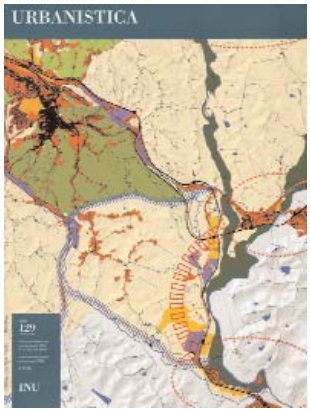

Urbanistica n. 129
January-April 2006

Distribution by www.planum.net

Changes undergone by the legal framework of town planning schemes and the evolution of the discipline of town planning. Part II

Chiara Mazzoleni

The national town planning law of 1942: from blueprint to operational plan

On completion of the experimental phase, the new town planning law, which embodied most of the principles enunciated in the parliamentary bill presented by the Commission set up in 1933 and combined them with the 'fundamental criteria' expressed by INU, decreed the definitive separation of the legal framework for the town planning scheme from that for compulsory purchase, to which it had been subordinated ever since its severance from the framework for the building code. The new law made the latter part of the system of control over town planning - associating it with scheme prescriptions in that its function was to define the "the characteristics of the various types of construction envisaged by the master plan", and made it compulsory for all municipal authorities to issue building codes.

Another way in which the new law influenced building regulations was its expansion of the scope for action of municipal authorities that had no master plan by allowing them to include within the building code a schedule that included instructions and explanations of the main guidelines for expansion and of the principal types of building to be constructed in each urban zone. Law no. 2248/1865, the first to define the nature of 'public works' and the legal regime for their planning and execution, had attributed a wide range of powers and responsibilities to the Ministry. In time, these gradually increased and the town planning law of 1942 made the Ministry responsible for policy throughout the sector.

The first of the legal instruments designed to put the regulatory system into effect, the regional coordination plans (*piani territoriali di coordinamento*), which constituted an innovative feature compared with the previous arrangements and, at least from a formal juridical point of view, confirmed the government's decision to use the regional level of administration for the organization of town planning, encountered insurmountable operational difficulties for over thirty years until these responsibilities were actually transferred to the regional authorities. The same thing happened in all cases of regional planning, promoted mainly by associations of local authorities (intermunicipal plans), which received neither the necessary impulse nor institutional legitimacy from the central institutions.

The new law confirmed the function of the Upper Council of Public Works, as envisaged by Law 678/1931, as the ultimate organ of technical consultancy for town planning issues (master plan and sets of regulations) and town planning departments were set up in the offices of the Compartmental inspectorates of civil engineering projects and in decentralized offices of the Ministry of Public Works to promote, supervise and coordinate town planning activities in their various areas.

The law empowered each municipal authority to draw up a master plan covering its entire territory and gradually made it compulsory for the authorities included in specific lists issued by the Ministry, the first of which was scheduled for publication within a year of the law coming into force. It also kept on the statute books the special laws through which approval had been given to the town planning schemes of several cities and to compulsory purchase orders for the purpose of public utility, though the Commission had urged the reform of this latter procedure once the legal framework for town planning schemes had been made independent.

As regards the form and contents of master plan, the law assimilated the arrangements by which plans approved by special provisions increasingly distinguished between broad-based general plans (*piani generali*) and detailed land use plans (*piani particolareggiati*) and set no time limit for the period for which the former would remain in force.

The need for a progressive, multi-level specification of town planning prescriptions was therefore satisfied by the two stages (general or outline and detailed) that reproduce the procedure for compulsory purchase. This assimilation of town planning procedure to that of compulsory purchase inevitably led, especially in legal contexts, to a perception of virtual continuity between the framework for the discipline of town planning established by the 1865 law and that created by the new law. This led in turn to a wide-ranging debate, especially among legal academics, and to problems whose solutions were to have significant consequences of a practical nature. It is also true, however, that this assimilation, which reflected the distinction between the two types of plan as established by several special laws and confirmed in the 1933 parliamentary bill, had emerged clearly both during the discussions of the Commission and in the ministerial report on the law. This report acknowledged that the perspective of the broad-based general plan, which was required to indicate certain general criteria, would be at the community rather than the individual property owner level, and that private interests would be dealt with in the detailed land use plans.

In order to ensure the orderly and gradual implementation of the new town-planning regime, the law authorized municipal authorities to proceed with compulsory purchases before the publication of detailed land use plans, thus making possible the advance creation of building areas, the formation of comparti edificatori (the specifically defined areas within which building activity, involving transformation and/or new construction, could be carried out in order to create the new street alignments provided for by an execution plan) and the regular subdivision of the areas. It also ruled that the level of compensation in cases of compulsory purchase should not take account of increases in value that could be attributed directly or indirectly to approval of the master plan and its implementation. The power thus granted to local administrations was described by the Minister Gorla as "the backbone of the law", and by some participants in the parliamentary debate as a reliable deterrent to speculation in the development areas and it remained part of the law despite the opposition of some members of the Commission.

The problem of building areas, which was considered the most important aspect of the implementation of the plans, given its close connection and involvement with the

other juridical and economic problems of urban planning, was later placed at the centre of attention at the INU conference that was held in Florence in 1955 and that again raised the question of the review of town planning law, which a specifically constituted INU commission had already studied between 1950 and 1952.
In the context of discussion on the reform of the law in the first half of the 1960s, a number of legal experts produced the opinion, based also on an examination of other documents that were fundamental to the discipline, the Civil Code approved in 1942 (articles 869-872) and the 1948 Constitution (art. 117), that a better formulated law should provide separate legal frameworks for the ownership of buildings and the ownership of land. In this light, the main issue to be dealt with by the reform was not so much the transfer of ownership from one subject to the other but rather to determine the ways all real estate properties throughout Italy could be used and to establish a system of controls and sanctions.
As regards the organizational structure of the central body responsible for supervising town planning activities and for defining a single set of criteria, the system for public works remained substantially that established by Royal Decree no. 1438/1940, which provided for a Central Inspectorate and eight General Directors, including one responsible for town planning. This latter was to be in charge of town planning problems, the application of the new law and the other special laws, and of problems to do with santitary works. Although there were renewed calls for administrative reform after the War and studies and discussions on the administrative issue were quickly resumed, the organizational models of the Fascist period remained substantially unchanged. And the Giannini-Barbera proposal, which was presented in the context of the Commission for studies concerning the reorganization of the State, set up by the Ministry for the Constituent Assembly, and which recommended that the organizational system based on ministries be replaced by one based on services and closely reflecting their functions.
On the occasion of the II National Congress of Town Planning and Building, which took place in Rome in 1948, INU's interim assessment of the effect of Law 1150 drew attention to serious inadequacies of the bodies responsible in these areas, at both central and peripheral level. The Ministry of Public Works had not provided itself with a structure that could deal properly with its new remit: it not only lacked "a central town planning body but it was also late in setting up the peripheral technical offices" provided for by Law 1150. Financial constraints had led to the office of Director General of Town Planning, which had once been independent, being merged with that of the Director General of Building and Health, the fusion taking place at exactly the moment when what was actually needed was an expansion of the autonomous Directorate so that it could perform the necessary functions of supervision and control of the drafting and approval of new master plan. And the new joint Directorate was not only responsible for applying the town planning law, the other special laws on the subject and problems concerning sanitary works; it also had powers to authorize the waiving of building regulations and the implementation of master plan by municipal administrations included on the list and therefore obliged to draw up plans.
Different again were the institutions responsible for town planning matters. But they did not constitute an organic system, a structure in which each element performed a specific task and exercised a specific responsibility within an agreed vision of planning. The Ministries that carried more political weight, such as the Ministry for Corporative Business, had ensured that they retained the power to authorize actions even when these were in conflict with the provisions of the general plans; indeed the guarantee of such powers had had to be granted as a condition for approval being given to the town planning law. The division of responsibilities between central institutions (the Ministry of Public Works, the Ministry of Education, the Directorate General for Health) and the local authorities responsible for planning (the municipal administrations) and public building works (IACP, INCIS), fragmented the problem of urban development into numerous sectorial problems and there was no procedure via which the various programmes could be organized with reference to an overall framework.
As well as the centralization of functions, the fragmentation and separation of powers in town planning matters immediately emerged as elements that seriously influenced and delayed the examination of master plan by the central authority, at least until Law no. 640/1954, which established that as regards their approval the opinion of the Upper Council of Public Works took precedence over that of any other consultative body or active administration except for the Council of State. Thus, not only was no central body created to coordinate urban planning but existing bodies were left uncoordinated and unequipped to deal with the new situation.
Application of the law was to be supervised by a group of academic and other experts appointed by the Ministry, including Cesare Valle, a lecturer in urban planning management in the Faculty of Engineering of the University of Rome. Valle was appointed Inspector General of Civil Engineers and he later became the first president of the VI Section of the Upper Council of Public Works, while the post of Director General of the General Directorate of urban planning and sanitary works went to Francesco Cuccia. Both these figures had formerly been members of important ministerial commissions, had participated in the Commission appointed to draft the law on town planning and, throughout the 1950s, were also members of the governing bodies of INU, played an active part in the work of the Commission appointed by INU to revise town planning law and were amongst the main architects of the consolidation of collaboration between INU and the Ministry of Public Works, especially from the end of the War to the 1950s. The period was one in which the elite of town-planning architects put themselves forward as leaders of the reconstruction of Italy, emphasizing the social function and value of urban planning and attributing priority importance to the relationship between political authority and technical development.
For the senior figures in INU, and for Valle in particular, the institution, in 1952, of the new Section to which town planning matters had been entrusted (Law no. 524) within the consultative technical body of the Ministry had signified the functional launch of the

long-awaited authoritative and powerful body that was to have made it possible to "improve the town planning system of the country, to undertake well-coordinated initiatives guaranteeing maximum public utility" and to perform "a governing and unifying function", as one would expect of the country's highest authority in urban planning.
The largely inoperative nature of the law and the consequent persistence of a standstill situation as regards its application, despite the fact that the workings of the Upper Council of Public Works had been made more responsive to the new requirements, made it clear that the government was failing in its duty to ensure the existence of effective means of applying the law and to provide guidance for the modernization of Italian cities and other aspects of regional transformation. But the government's chief failing was its unwillingness to attribute an unequivocal nature, a clear juridical status, to master plan, which would certainly have helped to solve the problem of how to ensure the effectiveness of the prescriptions concerned.

The limits of the town planning law and its improvement

When finally the town planning law began to be applied, 12 years after it came into force, with the issue of the first list of municipal authorities obliged to draw up a master plan in 1954, 11 years late according to Article 8 of the law, the situation as regards regional development and the opinions of town planners had changed. Reconstruction in areas destroyed during the war had been regulated by the reconstruction plans instituted by Decree Law no. 154/1945, which was designed to provide municipal authorities that had suffered war damage with a rapid and uncomplicated response instrument. It had been intended to be a temporary, emergency measure but in actual fact, with successive extensions and modifications, its effect last for some thirty years. As regards the acute housing situation, on the other hand, attempts were made to deal with it through a massive public effort that took various forms, practically none of which was executed with reference to urban development planning theory.
The passage from the previous town planning provisions to the new regulations would be 'smoothly carried out', claimed Ministry of Public Works Circular no. 847/1956, by confirming the validity of the town planning schemes approved by special decrees before Law 1150 came into force; these mainly concerned the major cities and were initially valid for a period of 10 years (up to 1952), subsequently extended to the end of 1957 or until the new master plan came into force in the case of municipal authorities included on the lists drawn up by the Ministry. Ope legis extensions also benefited reconstruction plans, which remained in force until the activation of a master plan in the case of municipal authorities included in the lists or still covered by an existing planning instrument or for ad hoc periods of no more than 10 years, granted at the discretion of the Ministry, for other municipal authorities. The granting of extensions to reconstruction plans became common practice, in particular in the case of small-to-medium sized communities, which chose to pursue this strategy for a certain number of years rather than draw up a master plan in inadequate technical circumstances and with insufficient financial resources.
Many commentators attributed responsibility for what came to be described as the 'failure of the plans' in part to the inadequate technical experience and poor organizational skills of the municipal administrations and in part to the fact that the town planning law lacked a set of regulations for its application. In line with established practice, according to which, when it came to putting the various provisions into practice and as regards the concrete functioning of the administration, reference was made to enforcing regulations rather than to the laws from which they arose, several articles of the law did indeed refer to just such sets of regulations. But it was not until the issue of Ministerial Circular no. 2495/1954 containing "Instructions for the drawing up of master plan and detailed land use plans" that directions concerning the formulation of plans became available.
Although these Instructions did to some extent make up for lack of enforcing regulations for the law (which, as Spantigati wrote, "only hidebound traditionalists or those who were ignorant of legal matters could mistake for a serious problem") they certainly could not solve many of the more obvious inadequacies of the law. Prominent amongst these (as Giuseppe Samonà noted in a careful review of the conditions and limits that formed the frame for the development of planning processes, which focused principally on problems concerning the contents of the broad-based general plans) were, on the one hand, the building-biased conception of the plan with a rigid division of the territorial surface into zones that gave preeminent importance to the constructional dimension, and on the other the absence of any clear discipline governing non built-up areas. Various phenomena offered an increasingly clear demonstration of "the irreducibility of urban migration processes to typological forms limited to particular areas", while it was obvious from the provisions contained in Article 7 of the law that "the juridical interpretation of the role of urban planner, which limited the relevance of regulatory processes to road systems in built-up areas, [had neglected] essential elements of planning, especially in the initial, general phase of the plan".
As regards the definition of zonal features and restrictions to be observed in the building process, the part of the law that concerned the broad-based general plan established no rules and the Circular, which stated that this definition must be translated into an indication of building exploitation indices, in fact was utterly evasive on the point. The legitimacy of including in the broad-based general plans prescriptions that belonged with building regulations (typological characteristics, heights of buildings and distances from each other) was subject to different interpretations, both in theory, and in practice. Indeed, these prescriptions, in addition to the zonal restrictions and with them helping to establish a general zoning discipline, were recognized as effects produced by the regulatory norms (Article 33 of the town planning law) that were supposed to set the rules governing building activities in the various zones. A careful examination of the law showed that the restrictive effects that the zoning arrangements contained in the master plans might introduce into the juridical sphere of private property appeared substantially similar to those that accompanied the first move

to regulate building activity through town planning schemes, as embodied in the 1865 law.
Another limiting feature of the law was represented by the absence of precise indications as to whether master plans were transactions of the municipal authority subjected to control, or transactions of the State or complex transactions of both State and municipality. The issue was of considerable practical relevance because if it was assumed that governmental action excercised control over muncipal decision-making, every change deemed necessary by the Upper Council of Public Works and automatically adopted by the Ministry would necessarily involve a new procedure to guarantee third party rights and inevitable delays in approval of the planning instrument. The question had in any case prompted a contrast between the trend in jurisprudence and the opinions of the authoritative members of the judiciary.
Another problem was that the law had made no provisions for precautionary measures to ensure that the expected results of the plan were not undermined by the actions of hostile land or property owners during the preparatory phase or while approval was awaited.
Thus, as the Court of Cassation more than once pointed out, the regulations and prescriptions embodied in a master plan 'had no legally binding effect' in the period between its adoption by the municipal authority and the decree confirming its approval, which was the only action that imbued the planning instrument with legal force.
As well as these shortcomings, another that proved still more important, and which was closely connected with the question of the nature and legal effectiveness of the town planning instrument, concerned the timing of when the restrictions on private activities scheduled by the master plan (zoning and alignment prescriptions) would become enforceable. This involved a wide-ranging discussion of the relationship between the broad-based general plan and detailed land-use plans, which led in turn to differing attitudes on the part of town planners as to the configuration of the plans. In this case, attention focused on the law's silence as to how exactly the provisions of the master plan as regards private property owners were to be enforced. In fact, several jurists maintained that the master plan, given that its task was to establish general criteria, concerned the community as a whole and it was only the detailed land-use plans that impinged on private interests. According to this view it followed that private individuals were not obliged to comply with zoning prescriptions until the detailed plans became enforceable.
This position was the subject of an acrimonious dispute between, on the one hand those who maintained that the master plan had a regulatory status and that all the provisions relating to its contents were therefore immediately enforceable (art. 7), and on the other those who insisted that the master plan was an administrative document and thus that its provisions could not be enforced as regulations. The latter group likened the master plan to the regional plan and maintained that it had no operative force except over the authorities responsible for drafting the detailed land use plans and except for the provisions that obliged private individuals and bodies to observe the alignment and zoning prescriptions. This approach gave rise to important practical implications since it assumed that nothing could prevent the owners of areas that the master plan had designated for public facilities and services (schools, churches, parks, etc.) from using them to build private dwellings, though they remained exposed to the possibility of compulsory purchase orders being issued if the municipal authority decided to carry out the work outlined in the master plan.
During the first half of the 1950s, when few master plan were actually produced, the jurisprudential orientation of the administrative judiciary, as expressed by the Council of State, was somewhat uncertain. In the majority of cases, the interpretation was that as a rule the broad-based general plan contained only guidelines and that these required further specifications, those that came with the detailed land use plan, before they could be put into practice. Later, as Alberto Predieri points out, the consolidated jurisprudential position became one of acceptance of the immediate applicability of the constraints imposed by the master plan inasmuch as they corresponded to the functions laid down for the plan itself; the main task of the master plan plan was "as a rule to prescribe broad programme guidelines, but any precise, categorical constraints these contained [were] compulsory in character and immediately applicable" (these included, for example, zone restrictions, rebuilding restrictions, restrictions to enable the construction of thoroughfares, etc.).
During the 1950s and in part in the '60s, it was the jurisprudence produced by the IV Section of the Council of State that served to guide the public administration and the legislator. In particular it was the judgements handed down in relation to appeals concerning reconstruction plans that contributed to bringing about changes and additions to the relevant legislative measure, Law Decree no. 154/1945. These judgements, which featured elements for both these emergency instruments and the broad-based general plans and therefore justified joint formulation, also made it possible to set some of the limits of town planning law.
Instituted as urgent measures with the nature of a detailed plan and with implementation deadlines that made the associated legislative instrument provisional in character and limited in prospects, reconstruction plans were drawn up for 343 municipal authorities; not just small-to-medium ones (as specified by the Ruini Circular of 1945, which contained the Instructions for the application of DLL 1/4/1945, no. 154) but also large cities. The reconstruction plans were updated and otherwise modified several times and their period of validity extended on several occasions, so in municipal authorities that had no master plan they remained in force until this latter was approved. As late as 1977 another bill had to be drafted to extend the period of validity of the reconstruction plans for as many as 235 municipal authorities, otherwise the plans risked becoming inoperative and could result in the Ministry being prevented from completing the already-started work they envisaged.
Originally directed at organisms suffering from serious structural and functional problems and designed to help them return to their normal conditions (limited therefore to areas affected by wartime destruction and to newly established areas that were strictly necessary for reconstruction of the seriously damaged built heritage), these instruments would, through a combination of ministerial

instructions, of opinions expressed by the central bodies when involved on a consultative basis and of the succession of supplementary measures and changes to Law Decree no. 154, assume the fundamental nature of 'good planning regulations'. In other words they set out to "reconcile [their] preciseness with a capacity to remain applicable in the face of subsequent developments" of built-up areas. As such they took the form in many cases, including those of some provincial capitals (Ancona, Frosinone, Pesaro, Pescara, Pisa, Treviso, Verona, Viterbo) of plans covering the entire extent of the municipal area, functioning both as broad-based general plans and as detailed land use. In taking the place of master plans, reconstruction plans therefore generated valuable experience for the ongoing testing and refining of technical aspects.

But it was above all in the jurisprudential sphere that reconstruction plans played a significant part in refining town planning discipline in that the judgements made by the Council of State and the Court of Cassation in recurring disputes further built up jurisprudential practice as regards the criteria to be adopted in interpreting the provisions of Law Decree no. 154. At the same time, the attitude of the institutional bodies made it possible to tackle some of the major problems that remained outstanding after the issue of Law 1150. This led in particular to the introduction of safeguarding measures, the simplification of approval procedures for plans and the assumption by the Ministry of powers to introduce changes to planning proposals submitted by a municipal authority.

As regards the first question, Law Decree no. 740/1948 was issued to provide a means of translating the judgements of the Council of State concerning the possibility of using areas occupied by destroyed buildings for public works and facilities, in other words for projects judged as indispensable for the purposes of reconstruction, and to deal with the requests, frequently put forward by municipal authorities, for approval of changes to reconstruction plans (essentially in order to obtain indemnity for building work which did not comply with the proposals of the plan that was carried out before the plan received final approval). Following the example of French planning law, the Law Decree ordered that for as long as the plan remained without approval the Prefect could suspend work involving the construction or reconstruction of private buildings if such work should make it more difficult or more costly to implement the plan itself.

These provisions, which constituted the indispensable juridical means to avoidance of a situation where the plan's proposals were undermined by buildings that were incompatible with them, had been amended during the process of ratification of the Decree (Law no. 834/1950). They were then reinstated through Law no. 1402/1952, which incorporated changes for Law Decree no.154, a sort of consolidation act for reconstruction plans. Later, with the single article of act no. 1902/1952, the safeguarding measures applicable solely to reconstruction plans were extended to master plans.

Another provision of Law 1402 was that plans submitted by provincial capitals had to be approved not only by the Technical administrative Committee of the Provveditorato but also by the Upper Council of Public Works, whose opinion replaced that of other central authorties. As regards the procedure for approval of general town-planning schemes, the Public Works Commission of the Senate proposed that the problem of long delays then occurring at the assessment and approval stages be dealt with by extending to them the system already devised and tested for reconstruction plans and by obtaining the opinions of the various authorities through a single consultative body rather than separately as proposed by Law 1150.

As regards the controversial question of whether or not the Ministry should have the power to make ex officio changes to master plans submitted for approval, with reference in particular to alterations that the Upper Council of Public Works had suggested be made to reconstruction plans and which had duly been introduced, ex officio, by the Ministry, the Council of State accepted the action of the Ministry as legitimate, given the special nature of reconstruction plans, providing it concerned changes connected with or dependant on provisions decided by the municipal authority. The Council thus provided a means where-by the Ministry could, under exceptional circumstances, avoid the provisions that denied it the power to over-rule, ex officio, a municipal authority.

The issue was thus brought into the framework of the same administrative procedure, both for reconstruction plans and for master plans, in order that over-ruling action on the part of the Ministry should be justified, from the point of view of its legitimacy and of its merit, in cases in which such action did not interfere with the rights of third parties. This established the principle that the draft plan was nothing other than a proposal put forward by the municipal authority. In passing through the various stages of its application for approval a municipal authority was subject to checks and assessments carried out by administrative bodies and authoritative technical commissions which could also reject the application or introduce changes or adjustments designed to achieve the overall objectives of the proposal but by different means.

In this way the principle of municipal autonomy in a field, that of town planning, characterized by the number and importance of the interests at stake, was reconciled to the principle of state sovereignty.