Monument Protection and Zoning: Regulations and Public Support from an International Perspective

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Abstract Restrictions on new constructions and modernisations occur in almost all countries and numerous regulations apply in Germany. This article outlines regulations regarding the protection of historical buildings, restoration law and preservation statutes and describes compensatory subsidies available in the form of tax benefits and/or grants. The article evaluates German regulations and public supports available for monument protection and modernisation from an international perspective.

Keywords Modernisation • preservation • redevelopment

1 Monument Protection

According to data, the number of monuments in Germany varies between 850,000 (IFO 2005, p. 97) and 1.2 million – predominantly private – properties, which corresponds to 5–7% of all buildings in the country.[1] The numbers differ because German states use different classifications (e.g., single monument, monument area, ensembles, constitutive part of a monument area, etc.).

The recording of historical properties has largely been completed, even though modern buildings will gradually be listed as they reach the typical age limit of 25–30 years. Currently, only some of the *Länder* in Germany apply formalised proceedings for registration of protected monuments and the rest provide an informal and solely informative listing only. In the latter case, objects that meet the legal definitions of cultural monuments are deemed worthy of preservation *ipso jure* and therefore are listed automatically. Hence, owners and investors are increasingly confronted with administrative preservation requirements applied unexpectedly by the soaring inclusion of modern buildings in listings.

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While divergent in detail, the state laws on monument protection specify protected objects as assets, multiple of assets and parts of assets, the preservation and use of which are in the public interest. This requirement applies when the protected assets are crucial to the history of mankind, cities and settlements, or for the development of working and production conditions, as well as when there are historical, artistic, scientific, ethnological or urban design reasons for their preservation and use (Haspel et al. 2008). Furthermore, clarification of the significance of previous achievements for the present day (Deutsches Nationalkomitee für Denkmalschutz 2004, p. 16) and expression of the wealth and diversity of European culture are also viewed as objectives (Deutsches Nationalkomitee für Denkmalschutz 2004). Finally, monument protection enhances the quality of a regional location, which may result, for example, in a boost to tourism (Deutsches Nationalkomitee für Denkmalschutz 2004, pp. 18, 22). Aesthetics, artistic dimensions and visible traces of former uses thus play an important role in the selection process. However, authorities claim that more prominent locations or higher market values do not influence their decisions.

Jurisdiction over preservation matters is regulated in the monument protection laws of the various states, with the top protection authority being the responsible ministry; each of the states has a Monument Protection Office, which acts as the central authority. Independent cities and counties act as lower conservation authorities and are the first point of contact for investors and owners. They check and verify whether the expected expenditure for preservation and repair requires grants and subsidies from federal funds (Deutsches Nationalkomitee für Denkmalschutz 2004, p. 13).

The primary legal consequence of designation of a building as a monument is that the owner has an obligation to preserve and maintain his/her properties. A secondary obligation dictates that owners must obtain permits under monument protection laws for modifications, removals, repairs, restorations and modified uses (cf. Haass 2008). If such measures are initiated without the requisite permits or if the owner is in breach of secondary provisions contained in permits, an injunction may be issued against the person in charge of the building measures to cease. If owners or investors refuse to comply with their obligations or neglect to do so, an injunction may be issued, ordering them to take specific maintenance or repair measures necessary for the monument in question. If the recipient of such an injunction fails to comply, the necessary measures can be taken by way of substitute performance, in which case the recipient is held responsible for the resulting costs. Expropriations are also possible, although such cases are rare.

The only essential limitation to preservation requirements is the general necessity of the reasonability of any public measures (Basty et al. 2008, p. 179). According to the basic liberties set out in the German constitution, preservation requirements may be ineligible if operating expenses for such requirements cannot be covered now or in the future by the revenue of the property itself. However, since the burden of proof rests with the investor and the usual duration of court proceedings is often measured in years, investors almost always seek to negotiate

with the public preservation authorities. In such negotiations, investors tend to have a weak bargaining position.

Owing to such ownership restrictions, according to civil law, monument protection of a building may itself be considered a defect in the quality of the property and therefore may have to be disclosed by the vendor without being asked (Basty et al. 2008, p. 139).

However, building operations in accordance with the regulations are eligible for tax deductions and financial assistance in the form of loans and subsidies. The number of funding opportunities in the field of heritage protection is so extensive that only an overview can be given.[2] In many states, depending on the importance of the object, the urgency of action to be performed and the expected tax benefits, (interest) subsidies and loans can be granted. If a monument is located in a redevelopment area ("Sanierungsgebiete"), funds can be allocated as part of the (federally funded) Urban Development programme ("Städtebauförderung"). The same applies to agricultural, village renewal and economic development programmes ("Landwirtschafts-, Dorferneuerungs- und Wirtschaftsförderungsprogramme"). The Programme for the conservation of cultural monuments of national importance ("Programm zur Erhaltung von Kulturdenkmälern von nationaler Bedeutung" and the Special Programme "BKM Sonderprogramm") also subsidise heritage buildings (Haspel et al. 2008, p. 300f). Under certain circumstances, EU funds may be available. Finally, private and public foundations also provide funds (Martin and Krautzberger 2006, H 151).

Quite often, such grants are not as important for investment decisions as the possibility of obtaining tax benefits with respect to inheritance, gift and property taxes, particularly in connection with income tax under sections 7i and 11b of the Income Tax Act (EStG) (regarding real estate leased to a third party) and under sections 10f (for owner-occupied real estate) and 10 g (for real estate that is used neither for income purposes nor for the owner's own residential purposes). The owner/investor can claim increased deductions for the historical costs from the time that work is completed, provided that before work commenced agreement was reached on costs with the competent conservation authority (Basty et al. 2008, p. 1). The purchase price and ancillary and financing costs cannot be deducted. Following an inspection, the conservation authority will issue a certificate to be submitted to the tax office. For properties leased to a third party, 9% of the maintenance and/or modernisation costs can be written off in the first 8 years and 7% in each of the following 4 years. The subsidy under EStG section 10f for owner–occupier is a 9% deduction that can be claimed annually for a period of 10 years.

EStG section 7h regulates possible increased deductions for buildings in redevelopment areas but is not linked directly to monuments. However, for monuments located in a redevelopment or urban development area, section 7h is the preferred

[2] For a more detailed description, see Beck (2008).

provision to be applied because the share of the confirmed costs is generally higher in this case.

2 Redevelopment Law ("Sanierungsrecht")

The material rights of investors may be materially affected by urban redevelopment law, which is governed by sections 136–164b of the Building Code (BauGB). In the states of former West Germany, redevelopment areas have been set up in many cities and villages since 1960, particularly in old towns and city centres. In the states of the former East Germany, most old towns and city centres have been designated as redevelopment areas since 1991.

According to BauGB section 136, such redevelopment measures should benefit the general public by reducing urban design nuisances. According to BauGB section 136 IV 3, public and private interests must be weighed up (Erbguth 2009, section 9, recital 6). The preparatory phase of the redevelopment procedure includes preliminary investigations pursuant to BauGB section 141, formal definition of the redevelopment area, and description of the redevelopment objectives and purposes according to BauGB section 142. Section 147 I sets out regulatory measures for the implementation phase and addresses issues such as acquisition of real estate and relocation of residents and companies. The measures affected by redevelopment law under BauGB section 148 II 1 include modernisation, repairs and new and replacement buildings, which are all subject to written approval by the municipality.

Once a redevelopment area has been designated officially, these measures are subject to comprehensive disposition and development restraints under BauGB section 144. All projects conducted without legal redevelopment approval are at risk of being stopped by the building control authority. According to BauGB section 144 I–II, all intended projects and legal transactions (including divisions) are subject to approval. Even the purchase contract for real estates in redevelopment area is object of inspection. If, after examination of the cost and financial overview to be submitted under BauGB section 149, the competent administrative authority concludes that the investment property has been purchased at such a high price that restoration is compromised for financial reasons, the purchase may be blocked.

The second major impact of BauGB sections 153 ff. is the so-called land value compensation. This is used as a levy on owners of properties in the redevelopment area for any redevelopment-related increases in land value. This also applies to owners whose properties are not redeveloped directly, but who may potentially experience an increase in value as a result of measures taken in the redevelopment area. Such countervailing charges for conventional buildings usually range from four to five figure euro amounts and must be paid by the owner. This can be important for investors who acquire a property after redevelopment. As a rule, the value increase is already factored into the purchase price. If the redevelopment area

is then declassified after a few years, they will still be obligated to pay any countervailing charge.

Charges stemming from redevelopment that may be hard to anticipate in some cases are offset by public grants under BauGB section 137. Thus, affected parties may be advised, supported or, if necessary, aided financially during the implementation (Battis et al. 2009, §137, no. 8). The grants listed in BauGB section 164a–b can be used in preparation of redevelopment measures, in the implementation of regulatory measures without a permanent countervalue, in the implementation of building measures, for the remuneration of redevelopment officers, and for expenditure in connection with a social compensation plan and hardship relief for tenants. Applicants do not have a vested claim to urban design grants (Stüer 2009, no. 2189).

As in the area of monument protection, EStG sections 7h, 10f and 11a also provide for tax breaks for investors and owners, according to which the costs for measures to be taken can be claimed as deductible expenditure. Section 7h is subject to similar regulations as section 7i for monuments. In the year of construction and in the following 7 years, it is possible to claim increased deductions of 9% of the construction costs, and then 7% in each of the subsequent 4 years. The increased write-offs can be applied to costs for construction, modernisation and repair, as well as to measures related to the conservation, restoration and functional use of buildings. Conservation expenditure can also be spread across up to 5 years if the requirements under EStG section 7h are met. Constructions costs for new buildings are generally not covered under section 7h, but they may be assessed as being eligible for grants by the redevelopment administration agency. Grants from redevelopment or development subvention funds must be offset.

It is recommended that international investors hire specialists to prepare applications for the implementation of measures and procurement of grants. Redevelopment administration agencies and authorities have considerable discretionary leeway.

3 Preservation Statutes and Social Environment Protection ("Erhaltungs- und Milieuschutzsatzung")

The objective of the individual measures defined in BauGB sections 172–179 (preservation statutes) is preservation of the urban design character of an area and/or composition of the local population. Displacement of the local population (which should be prevented) may for example occur if rented flats are converted to owner-occupied flats, if buildings with cheap housing space are removed and replaced by executive living space, or if structural changes are made to set up second homes or holiday apartments. The building code does not define uniform structural requirements regarding what composition of the population should be protected; instead, this is determined on a case-by-case basis.

The objective of preventing a change in population composition is permissible if negative effects on the urban design are expected if such a change occurs. Such urban design effects may manifest as the municipal infrastructure being unsuitable for new residents after the local population has been displaced. One example cited is if a population with low income and little mobility is replaced by groups with higher income, this could result in substantial restructuring measures to adapt the area to the higher level of motorisation of the new residents. An adverse effect on urban design, however, could also stem from out-migration of low-income groups to other residential areas if this also creates negative consequences for other city neighbourhoods (Battis et al. 2009, section 172, recital 46).

In areas designated by municipalities as protected social environments, demolition measures, modifications or changes in use in relation to building structures require approval. However, such approval cannot be withheld, for example, for building measures in a residential area if such measures will only achieve an average equipment standard, rather than so-called luxury restoration (Schmidt-Eichstaedt 2005, p. 491).

The demolition of a building is permitted if its preservation would entail costs that cannot be covered from current income (Stüer 2009, no. 1993). In such cases, if the municipality rules out demolition of a building, owner expropriation becomes possible under BauGB section 85 I 6.

These restrictions can create considerable limitations for investors, because they are forced to realise less profitable investment options or may be locked into the status quo, for the most part, in terms of apartment equipment and rent amounts. These restrictions for investors are not offset by tax breaks, in contrast to the situation for redevelopment areas (Geßner 2008, p. 126). Only in exceptional cases in states of the former East Germany does an option for subvention exist, which is via the monument protection route to conserve historical city centres. Subsidies are available only for projects in areas that have an urban design conservation ordinance in place under BauGB section 172, which provides for broad-based measures to protect and preserve historical city centres with heritage-value building stock whose structure and function are at risk (Haspel et al. 2008, p. 303).

4 Evaluating Regulations and Public Supports for Monument Protection and Modernisation from an International Perspective

The objectives of the zoning instruments described have one thing in common: they aim to prevent changes to the cityscape that are perceived as negative, while promoting those that are seen as being positive. These measures, when properly designed, can contribute to the positive development of a specific area or region.

The value of cultural heritage to society is recognised worldwide and is acknowledged in urban redevelopment strategies, especially in terms of attraction

to tourists, employees, and firms (Listokin et al. 1998; Noonan 2007). In the case of Berlin Ahlfeldt and Maennig (2010), stress that the totality of the built environment – and not just proximity to a single monument – constitutes the amenity recognised by real estate markets. According to their estimates, an additional landmark in close proximity can have a marginal price effect on neighbouring properties of up to 2.8% within a sphere of influence of approximately 600 m, with the strength of the price impact halving every 90 m.[3]

Such positive externalities of historical building stock can generally result in an unregulated market that does not adequately assess and/or develop areas or buildings of historical, cultural or urban design value. Against the backdrop of the war-related substantial loss of historical building stock in Germany, limiting property rights and granting some public benefits by way of compensation is justified. Protection of the historical building stock in Germany seems to be in too low supply in parts. As part of the currently planned energy-efficient restorations, the country risks redeveloping many historical, carefully structured façades, windows and roofs that are not protected to such an extent that they will no longer exist.[4]

Many German authorities have recognised the appeal of well-preserved historical building stock. They have also recognised that historical buildings can sometimes be rendered even more appealing through careful modernisation, even including modern additions to structures. In other regions, however, investors face inflexible monument protection offices that dictate an obligation to conserve the current status quo. To some degree this is related to political objectives to conserve even the most unfortunate failures in modifications to historical building stock, because they happen to have been realised at the "proper" time (for some, that would have been the time of East Germany). Experienced investors are aware of the view, widespread in international monument protection circles, that demolitions and additions are worthy of protection when seen in the context of time, even if they destroyed the original beauty of the buildings. According to one view widely held by some in monument protection, restoration or recreation of the original building stock is merely "historicist" and must therefore be rejected. Experienced investors also know that the authorities have considerable freedom in their decisions, depending less on facts than on "soft" (some might even call it "corruptive") factors. However, it is particularly difficult for international investors to identify such factors. It is possible to take legal action on building applications that are rejected on account of monument protection. However, such proceedings in the administrative courts can take years.

Explanations regarding monument protection also generally apply to redevelopment law and the preservation statutes. The approach itself is generally efficient and

[3] For similar results in other countries around the world, see Coulson and Leichenko (2001) and Noonan (2007).

[4] For an illustration of such harmful restorations in the 1960s and 1970s, see Siedler and Niggemeyer (1993).

legitimate, but this is not always true of the manner in which some authorities handle these matters. Sometimes decisions are taken that make sense only in light of institution-specific and/or local (political party) political objectives that are difficult to understand for local residents, and even more so for international investors.

Thus, there are cases in which permit applications to mount balconies on apartments were rejected because such "luxury modernisations" would displace the local population and thus jeopardise redevelopment and social environment protection objectives. The courts seem to be arriving at the realisation that balconies are part of the contemporary standard of an average apartment and should be approved, but the situation is still unclear regarding lifts. Dividing or merging of apartments is still considered problematic. Frequently, such measures are approved only on condition of upper rent limits (Dyroff 2009).

Another problem arises for investors in the lifting of a redevelopment area designation. The countervailing charges that are then applied are set on the basis of (valuation) reports sometimes prepared by the same agencies that were responsible for the redevelopment areas for many years. In this respect it is not surprising that the value increases calculated tend to be high. The underlying valuation techniques do not generally meet scientific requirements or the rules of general assessment practices. For example, when calculating the diminution in value, a grade between 1 and 5 is applied to characteristics that are difficult to operationalise and quantify, such as "cityscape" and "amenity and design quality of the street space", which are then weighted arbitrarily and condensed into an overall assessment. The valuation methods typically used in the real estate industry, which are based on objective comparisons of purchase price trends in the redevelopment area and comparable other neighbourhoods, are not applied, particularly when this would reveal that the situation in a redevelopment area had deteriorated in relative terms (Haass 2010).

To compensate for disadvantages stemming from regulations on monument protection, restoration and social environment protection, some public grants are available, particularly tax breaks. As for listed facilities or properties in redevelopment areas, limits on property rights and/or the increased financial burden are largely compensated by financial concessions, mostly in the form of tax deductions, depending on an investor's fiscal arrangements.

Tax deductibility of historical or acquisition costs in redevelopment areas or for monuments is highly appealing for investors (Haag et al. 2007, no. 266) and results in positive effects for the regional construction industry that can more than compensate for the economic costs of such loss of tax revenue (Maennig 2006, p. 30). Investors with a relatively high tax burden sometimes tend to limit their view to the tax savings and ignore the overall calculation, which also includes increased costs for the buildings and/or limited marketability, as well as any decreases in sales proceeds.

It is true that facilities in listed buildings and redevelopment areas are financially lucrative in individual cases, not only according to the plans, but also subsequently. However, the market mechanisms must also be borne in mind. If such (fiscal or

other pecuniary) advantages existed, the market would quickly offset these through corresponding increases in the real estate price (Looman 2009). It is small wonder, then, that for listed properties in Berlin and for other value-affecting characteristics, slightly significant negative price discounts at best are observed for protected properties (Ahlfeldt and Maennig 2010), an indication that in this case the disadvantages stemming from restrictions on property rights are largely balanced by tax breaks.[5]

Whether or not the urban economic objectives of regulations are achieved depends on the individual case. In many cases, the objectives may have been achieved. However, a discussion has commenced that tends to be sceptical in nature at times. In some instances, the objectives defined in the statutes on restoration and/or social environment protection have clearly not been achieved, while in others, the exact opposite seems to have occurred. Zoning-induced (not zoning-intended) deterioration in the quality of life in one area, for example, can be observed despite improvements in the equipment features of apartments, where redevelopment administration agencies, with the best of intentions but not enough foresight, used the occupancy rights[6] partially related to public redevelopment subsidies to settle large families with a migration background. Some redevelopment areas subsequently saw a strong increase in the share of residents with a migration background. In some primary school classes, 100% of the children come from a migration background. Such developments would not have occurred in these areas had it not been for the redevelopment measures. The use of occupancy rights shows that unregulated renting would hardly have resulted in such stratification effects.

Even when using a fundamentally different line of argument, regulatory zoning instruments can systematically lead to the missing of targets and/or deterioration of the situation. The redevelopment areas of Berlin Prenzlauer Berg are cited as an example. In the early 1990s, five areas with a total of over 30,000 housing units came under the purview of redevelopment statutes. Obligated to apply the principles of careful urban renewal, conservation of the composition of the social structure was adapted as a redevelopment goal as well (Holm 2011). According to a recent social study (Büro für Stadtplanung, -forschung und -erneuerung 2008) on the occasion of abolition of redevelopment areas, the population structure has changed completely in spite of, or especially because of, massive deployment of public funds. The formerly mixed neighbourhood of Kollwitzplatz was replaced by a largely homogeneous West-German middle-class environment. Similar trends

[5] These results are in line with previous international studies that found mixed or negative heritage policy effects, including Asabere and Huffman (1994), Schaeffer and Millerick (1991) and Creigh-Tyte (1998). By contrast, premium prices for historical building design quality have previously been identified by Penfold (1994), Shipley (2000) and Deodhar (2004).

[6] Occupancy right: the right of the competent administration agency to demand that the property owner makes available an occupancy-based apartment to specific people seeking accommodation (section 26.2 of the law on promoting social housing, WoFG), generally those who experience particular difficulties in finding housing.

have been observed in the redevelopment areas of Winsstrasse and Spandauer Vorstadt in Berlin-Mitte. What is striking is the dominance of younger adults (18–45 years of age), who account for around 60% of the influence on the shaping of the Prenzlauer Berg area. In the rest of Berlin, the corresponding percentage is only half as high. Radical changes have also been noted in the educational status of residents. The proportion of graduates and of students of universities and of universities of applied sciences among those older than 18 years has increased to 66% in Kollwitzplatz. In the Winsstrasse redevelopment area the share is almost 77%, compared to 17.5% in 1992. The average household income shows corresponding trends. In 1993 (at the start of the urban renewal measures) they were at 75% of the reference value for Berlin, while they are currently 140%. Within the last 20 years, the redevelopment areas in Prenzlauer Berg have evolved from being the poorest neighbourhoods of the city to being wealthy.

This change in social structure, paradoxical with respect to the redevelopment objectives, can be explained less by the upward mobility of existing residents than by massive replacement of the population. In the Winsstrasse redevelopment area, only 16% of those who had lived there since 1990 still lived there in the mid-2000s. State-subsidised modernisation work, in this critical line of argument, contributed to area gentrification, which attracted new residents.

The allegation of zoning-induced "deterioration", however, is correct only if these (or any other) changes to the population structure are considered problematic. Anyone reluctant to accord local people primacy for a specific area will have a problem with this line of reasoning. Incidentally, the same "milieu" that wants to grant such neighbourhood primacy, or wishes to have such primacy granted, typically exhibits a wholly different (i.e. liberal) attitude to international migration.

Regardless of how change is assessed, the first step is to determine whether zoning-induced changes have in fact occurred. Reasoning on the urban economic efficiency of zoning instruments regularly lacks the necessary conjectural evaluation ("with and without" comparison), as indicated previously. However, to the best of the author's knowledge, no correct isolating multivariate and geo-referenced analysis of zoning in Germany exists (e.g., despite all the countervailing charges imposed). The above-mentioned statistical descriptive statements and valuation reports by redevelopment administration agencies do not meet the requirements from an economic perspective.

The substantial restorations, gentrification and real estate value appreciation in Prenzlauer Berg, for example, were foreseeable in the early 1990s and probably would have occurred even without public redevelopment measures. The statutes on redevelopment and social environment protection drawn up at the time, therefore, can be interpreted as a "picking the winners" strategy on the part of the regulatory authorities (Noonan and Krupka 2011) to give themselves employment and legitimacy. In the case of Berlin-Neukölln, where a gentrification process has just begun, the current intentions to set up redevelopment statutes on a massive scale seem to be a repeat of the legitimacy strategy among city planners.

For potential investors, such existing zoning-induced (rather than zoning-intended) structural changes do not constitute an argument against redevelopment

areas. However, the inefficiencies described for conditions and countervailing charges, as well as the long processing times, can contribute to a perception that the granting of permits for modernisation and redevelopment measures may be subject to some lack of regulatory transparency, if not outright arbitrariness. Qualified experts who know the regulatory mechanisms and local idiosyncrasies are difficult to identify, and even then come at a considerable cost. Overall, zoning and listed properties may be less attractive for international investors in view of the rather complex regulatory practices in Germany.

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