that partially protects third parties (see C. II. 2. b bb (1) below). However, that does not affect the admissibility of the present complaint, because the assessment of whether lodging an appeal can reasonably be expected depends on the point in time at which the decision to appeal is made.

2.The admissibility of the constitutional complaint with regard to the violation of the right to property is not impeded by the fact that the complainant only acquired the property to which the order of condemnation refers at the beginning of 1998, that means at a time when the framework operating plan for the Garzweiler I/II opencast mine had already been approved, and it was consequently *de facto* established that the property would be used for this project. 152

a) […] 153-154

b) As far as the challenged expropriation of its property is concerned the complainant has the standing necessary to lodge a constitutional complaint. 155

By acquiring ownership of the property, the complainant attained the unrestricted legal status of an owner. As such, it can invoke the protection of the fundamental right under Art. 14 GG, and in particular assert that it is compelled to accept the loss of this ownership only through an expropriation that meets the requirements of Art. 14 sec. 3 GG. Protection under the fundamental right to property as a general rule does not depend on either the reason why the property was acquired, or the date of acquisition, or the other accompanying circumstances. The formal status of an owner suffices, which also otherwise gives the owner access to all private and public rights that are associated with ownership. Only in the exceptional case stipulated in Art. 18 GG can the owner forfeit the constitutional protection of the right to property, and thus also the 156

associated standing to lodge a complaint. This is evidently not the case here.

3. Nor is the constitutional complaint inadmissible because the complainant's property has meanwhile been used for mining – a fact that occurred even before the constitutional complaint was lodged. The piece of land has not disappeared because of the mining of lignite; it continues to exist as a geographically delimited portion of the earth's surface (cf. also § 905 sentence 1 of the German Civil Code – *Bürgerliches Gesetzbuch,* BGB), albeit in an altered state. The interference with the right to property by expropriation continues. The enforcement of the condemnation and the actual use of the property therefore did neither render the complaint moot nor eliminate the complainant's recognised legal interest in bringing an action as a prerequisite for a constitutional complaint. 157

II.

The constitutional complaint, to the extent that it is admissible, is also well-founded. The complainant's fundamental rights under Art. 14 sec. 1 sentence 1 and Art. 19 sec. 4 sentence 1 GG, each in conjunction with Art. 19 sec. 3 GG, have been violated. 158

The complainant has been dispossessed by the condemnation of its land (1.). Measured by the standard of Art. 14 sec. 3 GG, which applies to the constitutionality of an expropriation (2.), the legal basis for expropriation in §§ 77 and 79 BBergG in the scope relevant to a decision in the present case proves to be constitutional; however, the design of the Federal Mining Act is inadequate with respect to the overall balancing of all public and private interests required for an opencast mine, and with respect to effective legal protection in large proceedings of this kind (3.). The order of condemnation from the expropriation authority and the judgments of the Administrative Court and Higher Administrative Court violate Art. 14 GG, because they fail to perform an overall balancing act weighing the pursued public interest objective against the opposing public and private interests required under Art. 14 sec. 3 GG (4.). The Federal Administrative Court should not have let this stand without objection (5.). Furthermore, the proceedings that led to the condemnation do not meet the requirements for effective legal protection in court (6.). 159

1. The order of condemnation orders the expropriation of the complainant's land. 160

With an expropriation, the state interferes with individuals' property. Expropriation is directed to the full or partial withdrawal of specific, subjective legal positions guaranteed by Art. 14 sec. 1 sentence 1 GG in order to accomplish certain public tasks (cf. BVerfGE 101, 239 <259>; 102, 1 <15 -16>; 104, 1 <9>; established jurisprudence). 161

The order of condemnation expressly dispossesses the complainant of its land and transfers the property to the joined party in the initial proceedings, so as to build and conduct a "Garzweiler" operation for mining lignite. With this specific expropriation of the land by a state measure, the condemnation meets the requirements for the constitutional concept of expropriation. A condemnation even constitutes an expropria- 162

tion if one considers as expropriation only those cases in which goods are obtained by state act that are needed to carry out a specific project that serves a public task (cf. BVerfGE 104, 1 <10>). This too is the case for the transfer of ownership of the property to permit the Garzweiler opencast lignite mine.

Moreover, perceiving condemnation as expropriation is consistent with the legislature's declared intent when amending the mining laws in 1980, to configure condemnation as expropriation within the meaning of Art. 14 sec. 3 GG (cf. *Bundestag* document – *Bundestagsdrucksache,* BTDrucks 8/1315, p. 125; 8/3965, pp. 130 and 139). 163

2. Therefore, the condemnation must be measured by the standard of Art. 14 sec. 3 GG. 164

Art. 14 sec. 3 sentence 1 GG permits expropriation only for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation (Art. 14 sec. 3 sentence 2 GG). 165

Expropriation is usually a serious interference with the constitutionally guaranteed right to property (a). The determination of a public interest objective justifying expropriation, and of the projects that generally come under consideration for its realisation, as well as of the material requirements for an expropriation, is reserved to the legislature (b). If expropriation is planned for the benefit of private parties, the law must provide added precautions to ensure that the expropriated good will constantly serve the common good (c). An owner is only required to accept an expropriation for the public good that is proportionate in every respect. As to the requirements to be set for the necessity and appropriateness of the measure, it must be distinguished between the act of expropriation and the project that it serves to realise. The expropriation must be necessary in order to realise the project, and the project must – when applying reasonable standards – be necessary for the common good (d). The appropriateness of the act of expropriation must be determined in relation to the project, which in turn must withstand an overall balancing act weighing all affected public and private interests (e). Under Article 14 GG, the owner can claim effective legal protection against expropriation, which the administrative proceedings must take into account as well (f). 166

a) Property ownership is an elementary fundamental right, and protecting it is of particular importance for a social state under the rule of law (cf. BVerfGE 14, 263 <277>). Within the structure of fundamental rights, the right to property particularly serves to give the fundamental right holder leeway in the field of property rights, and thus enable him or her to arrange life on his or her own responsibility. Constitutionally guaranteed property is characterised by the owner's private benefit and fundamental power of disposal of the owned property (cf. BVerfGE 31, 229 <240>; 50, 290 <339>; 52, 1 <30>; 100, 226 <241>; 102, 1 <15>; established jurisprudence). It is intended to benefit the owner as a basis for private initiative, in the owner's private interest on his or her own responsibility (cf. BVerfGE 100, 226 <241>). It enjoys especially strong protection with respect to safeguarding the personal freedom of the individual (cf. 167

BVerfGE 50, 290 <340>; established jurisprudence). At the same time, the use of property shall serve the public good (Art. 14 sec. 2 GG). This concept rejects a system of property ownership in which the individual interest takes absolute priority over the interests of the community (cf. BVerfGE 21, 73 <83>; 102, 1 <15>).

168 The right to property protects the specific existence of property held by individual owners (cf. BVerfGE 24, 367 <400>; 38, 175 <181, 184 -185>; 56, 249 <260>). In the case of a constitutional expropriation, the guarantee of existence is replaced by a guarantee of value, which is directed to granting compensation to be determined in principle by the legislature (cf. BVerfGE 24, 367 <397>; 46, 268 <285>; 56, 249 <261>; 58, 300 <323>). However, this does not change the fact that Art. 14 GG first and foremost protects property's existence in its function of safeguarding freedom and not merely its value. Governmental interference with concrete items of property through expropriation is therefore regularly a serious interference with the right to property, which is protected under Art. 14 sec. 1 GG and shaped by ordinary law. This applies in particular to expropriation of land, in view of the inherently limited availability of this form of property. An intervention expropriating land is even more grave if it affects property used as a permanent residence, and thus destroys owners' established social relations with their environment and its local characteristics (for further details see C. II. 2. a). It is true that the severity of an expropriating intervention varies depending on how important the specifically withdrawn legal position is in structuring the affected individual's life and freedom, and depending on whether it is withdrawn completely or only in part. A transfer of property by government act is typically of high intensity. This must be taken into account when interpreting and applying the constitutional requirements for an expropriation under Art. 14 sec. 3 GG and the expropriation laws. In particular, this always calls for a strict review of the proportionality of the expropriation, depending on how severely the right to property is interfered with.

169 b) An expropriation can be justified only by a particularly weighty public interest objective, the determination of which is reserved for the legislature (aa). The requirements for the specificity of the statutory provision depend on the public interest objective concerned, and on the projects intended to achieve it (bb).

170 aa) The public interest objective required under Art. 14 sec. 3 sentence 1 GG is the key substantive prerequisite established by the Basic Law for the legality of any expropriation. Irrespective of all other requirements, an expropriation is constitutional only if, insofar, and as long as it is carried out for the public good. (cf. BVerfGE 24, 367 <403>; 38, 175 <180>; 56, 249 <259 and 260>).

171 (1) Pursuant to Art. 14 sec. 3 sentence 2 GG, it is reserved for the democratically legitimated legislature to determine those public interest objectives that will be enforced by expropriation if necessary (cf. BVerfGE 56, 249 <261-262>; 74, 264 <285>). Especially in light of the fact that the assessment of what objectives are especially important to society may change over time, the task of selecting which public interest objec-

tives support an expropriation is reserved for the legislature alone.

The legislature has broad leeway in selecting public interest objectives. This latitude is subject only to limited review by the Federal Constitutional Court, because the Basic Law offers only a limited standard for determining the public good within the meaning of Art. 14 sec. 3 sentence 1 GG. In particular, the Basic Law provides no comprehensive, general definition of the public interest objectives that are able to justify an expropriation. The Constitution precludes only those purposes for expropriation that lie solely in the interest of private parties (cf. BVerfGE 74, 264 <284 et seq.>), that serve purely fiscal interests (cf. BVerfGE 38, 175 <179-180>), or that pursue objectives disapproved of by the Basic Law. 172

(2) The public interest objective defined by the legislature must as a rule be able to justify the expropriations that typically come under consideration in order to achieve that objective. As a consequence, the requirements as to the importance of the objective may vary depending on the situation that is regulated. Neither does every expropriation have the same impact, nor does every legitimate public interest objective justify expropriations of any severity. The legislature's margin of appreciation in weighing the importance of the objective against the impact of the expropriation is subject to review by the Federal Constitutional Court. Considering the fact that an expropriation always severely interferes with the right to property, the public interest objective the legislature intends to achieve by expropriation must be of particular weight. Not every public interest is sufficient for this purpose (cf. BVerfGE 74, 264 <289>). 173

bb) The law authorising expropriation must stipulate with sufficient precision for which purpose, under what conditions, and for what kind of projects expropriations are permissible (cf. BVerfGE 56, 249 <261>; 74, 264 <285>; similarly, also, BVerfGE 24, 367 <403>). 174

It cannot be generally determined how exact the legislature must specify the public interest legitimising expropriation in the respective expropriation act. This depends, among other factors, on the interaction between that interest and the projects advancing the intended public interest objective, and their specific configuration in the expropriation act. 175

Only rarely will a statutorily defined public interest objective be achieved directly by individual expropriation measures. In this case, a precise specification of the objective of expropriation by the legislature will suffice, provided that this specification at the same time reveals the ultimately intended public interest objective. Between claiming individual property items and achieving the intended public interest objective, at least one further intermediate step of realising specific projects will be necessary – e.g., building a road, a railway track, an airport, or, as in this case, a mining operation – for the accomplishment of which the expropriation measures are necessary. In these cases the legislature need not define the specific individual projects, nor will it generally be in any position to do so (cf. BVerfGE 95, 1 on the special case of planning by the legislature). However, the legislature is required to name the type of pro- 176

jects through which the intended public interest objective is to be achieved (cf. BVerfGE 24, 367 <403>; 56, 249 <261>; 74, 264 <285>). If a project whose nature is adequately specified by statute clearly indicates the public interest objective intended by the legislature, specific mentioning of the public good in the act is not necessary. Conversely, a precise description of the intended public interest objective relieves the legislature from more specifically defining the projects permitted for the achievement of that objective, if only certain kinds of projects come under consideration for that purpose, and they are self-evidently supposed to be legitimated by defining the public interest objective.

177 However, a provision does not meet the constitutional requirements of specificity under Art. 14 sec. 3 sentence 2 GG if it *de facto* leaves the administration to decide what projects and purposes permit expropriation (cf. BVerfGE 74, 264 <285 and 206>). Expropriation laws that permit expropriation in order to accomplish “a project serving the public good”, yet do not specify in more detail either the project or the public good, merely repeat the wording of the Basic Law and thus fall short of the task of specification reserved for the legislature.

178 c) The Constitution does not preclude expropriations for the benefit of private parties (cf. BVerfGE 66, 248 <257>; 74, 264 <284>). However, expropriation for the benefit of private parties poses special requirements with regard to the specificity of the objective pursued, the statutory definition of prerequisites, and further conditions for the validity of such an expropriation. Expropriation for the benefit of private parties requires especially careful review as to whether the pursued public interest objective is backed by a sufficiently weighty specific public interest even in view of the private benefits of the expropriation (cf. BVerfGE 74, 264 <281 et seq., 289>).

179 If the state orders expropriations for the benefit of private parties, it cannot automatically take for granted, in spite of the fundamental requirement that property serve the common good (Art. 14 sec. 2 GG), that the private parties who benefit from the expropriations will in fact pursue the public interest objective that the state intends to achieve or at least advance through expropriation. Therefore, in these cases statutory rules are needed to ensure that private beneficiaries will use the expropriated good to accomplish the objective legitimating expropriation, and that this use will be on a lasting basis, unless by nature it is limited to a single occasion (cf. BVerfGE 38, 175 <180>; 74, 264 <286>).

180 In case of expropriations for the benefit of private parties that only indirectly serve the common good, stricter requirements must be met for the clarity and specificity of the statutory rules for expropriation. For example, the legislature must unmistakably regulate whether and for what projects such an expropriation is permissible (cf. BVerfGE 74, 264 <285>). The state must retain responsibility to determine which specific project shall be accomplished to achieve the public interest objective, what property shall be considered as suitable for that purpose, and whether its expropriation is proportionate in the specific case. In cases of expropriation of land, this especially ap-

plies to the selection of the pieces of land to be expropriated. It does not preclude the possibility that the private party carries out substantial advance work in planning the project on the basis of its own ideas of future operational development and states what space it needs, as long as the binding decision on any expropriation remains with the state not just formally, but in terms of its content.

Statutory requirements aimed at safeguarding the permanent benefit of the expropriated property to the public good must be all the more precise and detailed, the less the business object of the private entity benefiting from the expropriation is directed to serving the public good (cf. BVerfGE 74, 264 <285>). This may require regulating private business activity – either through statutory obligations to other private parties or the public, or through an authority's suitable and effective rights of approval, supervision and intervention – so as to ensure that the private party remains bound by its obligation towards the public interest objective for as long as the party derives benefit from an expropriation. 181

d) Expropriation is permissible only if it is suitable – a point that does not need to be addressed separately here – and necessary to achieve the public interest objective (cf. BVerfGE 24, 367 <404>; 45, 297 <322>; 56, 249 <261and 262>). Here a distinction must be made between the necessity of an individual expropriation measure in order to accomplish the specific project serving the common good – for example, a specific road, a railway track or a power transmission line – (aa) and the project's necessity for the common good (bb). 182

aa) As a general rule, a specific expropriation does not directly serve the common good defined as "deserving of expropriation" by the legislature, but rather serves to accomplish a specific project, which in turn is supposed to lead to the achievement of the public interest objective or promote it in a substantial way. The necessity of an individual expropriation measure is determined with reference to this specific project. Accordingly, expropriation is necessary only if and insofar as it is indispensable in order to accomplish the project, and hence there is no less radical means that would be equally suitable. However, if the project can be accomplished in the same way without expropriating private property – for example, by utilising land provided voluntarily from a public or private source instead of an expropriation (cf. BVerwG, judgment of 23 August 1996 - BVerwG 4 A 29.95 -, NVwZ 1997, p. 486 <488> and judgment of 24 March 2011 - BVerwG 7 A 3.10 -, NVwZ 2011, p. 1124 <1127 [para. 48]> with further references) – then expropriation is impermissible. 183

bb) The specific project, in its turn, need not be as indispensable to achieve the statutorily prescribed public interest objective as the individual expropriation measure is for the project. Rather, for the project to be necessary it must – when applying reasonable standards – be required for the public good. This is the case if the specific project is capable of making a substantial contribution to achieving the public interest objective. The reference to the public good in Art. 14 sec. 3 sentence 1 GG does not call for a stricter standard of necessity. If the Basic Law were to require the existence 184

of an irrefutable need for the project in question, it would establish a largely unattainable requirement for the permissibility of an expropriation, which would practically lead to a *de facto* prohibition of expropriation. After all, it will seldom happen that the public interest objectives pursued by a specific project like the routing of a specific road, railway track or power line, or the extraction of a raw material in a particular place, can be achieved, or at least significantly advanced, solely by carrying out precisely this project. Usually, other comparable projects that serve the desired public interest objective will come under consideration. It cannot be deduced from the provision on expropriation in the Basic Law that expropriation for the public good is supposed to be limited to the particular case of a project that is the only way to achieve the public interest objective in question.

[…] 185

e) Like any interference by the state with a fundamental right, expropriation is compatible with Art. 14 sec. 3 GG only if it proves to be appropriate (cf. BVerfGE 24, 367 <404>). In order to make that determination, one must distinguish between an individual expropriation measure (aa) and the specific project causing the expropriation (bb). 186

aa) An individual expropriation measure is compatible with the principle of proportionality if the contribution made by the withdrawn right to property towards carrying out the project is not out of proportion to the severity of the interference the holder of rights suffers from the specific expropriation. The compensation owed for expropriation pursuant to Art. 14 sec. 3 GG is irrelevant to the proportionality of the interference; it does not diminish the weight of the interference, because it is merely the inevitable consequence of an otherwise constitutional expropriation (cf. BVerfGE 24, 367 <401>; 38, 175 <185>). 187

bb) The owner must accept expropriation only if it serves the public good. A specific expropriation measure does not serve the public good if the importance of the project requiring expropriation for the specific public interest objective, for its part, is not in appropriate proportion to the interests impaired by the project. Whether this is the case must be decided on the basis of an overall balancing act weighing the public interest objectives arguing for the project, on the one hand, against the public and private interests that are impaired by its realisation, on the other hand. In this overall balancing act, one must first evaluate and assess whether and to what extent the project is able to advance the public interest objective, keeping in mind that the legislature already determines that the pursued public good generally warrants expropriation (see b above). But this must be counterbalanced, on the other hand, by the totality of the adversely affected private legal positions, as well as by the public interests opposing the project. 188

Thus, a project does not serve the public good within the meaning of Art. 14 sec. 3 sentence 1 GG if an overall balancing reveals that the public and private interests adversely affected by the project outweigh the reasons of the public good that argue in 189

favour of the project. In this case, the owner need not accept expropriation.

f) Guaranteeing effective legal protection is a primary element of the right to property under Art. 14 sec. 1 sentence 1 GG (cf. BVerfGE 45, 297 <322>). Persons affected by an expropriation are entitled ultimately to have a court review and decide whether the statutory requirements for expropriation are met in their case. The courts must review the expropriation in terms of both fact and law, and in particular also its constitutionality (cf. BVerfGE 45, 297 <322>; 74, 264 <282 and 283>). In an individual examination it must be determined whether the reasons for and the extent of the expropriation are justified with respect to the individuals affected. 190

The examination must meet the requirements for effective judicial review as also guaranteed under Art. 19 sec. 4 sentence 1 GG (on this cf. BVerfGE 129, 1 <20> with further references). Legal protection may not be rendered impossible, unreasonably impeded, or rendered ineffective by the structure of the administrative procedure leading up to expropriation. 191

Within the bounds thus defined, the legislature has considerable leeway in shaping the administrative procedure leading up to an expropriation. It may focus on practical considerations, including those of procedural economy and expedited procedure. Therefore, the legislature is generally free, particularly for complex facts of life, to provide for graduated procedures that lead to a binding subdivision of the facts and issues (cf. BVerfGE 129, 1 <32 and 33>). However, the legislature cannot choose a procedural design that unreasonably impedes or renders impossible a citizen's entitlement to effective legal protection against government acts interfering with his or her rights, an entitlement ensuing from the fundamental right to property in conjunction with Art. 19 sec. 4 sentence 1 GG (cf. BVerfGE 61, 82 <109 et seq.>; 83, 182 <198>; 129, 1 <32 and 33>). 192

Graduated proceedings may lead to early legal protection of individuals and the reduction of complex litigated matters. But genuine graduations of proceedings, in the form of binding prior decisions that by challenge of the final decision are no longer or only restrictively subject to judicial review, are compatible with Art. 14 in conjunction with Art. 19 sec. 4 sentence 1 GG only if the following three requirements are met. First, it must be the result of a sufficiently clear provision of law that one authority will be bound by another authority's prior findings or decisions; second, effective legal protection must be available against the partial or advance decision that has binding effect; and third, the segmentation of legal protection, together with any burden to challenge the advance decision, must be clearly recognisable by the persons concerned, and not be associated with unreasonable risks and burdens (cf. BVerfGE 129, 1 <32 and 33>). 193

If the legislature chooses a procedural structure that opens up legal protection for the persons affected only against the state measure that concludes the proceedings – as is the rule in the case of simple matters (cf. § 44a of the Administrative Courts Code – *Verwaltungsgerichtsordnung,* VwGO) – this does not automatically raise con- 194

stitutional concerns even in complex proceedings, especially because in such cases the persons affected are freed from any prior burden of raising objections. In case of such administrative structures, however, the administrative proceedings and the courts' authority to review them must be set up in such a way as to ensure, even in extensive, time-consuming administrative proceedings, a comprehensive, effective review of the final act of interference, including supporting advance decisions that could not be independently challenged by the persons affected. If such a review of the challenged state measure, generally ensured by the guarantee of effective legal protection, is provided by law but normally cannot be realistically expected, especially in light of the duration and complexity of the administrative proceedings, this is not compatible with Art. 14 in conjunction with Art. 19 sec. 4 sentence 1 GG. This is the case if legal protection becomes available only at a point in time when, with regard to advance determinations or the actual execution of the underlying project, one can no longer expect an open-ended review of all expropriation requirements. Legal protection is deficient in the same way if at that point in time, the violation of the right to property usually can no longer be prevented or reversed even if the legal action succeeds.

3. The expropriation provisions in §§ 79 and 77 BBergG, which are indirectly challenged by the constitutional complaint, are compatible with Art. 14 sec. 3 GG, at least to the extent relevant for the decision in the initial proceedings (a and b). The terms of the Federal Mining Act furthermore prove to be constitutional with respect to requirements for expropriation for the benefit of private parties (c), but are partially deficient with respect to the required overall balancing and the necessary effective legal protection (d). 195

a) As long as its public interest clause is interpreted in conformity with the Constitution (aa), § 79 sec. 1 BBergG is in accordance with Art. 14 sec. 3 GG provided that it stipulates supplying the market with raw materials as a public interest objective, and limits this to the mineral resources listed in § 3 BBergG (bb). Ensuring a reasonable, planned extraction of deposits is not a self-sufficient reason for expropriation (cc). […] 196

aa) Under § 79 sec. 1 BBergG, condemnation in a particular case is permissible if it serves the public good, in particular if it is intended to ensure supply of the market with raw materials, preservation of jobs in mining, existence or improvement of an economic structure, or reasonable and planned extraction of deposits, and the purpose of the condemnation cannot reasonably be achieved in any other way given that the mining operation is tied to one location. 197

(1) The wording of the provision suggests that in general, a condemnation is permissible if it "benefits the public good", and that the expropriation purposes specifically stated after the words "in particular" cite, merely as examples and not exhaustively, certain especially weighty public interest objectives that are typical of mining operations under mining law. Under such a broad interpretation, the provision would not be compatible with the Basic Law. It is the task of the legislature to define in greater de- 198

tail those public interest objectives for the advancement of which expropriation is permissible. A statutory authorisation of expropriation that limits itself merely to repeating the public good clause of Art. 14 sec. 3 sentence 1 GG, which is meant to guide the legislature, does not do justice to this protection of property based requirement of a separate legislative decision. It ultimately leaves it solely to the administration to determine the purposes justifying expropriation for the benefit of mining operations under the mining laws. This is in contradiction with the constitutional requirement of a statutory provision under Art. 14 sec. 3 sentence 2 GG (see 2. b above).

The listing of specific purposes of expropriation in § 79 sec. 1 BBergG does not change the provision's unconstitutionality if those purposes are understood purely as particularly concise examples that do not, however, preclude expropriation for other purposes. Even if the further expropriation purposes are supposed to be equal in nature and importance to the expressly mentioned guideline examples, selecting them would still be entirely in the administration's hands. Pursuant to Art. 14 sec. 3 sentence 2 GG, this is, however, reserved to the legislature. 199

(2) However, § 79 sec. 1 BBergG does not violate the constitutional requirement of a statutory provision under Art. 14 sec. 3 GG, because the list of express expropriation purposes mentioned there can be understood as exhaustive, beyond which the provision does not permit any further expropriation purpose. This interpretation does not contradict the wording of the law or the recognisable intent of the legislature (cf. BVerfGE 98, 17 <45>; 101, 54 <86>; 128, 157 <179> with further references). In light of the constitutional requirements, § 79 sec. 1 BBergG can be read in such a way that it permits condemnation only in the cases mentioned there, because they benefit the public good. The legislative history of the provision also supports that the legislature did not intend to leave the expropriation authorisation open for other cases that are not mentioned. […] Since this allows to interpret § 79 sec. 1 BBergG in compliance with the Constitution, there is no need for a finding that the expropriation authorisation, which would otherwise overreach, is unconstitutional. 200

bb) Accordingly, § 79 sec. 1 BBergG is compatible with Art. 14 sec. 3 GG insofar as it permits expropriations that serve to supply the market with raw materials (similarly BVerwGE 87, 241 <246 et seq.>; 132, 261 <265 and 266>). With this precondition, the expropriation authorisation is in compliance with the objectives of § 1 no. 1 BBergG, which defines safeguarding the supply of raw materials as one of the key purposes of the Federal Mining Act. According to the systematic structure of the Federal Mining Act, the only raw materials for which expropriation can be allowed so that they can be mined for purposes of supplying the market, are the mineral resources, whether independent from or associated with surface property rights, that are listed by name in § 3 BBergG. These resources also include lignite. 201

With this restriction to the mineral resources listed in § 3 BBergG, the authorisation for a condemnation under § 79 sec. 1 BBergG is sufficiently specific. By mentioning the mining of raw materials to supply the market, the authorization refers to a public 202

interest objective that is also constitutionally unobjectionable in light of the Federal Constitutional Court's limited intensity of review in this regard (see 2. b above), and can generally support expropriation of property or property rights. According to the legislature's intent, this purpose to supply the market with raw materials has an especially high priority for the viability of a modern industrialised society like the Federal Republic of Germany (cf. BTDrucks 8/1315, pp. 67 and 74; 8/3965, pp. 130 and 131; also BVerwGE 87, 241 <250>). From a constitutional viewpoint, there is no compelling need for the legislature to restrict possible expropriations to individual especially important mineral resources listed in § 3 BBergG. The extent to which expropriations may be justified in order to mine raw materials to supply a specific market must be decided based on their importance to the common good, and after having conducted an overall balancing (see 2. d above) of how a specific mining project serves the public good, and of the public and private interests it impairs.

cc) The expropriation purpose of ensuring a reasonable and planned extraction of deposits stipulated in § 79 sec. 1 BBergG can legitimise expropriations only in conjunction with an extraction of mineral resources serving to supply the market with raw materials. Within this scope, an expropriation that *per se* only ensures the reasonable and planned extraction of a specific deposit may nevertheless serve the public interest. However, the public interest objective of a reasonable and planned extraction of a deposit by itself, without regard to the mineral resource involved and its importance to supplying the market, exceeds the broad margin of appreciation and selection to which the legislature is entitled here. It would even permit expropriation for the purpose of optimising private mining operations, even if they did not produce mineral resources in which there was a public interest. That would not be compatible with the constitution. 203

dd) […] 204

b) The legislature has stipulated with sufficient specificity the types of projects whose accomplishment justifies expropriation under the conditions of § 79 BBergG. Pursuant to § 77 sec. 1 BBergG, property may be condemned on application by an entrepreneur if the use of a piece of land is necessary in order to build or conduct a mining or processing operation. A definition of "mining operation" and "processing operation" is provided in § 4 sec. 2, 3 and 8 BBergG. There is no constitutional requirement for a more specific description of the projects for which property may be expropriated, in view of the pursued public interest objectives of ensuring a supply of raw materials for the market, and in this context ensuring a reasonable and planned extraction of deposits (see 2. b bb above for the prerequisites. Specifying mining and processing operations as well as the associated activities and installations as possible projects for the benefit of which property may be expropriated is consistent with the systematic structure of federal mining law. There is no constitutional requirement for any further statutory specification of the projects. 205

c) The provisions of the Federal Mining Act on condemnation are constitutionally un- 206

objectionable insofar as they permit expropriation – as they generally do – for the benefit of a private mine operator.

The purpose of condemnation that is relevant to the present proceedings – namely to ensure the market's supply with those raw materials stipulated in the Federal Mining Act – is regularly achieved directly by the business activity of the mining entity, namely by mining the raw material and selling it on the market. […] Thus also a private mining entity comes close to the type of entity that, on the basis of its business objective, is categorised as an entity providing services of general interest, with the consequence that it is sufficient if adequate precautions are taken in order to duly fulfil the self-imposed "public" task (cf. BVerfGE 74, 264 <286>, with referral to BVerfGE 66, 248 <258>). 207

The Federal Mining Act meets these requirements. For example, a company has limited discretion of deciding on the point in time it will mine the raw material that it is permitted to extract by using land owned by a third party. The Federal Mining Act requires the administrative authority to fix a respective time limit (§ 81 sec. 1 sentence 2 BBergG; cf. also § 95 BBergG). If the entity favoured by the condemnation fails to meet that deadline, or if it abandons the purpose of the condemnation before that deadline expires, the condemnation must, as a rule, be revoked (cf. § 96 BBergG). 208

There is no constitutional requirement for further provisions as to a lasting safeguard of the purpose of expropriation in the case of condemnations under mining law. Once the raw material for which a condemnation was necessary has been mined, the legislature may assume that the material will be made available to the market, without a need for supplementary precautions to safeguard the public good. 209

d) However, the statutory arrangement for the approval and operation of processing and mining operations, including condemnations necessary for this purpose, does raise constitutional questions. First of all, there are no express statutory requirements for the necessary overall balancing act (aa); second, there is no reliable guarantee of effective, and most especially timely legal protection against condemnation, at least in the case of major projects (bb). 210

aa) (1) An expropriation is in the public interest within the meaning of Art. 14 sec. 3 sentence 1 GG only if the project itself whose realisation requires expropriation serves the common good. However, a project serves the common good only if, in addition to its suitability to promote the statutorily prescribed public interest objective, an overall balancing of the common good reasons in favour of the project and the public and private interests that are impaired by its realisation, turns out in favour of the project. This will not be the case if the public and private interests that are impaired by the project predominate (see 2. e bb above). 211

Particularly in the approval of complex projects like an opencast lignite mine, which is preceded by time-consuming, multi-level proceedings, clear and transparent rules 212

are needed that unequivocally stipulate an overall balancing as a core component of such an approval in the procedural schedule, in the allocation of responsibilities, and in the fundamental structure of its prerequisites for a decision. This is not only a necessary prerequisite for a proceeding under the rule of law, which guides the administration and provides security for the beneficiary, but it is also required under Art. 14 GG in order to protect those whose right to property is affected.

(2) The terms of the Federal Mining Act do not expressly prescribe the necessary overall balancing act in either the provisions on prospecting and mining mineral resources and on approving operating plans (Part Three, §§ 39 -57c) or those on condemnation (Part Seven, §§ 77 et seq.). 213

However, by its judgment of 29 June 2006 (BVerwGE 126, 205 <208 et seq. [para. 17 et seq.]>), which was rendered in the initial proceedings leading up to constitutional complaint 1 BvR 3139/08 (see C. below), the Federal Administrative Court has meanwhile responded to these shortcomings of the approval provisions for mining companies, and has demanded that via § 48 sec. 2 BBergG the interests of the affected landowners be balanced against the legitimate interests of the mining industry (op. cit., p. 210 [para. 20]). This understanding of statutory law leaves room for the constitutionally required overall balancing during the official approval of a framework operating plan (see C. II. 2. c dd and ee (1) below). 214

(3) After all, the Act does not clearly stipulate whether the overall balancing required pursuant to Art. 14 sec. 3 GG is required at least in the context of a given condemnation for an overall project, nor how it relates to the balancing required previously for the approval of the framework operating plan; §§ 77 et seq. BBergG, which deal with condemnation, do not mention the overall balancing. 215

However, it is consistent with long-established jurisprudence of the administrative courts that in order to mine a mineral resource, an expropriation in a specific case is permissible only on the basis of an overall balancing. As part of this balancing, one must examine not only whether the public interest in mining this particular mineral resource in order to supply the market with raw materials – and thus, ultimately at the same time, the mine operator's interest, secured with a mining permit, in mining and selling that resource (cf. BVerfGE 77, 130 <136>) – is so important that it requires an interference with private property. One must also examine whether other, more important public interests, such as those of protecting the landscape, protecting historical monuments, water resource management, regional development, or urban planning, stand to oppose mining the mineral resource at that location (cf. BVerwGE 87, 241 <251 and 252> for lignite; BVerwG, judgment of 24 June 2010- BVerwG 7 C 16.09 - juris para. 29). For projects that require rather extensive resettlements, this particularly also includes a more detailed assessment of the scope of such resettlements as a whole, their specific importance to the affected persons as a group, and of the respective compensation measures taken. According to the jurisprudence of the administrative courts, private individuals whose property is to be used for the project 216

may also demand a decision that considers these public interests; a project that serves the statutory expropriation purpose but is opposed by existential public interests of another kind does not serve the public good, expropriation for such purposes is not permissible (cf. BVerwGE 87, 241 <252> with referral to BVerwGE 67, 74 <76 et seq.>; 72, 15 <25 and 26>; 74, 109 <110 and111>; 85, 44 <51>).

In any case, for the overall balancing that is relevant for the present constitutional complaint and must be carried out at the time of the decision on condemnation, the established administrative-court jurisprudence has adequately clarified the legal situation, which had been unclear on that aspect. Accordingly, in examining the proportionality of an expropriation, the expropriating authority must perform an overall balancing of all interests arguing in favour of and against the project, as described above, and the persons affected by the expropriation may demand review of that balancing act by the courts. 217

This overall balancing occasioned by expropriation is not rendered unnecessary because an overall balancing was also already factually required for the decision to approve the framework operating plan – in the case at hand, this was the Garzweiler I/II project (see C. II. 2. c ee (1) below). Since the Act does not provide for the approval decisions on the framework or main operating plans to have a formal binding effect, and especially an advance effect under expropriation law, on a subsequent condemnation proceeding (cf. the challenged order of the Federal Administrative Court of 20 October 2008 – BVerwG 7 B 21.08 –, juris para. 12), an overall balancing in the proceedings on the framework operating plan does not eliminate the need for an overall balancing for the order of condemnation, even if their contents are largely identical. 218

bb) The statutory structure of the legal protection options against mining operations under mining law, in the administrative courts' interpretation still applicable to the complainant before the Federal Administrative Court's judgment of 29 June 2006 (BVerwGE 126, 205), did not meet the constitutional requirements for effective legal protection, at least not for opencast lignite mines (1), because it offered no opportunity for the affected owners to lodge complaints at any step before the expropriation decision, and therefore offered that opportunity too late (2). 219

(1) Persons affected by an expropriation are entitled to have a court decide, with ultimate binding effect, whether the statutory requirements for an expropriation are met in their case. The courts must review the legality of the expropriation in terms of fact and law (cf. BVerfGE 45, 297 <322>; 74, 264 <282 and 283>). Effective legal protection also requires timely legal protection. A citizen is entitled to have access to legal protection against burdensome state measures before a *fait accompli* is established (cf. BVerfGE 37, 150 <153>; 93, 1 <13>). 220

If an expropriation is founded on advance decisions by the authorities that were not yet open to review by the courts, the guarantee of effective legal protection derived from Art. 14 sec. 1 GG requires that by challenging the expropriation these prior decisions can also be made subject to comprehensive judicial review. Otherwise, affected 221

owners would have to accept interference with their fundamental right based on (advance) decisions by the authorities against which legal protection would have been completely denied. That would be incompatible with the guarantee of effective legal protection.

For the initial proceedings underlying the constitutional complaint the owners later affected by a condemnation, based on the legal situation at that time, had no opportunity for independent legal protection against the authorities' prior decisions that approved the mining project, even if the subsequent use of the property was already foreseeable at that point in time. The order of condemnation favouring the Garzweiler opencast lignite mine was therefore the first state measure the complainant could challenge. Its prior appeals against the approval of the framework operating plan were unsuccessful because under the established administrative jurisprudence at the time, the approval of the framework operating plan could not violate the owner's individual rights (see I. 1. above). Accordingly, the complainant's fundamental entitlement to judicial review of the act of expropriation, including the overall balancing for the Garzweiler I/II opencast mine project specifically pursued with the expropriation, was out of the question at the time of its complaint against the order of condemnation. The fact that the Federal Administrative Court in the meantime changed its jurisprudence, thereby offering the affected owners to challenge the approval of the framework operating plan (cf. BVerwGE 126, 205 <208 [para. 16]>; cf. aa (3) above and C. II. 2. c ee (1) below) has not changed the above-described situation, because the Federal Administrative Court changed its jurisprudence after the approval proceedings for the Garzweiler framework operating plan had been concluded and become final with respect to the complainant. 222

(2) This concept of legal protection underlying the Federal Mining Act, as initially interpreted by the regular courts, could meet the constitutional obligation to provide effective legal protection as long as the operating plan approval for a mining operation and any necessary condemnations are sufficiently close in time that the overall proceedings do not expand to such dimensions, either in content or in time, as to preclude corrections of the project in the event the expropriation decision is challenged. Although such a concept keeps the operating plan approval proceedings free from litigation by third parties, it burdens third parties whose right to property is affected with the need to wait until the expropriation before lodging their petitions for legal protection, and it burdens companies with the risk of a late decision amending the previously approved operating plan. There are no compelling constitutional objections to such a concept as long as effective legal protection is still actually available and reasonable. 223

However, for complex major proceedings – such as the Garzweiler opencast lignite mine – where planning and approval takes place at numerous decision-making levels and extends over many years, and where, over the course of that period, actual determinations are made where a substantial correction cannot realistically be expected, a concept of legal protection affording those impaired in their rights the first oppor- 224

tunity to seek legal protection at the very end of the proceedings, does not meet constitutional requirements of effectiveness. Under such conditions, an appeal by a landowner affected by expropriation regularly no longer has any realistic prospect of success, even if the owner's objections to the public interest benefits of the project appear justified. The incidental review of the project – as of the Garzweiler I/II opencast mine here – that is required for effective legal protection against expropriation typically comes too late, and thus substantially narrows the prospects of success even of justified objections to a specific expropriation. Considering that the planning of the Garzweiler opencast lignite mine dates back to 1987, that a lignite plan and resettlement plans was prepared over the course of several years, for which in turn a framework operating plan was prepared in multi-year proceedings, which was approved in 1997, and that a 4,800-hectare area (Garzweiler II) has been undergoing mining since 2006, one cannot seriously expect that the objections against the opencast lignite mining that were submitted with the action against the order of condemnation in 2005 can challenge opencast mining in the course of an incidental review in response to an action against the expropriation of a piece of land, as effectively as an action brought earlier. Likewise, in such a situation, a petition to spare property lying in the middle of the vast opencast mine whose actual use was therefore firmly established long before expropriation for the mine was planned in detail, can hardly have a realistic chance to succeed at such a late date. If in such complex major proceedings, legal protection by the courts is afforded only for the condemnation, it regularly comes too late, because at that point in time the state of the project no longer allows for corrections.

4. The order of condemnation and the decisions by the Administrative Court and Higher Administrative Court upholding its legality violate the complainant's fundamental right to property, because they failed to perform or review the overall balancing of the interests arguing in favour of and against the mine, as is necessary for an expropriation, in a manner that adequately meets constitutional requirements. Although the expropriating authority correctly determined the expropriation of the complainant's property to be necessary for a cost-effective and adequate operation of the Garzweiler II opencast mine (a), the required overall balancing with reference to the project (b) was not performed by either the expropriating authority (c) or the courts upholding the expropriation (d, e). 225

a) The complainant's property is located in the midst of the Garzweiler I/II opencast mine. Mining the property is necessary for a technically and economically appropriate management of operations (cf. § 77 sec. 2 BBergG) within the meaning of the approved framework operating plan. […] Under expropriation law aspects, mining this property is therefore necessary for the implementation of the Garzweiler I/II opencast mine project. Whether the particular lignite lying under the complainant's property is indispensable to the energy supply is not relevant. The point of reference for reviewing the necessity of utilising the property is the specific project, not the public interest objective that it pursues (see 2. d aa above). 226

b) Whether the project for which expropriation is carried out serves the common good, as required by Art. 14 sec. 3 sentence 1 GG, depends first of all on whether this project is reasonably required in order to achieve or at least substantially contribute to the specific public interest objective being pursued (see 2. d bb above). Furthermore, an overall balancing is required between the public interests speaking in favour of the project and the public and private interests that are impaired by its realisation (see 2. e bb and 3. d aa (3) above). This overall balancing for the Garzweiler I/II opencast mine project is required at the time of the condemnation, if only because, based on the Federal Administrative Court's previous jurisprudence the complainant could not challenge the approval of the project under the framework operating plan any earlier. 227

[…] 228

c) In the order of condemnation the district government, in its capacity as expropriating authority, thoroughly dealt with the Garzweiler mine's importance in supplying the energy market with lignite (pp. 8-14 of the order of condemnation). However, the order does not contain an even approximately adequate compilation and assessment of the public interests opposed to the project (on this point see only p. 15), particularly the protection of nature and water bodies, and most importantly a weighing of the overall private interests concerned, especially those of the persons affected by resettlement. It is not evident that and how the required overall balancing could have been conducted on that basis. 229

d) Equivalent considerations apply to the judgment of the Administrative Court. It also fails to substantially weigh the affected original public interests and the private ownership interests, which in sum are likewise aggregated as public interests within the meaning of § 48 sec. 2 BBergG, especially those of the persons to be resettled (on this point see only p. 12 of the judgment). 230

e) Nor does the Higher Administrative Court, in its judgment of 21 December 2007 (11 A 3051/06, juris), perform the overall balancing required pursuant to Art. 14 sec. 3 GG. 231

aa) However, initially, the Higher Administrative Court did correctly recognise that Art. 14 sec. 3 GG prescribes an overall balancing. In a constitutionally unobjectionable manner, the court described this balancing by stating that one must examine not only whether the public interest in mining a certain mineral resource in particular – here, lignite – is so important for supplying the market that it necessitates an interference with private ownership of surface property, but also whether other, more important interests of the public good, such as those of protecting the landscape, protecting historical monuments, water resource management, regional development or urban planning, conflict with mining the mineral resource in the location under consideration (pp. 16 and 19 = juris para. 40 and 51, each with reference to BVerwGE 87, 241). The discussion of the opposing public interests within the balancing act shows that the Higher Administrative Court rightly includes the interests of the owners affected by re- 232

settlement among them (pp. 29 et seq. = juris para. 96 et seq.).

This overall balancing can generally still be performed in the court proceedings if an adequate basis of facts is available for the purpose. This is because in statutory terms, condemnation is not configured as a planning decision that an administrative authority is free to structure as desired, but rather as a non-discretionary decision, which can therefore also be made by the court through substitute balancing (cf. p. 49 = juris para. 193 with referral to BVerwGE 87, 241, and the challenged order of the Federal Administrative Court of 20 October 2008 – BVerwG 7 B 21.08 –, juris para. 22). 233

bb) However, the Higher Administrative Court did not adequately perform the substitute overall balancing that at least *de facto* underlies the approval of the framework operating plan for the Garzweiler I/II opencast mine and therefore did not fulfil the required court review. It thus violated the complainant's fundamental right to property. 234

[…] 235-237

5. The challenged decision of the Federal Administrative Court, denying appeal on points of law, also violates the guarantee of effective legal protection under Art. 19 sec. 4 sentence 1 GG. The Federal Administrative Court accepts the limited review of the facts by the Higher Administrative Court, even though the constitutionally required understanding of the judgment, which was objectionable in this regard (see bb above), should otherwise have resulted in granting the appeal on points of law according to the Federal Administrative Court's own approach. This decision limited access to the court of ultimate appeal in a manner that is not objectively justifiable (on this standard cf. Federal Constitutional Court, order of the First Senate of 16 July 2013 - 1 BvR 3057/11 -, NJW 2013, p. 3506 <3508 [para. 34]>). 238

6. Finally, in the challenged decisions, the courts also violate the guarantee of effective legal protection ensuing from Art. 14 GG, because the decisions are founded on a configuration and interpretation of the Federal Mining Act that, at the relevant point in time presented a structural deficit as to legal protection. Even though an incidental review of the approval of the framework operating plan was formally guaranteed in the context of the challenge to the condemnation, legal protection through the courts, which was not made available to landowners until the time of the individual condemnation decision, could not guarantee the required actual effectiveness in major projects that run for decades, like the Garzweiler opencast mine, because the protection came too late (cf. 3. d bb above). 239

III.

[…] 240-245

C.

The constitutional complaint of complainant P. (1 BvR 3139/08 - Framework Operating Plan) is admissible (I.), but unfounded (II.). 246

I.

[…] 247-248

II.

The approval of the framework operating plan for the Garzweiler I/II opencast mine does not interfere with the fundamental right to freedom of movement (1.) and consequently also does not violate the complainant's fundamental right to property (2.). 249

1. The fundamental right to freedom of movement (a) does not protect the complainant against the need to surrender his residential property and relocate, as a consequence of the approval of the framework operating plan for the Garzweiler I/II opencast mine, because the scope of protection under Art. 11 sec. 1 GG does not extend to defending against state measures on the use of land that ultimately result in an involuntary surrender of one's place of residence (b). Nor does the fundamental right to freedom of movement confer an independent right to a homeland – however, that does not result in a gap in protection for those affected (c). This understanding of the fundamental right to freedom of movement ultimately also corresponds to the jurisprudence of the European Court of Human Rights (d). 250

a) In acknowledgement of the free and self-determined organisation of one's own life, Art. 11 GG guarantees freedom of movement for all Germans within the entire federal territory. Through a free choice of their place of settlement and residence, it protects their planning and organisation of their own lives against interference from the state. 251

aa) Historically, the fundamental right to freedom of movement goes back to the tradition of the freedom of movement that was reserved for free persons in the Middle Ages […]. The German constitutions of the 19th and early 20th centuries then guaranteed the right to freedom of movement for all citizens; at that time, it was closely associated with freedom of profession or occupation (cf. § 133 of the Constitution of 1849 drafted in St. Paul's Church (*Paulskirchenverfassung)* and Art. 111 of the Weimar Constitution, as well as § 1 of the Freedom of Movement Act of the North German Confederation of 1867 […]; likewise the first draft of a fundamental right to freedom of movement in the Parliamentary Council (*Parlamentarischer Rat*) […]). Irrespective of the guarantee of occupational freedom as an independent fundamental right under Art. 12 GG, the guarantee of the free choice of a place for settlement and residence in a differentiated society based on the division of labour is a fundamental condition for a free choice of occupation and for independently gaining one's own livelihood. However, irrespective of its connections with a choice of occupation, the fundamental right to freedom of movement also guarantees a free choice of place of settlement and residence as an expression of self-determined organisation of one's own life. It acknowledges the right, by one's own free decision, to travel generally without hindrance and without any official permit anywhere in the federal territory, and remain there. 252

bb) Freedom of movement within the meaning of Art. 11 sec. 1 GG means the right to settle or reside anywhere within the federal territory (cf. BVerfGE 2, 266 <273>; 43, 203 <211>; 80, 137 <150>; 110, 177 <190 and 191>). This includes entering Germany for the purpose of taking up residence here (cf. BVerfGE 2, 266 <273>; 43, 203 <211>; 110, 177 <191>) as well as freedom of movement between federal states, between municipalities, and within a municipality (cf. BVerfGE 110, 177 <191>; see also BVerfGE 8, 95 <97>). 253

The fundamental right to freedom of movement guarantees not only the freedom to move into a location in the federal territory, but the right to remain in the place chosen in one's exercise of the right to freedom of movement, and thus also generally protects against forced resettlements. […] 254

The right to settle or reside anywhere in the federal territory could be undermined and rendered ineffective if the fundamental right did not also include the right to remain or live in the freely chosen place. Otherwise, citizens would have no constitutional protection, comparable to the right to move to a place, against being expelled from their chosen place by state measures immediately after exercising the right to freedom of movement. 255

b) However, the fundamental right to freedom of movement does not grant a right to take up residence and to remain in places in those parts of the federal territory where regulations on real estate or land use conflict with a permanent residence, and thus already preclude or restrict taking up residence, or, if such regulations are established later, ultimately compel a person to move away. At least when they apply generally and are not intended to specifically target the freedom of movement of certain persons or groups of persons, such provisions do not fall within the scope of Art. 11 sec. 1 GG. 256

aa) Article 11 sec. 1 GG in general confers a right to relocate and reside only in places where anyone can settle and reside. However, it does not confer an entitlement to establish and maintain the legal and factual requirements for permanent residence. The configuration of the legal requirements for the permissible land use associated with residence at a particular place therefore does not fundamentally affect the scope of protection of freedom of movement, but rather shapes the preconditions for exercising this fundamental right […]. The laws that thus structure the preconditions for exercising this fundamental right, include in case of the right to freedom of movement, which necessarily relies on the use of space, provisions on land use such as building codes, regional development laws, infrastructure planning laws, laws to protect nature and landscape, or - as in the instant case - mining law. 257

This placement of regulations governing land use outside the scope of protection of the freedom of movement applies not only to restrictions on taking up residence, but also to those regulations that cause or even compel a person to move away or to leave a permanent residence. Just like the impediment to taking up residence under construction planning laws, expropriation of residential land for a planned subsequent 258

infrastructure measure is a consequence of existing or changed conditions for exercising the right to freedom of movement, but it does not fall within the scope of protection of this fundamental right. […]

bb) Both the article's legislative history ((1)) and its purpose of protection and system ((2)) support this interpretation of the right to freedom of movement. 259

(1) The legislative history of Art. 11 GG shows that the debate about incorporating this fundamental right into the Basic Law, and about its configuration, was strongly shaped by the special challenges that West Germany faced in view of the large number of refugees in the American, British and French Occupation Zones, and the expectation of additional Germans intending to immigrate. This first of all concerned the question of whether under the conditions at that time it would even be possible to grant all Germans a right to freedom of movement (cf. the Third and Fifth Sessions of the Committee on Fundamental Questions, 21 and 29 September 1948 […]; Twenty-third Session of the Committee on Fundamental Questions, 19 November 1948 […]; Forty-fourth Session of the Main Committee, 19 January 1949 […]). There are no indications in the documentation on Art. 11 GG that the right to freedom of movement, and its intentionally strict limiting provisions, were intended to significantly restrict the already existing and implemented legal possibilities for the planning and organisation of land use – for example by raising dams or building roads and railway tracks. On the contrary, the detailed discussion of the problem of restrictions at the Thirty-Sixth Session of the Committee on Fundamental Questions on 27 January 1949 […] strongly suggests the conclusion that the Parliamentary Council did not view an absence of the factual and legal conditions for taking up residence - for example, a lack of living space in a disaster area - as a restriction on the right to freedom of movement […]. 260

(2) The fundamental right to freedom of movement unfolds its freedom-protecting intent by guaranteeing that all Germans have the possibility of moving from one location to another unhindered by state restrictions, and settling and residing there, whether for purposes of carrying out an occupation, or for other freely chosen reasons in the organisation their life. This freedom of movement is not reduced in its freedom-protecting intent by considering generally applicable rules for land use, and therefore does not need to be exempted from them. 261

Article 11 sec. 1 GG does not guarantee that an intended settlement or taking of residence will be suitable or permissible under the land laws. If the general rules of land use or real estate, and their implementation, were to be understood as interference with the scope of protection of the fundamental right to freedom of movement, then in view of the narrow restrictions of Art. 11 sec. 2 GG a meaningful control of settlement development and other land use by means of the laws for regional development and construction planning, and the other instruments of spatially related planning, would scarcely be possible. The definition of the possibilities for restricting the right to freedom of movement in Art. 11 sec. 2 GG argues against understanding the scope of protection of Art. 11 sec. 1 GG to include the legal requirements for land use. Pur- 262

suant to Art. 11 sec. 2 GG , the right to freedom of movement may be restricted only by and pursuant to a law, and only in cases in which the absence of adequate means of support would result in a particular burden for the community, or in which such restriction is necessary to avert an imminent danger to the existence or the free and democratic basic order of the Federation or of a *Land,* to combat the danger of an epidemic, to respond to a grave accident or natural disaster, to protect young persons from serious neglect, or to prevent crime. None of the listed cases includes situations in which, based on space-relevant plans or other measures for land use taken by the state, the persons concerned are prevented from taking up residence in a certain place or compelled to abandon their home or change their place of residence. There is also no indication of any kind that major projects taking up space, or other space-relevant plans, are no longer permissible or should be intolerably impeded under the Basic Law.

c) Article 11 sec. 1 GG does not guarantee an independent right to a homeland (*Recht auf Heimat*) in the sense of the urban and social environment permanently associated with a chosen residence […]. 263

In view of the consequences of flight and expulsion, the Parliamentary Council deliberately declined to include an independent right to a homeland in the Basic Law (cf. Forty-second Session of the Main Committee, 18 January 1949 […]). If a chosen and occupied residence has a special quality for its occupant, which might have consolidated over time, with regard to the associated social contacts and ties within the geographic environment, and the residence being rooted in a specific urban context, the right to reside ensuing from Art. 11 sec. 1 GG gains more importance – if the protection of this fundamental right applies at all (see b above). Extensive resettlements in particular, such as the one required for large-scale opencast mining, impose extraordinary burdens on established social relations and local and regional ties, because they can result in the disappearance of entire communities, including all of their buildings and infrastructure. All of this must duly be taken into account when reviewing the proportionality of an interference with the fundamental right to freedom of movement, or, if its protection does not apply, the otherwise affected fundamental right (see 2. a below). 264

d) A constitutional gap in protection for the persons affected arises neither because the Basic Law does not provide an independent right to a homeland, nor because the fact that a person is forced to abandon his or her residence or home due to real estate measures or land use regulations does not render the protection of Art. 11 sec. 1 GG applicable. The affected persons' particular hardships resulting from the loss of social, regional and urban ties, can be considered in the context of the fundamental rights protection under Art. 14 secs. 1 and 3 GG, insofar as interferences with the right to property are concerned (see 2. a below), and otherwise under Art. 2 sec. 1 GG. 265

e) This interpretation of Art. 11 GG does not conflict with the jurisprudence of the 266

European Court of Human Rights. That court viewed the resettlements occasioned by the Horno opencast lignite mine as an interference with both the right to respect for private and family life under Art. 8 ECHR and the right to freedom of movement enshrined in Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (cf. ECtHR, decision of 25 May 2000 - Complaint no. 46346/99 (Noack) -, Landes- und Kommunalverwaltung – LKV 2001, p. 69 <71 and72>). In accordance with the limiting provisions stipulated in Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which are less strict than those in Art. 11 sec. 2 GG, the European Court of Human Rights held that this interference was justified. Ultimately this does not conflict with the Federal Constitutional Court's interpretation that on the basis of the strict limiting provisions under Art. 11 sec. 2 GG, the protection of the fundamental right to freedom of movement does not apply, however, that protection against the special burdens caused by resettlement measures is provided primarily through Art. 14 or Art. 2 sec. 1 GG (see 2. a below). The European Convention on Human Rights and its interpretation by the European Court of Human Rights must be used to assist in interpreting the fundamental rights and the principles of the rule of law established by the Basic Law (cf. BVerfGE 111, 307 <315 et seq.>; 128, 326 <366 et seq.>; 131, 268 <295 and 296>). Using this aid of interpretation does not demand a schematic parallelisation of the terms of the Basic Law with those of the European Convention on Human Rights, but rather an incorporation of their values, to the extent that this is methodologically justified and compatible with the requirements of the Basic Law (cf. BVerfGE 111, 307 <315 et seq.>; 128, 326 <366 et seq.>; 131, 268 <295>).

2. The complainant's fundamental right to property is not violated. 267

Article 14 GG protects the existence of a specific (residential) property, including in its social relations (a). The approval of the framework operating plan interferes with this aspect of the fundamental right to property (b). However, that interference is justified (c). 268

a) Within the structure of fundamental rights, the right to property has the task of safeguarding the fundamental right holder's freedom in the field of property rights, thus enabling that person to organise life on his or her own responsibility (cf. BVerfGE 97, 350 <370 and 371>; established jurisprudence). It enjoys especially broad protection where safeguarding the personal freedom of the individual is concerned (cf. BVerfGE 50, 290 <340>; established jurisprudence; see also B. II. 2. a above). This protection includes the ties of the property in question to its social environment. 269

The right to property protects the specific existence of the property held by individual owners (cf. BVerfGE 24, 367 <400>; 38, 175 <181, 184 and185>; 56, 249 <260>) and gives them the power to exclude third parties from its possession and use (cf. BVerfGE 101, 54 <74 and 75>). When use of a piece of land is exercised, the guarantee of existence reflects the legal and factual state that exists at the time of the state measure (cf. BVerfGE 58, 300 <352>). Accordingly, the residential property thus protect- 270

ed also includes its established social and urban relations, insofar as these are tied to geographically consolidated property items. This applies for land on which residential buildings are built and for condominiums or limited rights *in rem* that permit use as a residence. Protection also extends to the right of possession of tenants of residential spaces, for whom an apartment likewise constitutes the focus of their private life (cf. BVerfGE 89, 1 <6 and 7>). When entire localities are resettled, a tenant's rights of use and disposition are affected to the same extent as those of owners under property right aspects. Thereby the constitutional protection of property does not establish an entitlement to maintain or even create a specific residential environment. However, if firm social ties to the local environment and its urban circumstances are associated with a residence that is actually occupied, these deeply-rooted ties must duly be taken into account in the event of an interference with the fundamental right to property. Primarily, the fundamental right to property is a basis for personal freedom and personal development (cf. BVerfGE 50, 290 <340>; established jurisprudence and B. II. 2. a above), also with regard to its specific geographical and social relations. A certain protection of an established social environment, which in legal scholarship is sometimes placed under the concept of "homeland" in Art. 11 GG, is therefore ultimately guaranteed by Art. 14 sec. 1 GG. Thus, the interference with Art. 14 sec. 1 GG is all the more serious, the more comprehensive and more consequential for the exercise of freedom the impairment or even destruction of the residential environment associated with the expropriation of residential property is.

b) The approval of the framework operating plan for the Garzweiler I/II opencast mine of 22 December 1997 interferes with the complainant's ownership of his residential property situated in the middle of the mined area. 271

aa) The approval of the framework operating plan does not, however, deprive the complainant of the ownership of his property. Unlike most of the plan adoption orders for infrastructure projects, the approval of the framework operating plan also does not result in a so-called advance effect for expropriations that may become necessary later for the realisation of the opencast mine. Pursuant to the relevant interpretation by the Federal Administrative Court (cf. the challenged order of 29 September 2008 - BVerwG 7 B 20.08 -, NVwZ 2009, p. 331 <para. 10 and p. 332 [para. 14]> and BVerwGE 126, 205 <213 [para. 26]>), the Federal Mining Act does not prescribe such a binding effect of the approval of the framework operating plan for a subsequent expropriation proceeding, either as a whole or in parts of decisions. Yet, it is indispensable to the assumption of an advance effect for an expropriation that a binding effect of the results of previous stages of the proceedings be imposed by statute (on this legal configuration in general, cf. BVerfGE 56, 249 <264>; 74, 264 <282>; 95, 1 <22> and on the requirement of a statutory provision on genuinely graduated proceedings , BVerfGE 129, 1 <32 and 33>). 272

bb) However, the approval of the framework operating plan does interfere with the complainant's right to property, because it also includes a finding, to his disadvantage, that the opencast mining project is, in general, approvable ((1)), because it has 273

a serious *de facto* impact on the residential environment of his property within the affected municipality ((2)), and because the approval and associated initiated realisation of the opencast mine render his subsequent legal protection against the expropriation largely ineffective ((3)).

(1) In a judgment of 29 June 2006 obtained by the complainant in the first round of the initial proceedings and not challenged here, the Federal Administrative Court decided that, with a view to § 48 sec. 2 sentence 1 BBergG, the approval of the framework operating plan included the finding that the intended mining of lignite could not be limited or prohibited because of prevailing public interests, hence, not even if the protection of the right to property were taken into account (cf. BVerwGE 126, 205 <212 [para. 23]>). On the basis of this interpretation of statutory law, which is, in principle, relevant for the Federal Constitutional Court, the Federal Administrative Court amended its prior jurisprudence (cf. BVerwG, judgment of 14 December 1990 – BVerwG 7 C 18.90 –, NVwZ 1991, p. 992) and concluded that through this finding, the approval of the framework operating plan imposed a burden on the complainant as a landowner, and therefore constituted a legal obligation applicable to him and could consequently be challenged by him (cf. BVerwGE 126, 205 <212 [para. 23]>). The court held that § 48 sec. 2 sentence 1 BBergG, which is material to the approval of the operating plan, therefore had an effect protecting third parties to the benefit of the landowner (cf. BVerwGE 126, 205 <208 [para. 16]>). 274

According to the administrative courts' jurisprudence, the thus interpreted approvability of the project furthermore depends on whether the mining project is justified by the need to extract the mineral resource present there in order to safeguard the supply of raw materials, and whether therefore the large-scale use of land, with the resettlement of numerous people and a complete restructuring of the landscape, is compatible with public interests. Pursuant to the court, an opencast mine project conflicts with the public interest within the meaning of § 48 sec. 2 BBergG, if it is already evident at the time of the approval of the framework operating plan that the realisation of the project must fail, because the requisite involvement of private third parties' property is not justified by interests of the public good (cf. BVerwGE 126, 205 <209 and 210 [para. 19]>). 275

With this altered interpretation of § 48 sec. 2 BBergG in respect to the approval of a framework operating plan, the Federal Administrative Court for the first time attributed a legal effect to the approval of a framework operating plan that leads to an interference with the right to property of the landowners affected by an opencast mine, even if it does not yet have the effect of a permit for the mine operator. The determination of the project's general approvability, which results from the approval of the framework operating plan (cf. BVerwGE 126, 205 <212 [para. 25]>), defeats owners' opposing interests, as part of the public interests to be taken into account under § 48 sec. 2 BBergG, and has an effect on the further operation planning steps. Furthermore, the approval of the framework operating plan is not without significance for the subsequent condemnation proceedings, at least for any landowner who – like the com- 276

plainant – has unsuccessfully challenged it (cf. BVerwGE 126, 205 <213 [para. 26]>), because it bindingly establishes for him that the project conforms to a technically and economically appropriate planning and conduct of operations, and that the use of the land for the mining project is necessary under this aspect.

(2) The approval of the framework operating plan also interferes with the complainant's property ownership because this decision will trigger the migration of people, businesses and other public and private institutions from the communities affected by an opencast mine, which leads to an increasingly massive alteration of the social and urban environment tied to residential ownership, so that in view of the complete elimination of the social ties that come with homeownership, the right to property is already lastingly affected at this point in time. This fact adduced by the complainant in the proceedings was convincingly confirmed and substantiated at the oral hearing by the First Councillor of the Town of Erkelenz (cf. also BVerwGE 126, 205 <212 [para. 24]>), and was not objected to. Thus, in cases of large-scale opencast mining, the approval of the framework operating plan represents a functional equivalent comparable to a direct legal interference, in view of the scope and permanence of the adverse changes it induces (on this legal concept, see BVerfGE 116, 202 <222>; 118, 1 <20>; 120, 378 <406>). 277

(3) Finally, the approval of the framework operating plan has an interfering effect on the complainant's right to property because, although it has no advance effect under expropriation law (see aa above), it does have a legal advance effect with respect to the complainant's legal protection options against a subsequent condemnation. At least for properties that – like that of the complainant – lie in the midst of the mined area, the approval of the framework operating plan establishes, in principle, that if no agreement is reached between the owner and the mine operator, the property will be taken by condemnation. As the realisation of the opencast mining project, which has generally been determined to be approvable by the approval of the framework operating plan, progresses, the *de facto* chances for a successful legal action against a subsequent condemnation dwindle if that action is founded on the unlawfulness of the project underlying the expropriation (see B. II. 3. d bb above). 278

c) The interference with the complainant's right to property as a result of the official approval of the framework operating plan is justified. 279

aa) Assuming that for large-scale opencast mines the preliminary decision on the future use of land situated within the planning area is made at the time of the framework operating plan's approval, Art. 14 sec. 1 GG already protects owners at this point against such approval if there are obvious reasons against that approval that would automatically also render later decisions on condemnations unsuccessful. Therefore, the interference with a landowner's right to property following from the official approval of the framework operating plan is justified only if the conditions for an expropriation for the opencast mine are met at least in principle. However, it is not necessary that all requirements for a legal individual expropriation be met, because the 280

approval of the framework operating plan is not yet an expropriation.

Accordingly, with respect to the affected landowner or owner of other residential property, approval of a framework operating plan for an opencast mine is not constitutional in light of the future expropriation that has thus been, in principle, legitimated, unless the public interest objective pursued by the opencast mining project derives from a sufficiently precise statutory public interest provision, the project is under reasonable standards required in order to achieve the public interest objective, the decision-making process for the approval complies with minimum constitutional requirements, and the official approval is reasonable and based on a comprehensive overall balancing of all interests in favour and against the project. 281

The mining of lignite implements a public interest objective sufficiently defined by law and sufficiently viable (bb). To achieve this objective, the courts correctly considered the Garzweiler I/II opencast lignite mine to be, by reasonable standards, required at the time relevant for their decision (cc). Admittedly, the statutory configuration of the project approval for large-scale opencast mines lacks consistently coordinated provisions for the graduated completion of the decision-making programme underlying that approval, and does not make an entirely clear division between the responsibility for deciding on the lignite plan, on one hand, and the specific approval of the project under the Federal Mining Act, on the other hand. However, the Federal Administrative Court has held that the existing provisions contain a link between the lignite planning and the operating planning under the Mining Act, as well as the necessary terms governing the question of making an overall balancing in this context, which is constitutionally unobjectionable. At the same time, the process of the specific planning and approval of the Garzweiler I/II opencast mine proves to be constitutionally acceptable (dd). Finally, the requisite overall balancing of all interests arguing for and against the project is still constitutional, at least in the substitute balancing performed in the challenged judgment of the Higher Administrative Court for the *Land* of North Rhine-Westphalia; accordingly, the project proves to be proportionate (ee). 282

bb) In § 79 sec. 1 BBergG, the legislature with sufficient specificity determined the “supply of the market with raw materials”, to be a public interest objective (see B. II. 3. a bb above), which is able to support expropriations. Lignite is among the mineral resources stated in § 3 sec. 3 BBergG that are not attached to ownership of the overlying property. The provisions on lignite plans in the North Rhine-Westphalian *Land* Planning Act (§§ 24 et seq. LPlG 1994, §§ 37 et seq. LPlG 2005) presuppose the mining of lignite, and the public interest objective of supplying the energy market with lignite is given further detail in the guideline decisions of the *Land* government on lignite mining in the Rhine lignite planning region; these provisions fall within the bounds of the statutory requirement under § 79 sec. 1 BBergG. In light of the Federal Constitutional Court’s limited competence of review in this regard, there are no compelling doubts as to the possibility of lignite mining to supply the energy market constituting a public interest objective within the meaning of Art. 14 sec. 3 sentence 1 GG (see B. II. 283

2. b above).

(1) At the time of the general determination by the *Land* of North Rhine-Westphalia about further lignite use over an extended time, it was already established that lignite can be mined only in opencast mines, and thus only in combination with a serious interference with existing settlement structures and with a massive impact on the water resources, nature, and the landscape. As a result, it was necessary to determine a public interest reason sufficiently important to generally justify expropriations while accepting these disadvantages. 284

Such a public interest objective of exceptional importance to both the *Land* and the Federal Republic of Germany is identified by the North Rhine-Westphalian *Land* government's 1987 and 1991 guideline decisions to pursue longer-term lignite mining from the Rhine lignite field, reached as part of the general public interest determination under § 79 sec. 1 BBergG in the course of preparing the lignite plan under the *Land's* planning laws. 285

The Federal Constitutional Court has already repeatedly emphasised the existential importance safeguarding the energy supply has for the public good. Accordingly, it has designated safeguarding the energy supply by appropriate measures a public task of the highest significance, and placed the energy supply in the category of public service task indispensable for the citizens to lead a dignified life (cf. BVerfGE 66, 248 <258>; also 25, 1 <16>; 30, 292 <323>; 53, 30 <58>; 91, 186 <206>). The continuous availability of sufficient amounts of energy is furthermore a crucial precondition for the viability of the entire economy (cf. BVerfGE 30, 292 <324>). 286

First and foremost it is for the Federation and the *Laender* to decide on the energy sources and the combination of available energy sources by which they intend to guarantee a reliable energy supply. In this field, they have a wide margin of appreciation. This decision depends on many factors, such as the security of supply when a certain energy source is used, the cost of its use to business and the consumer, its impact on the climate and the environment, its impact on the job market, and the necessary consideration of European or international commitments. The Federation and the *Laender* have a considerable margin of appreciation in weighing the individual factors. The assessment of the interplay of the various factors, in turn, depends on political evaluations, and to a considerable degree on predictions of future developments. 287

[…] 288

These decisions of the federal and *Land* governments are subject to only very limited review by the Federal Constitutional Court. The Basic Law does not provide a standard determining what kind of energy policy is the only constitutional option, or even the constitutionally preferable option, for the Federation or a *Land* at any given point in time. The Federal Constitutional Court can thus review fundamental decisions on energy policy only with regard to whether they are obviously and clearly incompati- 289

ble with the values of the Constitution, values embodied in particular in fundamental rights or in the provisions on fundamental national objectives – here, in particular, the protection of the environment (Art. 20a GG). This also applies if, as in the present case, the energy policy decision at the same time further defines a public interest objective within the meaning of Art. 14 sec. 3 sentence 1 GG that supports expropriations.

(2) The constitutional complaint proceedings, especially the oral hearing, have not shown that the fundamental energy policy decision of the *Land* of North Rhine-Westphalia, favouring the continuation of lignite extraction in the medium term – including the way this relates to the specific decision in favour of the Garzweiler opencast mine – is obviously and clearly incompatible with the values of the Constitution. 290

(a) Here, it must be taken into account that in its judgment challenged by the constitutional complaint, the Higher Administrative Court, as the last trial court in regular court proceedings, focused on the situation of fact and law at the time of the decision on the objection when it performed its judicial review (judgment of 21 December 2007 - 11 A 1194/02 -, p. 19 = juris para. 51). The decision on the objection to the approval of the framework operating plan was rendered on 24 February 2000. Within the scope of a constitutional complaint on a judgment, this date is, in principle, also decisive for the review by the Federal Constitutional Court. 291

[…] 292

(b) (aa) The federal government, the *Land* government of North Rhine-Westphalia, the joined party in the initial proceedings, the *Vereinigung Rohstoffe und Bergbau e.V.* (Raw Materials and Mining Association) and the *Bundesverband der Energie- und Wasserwirtschaft e.V.* (Energy and Water Management Association) unanimously argued in favour of using lignite to generate electricity because of its reliable availability as a domestically produced primary source of energy. They argued that generating electricity from lignite therefore helps mitigate dependence on the importation of other energy sources. […] The generation costs were said to be low, especially in comparison to those for renewable energy […]. Furthermore, this form of generation is not subsidised by the state. Finally, it was pointed out that generating electricity from lignite entailed a considerable demand for labour in the mining regions. As another argument in favour of continuing to generate electricity from lignite it was stated that modern lignite-fired power plants can be operated just as flexibly as, for example, gas-fired power plants. 293

In the constitutional complaint proceedings, this evaluation of the advantages of generating electricity from lignite did not prove to be either plainly false in its factual assumptions, or unreasonable in its assessment. The objections raised against it by the complainant, by Öko-Institut e.V., and by the Federal Environment Agency (*Umweltbundesamt*) primarily focus on other emphases (see (bb) immediately below). […] 294

(bb) The principal objections of the opponents to the further generation of electricity from lignite are aimed primarily at what they believe to be the by far predominant disadvantages of using this energy source. These consist of the substantial impact on people and the environment that is associated with mining and using lignite. 295

[…] 296-297

(cc) Even taking these objections into account, in view of the relevant margin of appreciation and assessment, which refers to both energy policy and the public interest goals that support expropriation, the energy policy decision by the North Rhine-Westphalian *Land* government in favour of the medium-term further mining of lignite for power generation cannot be viewed as obviously and clearly erroneous from a constitutional viewpoint. The assessment of the serious impact on people and the environment that undisputedly follows from the mining of lignite and its use for power generation is subject to the executive and legislative branches' political prerogative of assessment, also with regard to the constitutional values of Art. 14 sec. 1 and Art. 20a GG. In any case these assessments are not obviously incorrect in such a way that the energy policy decision by the competent government agencies in favour of this concept of ensuring the energy supply would be constitutionally objectionable according to the Federal Constitutional Court's standard of review, which is less strict in this regard. In any event, the *Land* government provides weighty public interest arguments for this approach, which emphasises the constant availability of a traditional raw material for a secure energy mix. It is not for the Federal Constitutional Court to decide whether, at the relevant time, this is the best energy supply concept under energy policy, economic and ecological aspects. In any event, the decision in favour of continuing to generate electricity from lignite in a constitutionally unobjectionable way further defined the public interest goal of supplying the market with raw materials, within the meaning of § 79 sec. 1 BBergG for the important energy sub-market. […] 298

cc) The Garzweiler I/II opencast lignite mine is necessary in order to achieve the public interest objective of mining lignite and using it to generate electricity in order to make a significant contribution to the energy mix, as desired according to the relevant energy policy decision, for the *Land* of North Rhine-Westphalia and the Federal Republic of Germany. Here it is sufficient for the necessity of the Garzweiler mine that it is required in a reasonable way for the public good (on this standard, see B. II. 2. d bb above). This is the case if mining lignite from this mine is able to make a substantial contribution towards achieving the public interest objective of a secure electric power supply, primarily for the *Land* of North Rhine-Westphalia, but also for the Federal Republic of Germany (bb (2) (b) above). However, Art. 14 sec. 3 GG does not require that this exact opencast mine be indispensable to the energy supply. 299

[…] 300

dd) (1) The statutory provisions on the decision-making process in the official approval of an opencast lignite mine project in North Rhine-Westphalia have shortcomings with regard to a clear distribution of the decision-making responsibility and the 301

constitutional requirements for a transparent and clear procedure, as they ensue from the principles of the rule of law and the requirements for effective protection of fundamental rights (cf. BVerfGE 53, 30 <59 et seq.>) – here, in particular, the fundamental right to property. This is the case, first, for the issue of the relationship between lignite planning under North Rhine-Westphalian planning law and the approval of the framework operating plan under the Federal Mining Act, and second, for the issue of whether a uniform overall balancing of an opencast mining project is required and sufficiently clearly regulated.

The legislature has not expressly decided whether, and with what binding effect, the findings reached in the *Land*'s lignite planning, and the assessment decisions made there, are linked with the framework operating plan under the Federal Mining Act and the overall balancing to be performed in that context. § 24 LPlG 1994 requires in fact that lignite plans in the lignite planning area must specify the objectives of regional development and *Land* planning so far as is necessary for orderly lignite planning. However, on this point the Federal Administrative Court has decided that the mining operator is not bound by the objectives of regional development as expressed in a lignite plan, because the regional development clause in § 4 sec. 1 sentence 2 no. 2 of the Regional Development Act (*Raumordnungsgesetz* – ROG) 1998 is not applicable to the approval of an optional framework operating plan (cf. BVerwGE 126, 205 <210 and 211. [para. 21]>). The provision of § 34 sec. 5 sentence 2 LPlG 1994, according to which the operating plans of the mining operations located in the lignite planning area must be reconciled with the lignite plans, as a *Land* statutory provision , cannot directly establish a binding obligation in the federally governed approval procedure, due to a lack of competence. The Federal Administrative Court, however, has resolved this unsatisfactory legal situation by interpreting § 48 sec. 2 sentence 1 BBergG in a way that still meets constitutional requirements. It held that a large-scale opencast mine cannot be put into operation on the basis of a framework operating plan without the mining authority first having determined that the project in its entirety does not interfere with public interests. If these public interests have been determined in lignite proceedings as part of a *Land* planning, and have been incorporated into the description of objectives of regional development, it is the Federal Administrative Court' opinion that § 48 sec. 2 sentence 1 BBergG is the provision of federal law through which regional development objectives can be made binding for the approval procedure (BVerwG, op. cit.). Although the approval procedure for an operating plan at the federal level leaves no room for the direct application of additional *Land* requirements for approval, according to this decision the obligation under § 34 sec. 5 sentence 2 LPlG 1994 to reconcile the operating plans of the mining operations located in the lignite planning area with the lignite plans is established through the opening clause of § 48 sec. 2 sentence 1 BBergG (cf. Higher Administrative Court for the *Land* Brandenburg, order of 28 September 2000 – 4 B 130/00 –, juris para. 66). This ensures a statutory distribution of decision-making responsibility that meets minimum constitutional requirements. 302

Another point that is not clearly regulated by statute is the issue, which is central to the substantive lawfulness of the framework operating plan approval, of the need for an overall balancing of the private and public interests in favour and against the project (see ee (1) below). Nevertheless, as interpreted by the Federal Administrative Court, the provisions still meet the constitutional requirements in this regard for a transparent, clear legal structure of the procedure and of the substantive decision-making process, as well as the requirement for a clear allocation of responsibility. 303

(2) The actual steps in the procedure that led to the official approval of the framework operating plan for the Garzweiler I/II opencast lignite mine – insofar as they are constitutionally relevant – also do not conflict with the minimum requirements that must be set under the aspect of clear allocation of decision-making responsibility and that can be derived from the fundamental right to property for proceedings that ultimately lead to expropriation. 304

(a) The fundamental decision to mine lignite in the Rhine lignite field was made by the *Land* government of North Rhine-Westphalia in its guideline decisions on future lignite policy from 1987, and in the guideline decisions on the Garzweiler II lignite mining project from 1991. 305

It is consistent with the way responsibility is allocated within a government organised according to a division of functions that the guiding decisions for the long-term concept for lignite mining in the Rhine lignite field should be made at the level of the *Land* government of North Rhine-Westphalia, because they concern a key question for the state's energy policy (cf. BVerfGE 49, 89 <124 et seq.>), which must be decided with a view to numerous other factors, especially including its integration with the energy policy of the Federal Republic of Germany and of the European Union. Making the fundamental decision at this level is constitutionally unobjectionable. It is not evident, and was not claimed in the oral hearing, that the competence to decide this fundamental question had been transferred by statute to the federal government or some other body at the *Land* level. It is inevitable that such a guiding decision – especially if it concerns a specific project, as do the guideline decisions for the Garzweiler II lignite mine project from 1991 – will pre-determine future official decisions on what to select and approve, like the framework operating plan in this case. However, this is acceptable if in subsequent decisions having an external impact on third parties, full legal responsibility for the fundamental decision must be assumed. That is the case here. 306

(b) On the basis of a "Garzweiler I/II" framework operating plan submitted in 1987 by the legal predecessor of the joined party in the initial proceedings, the Lignite Committee prepared a lignite plan in complex proceedings in accordance with the requirements of the North Rhine-Westphalian *Land* Planning Act. This plan was ultimately approved in 1995 as the "Garzweiler II" lignite plan. 307

[…] 308-309

The lignite plan is a part of the *Land*'s planning, but not of the framework operating planning under the Federal Mining Act. According to the jurisprudence of the Federal Administrative Court, the determinations of the lignite plan acquire binding legal force for the framework operating plan under the federal mining laws as public interests that may oppose the framework operating plan within the meaning of § 48 sec. 2 sentence 1 BBergG (see (1) above). In case of the specific approval of the framework operating plan for the Garzweiler I/II opencast mine, which was at issue in the initial proceedings, the decision of the approving authority, as well as the review of that decision by the courts, is explicitly founded directly on the findings and determinations of the lignite plan; it evaluates these findings and determinations and bases its overall balancing on them (see ee (2) and (3) below). Accordingly, there is no constitutionally relevant shortcoming in the decision-making process in this specific case. 310

ee) According to the recent jurisprudence of the Federal Administrative Court, the Federal Mining Act prescribes an overall balancing for the approval of framework operating plans, at least for large-scale opencast mines; such a balancing act is also required by the Constitution ((1)). In the case of the Garzweiler I/II opencast mine, this overall balancing was performed in a way that is ultimately not objectionable under the Constitution ((2)). As a result of this overall balancing, the opencast mine proves to be in compliance with the Constitution ((3)). 311

(1) Interference with the right to property through the approval of the framework operating plan is acceptable only if that approval is founded on a comprehensive overall balancing act. This is already evident from statutory law ((a)), but is also required by the Constitution ((b)). 312

(a) According to the interpretation of ordinary law by the Federal Administrative Court, which is, in principle, decisive for the Federal Constitutional Court, the approval of a framework operating plan requires an overall balancing of all interests arguing in favour of and against the project. 313

[…] 314

(b) Such an overall balancing of all relevant interests is constitutionally required for the approval of a framework operating plan at issue here. 315

In any case, for complex projects like opencast lignite mines, it is also constitutionally necessary to organise the decision-making process in a way that permits the project to be approved only on the basis of an overall balancing of all interests arguing for and against the project. This overall balancing must be designed, in principle, to be a fundamentally uniform decision, must be made before extraction operations begin, and must also be open to a timely challenge by the affected property owners. 316

Under the rule of law, from the viewpoint of democratic legitimation and, insofar as the projects use property, also under Art. 14 GG, an extent of transparency and clarity in the decision-making process is required that makes it sufficiently clear who is responsible for deciding, and at what stage in the process, whether a mineral resource 317

can be extracted on a large scale, as well as at what location this can be done, and for whose benefit. Only a uniform overall balancing of all public and private interests in favour of and against the project made within the scope of the approval decision can ensure that the approval of a mining operation will not be improperly weighed, and thereby rendered erroneous, by the segmentation of individual items to be decided. After all, the guarantee of effective legal protection against interference with property ownership, which is also rooted in the fundamental right to property (cf. BVerfGE 45, 297 <322>), requires that at least in complex, large-scale proceedings the owners threatened with the taking of their property be granted legal protection already against the decision to approve the project. If in such large proceedings, the way to legal protection is not opened up until the expropriation decision, it will typically come too late, if the success of an appeal depends on the lawfulness of the entire project, which must be reviewed incidentally, and that project has already been put into action long ago (see B. II. 3. d bb above).

[…] 318

(2) The necessary overall balancing for the Garzweiler I/II opencast mine was performed. However, following the interpretation of the legal situation concerning §§ 48, 55 BBergG at that time, the Düren Mining Office did not perform an overall balancing of all interests in favour and against the project when it rendered its decision approving the Garzweiler I/II framework operating plan of 22 December 1997; in particular, it failed to include in its decision the interests of the affected owners and thus also of the persons to be resettled. However, such an overall balancing act was in substance performed later by the Arnsberg district government, which had assumed responsibility in the meantime, during the proceedings before the Higher Administrative Court, after the Federal Administrative Court, in its judgment of 29 June 2006 (BVerwGE 126, 205), had changed its jurisprudence on the requirement to consider the interests of affected owners pursuant to § 48 sec. 2 sentence 1 BBergG when approving a framework operating plan. 319

[…] 320-321

(3) The fact that the approval of the framework operating plan complies with the constitutional requirements for an overall balancing of all interests in favour and against the project results from the judgment of the Higher Administrative Court, which performed this balancing act and is challenged in the constitutional complaint at hand. 322

(a) However, it is not the task of the Federal Constitutional Court to perform the task of an overall balancing, which is incumbent on the approving authority and the regular courts, nor is it the Court's task to take their place. Rather, the determination and evaluation of the facts, the interpretation of statutory law and its application to the specific case are solely incumbent upon the courts generally competent for such matters, and are exempt from review by the Federal Constitutional Court unless errors of interpretation become evident that are founded on a fundamentally incorrect view of the significance of a fundamental right, and particularly of the extent of that right's 323

scope of protection, and are also of some substantive importance for the specific legal case at hand (cf. BVerfGE 18, 85 <92 and 93>). The overall balancing of all interests in favour and against a major project like the Garzweiler opencast mine is a complex process that depends to a large extent on findings of fact, evaluations, and projected estimates. Performing or reviewing them is first and foremost the task of the regular courts. In reviewing the decisions of the regular courts and the specialised authorities, the Federal Constitutional Court is limited to examine whether they made considerable mistakes of constitutional relevance during the determination of facts, or whether they fundamentally misjudged in their overall balancing the importance of the affected fundamental rights – in particular those under Art. 14 sec. 1 GG – or of other values enshrined in the Constitution.

(b) On this basis, the overall balancing for the Garzweiler I/II project, insofar as it is to be decided in the context of the approval of the framework operating plan, and as reviewed by the Higher Administrative Court, still proves to be compatible with Art. 14 sec. 1 GG. 324

[…] 325

(c) The importance of lignite extraction from the Garzweiler I/II opencast mine was evaluated in depth by the Higher Administrative Court in the course of its review of the necessity of the project. It focused, in a constitutionally unobjectionable way, in principle on the date of the decision on the objection to the approval of the framework operating plan in 2000 (p. 19 = juris para. 51 and p. 25 = juris para. 85) and furthermore rightly considered whether material new findings or energy policy guideline decisions since then had caused electric power generation from lignite to take on an entirely different aspect. It ultimately found that this was not the case. 326

Based on the lignite quantities to be expected from the Garzweiler I/II opencast mine in the scheduled mining period 2001 to 2045, the Higher Administrative Court predicted that the mining project would make a substantial contribution to the generation of electricity in North Rhine-Westphalia and also in the federal territory. It went on to consider the mining project with respect to the guideline decisions of the North Rhine-Westphalia *Land* government from 1987 and 1991, assessed its compatibility with the climate policy of Germany and the European Union as well as with the fundamental national objective under Art. 20a GG of protecting the environment, and found that, as a whole, the project was sufficiently important. This assessment of the great significance of power generation from lignite for the energy supply of the Federal Republic of Germany, and of the critical share of that energy to be supplied by the lignite obtained from the Garzweiler I/II opencast mine during the relevant period, as well as the existential general social importance of a secure energy supply, is constitutionally unobjectionable in light of the limited review by the Federal Constitutional Court. It is consistent with the assessment above of lignite extraction as a legitimate public interest objective within the meaning of Art. 14 sec. 3 sentence 1 GG (see bb (2) above). 327

(d) As concerns the interests of the persons whose residential property is affected 328

by the Garzweiler I/II opencast mine, as well as those whose property ownership is otherwise affected, they constitute together a particularly weighty public interest that conflicts with the opencast mine. One may very well doubt whether the Higher Administrative Court adequately stressed this major concern in the overall balancing act. These doubts, however, are not compelling.

[…] 329-331

(e) Finally, the affirmation of the overall balancing by the Higher Administrative Court does not meet with serious constitutional objections that are based on addressing the other public interests that oppose the Garzweiler I/II opencast mine, particularly with regard to the alteration of the landscape. For lack of substantiated arguments from the complainant in this regard, there is no need for further constitutional consideration of these interests. 332

D.

The decision as to whether in proceedings 1 BvR 3139/08, the Higher Administrative Court conducted an overall balancing that gave sufficient consideration to the impact of resettlement (C. II. 2. c ee (3) (d)) was adopted by 5 : 3 votes. 333

Kirchhof Gaier Eichberger

Schluckebier Masing Paulus

Baer Britz

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