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## The Enhancement of Immovable Cultural Heritage by Urban Planning Law: The French Experience

**Abstract:** Despite the incremental development of the heritage dimension of local urban planning plans, as well as an ever-more substantial relationship between immovable cultural heritage law and urban planning law, these two elements remain susceptible to raising confusion, occasionally contradicting one another frontally. The French Act of 7 July 2016 on Freedom of Creation, Architecture, and Heritage had the initial ambition of harmonizing and simplifying the mechanisms for the protection and enhancement of immovable cultural heritage, including under urban planning law. Yet the Act of 23 November 2018 on Housing Development, Urban Planning, and Digital Technology has further contributed to weakening the heritage protection mechanisms and bestowed a priority on the construction of new buildings over the conservation and enhancement of old neighbourhoods and buildings.

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## Introduction

The protection and conservation, as well as the enhancement, of immovable cultural heritage cannot be envisaged independently of the environment from which such heritage is indissociable.<sup>1</sup> There is no question that immovable cultural heritage extends into urban planning law, just as urban planning law includes certain provisions substantially oriented towards cultural heritage. The notion of immovable cultural heritage nevertheless needs to be circumscribed to the build heritage or monumental, architectural, and urban heritage. Conversely, it excludes from our field of study bare land, small rural heritage, and landscapes.

This article is not intended to cover all French legislation regarding immovable cultural heritage and the instruments aimed at its protection or enhancement, but instead focuses on the Act of 7 July 2016 on Freedom of Creation, Architecture, and Heritage (“the LCAP Act”),<sup>2</sup> as well as the Act of 23 November 2018 on Housing Development, Urban Planning, and Digital Technology (“the ELAN Act”).<sup>3</sup> The former intended to rationalize the methods of protection and enhancement of immovable cultural heritage, and should have reconciled these methods with town planning regulations. Unfortunately, the ELAN Act undermines this balance by providing more flexibility to the authorities responsible for urban planning, to the detriment of cultural heritage.

In general, this article analyses the way in which this form of cultural heritage is combined with urban planning law and on the choices made by the competent urban planning authorities. First of all, it should be recalled that these two elements implement two distinct codes: the Heritage Code,<sup>4</sup> and the Urban Planning Code.<sup>5</sup> However, it should be noted that the latter Code also contains a number of provisions geared to the protection or enhancement of immovable cultural heritage. Secondly, the relationship of immovable cultural heritage to urban planning can proceed from two distinct logics: primarily, the logic of protection, conservation, and safeguarding, which essentially consists of a logic of prudence and control. This leaves a significant role for state institutions (the architect of Bâtiments de France, Prefect, and Secretary of State for Culture), which are the guarantors

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<sup>1</sup> For instance, see Article 10 of the Convention for the Protection of the Architectural Heritage of Europe, 3 October 1985, ETS 121.

<sup>2</sup> *Loi n° 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l'architecture et au patrimoine*, Journal officiel de la République française 0158, 8 July 2016.

<sup>3</sup> *Loi n° 2018-1021 du 23 novembre 2018 portant évolution du logement, de l'aménagement et du numérique*, Journal officiel de la République française 0272, 24 November 2018.

<sup>4</sup> *Code du patrimoine*, [https://www.legifrance.gouv.fr/codes/texte\\_lc/LEGITEXT000006074236](https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006074236) [accessed: 30.11.2020].

<sup>5</sup> *Code de l'urbanisme*, [https://www.legifrance.gouv.fr/codes/texte\\_lc/LEGITEXT000006074075](https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006074075) [accessed: 30.11.2020].

of this protection. At the same time this relationship of immovable cultural heritage to urban planning can also correspond to a logic of enhancement, in the sense that cultural heritage can enhance the urban environment, the district, and/or the city. In this second aspect, immovable cultural heritage comes to be substantially combined with urban planning law, without however neglecting the primary requirement of protection. Finally, the logic of enhancing the cultural heritage of immovable property by urban planning law involves a certain number of risks if it is not accompanied by guarantees in the form of administrative and jurisdictional controls.

In view of these different aspects, the LCAP Act of 2016 that aimed at harmonizing and simplifying the mechanisms for protecting and enhancing immovable cultural heritage was weakened by later legislative developments that have further contributed to undermining the protection mechanisms and favouring the development of new buildings over the conservation of old neighbourhoods and buildings.

## Harmonization and Simplification of the Protection and Enhancement Mechanisms for Immovable Cultural Heritage

The LCAP Act initially aimed to “simplify to better protect”. This aim must be borne in mind in order to understand the evolution governing the protection of the surroundings of historic monuments. The Act of 31 December 1913<sup>6</sup> first created the protection regime for historic monuments, which can be classified or registered according to a largely centralized procedure which essentially involves the regional prefect for registration measures and the Secretary of State for Culture for classification measures. The Act of 25 February 1943 (“the 1943 Act”)<sup>7</sup> then came to superimpose on this protection of classified or registered monuments a new protection regime, one which concerned the surrounding area, that is to say a certain perimeter surrounding historic monuments. The surroundings include, according to Article 1 of the 1943 Act, “any other building, bare or constructed, visible from the [listed monument] or visible at the same time as it is and included in a perimeter not exceeding 500 meters”. This initial regime of protection of the surroundings suffered from excessive rigidity, taking into account its dual geometric criterion (a perimeter of 500 m) and optical criterion (visibility or co-visibility from the listed monument), both of which fell under the sole determination of the architect of Bâtiments de France.

<sup>6</sup> *Loi du 31 décembre 1913 sur les monuments historiques* [Act of 31 December 1913 on Historical Monuments], *Journal officiel de la République française*, 4 January 1914.

<sup>7</sup> *Loi du 25 février 1943 portant modification de la loi du 31-12-1913* [Act of 25 February 1943 Amending the Act of 31 December 1913], *Journal officiel de la République française*, 4 March 1943.

This mechanism has been relaxed by the Act of 13 December 2000 on Urban Solidarity and Renewal,<sup>8</sup> and next by the ordinance of 8 September 2005 amending the Heritage Code.<sup>9</sup> These texts create two new mechanisms: the “adapted protection perimeter” and the “modified protection perimeter”. These address the issue of allowing for the adaptation of the perimeter of the surroundings to the topographical and urban realities surrounding the historic monument by the constitution of a perimeter which can go beyond 500 m, while ensuring the better involvement of local stakeholders in the definition of this new variable geometry perimeter. Yet the adapted and modified protection perimeters had a dual downside: the first is the duplication of this protection mechanism; and the second the retention of the visibility and co-visibility rule, which remains at the discretion of the architect of Bâtiments de France. The LCAP Act changed this mechanism for protecting the surroundings in order to merge these two perimeters into one and the same protection perimeter: the “perimeter of the surroundings”. This includes “buildings or groups of buildings which form a coherent whole with a historic monument or which are likely to contribute to its conservation or enhancement” (Article L.621-30-I of the Heritage Code). This new perimeter allows more flexibility, discarding both the geometric rule of 500 m and the optical rule of visibility and co-visibility. In addition, the procedure for delimiting the perimeter of the surroundings allows for a more meaningful involvement of local actors: the perimeter is proposed by the architect of Bâtiments de France, and then immediately submitted to the opinion of the authority in charge of local urban planning as well as the town concerned. After conducting a public inquiry, which requires the consultation of the owner or the domanial allocator of the historic monument, it is up to the competent authority for local urban planning to deliberate, with a view to giving (or not) its agreement to this perimeter delimited by the surroundings. If there is agreement, it is the regional prefect who decides on the creation of the surrounding perimeter. In the event of a disagreement, the decision to create the defined perimeter of the surroundings is likely to be the responsibility of two separate bodies. When the perimeter does not exceed the distance of 500 m from a historic monument, the decision is left to the regional prefect, after consultation with the regional heritage and architecture commission. When the perimeter exceeds the distance of 500 m from a historic monument, the creation must be decided by a decree of the Council of State, after the National Commission of Heritage and Architecture issues its opinion. It remains to be specified whether this new perimeter delimited by the surroundings will continue to coexist with the old regime of

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<sup>8</sup> *Loi n° 2000-1208 du 13 décembre 2000 relative à la solidarité et au renouvellement urbains*, Journal officiel de la République française 289, 14 December 2000.

<sup>9</sup> *Ordonnance n° 2005-1128 du 8 septembre 2005 relative aux monuments historiques et aux espaces protégés* [Ordonance No. 2005-1128 of 8 September 2005 Relating to Historic Monuments and Protected Areas], Journal officiel de la République française 210, 9 September 2005.

the surroundings, inherited from the 1943 Act. Article L.621-30-II of the Heritage Code stipulates that “in the absence of a defined perimeter, the protection under the surroundings applies to any building, whether built or bare, visible from the historic monument or visible at the same time as it and located less than five hundred meters from it”. The authority responsible for local urban planning can thus choose either to keep the old perimeter of the surrounding area, or to establish a new perimeter according to the dual geometric and optical rule. Finally, the right of objection available to the authority competent for local urban planning, even if it can be circumvented, requires that this authority and the architect of Bâtiments de France both agree on the identification of the “buildings or sets of buildings which form a coherent whole with a historic monument”. However, there is nothing to confirm *a priori* that there will be convergence in the respective assessments of the architect of Bâtiments de France and the local authority, or that the public establishment of inter-municipal cooperation will be maintained. In other words, the concern for the protection or enhancement of heritage – specific to the architect of Bâtiments de France – may be only secondary for a local authority, which can choose to favour a development project of the habitat or business, or any other development project, which may deviate from purely heritage considerations. There will be convergence between the architect of Bâtiments de France and the local authority only insofar as heritage protection and enhancement are likely to be part of the urban planning project carried out by the local authority concerned.

This first development was supplemented by another measure for the harmonization and simplification of heritage protection in the form of “remarkable heritage sites”. These designate “the towns, villages or districts whose conservation, restoration, rehabilitation or enhancement presents a public interest, from the historical, architectural, archaeological, artistic or landscape point of view”, as well as “the rural areas and the landscapes which form a coherent whole with these towns, villages or districts or which are likely to contribute to their conservation or enhancement” (Article L.631-1 of the Heritage Code). This new category replaces three pre-existing mechanisms: the safeguarded sectors; the Architectural, Urban, and Landscape Heritage Protection Areas; and the Areas for the Development of Architecture and Heritage. These three mechanisms initially were aimed at creating a common consensus to bring together the mechanisms for the enhancement of the cultural heritage of buildings and the instruments of urban planning: within the framework of the safeguarded sectors, the safeguard and enhancement plan came to completely replace the local planning on the protected perimeter, while the Architectural, Urban, and Landscape Heritage Protection Areas and the Areas for the Development of Architecture and Heritage constitute, like the historic monuments and the perimeter of the surroundings, a public utility annexed to the local urban plan. These heritage instruments contribute to the urban project as a whole, beyond just heritage or aesthetic considerations. The new category of “remarkable heritage sites” extends this inclusive

logic in the form of two distinct instruments: on the one hand, the Architecture and Heritage Enhancement Plan (Plan de Valorisation de l'Architecture et du Patrimoine, PVAP); and on the other hand the Safeguarding and Enhancement Plan (Plan de Sauvegarde et de Mise en Valeur, PSMV). These two heritage space management plans are distinct, in that the first results from the Heritage Code, while the second is framed by the provisions of the Urban Planning Code. Their respective legal systems, as well as their competences with regard to urban planning documents, also present some differences. First of all, the initiative and the study of a project for the promotion of architecture and heritage is managed by the local authority competent for urban planning. This study is conducted by an architect, chosen by the municipality or the public organ of inter-municipal cooperation and the architect of Bâtiments de France, and the local commission of the remarkable heritage site. It is then up to the local authority competent for urban planning to draw up and adopt a draft plan for the promotion of architecture and heritage, including a presentation report and regulations, which is immediately transmitted to the regional prefect and the regional heritage and architecture commission. Then, subsequent to the completion of a public inquiry and after the regional prefect's agreement, the deliberative body of the authority competent for urban planning adopts the architecture and heritage enhancement plan (Article L.631-4 of the Heritage Code). Finally, as soon as it is adopted the architecture and heritage enhancement plan has the character of a public utility and has to be annexed to the local urban plan. In addition, the initiative for the safeguarding and enhancement plan belongs to the prefect of the department. It is he/she who, after the agreement of the deliberative body of the authority competent for urban planning, issues the decree for a study of a draft safeguarding and enhancement plan. This decree delimits the perimeter of the study and revises the local urban plan. The study is conducted by an architect, in association with the authority competent for urban planning, the local commission for the remarkable heritage site, and the architect of Bâtiments de France. Once the study is completed, the formulation of the safeguarding and enhancement plan (including a presentation report and regulations) is jointly conducted by the prefect and the competent authority. After a public inquiry, the safeguarding and enhancement plan may be approved by order of the prefect of the department, after agreement with the authority competent for urban planning; or otherwise by a decree in the Council of State in the event of an unfavourable opinion from the deliberative body of the authority responsible for urban planning. Here again, there is substantial state intervention in the preparation of the safeguarding and enhancement plan. Yet unlike the architecture and heritage enhancement plan, the safeguarding and enhancement plan is an urban planning document and constitutes a local urban planning plan on the perimeter that it covers (Article L.313-1 of the Local Urban Planning Code). As such, it illustrates how the drive for heritage valorization has penetrated into urban planning, which naturally leads to the hypothesis of the

complete inclusion of heritage protection within the local urban planning plan and its placement at the core of local authorities' competence.

The ambition of the LCAP Act to "simplify to better protect" led it to also extend the government's initial aspiration to make the local urban plan the common tool for the protection of heritage, and to allow the heritage issue to be integrated into the definition of urban planning rules. This has given local authorities the freedom of choice of the urban planning document to be adopted to establish the heritage rules on the perimeter of a historic city, even allowing them to divide a historic city into several parts, each governed by a different document. In the end, the LCAP Act has merely enabled confirmation of the insertion of heritage elements within the local urban planning plan and contributed to consolidating, without fully enshrining, the concept of a Local Urban Plan (Plan Local d'Urbanisme, PLU) on heritage. Since the Ordinance of 23 September 2015 Relating to the Legislative Part of Book I of the Urban Planning Code<sup>10</sup> (using the terms of the old Article L.123-1-5 resulting from Act No. 2014-366 of 24 March 2014 on Access to Housing and Renovated Urban Planning), Article L.151-19 of the Urban Planning Code specifies that:

[T]he regulations [of the PLU] can identify and locate the landscape elements and identify, locate and delimit neighbourhoods, islets, built or undeveloped buildings, public spaces, monuments, sites and sectors to be protected, conserved, highlighted or reclassified for cultural, historical or architectural reasons and define, if necessary, the prescriptions likely to ensure their preservation, their conservation or their restoration.

Echoing this first provision, Article L.111-22 adds that "in a territory not covered by a local urban plan or an urban planning document in lieu thereof, the municipal council may, by deliberation taken after a public inquiry [...], identify and locate one or more elements of heritage, landscape or ecological interest and define, if necessary, the prescriptions likely to ensure their protection".

These provisions thus entrust to the local authority, if not to the public institution of intermunicipal cooperation competent in matters of urban planning, the duty and means to identify, in the absence of a local urban planning plan, or to include in the rules of procedure of the local urban plan, the heritage elements that it intends to protect and enhance. In addition, all work carried out on existing constructions (with the exception of ordinary maintenance or repair work) which have the effect of modifying or eliminating an element identified and protected under Articles L.151-19 and L.111-22 of the Urban Planning Code have to be preceded by a prior declaration, when they are not subject to a building permit, with the local authority responsible for urban planning (Article R.421-23 of the Urban Planning

<sup>10</sup> *Ordonnance n° 2015-1174 du 23 septembre 2015 relative à la partie législative du livre Ier du code de l'urbanisme*, Journal officiel de la République française 221, 24 September 2015.

Code). This development echoes the emergence in recent years of the concept of local heritage urban planning (“heritage PLU”), which proceeds from the insertion of a heritage component within local urban planning and the sole initiative of the local authority.

The practice of heritage PLU, now widespread, is exemplarily reflected in the intercommunal Angers Loire Métropole PLU (PLUi),<sup>11</sup> dated 8 July 2019, whose presentation report gives prominence to immovable cultural heritage. Firstly, it identifies each of the protected elements: classified and registered sites; historic monuments and surroundings; Architectural, Urban, and Landscape Heritage Protection Areas and Areas for the Development of Architecture and Heritage; protected areas of Angers; UNESCO Val de Loire property and the Val de Loire Management Plan; and archaeological sites. Secondly, the presentation report aims to identify a set of elements of the “built heritage to be enhanced”,<sup>12</sup> stipulating that “beyond the recognized and protected institutional heritage, the territory is made up of a great variety of unprotected local interest heritage, which contributes to the identity of the agglomeration territory”.<sup>13</sup> This includes a series of “remarkable ensembles”, “character buildings”, “agricultural units”, “technical buildings”, “buildings constructed for their cultural or cult use”, and “ensembles built under the influence of landscapes”, as well as a set of heritage and urban elements expressing a “territorial singularity”.<sup>14</sup> Accordingly, each of the areas (urban; to be urbanized; agricultural; natural and forest) constituting the PLUi is expected to include a “p”<sup>15</sup> sector. In this regard, the presentation report states that:

the definition of this sector reflects the will of the agglomeration to preserve and enhance the identity of the territories through the diversity of the built heritage. The objective of the indexed “p” sector is therefore to enhance the existing built heritage as a whole landscape. To satisfy the purpose of maintaining and enhancing the built heritage, the PLUi defines specific rules that allow the heritage to evolve (extension, change of destination), subject to respecting a harmonious integration into the landscape environment.<sup>16</sup>

<sup>11</sup> Angers Loire Métropole, *Plan local d’urbanisme intercommunal. Etat initial de l’environnement*, February 2017, [http://www.angersloiremetropole.fr/fileadmin/plugin/tx\\_dcddownloads/1.1\\_eie\\_appro.pdf](http://www.angersloiremetropole.fr/fileadmin/plugin/tx_dcddownloads/1.1_eie_appro.pdf) [accessed: 13.10.2020].

<sup>12</sup> Ibidem, pp. 108-117.

<sup>13</sup> Ibidem, p. 108.

<sup>14</sup> Ibidem, pp. 108-117.

<sup>15</sup> Angers Loire Métropole, *Plan local d’urbanisme intercommunal. Règlement écrit*, 8 July 2019, [http://www.angersloiremetropole.fr/fileadmin/plugin/tx\\_dcddownloads/5.1\\_reglement\\_ecrit\\_modif\\_3\\_som\\_dyn\\_complet.pdf](http://www.angersloiremetropole.fr/fileadmin/plugin/tx_dcddownloads/5.1_reglement_ecrit_modif_3_som_dyn_complet.pdf) [accessed: 13.10.2020].

<sup>16</sup> Angers Loire Métropole, *Plan local d’urbanisme intercommunal. Justification des choix*, 13 February 2017, pp. 65-66, [http://www.angersloiremetropole.fr/fileadmin/plugin/tx\\_dcddownloads/1.4\\_justification\\_des\\_choix\\_appro.pdf](http://www.angersloiremetropole.fr/fileadmin/plugin/tx_dcddownloads/1.4_justification_des_choix_appro.pdf) [accessed: 13.10.2020].



Using the same legal tools, the PLU of the city of Mulhouse, dated 25 September 2019:

incorporates a certain number of rules which make it possible to ensure the protection and enhancement of heritage and the urban landscape, as well as the insertion of projects in the environment within which they take place: rules on urban morphology in general, on the architectural treatment of constructions, protection of remarkable buildings, protection of remarkable trees and wooded parks, etc.<sup>17</sup>

The presentation report of the PLU of the city of Paris, while stipulating that “the Parisian-built heritage is sparsely inventoried and protected by the protections relating to the historical monuments implemented by the State”, provides for the execution of a:

reasoned inventory of the Parisian built heritage which will not be completed until many years after the adoption of the revised PLU. But it has already confirmed the richness of the census put in place during the consultation process relating to the development of the PLU: by crossing many local and central sources, this procedure has made it possible to identify more than 4,000 remarkable buildings to be protected in the PLU.<sup>18</sup>

Consequently, the regulations of the PLU include graphic documents indicating, for informational purposes and without forming easements of a legal nature, lands on which elements of heritage, cultural, or landscape interest<sup>19</sup> have been identified, indicating in that way the existence of a heritage PLU.

In order to definitively enshrine the principle of a local heritage urban planning plan, the LCAP Act provided, above all, that “on the parts of the historic city [now known as “remarkable heritage site”] not covered by a safeguarding and enhancement plan, the regulations of the local urban plan include the provisions relating to the protection and enhancement of architecture and heritage” (draft Article L.631-3 of the Heritage Code). The intention of the government was to make the regulation of the local urban plan “the common tool for heritage protection”. The substance of the LCAP Act is however very different: Article L.631-3 of the Heritage Code as finally passed no longer mentions the regulations of the local urban plan to provide that “on the parts of the remarkable heritage site not covered

<sup>17</sup> Ville de Mulhouse, *Règlement municipal des constructions*, 22 May 2017, p. 13, <https://www.mulhouse.fr/medias/urbanisme-et-grands-projets/Urbanisme-habitat/RMC%20TEXTES/justifications-rmc-22mai2017.pdf> [accessed: 13.10.2020].

<sup>18</sup> *Plan local d'urbanisme de Paris. Rapport de présentation VI - Paysage, patrimoine et construction*, 6 July 2006, p. 81, [http://pluenligne.paris.fr/plu/sites-plu/site\\_statique\\_35/documents/724\\_Plan\\_Local\\_d\\_Urbanisme\\_de\\_P/725\\_Rapport\\_de\\_presentation/C\\_RP1\\_PAYSAGE-V01.pdf](http://pluenligne.paris.fr/plu/sites-plu/site_statique_35/documents/724_Plan_Local_d_Urbanisme_de_P/725_Rapport_de_presentation/C_RP1_PAYSAGE-V01.pdf) [accessed: 13.10.2020].

<sup>19</sup> *Plan local d'urbanisme de Paris. Règlement I - Dispositions générales applicables au territoire couvert par le P.L.U.*, p. 24, [http://pluenligne.paris.fr/plu/sites-plu/site\\_statique\\_35/documents/724\\_Plan\\_Local\\_d\\_Urbanisme\\_de\\_P/730\\_Reglement/731\\_Tome\\_1\\_\\_\\_Dispositions\\_gener/C\\_REG1GENE-V07.pdf](http://pluenligne.paris.fr/plu/sites-plu/site_statique_35/documents/724_Plan_Local_d_Urbanisme_de_P/730_Reglement/731_Tome_1___Dispositions_gener/C_REG1GENE-V07.pdf) [accessed: 13.10.2020].

by a safeguarding and enhancement plan, an architecture and heritage enhancement plan is drawn up". Far more than the local urban plan, it is the architectural and heritage enhancement plan and the safeguarding and enhancement plan which constitute the main instrument that can be used by the local authorities competent in the field of urbanism. Accordingly, due to the prevalence of heritage easements (classified and registered historic monuments, demarcated perimeters of surrounding areas, and remarkable heritage sites), in addition to the safeguarding and enhancement plan, it is necessary to put into perspective this new opportunity offered to communities. The local heritage urban plan, in the strict sense, is called upon to constitute, by force of circumstances, a secondary, if not complementary, element of the protection and enhancement of immovable cultural property, confined to Articles L.151-19 and L.111-22 of the Urban Planning Code.

The fact remains that the local authorities as well as the public institutions of inter-municipal cooperation competent with respect to urban planning are also, under this jurisdiction and on the basis of Article L.101-2 of the Urban Planning Code, responsible for fulfilling the general objective of urban and architectural quality. This architectural protection, which is not unrelated to urban planning documents nor to the Heritage Code – as evidenced by the old mechanisms of the Architectural, Urban, and Landscape Heritage Protection Areas and the Areas for the Development of Architecture and Heritage – is also present in the LCAP Act. This architectural protection takes the form of the labelling of "buildings, architectural complexes, structures and layouts, among the achievements of less than one hundred years of age, whose design is of sufficient architectural or technical interest" (Article L.650-1 of the Urban Planning Code).

The application for this labelling can be submitted to the prefect of the region where the property is located by the owner or by any person having an interest in it. This initiative can also be taken directly by the regional prefect, who decides on such labelling after consulting the regional heritage and architecture commission. As soon as this labelling has been confirmed, the owner of the property concerned has to "inform [the regional prefect], before submitting the permit application or the prior declaration, that he/she plans to carry out work likely to modify it". It is a question of ensuring the protection of the cultural heritage of the 20th century against possible demolition or deterioration by establishing a prior declaration procedure. Such a device is not entirely new, since Article L.421-6 of the Urban Planning Code, following the decree of 8 December 2005 relating to building permits and urban planning permits, already included the provision that "the demolition permit can be refused or be granted only subject to compliance with special prescriptions if the work envisaged is likely to compromise the protection or enhancement of the built heritage, neighbourhoods, monuments and sites". It is, moreover, on this latter basis that the Administrative Court of Appeal of Bordeaux, in a ruling issued on 8 February 2018, was able to annul an order of the Prefect of the Charente-Maritime department authorizing the demolition of houses located on the Perrotine quays

in Saint-Pierre d'Oléron, following the Xynthia storm, on the grounds of public safety. The Administrative Court of Appeal operates as a crossover between the heritage PLU mechanism and that specific to architectural protection. The Court noted that the “heritage interest [of these buildings] was recognized by the urban planning document approved in December 2011 in the context of Article L.123-1-5 [today L.151-19] of the Urban Planning Code, then applicable to the urban planning code as a seaside building, in order to preserve this building characterized by its cornices, balconies, skylights, roof eaves”. The Court added that “if a residential use remains dangerous, it is not excluded that another use can be found. This house seems to be in good condition and its architectural interest, in particular the quality of the pediment and the fins of each skylight which carry a sculpted decoration, makes it possible to privilege its conservation”.<sup>20</sup> The balance resulting both from this jurisprudence and from new Article L.650-1 of the Urban Planning Code echoes the Council of Europe’s Recommendation R (91) 13 on the Protection of the Twentieth-Century Architectural Heritage. In its entirety it underlines the hypothesis of a change in the use of cultural property as an alternative to demolition. According to the Recommendation, “new uses [should] take account of the needs of present-day life so that buildings are not allowed to fall derelict, provided the new use does not run counter to the architectural or historical significance which was the reason for their protection”.<sup>21</sup> The hypothesis of an enhancement of immovable cultural heritage, in the sense of an evolution of the allocation of this in the direction of a use other than a simply patrimonial use, can be considered as a means to enhance and place such heritage within an urban planning project.

The requirement mandating architectural quality currently permeates a number of urban planning documents, in particular from Article 1 of the Act of 3 January 1977 on Architecture, according to which

the architectural creation, the quality of constructions, their harmonious insertion in the surrounding environment, the respect of natural or urban landscapes as well as heritage are of public interest. The authorities competent to issue the building permit as well as the subdivision authorizations ensure, during the examination of the applications, that this interest is respected.<sup>22</sup>

This requirement is also found in Article R.151-41 of the Urban Planning Code, which allows, within the regulations of the PLU, the insertion of provisions relating to the quality and architectural, urban, and landscape diversity of construc-

<sup>20</sup> Administrative Court of Appeal of Bordeaux, Ruling of 8 February 2018, <https://www.legifrance.gouv.fr/ceta/id/CETATEXT000036757363> [accessed: 30.11.2020].

<sup>21</sup> Council of Europe, *Recommendation R (91) 13 of the Committee of Ministers to Member States on the Protection of the Twentieth-Century Architectural Heritage*, 9 September 1991, para. III.1.

<sup>22</sup> *Loi n° 77-2 du 3 janvier 1977 sur l'architecture*, Journal officiel de la République française, 4 January 1977, amended: Journal officiel de la République française, 5 and 21 January 1977.

tions, as well as the conservation and enhancement of heritage. As an extension of these latter provisions, the PLU of the city of Mulhouse stresses the need to develop the city “while respecting the architectural and urban heritage. This respect for the city and its heritage singularities must be combined with the strengthening of architectural creation in construction projects”.<sup>23</sup> Following the same logic, a Charter of Architectural and Urban Quality was signed in 2006 between the city of Lyon, the Federation of Builders and Developers, the Departmental Service of Architecture and Heritage, and representatives of architects (Order and unions), while a number of local authorities have opted for an urban quality charter (Tours, Toulouse, Livry-Gargan, Albi, Mérygnac, etc.), which itself includes an architectural component.

## Weakening of the Protection and Enhancement Mechanisms of Immovable Cultural Heritage

Article L.101-2 of the Urban Planning Code sets out a list of objectives governing the actions of public authorities competent in urban planning matters. It includes in particular an objective of balance between, on the one hand, “urban renewal, controlled urban development, restructuring of urbanized spaces, revitalization of urban and rural centres, the fight against urban sprawl”, and on the other hand “the protection, conservation and restoration of the cultural heritage”. Article L.101-2-2 adds, among other objectives, that of “urban, architectural and landscape quality” and those of “diversity of urban and rural functions and social mixing in housing”.<sup>24</sup> The essential place reserved for the protection and enhancement of immovable cultural heritage can easily be noted among all of these objectives. Above all, Article L.101-2 of the Urban Planning Code highlights the existing link between immovable cultural heritage and the other objectives of public authorities’ actions in urban planning: the fight against urban sprawl, the revitalization of old centres, as well as social and functional mixing.

Urban planning rules also emphasize the renovation and development of housing, imposing a combination of the objective of urban renewal with that of protection, conservation, and restoration of cultural heritage, as well as urban, architectural, and landscape quality. Consequently, immovable cultural heritage can no longer be dealt with separately from contemporary urban planning issues. Therefore it is possible to identify the third objective of “diversity of urban functions”,

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<sup>23</sup> Ville de Mulhouse, *Projet d'aménagement et de développement durable*, 25 September 2019, p. 17, <https://www.mulhouse.fr/wp-content/uploads/2019/10/PADD.pdf> [accessed: 13.10.2020].

<sup>24</sup> It should be noted here that the LCAP Act substituted the words “the protection, conservation and restoration of the cultural heritage” for those of “remarkable built heritage” inherited from the former wording of this same provision.

based on “sufficient construction and rehabilitation capacities to satisfy, without discrimination, the present and future needs of all types of housing, economic, tourist, sporting, cultural and general interest activities as well as public and commercial equipment” (Article L.101-2-3 of the Urban Planning Code). In the same perspective, the Urban Planning Code insists on the requirement of “social and functional mixing of urban areas and urbanization” (Articles L.151-14 to 16). The requirement of functional diversity is defined by Professor François Priet as the “will to diversify the use of space”<sup>25</sup> and proceeds, in the words of the 1998 Le Sueur report, from an “urban model which, therefore, based on the specialization and juxtaposition of spaces which are nowadays data, creates more connections, interpenetration, fluidity, and mixing between the different spaces”.<sup>26</sup> Therefore, there is absolutely no doubt about the expediency, even the necessity, for local authorities to not only respect the heritage prescriptions, but also to work to enhance, within the framework of their urban planning policies, all the assets of immovable cultural heritage. The capacity of the local authority to use the urban planning instruments at its disposal in order to work for such development of the cultural heritage of property is extended by the intensification of the attractiveness of a district or of an urban complex and the development around the heritage element of an environment conducive to commercial and economic activity. By way of illustration, the presentation report of the local urban plan for the city of Albi in 2010 is based on such a logic of functional and social diversity: “For 10 years, the city of Albi has been implementing an ambitious programme which has helped to revitalize its city centre, to highlight its rich heritage, and consequently to give it a social and economic dynamic”, going on to stress that “significant efforts have already been made on the plan for the urban revaluation of the historic and architectural heritage and urban revitalization, with a marked orientation towards the tourist tools of economic development”.<sup>27</sup> In the same vein, the presentation report of the PLU for the city of Toulouse from 2013 highlights the willingness of the:

municipality [to] redesign the city through development projects by integrating the principles of sustainable development. These projects must take into account various issues, such as: habitat, displacement, functional diversity [...] but also the inclusion of nature in the city or heritage, in an integrated way and no longer juxtaposed. This new methodology will make it possible to build neighbourhoods that are more balanced and articulated harmoniously with one another. It appears necessary

<sup>25</sup> F. Priet, *La rénovation du règlement du plan local d'urbanisme*, “Revue française de droit administratif” 2016, p. 863.

<sup>26</sup> J.-P. Sueur, *Demain, la ville. Rapport présenté à Martine Aubry, ministre de l'emploi et de la solidarité*, 13 February 1998.

<sup>27</sup> Ville d'Albi, *Plan local d'urbanisme d'Albi. Rapport de présentation complémentaire*, 13 September 2010, [https://www.mairie-albi.fr/sites/default/files/atoms/files/compatibilite\\_MC1\\_plu\\_albi\\_0.pdf](https://www.mairie-albi.fr/sites/default/files/atoms/files/compatibilite_MC1_plu_albi_0.pdf) [accessed: 13.10.2020].

to initiate a new urban dynamic by providing the PLU with the means to supervise the operations of urban development and renewal.<sup>28</sup>

The interest of local authorities in enhancing their heritage assets through their urban policies also extends to instruments for revaluing old and degraded neighbourhoods and buildings. According to a general definition, the notion of revaluation consists of the will to “restore prestige, add greater value to something”. This must be distinguished from the concepts of protection and conservation of cultural heritage, which can be defined as “the set of measures essential for the safeguarding [of cultural property] by the preventive or curative treatment of risks”.<sup>29</sup> As regards immovable cultural heritage, the notion of revaluation can thus be seen as an extension of the aims of restoration, renovation, renewal, or even requalification. These notions themselves refer to a variety of systems relating to urban policy and the requalification of degraded old districts. Urban renewal emerged with the Ordinance of 23 October 1958 Reforming the Rules Relating to Expropriation for Reasons of Public Utility<sup>30</sup> and the decree of 31 December 1958 relating to urban renewal.<sup>31</sup> Fundamentally based upon a demolition logic, as reflected in Article 3 of the Ordinance of 23 October 1958,<sup>32</sup> this mechanism was corrected by the Malraux Act of 4 August 1962,<sup>33</sup> which gave rise to, alongside the safeguarded sectors, the mechanism of property restoration. It is now a question of associating it with the operations of conservation, restoration, and enhancement of the cultural heritage, including works of restoration, modernization, or demolition of buildings – it being specified that “these operations can be decided and executed under the conditions set by the decree of 31 December 1958 relating to urban renewal” (Article 3). A few years later, in the extension of the 1970 amending finance law setting up the National Housing Improvement Agency (Agence Nationale pour l’Amélioration

<sup>28</sup> Toulouse Métropole, *Plan local d’urbanisme. Rapport de présentation: résumé non technique*, 27 June 2013, p. 11, [https://www.toulouse-metropole.fr/documents/10180/13100062/555\\_RAP\\_1F\\_resum\\_non\\_tech/d03ee777-3dd9-47e0-9dc2-692e835def6b](https://www.toulouse-metropole.fr/documents/10180/13100062/555_RAP_1F_resum_non_tech/d03ee777-3dd9-47e0-9dc2-692e835def6b) [accessed: 13.10.2020].

<sup>29</sup> M. Cornu, J. Fromageau, C. Wallaert, *Dictionnaire comparé du droit du patrimoine culturel*, CNRS éditions, Paris 2012, p. 356.

<sup>30</sup> *Ordonnance n° 58-997 du 23 octobre 1958 portant réforme des règles relatives à l’expropriation pour cause d’utilité publique*, Journal officiel de la République française, 24 October 1958.

<sup>31</sup> *Décret n° 58-1465 du 31 décembre 1958 Organismes pouvant procéder à des opérations de rénovation urbaine* [Decree No. 58-1465 of 31 December 1958 Organizations Authorised to Conduct Urban Renovation Operations], Journal officiel de la République française, 4 January 1959.

<sup>32</sup> “The renovation organization is responsible for [...] acquiring directly, amicably or by expropriation through the municipality, the land and buildings whose demolition is necessary to proceed with the provisional or final settlement of the occupants of these buildings, to carry out the demolitions and the repair of the ground”.

<sup>33</sup> *Loi n° 62-903 du 4 août 1962 complétant la législation sur la protection du patrimoine historique et esthétique de la France et tendant à faciliter la restauration immobilière* [Act No. 62-903 of 4 August 1962 Supplementing the Legislation on the Protection of the Historical and Artistic Heritage of France and Aimed at Facilitating the Restoration of Buildings], Journal officiel de la République française, 7 August 1962.

de l'Habitat), the Circular of 1 June 1977 Improvement of Housing insists not only on "the rediscovery and the value of the old centres and districts of cities [which] results in a more vigorous action to protect and revitalize them" (Preamble), but also on "questions of aesthetics, architecture, protection and enhancement of urban sites" (Article III.3).<sup>34</sup> After the Act of 13 December 2000 on Urban Solidarity and Renewal included the concept of "urban renewal" among the general binding principles on urban planning documents, meaning the reconstruction of the city on itself (former Article L.121-1 of the Urban Planning Code, prefiguring the current article L.101-2 of the Urban Planning Code), the Act of 1 August 2003 on Orientation and Programming for the City and Urban Renewal<sup>35</sup> has placed the concept of urban renewal at the core of urban planning law. Central to this new environment, the National Urban Renewal Programme (Programme National de Rénovation Urbaine, PNRU) aims at enabling "urban development operations, rehabilitation, residentialization, demolition and production of housing, creation, rehabilitation and demolition of public or collective facilities, the reorganization of areas of economic and commercial activity, or any other investment contributing to urban renewal" (Article 6).

The PNRU, implemented mainly by the National Urban Renewal Agency (Agence Nationale de Rénovation Urbaine), is interesting from the point of view of immovable cultural heritage since this type of operation can also be applied to old and degraded districts, as confirmed by the implementation of the National Programme for the Requalification of Degraded Older Neighbourhoods (Programme National de Requalification des Quartiers Anciens Dégradés, PNRQAD) in accordance with the Act of 25 March 2009 on Mobilization for Housing and the Fight Against Exclusion.<sup>36</sup> It is, according to the terms of Article 25, aimed at initiating the "actions necessary for a global requalification of these districts while [...] seeking a balance between habitat and activities"; in particular, "the reorganization or the creation of economic and commercial activities". These mechanisms of urban renewal or requalification of old districts still coexist today with those of property restoration. Amended by the ELAN Act, Article L.313-4 of the Urban Planning Code specifies that property restoration operations consist of "works of restoration, improvement of the habitat, including the installation, including by demolition [...] or modernization or demolition having as an object or effect the transformation of the conditions of habitability of a building or a set of buildings". Such operations, which can be undertaken "on the initiative of either public authorities

<sup>34</sup> *Circulaire du 1 juin 1977 Amélioration de l'habitat*, Journal officiel de la République française, 28 July 1977.

<sup>35</sup> *Loi n° 2003-710 du 1 août 2003 d'orientation et de programmation pour la ville et la rénovation urbaine*, Journal officiel de la République française 177, 2 August 2003.

<sup>36</sup> *Loi n° 2009-323 du 25 mars 2009 de mobilisation pour le logement et la lutte contre l'exclusion*, Journal officiel de la République française 73, 27 March 2009.

or one or more owners, grouped or not in a trade union association”, can directly result from a safeguarding and enhancement plan. In such a situation, the safeguarding and enhancement plan must indicate the buildings or parts of buildings whose demolition, removal, or alteration is prohibited, as well as, conversely, those upon which demolition or modification may be imposed during the property restoration operation. In the absence of such a safeguarding and enhancement plan, or when the safeguarding and enhancement plan does not provide for any real estate restoration operation, this can be carried out only after being declared as a public utility and in accordance with the conditions fixed by the code of the expropriation on grounds of public utility. While these various operations of requalification of old districts, urban renovation, or property restoration do not exclusively apply to degraded old districts, but also include “large peripheral complexes”, or even “mining towns or old garden cities”,<sup>37</sup> they cannot, however, be dissociated from the logic of revaluation of the immovable cultural heritage.

All of them share a certain convergence in terms of developing attractiveness and revitalizing old districts. There are numerous examples of urban renewal and renewal operations that have helped to enhance the economic and social environment of the cultural heritage of buildings. It is particularly relevant to mention the PNRQAD of the Nice Côte d’Azur Metropolis, covering a perimeter starting from Place Masséna to Place du Général de Gaulle. This was aimed at undertaking an operation to rehabilitate and reuse the Provence railway station, a monument built in 1892, whose facade and hall of trains were entered as historic monuments in 2002 and 2005 respectively, after the decommissioning, then abandonment, of the station in 1991. The aim of the operation was to allow the reassembly of the metal hall to house a covered market, and the creation of a library within the walls of the old station, as well as the construction of a multiplex of nine cinemas, three apartment buildings, the installation of shops, restaurants, a sports hall, and underground parking around the historic monument. However, even though to date the new Raoul Mille library opened its doors on 16 January 2014 and the surrounding neighbourhood has been completely renovated, the strictly economic aspect of the project has been abandoned following an appeal brought before an administrative judge.

All the systems aimed at revaluing degraded old districts are essentially the result of urban choices made by a local authority. They are inseparable from carrying out renovation, development, and demolition works. When these old districts include classified or registered monuments, or correspond in whole or in part to a remarkable heritage site, the authorization to carry out such work is subject to a set of constraints. For works carried out on classified buildings, such authorization is issued by the regional prefect, unless the Secretary of State for Culture decides to discuss the file (Articles L.621-9 and R.621-13 of the Heritage Code). As regards

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<sup>37</sup> D. Noin, *Le nouvel espace français*, Armand Colin, Paris 2009.



the listed buildings, maintenance work is still exempt from formalities. On the other hand, modification works are subject to prior notification to the regional prefect, while those subject to a building, demolition, or development permit require the agreement of the architect of Bâtiments de France (Articles L.621-27, R.621-60 CP, and R.421-16 of the Urban Planning Code).

With regard to the protection regime for a surrounding area or for a remarkable heritage site, Article L.632-1 of the Heritage Code requires the authorization of the prefect for all the work likely to modify the exterior appearance of built buildings, as well as those authorized but not built. The LCAP Act widened the field of application of the prior authorization, which is now applicable to works “likely to modify the state of the elements of architecture and decoration, buildings by nature or movable effects attached in perpetual remains [...] when these elements, located outside or inside a building, are protected by the safeguard and enhancement plan”. This authorization issued by the prefect is also subject to the prior opinion of the architect of Bâtiments de France, who must ensure “respect for the public interest attached to heritage, architecture, natural or urban landscape, the quality of the constructions and their harmonious integration into the surrounding environment. He/she ensures, where applicable, that the rules of the safeguarding and enhancement plan or the architecture and heritage enhancement plan are respected” (Article L.632-2 of the Heritage Code).

However, the situation of the architect of Bâtiments de France was significantly weakened by the ELAN Act. Articles L.632-1 and L.632-2 of the Heritage Code specify that the architect of Bâtiments de France is called upon to give a compliant opinion, accompanied, if necessary, by reasoned prescriptions prior to the authorization of the prefect. A negative response from the architect of Bâtiments de France can only be challenged by the authority in charge of urban planning by means of a referral from the regional prefect, who makes his/her decision after consulting the Regional Commission of Heritage and Architecture. Conversely, when the architect of Bâtiments de France is called upon to give a simple opinion, the authority responsible for urban planning remains free to follow or deny the opinion or the prescriptions issued. However, subsequent to the passage of the ELAN Act, Articles L.632-1 and L.632-2 of the Heritage Code are now formulated subject to the additional Article L.632-2-1 of the Code. This latter provision replaces the assent of the architect of Bâtiments de France with a simple opinion for four categories of work:

1. Relay antennas for mobile radiotelephony or ultra-high speed broadband via terrestrial means and their hook systems, as well as their premises and technical installations;
2. Operations to absorb indecent housing;
3. Prescribed measures for immovable property declared unsanitary on an irremediable basis;
4. Prescribed measures for buildings used for residential purposes which are dangerously run down and have been subjected to an order of risk and accompanied by a demolition order or a permanent ban on living.

According to the explanatory memorandum to the ELAN Act, the new Article L.632-2-1 is aimed at ensuring that “the authority competent to issue planning permission is no longer linked to the assent of the architect of Bâtiments de France and has more leeway to decide on projects” submitted to it.

Thus, “the issuance of planning authorizations being a decentralised competence and devolved mainly to mayors, they will be able to benefit from a faster procedure in the issuing of planning authorizations. This will also allow them to take better account of their position in the event of disagreement with the architect of Bâtiments de France”. However, there is a great risk of local authorities circumventing a simple negative opinion from the architect of Bâtiments de France relating to a work project on an element of immovable cultural heritage located within the perimeter of a remarkable heritage site, or in the surroundings of a historic monument, when it is likely to correspond to a building for residential use declared indecent, unfit, or dangerously run down. The situation is obvious with respect to old and degraded centres, for which a local authority may be tempted to choose a short-term solution which is the most economical and effective from the point of view of housing, but to the detriment of the heritage protection. By putting the opinion of the architect of Bâtiments de France into a new regime, this provision seems to proceed from a differentiation between, on the one hand, heritage renovation (necessarily restrictive and possibly costly for the local authority) and on the other hand renovation and improvement of old and degraded centres through demolition and building construction operations. In addition, in order to simplify the procedures for appealing against the opinion of the architect of Bâtiments de France for work carried out in the areas surrounding historic monuments and remarkable heritage sites, the legislator amended Article L.632-2 of the Heritage Code. Now, within the framework of the appeal exercised by the authority in charge of urban planning against the assent of the architect of Bâtiments de France, the prefect has a period of two months to rule on the request for completion of the work. With the ELAN Act, the legislator wanted to return to the situation prior to the LCAP Act, which provided that “in the event of silence, the administrative authority is deemed to have rejected [the] draft decision” presented by the planning authority. Henceforth, under the ELAN Act “in the event of silence, the administrative authority is deemed to have approved this draft decision”. This new balance is, therefore, much more favourable to a local authority and contributes to further reducing the weight of the assent given/required by the architect of Bâtiments de France.

The ELAN Act also made it possible to further frame the rules governing urban planning disputes. First, the legislator has restricted the standing and ability of associations and third parties to act against a decision relating to the occupation or use of the land.

In addition, the legislator consolidated the device preventing abusive litigation appeals in urban planning. Firstly, Article L.600-1-1 of the Urban Planning Code specifies that “an association is only admissible to act against a decision relating to

the occupation or use of land if the deposit of the statutes of the association in the prefecture intervened took place at least one year before the display in the town hall of the petitioner's request". Secondly, Article L.600-1-2 of the Urban Planning Code adds that:

a person other than the State, local authorities or their groupings or an association is permitted to appeal for excess of power against a decision relating to the occupation or use of the land governed by this code only if the construction, arrangement or authorised project is likely to directly affect the conditions of occupation, use or enjoyment of the property that it regularly owns or occupies, or for which it benefits from a promise to sell, from a lease, or from a preliminary contract mentioned in Article L.261-15 of the Building Code and of housing.

In addition, Article L.600-7 of the Urban Planning Code addresses the situation where "the right to appeal for excess of power against a building permit, to demolish or to develop, is implemented in conditions which reflect abusive behaviour on the part of the applicant and which cause damage to the beneficiary of the permit". In such a case, the beneficiary of the permit "may ask the administrative judge in charge of the appeal to order the author of the latter to award him damages and interest".

## Final Remarks

None of the above-mentioned provisions originate from the ELAN Act of 2018, but instead from the Act of 13 July 2006 on the National Commitment to Housing<sup>38</sup> (for Article L.600-1-1 of the Urban Planning Code and the Ordinance of 18 July 2013 on Urban Planning Litigation<sup>39</sup> for Articles L.600-1-2 and L.600-7). The ELAN Act has nonetheless contributed to a strengthening of the constraints on town-planning appeals: first, by adding the additional requirement to Article L.600-1-1 of filing the statutes within one year before the petitioner's request is posted in the town hall; and then by modifying two points of Article L.600-7: the appeal for excess of power against a building permit, to demolish or to develop, must from now on be implemented under conditions "which translate as an abusive behaviour on the part of the applicant", and no longer "which exceed the defence of the legitimate interests of the applicant and which cause excessive prejudice to the beneficiary of the permit". The ELAN Act also removed the second paragraph of Article L.600-7, which provided that an association whose main object consisted of the protection of the environment was always presumed to act within the limits of the defence of its legitimate interests. It is obvious that this regime, essentially resulting from the Ordi-

<sup>38</sup> *Loi n° 2006-872 du 13 juillet 2006 portant engagement national pour le logement*, Journal officiel de la République française 163, 16 July 2006.

<sup>39</sup> *Ordonnance n° 2013-638 du 18 juillet 2013 relative au contentieux de l'urbanisme*, Journal officiel de la République française 166, 19 July 2013.

nance of 18 July 2013 on Urban Planning Litigation, constitutes a serious reduction in the protection of immovable cultural heritage. Now housing construction and commercial projects are essential elements of local public action. The restrictions on urban planning remedies do not authorize indirectly-interested individuals or specially-constituted associations to take legal action against such projects, including for the protection of cultural heritage. Therefore the objective of building new housing or economic developments collides with that of protecting, if not enhancing, the immovable cultural heritage.

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## VARIA

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