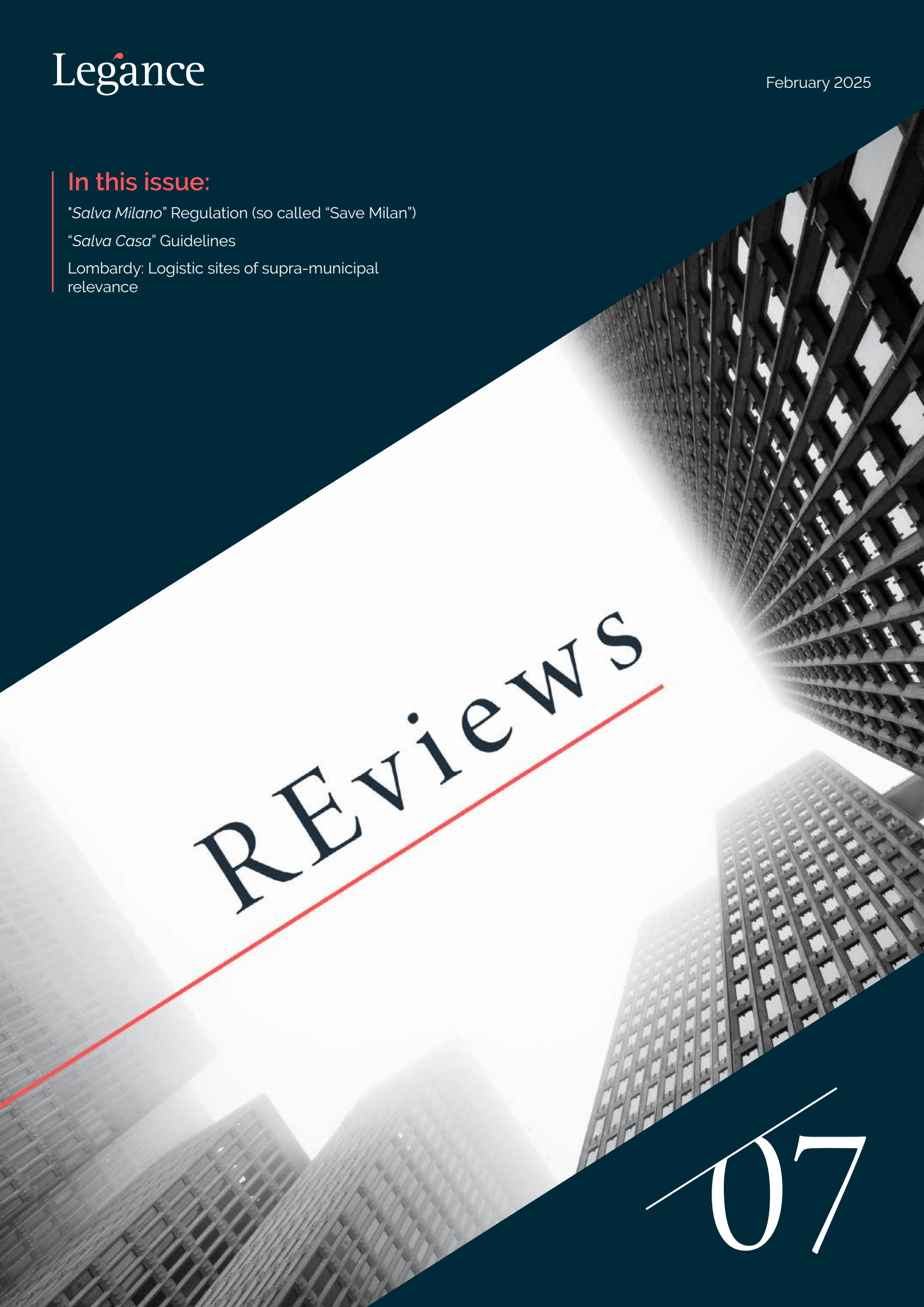
Legance

February 2025

In this issue:



REviews

07

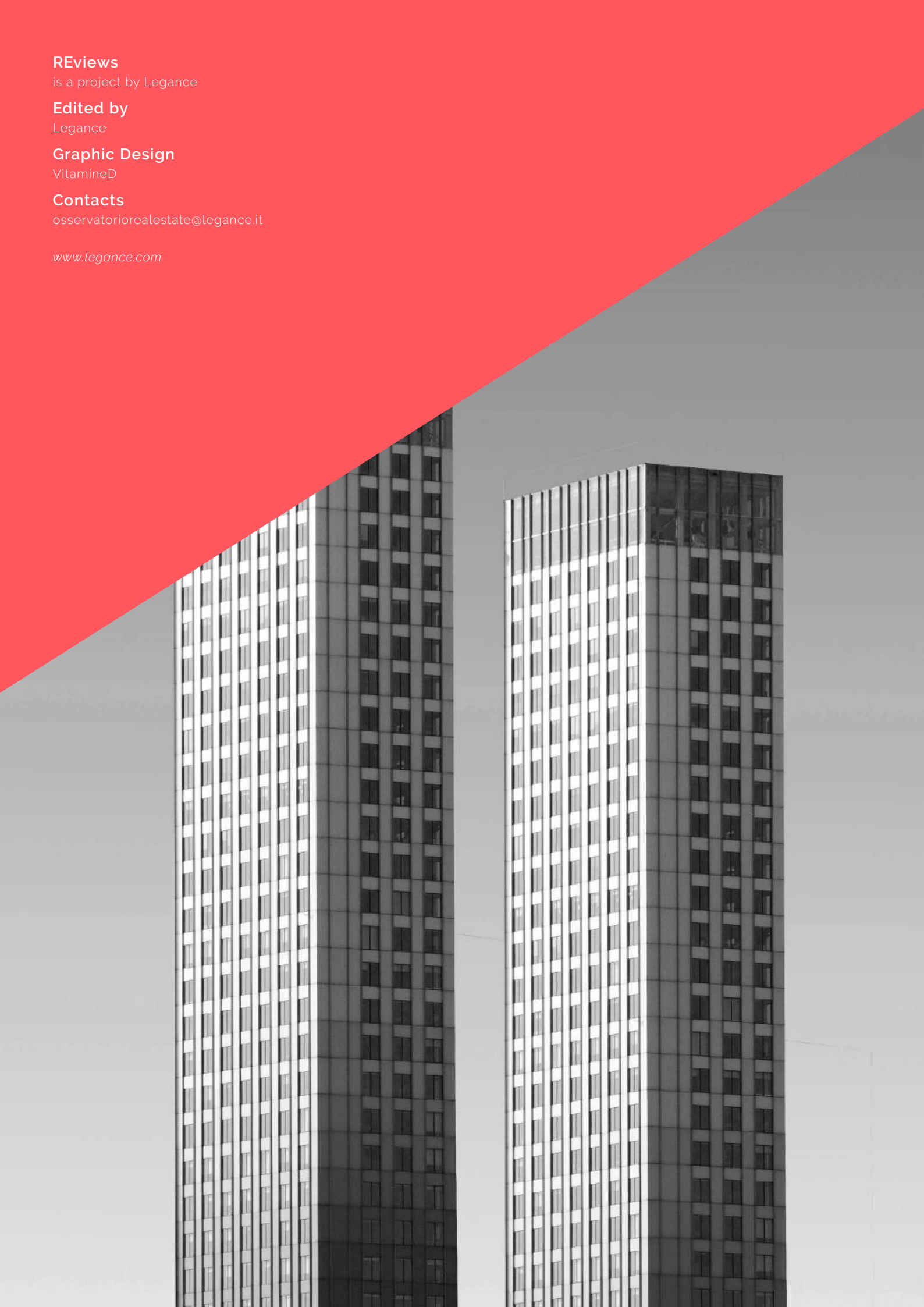
REviews
is a project by Legance

Edited by
Legance

Graphic Design
VitamineD

Contacts
osservatoriorealestate@legance.it

www.legance.com



Index

Editorial

The real estate industry is undergoing a major transformation, driven by innovative housing models, new laws under discussion and innovative judicial interpretations.

The concept of building renovation is being debated - and how could it possibly not be, considering Italy's real estate heritage - with recent restrictive judicial guidelines, that deem it necessary to preserve the identity of existing buildings, in order to avoid falling under the definition of "new construction".

The "Save Milan" regulation aims to resolve the uncertainties regarding how to interpret the law that have paralysed building development in Lombardy's capital city, but it is still under discussion. In the meantime, the city has a new regulation for the Landscape Commission, which aims to improve land management.

In Rome, the City Council has completed the first phase of the creation of the new General Urban Development Plan ("PRG") implementation regulation. This phase will be followed by the final approval phase.

The regulation concerning parking spaces continues to evolve, with new rulings that - contrary to what has been previously stated in the past - seem to recognise the possibility of creating parking easements, and the Constitutional Court intervenes on civic uses, trying to strike a balance between economic development and environmental protection.

On the social side, the senior co-housing model asserts itself as an innovative alternative to nursing homes, offering supportive living among the elderly, providing new solutions to the need for security and mutual support. A model that represents a revolution in the way of living among the elderly, however, it still lacks a clear regulatory framework.

These developments outline the future of Italian town planning where tradition and innovation coexist, striving for sustainable solutions for our ever-changing cities.
This and more will be featured in the new issue of Review.

Adoption of the amendment to Rome's General Urban Development Plan ("PRG") - Revision of the Technical Implementation Rules

On 11 December 2024, the City Council passed a resolution to adopt the partial amendment of the Rome General Urban Development Plan, which concerns the revision of the Technical Implementation Rules.

The Technical Implementation Rules of the PRG define the regulations governing building and urban development transformation of the city and its territory. They have been in force since 2008 following the approval of the PRG and have never been modified and/or updated. The amendment under review, therefore, represents the first change to the Technical Implementation Rules of the PRG since its approval.

With the adoption of the amendment, the safeguard measures became effective, the purpose of which is to avoid the possibility that, pending final approval, building permits be issued, which are in conflict with the new provisions. The safeguard measures will remain effective until final approval or, in any case, for a maximum of three years.

"Save Milan" Regulation

Bill No. 1987 is awaiting approval in the Senate. Discussions have begun.

The so-called "Save Milan" regulation aims to resolve the regulatory uncertainties that have paralysed building development in Lombardy's capital city, by retroactively clarifying key criteria for construction in urban areas and regulating the difference between building renovations and new constructions.

The new provision, approved by the Chamber of Deputies on 21 November, introduces a retroactive authentic interpretation that clarifies, very briefly, two crucial aspects:

1. Prior approval of a detailed plan is not required for construction on individual plots located in urban and built-up areas, unless they conflict with actual and current public interests.
2. Demolition and reconstruction work can be qualified as building renovation even in the event of substantial volumetric and layout modifications, while respecting regional constraints.

The measure, aims to resolve the regulatory uncertainty that has hampered building development and to boost investor confidence, has not yet been approved in the Senate and is the subject of a lively debate.

Building renovation: definition and recent judicial clarifications

Without prejudice to the effects of the reform referred to in the previous article, the Consolidated Law governing Construction contains a very broad definition of "building renovation".

Two judgments have interpreted this definition in a restrictive manner.

On one hand, the Lombardy Regional Administrative Court (TAR), through Judgment No. 2353/2024, clarified that a building intervention is to be considered a "new construction" (which is subject to a more onerous procedure) when there is no continuity between the pre-existing building and the one to be constructed. This absence of continuity is recognised when the new building work results in an increase in the urban development that can no longer be connected to the previous building, thus creating a clear separation between the two buildings and highlighting the need to maintain a connection, including functional, between the two structures.

At the same time, the Criminal Court of Cassation, through Judgment No. 18044/2024, further restricted the definition of building renovation, stating that only those interventions aimed at the recovery of pre-existing buildings, of which a very specific identity trait is preserved, can be considered as such. In particular, the building undergoing renovation must retain functional or identity characteristics that coincide with the pre-existing building structure.

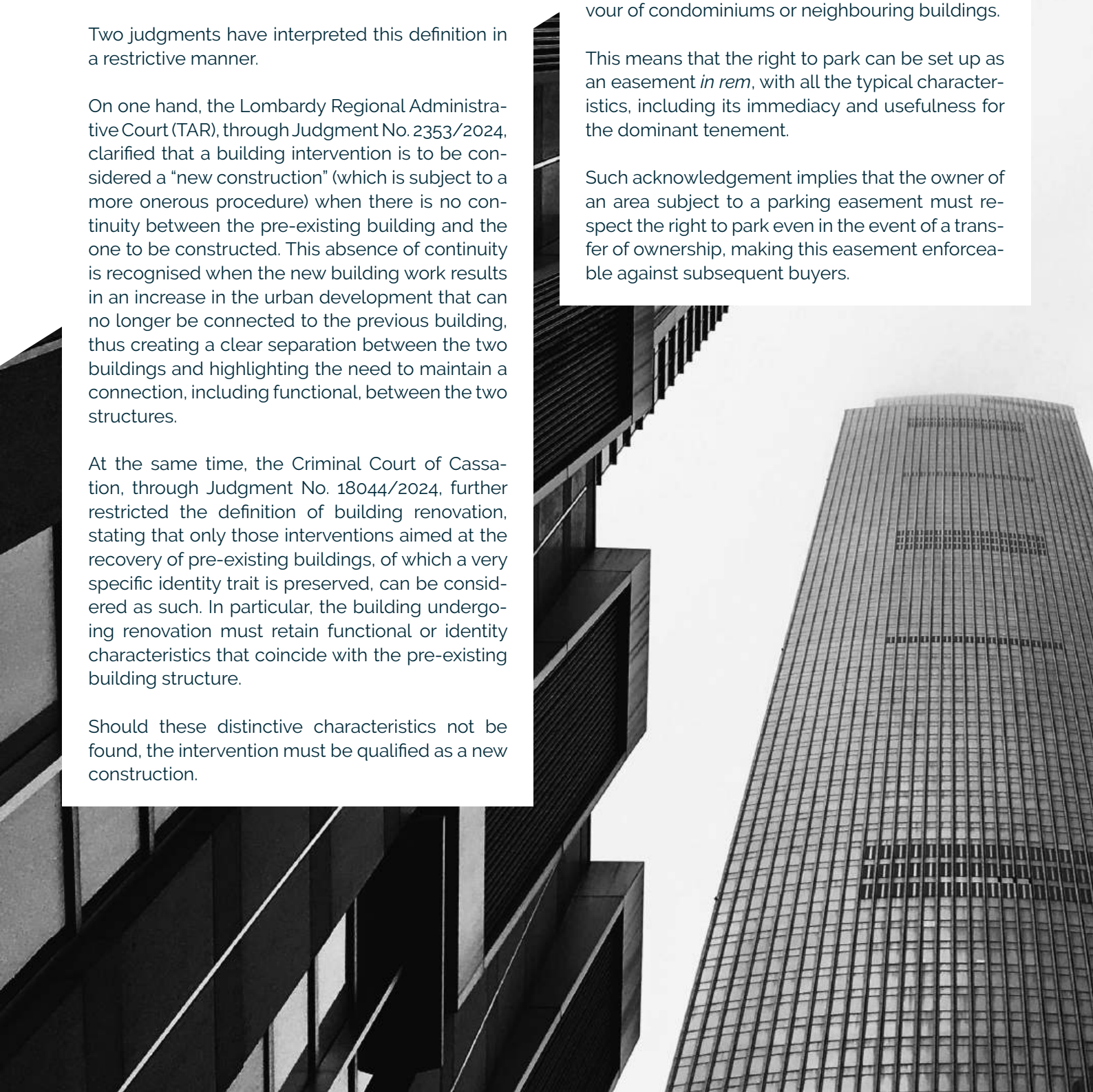
Should these distinctive characteristics not be found, the intervention must be qualified as a new construction.

Parking easements: an additional type of parking space

In Judgment No. 3925 of 13 February 2024, the United Chambers of the Court of Cassation intervened on a controversial judicial issue, stating that it is possible to establish a parking easement in favour of condominiums or neighbouring buildings.

This means that the right to park can be set up as an easement *in rem*, with all the typical characteristics, including its immediacy and usefulness for the dominant tenement.

Such acknowledgement implies that the owner of an area subject to a parking easement must respect the right to park even in the event of a transfer of ownership, making this easement enforceable against subsequent buyers.



Nursing homes and Senior Co-housing: new urban prospects

The Molise Regional Administrative Court (Judgement No. 214/2024) declared the compatibility of nursing homes with the urban destination of tourist-accommodation.

The decision is based on the similarity of the hospitality functions that are common to tourist facilities and residences for the elderly, although they are intended for different types of users.

At the same time, the senior co-housing trend is gaining ground as an innovative housing solution for the elderly.

The National Council of Notaries has examined in depth the regulatory issues associated with this kind of cohabitation, in which self-sufficient elderly people live together, the purpose of which is to improve psychological and economic wellbeing through the sharing of space and responsibilities. Recent Law No. 33/2023 and Legislative Decree No. 2/2024 have encouraged this housing model, which differs from traditional nursing homes due to its intergenerational and collaborative nature.

However, the lack of a comprehensive legal framework means that such forms of cohabitation need to be regulated, through agreements governing the use of property, inheritance rights and the management of community relationships.

Private Land and Civic Uses: balance between development and environmental protection

In its Ruling No. 119-2023, the Constitutional Court affirmed that private land encumbered by civic uses cannot be considered automatically inalienable, thus changing the previous stance that limited the possibility of selling such land for environmental protection reasons.

The Court recognised the need to balance the protection of the environment with property rights, suggesting the creation of a national register of civic uses, to ensure greater clarity and certainty when purchasing and selling such land.

This register could represent a turning point in overcoming the legal and management uncertainties associated with land that is subject to civic constraints.

Pre-contractual liability of the Public Administration

With regards to the public administration's liability, through Order No. 9960 of 12 April 2024, the Supreme Court of Cassation clarified that the damage resulting from the municipal administration's unlawful refusal to enter into the lots agreement, despite having approved the relevant plan, is not to be measured in terms of the profit lost, but rather in terms of the negative interest resulting from the unjustified interruption of negotiations.

According to the Court of Cassation, the public administration's change of heart "*integrates that violation of the principle of alterum non laedere (in the form of impairment of freedom of negotiation) which entitles recourse to the right of compensation. The extent of which, therefore, is to be measured, not against the profit lost (because this, in the case under consideration here, would be tantamount to contradicting the assumption that the conclusion of the agreement does not constitute a "due act"), but against the interest in not being involved in operations that ultimately prove to be useless. Therefore, the choice - made by the first judge and ("theoretically") shared by the appeal court - of limiting the compensation to the damage of the negative interest must be considered correct.*"

The enforceability of obligations *propter rem*

With regards to obligations arising from town-planning agreements, in its Judgment No. 5152 of 10 June 2024, the Council of State clarified that, the purchaser of an area for which a town-planning agreement has been entered into prior to the purchase agreement, must perform the obligations arising from the town-planning agreement, without any relevance to the possible presence of exemption clauses in favour of the purchaser in the purchase agreement.

In fact, the town-planning agreement gives rise to real or "*propter rem*" obligations, i.e. obligations linked to the land, which are therefore the responsibility of the party owning the area covered by the agreement, meaning that any exemption clauses set out in the purchase agreement, only have effect on the internal relations between the seller and the purchaser.

Consequently, all those who acquire ownership or a right of enjoyment over time of the area covered by the agreement, are subject to the obligation towards the municipality, without prejudice to the possibility of the assignees of the right of enjoyment of the area covered by the agreement, to bring an action against the seller before the ordinary courts, in order to object to the contractual exemption clause.

Guidelines for the realisation of Data Centres in Lombardy

In order to address the lack of specific regulations, through Regional Council Resolution No. XII/2629 of 24 June 2024, the Lombardy Region approved the Guidelines for the realisation of Data Centres in Lombardy.

The Guidelines define data centres as physical infrastructures in which equipment (servers, storage systems, etc.) and IT resource management services are located. In other words, they are defined as "*a room, building or physical structure that houses the IT infrastructure for the creation, execution and deployment of applications and services and for the storage and management of associated data*".

According to their relative size, the guidelines subdivide them into, Hyperscale, Colocation, Edge, HPC and Cripto-mining.

The Guidelines also

i. affirm the compatibility of these infrastructures with productive and office uses and provide initial guidelines for the location of medium- and large-sized facilities from a town planning point of view;
ii. clarify certain aspects related to the granting of environmental authorisations necessary for their construction from an authorisation point of view.

Amnesty of partial non-conformities and fundamental variations in the new Article 36-*bis* of the Consolidated Law governing Construction

The so-called *Salva Casa* Decree (Law Decree No. 69 of 29 May 2024, converted by Law No. 105 of 24 July 2024) introduced a new Article 36-*bis* into the Consolidated Law governing Construction, entitled "ascertainment of conformity in cases of partial non-conformity and fundamental variations".

In the first paragraph, the new Article 36-bis primarily depoliticises the dual conformity regime concerning the amnesty of building non-conformities, introducing the notion of "asymmetrical conformity" (which provides for compliance with the town planning regulations in force at the time the application is submitted, as well as with the requirements specified by the building regulations in force at the time of construction). In this regard, the doctrine has expressed numerous reservations about the lack of distinction between town planning regulations and building regulations in the same law, which will force the courts to rule on the matter.

The second paragraph introduces the so-called "amnesty with works", allowing the possibility of amnesty to be made conditional on the applicant carrying out the necessary building works to ensure compliance with the technical regulations of the sector.

The third paragraph provides that the application for a building permit or the certified report on the commencement of amnesty activities must be accompanied by a declaration from a qualified professional certifying the necessary "asymmetrical conformity" mentioned above.

The fourth paragraph provides that, if the works referred to in paragraph 1 are carried out in the absence of or non-conformity with the landscape authorisation, the manager or office manager is required to request "a binding opinion on the verification of the landscape compatibility of the intervention, also in the case of works that have led to

the creation of useful surfaces or volumes or the increase of those legitimately carried out" from the competent authority. Consequently, it implies that it is possible to obtain the building permit under amnesty by obtaining a positive opinion on the landscape compatibility of the work.

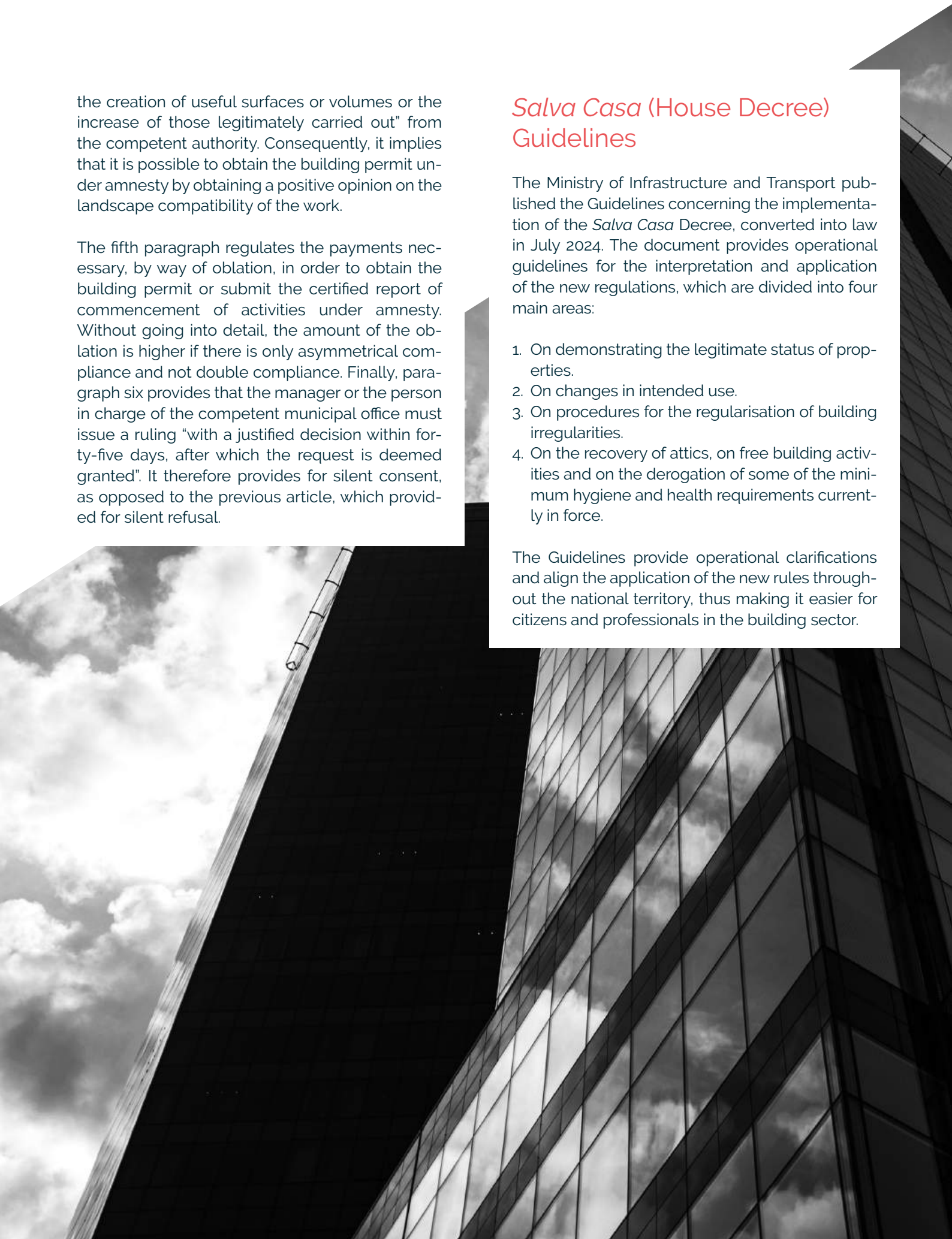
The fifth paragraph regulates the payments necessary, by way of oblation, in order to obtain the building permit or submit the certified report of commencement of activities under amnesty. Without going into detail, the amount of the oblation is higher if there is only asymmetrical compliance and not double compliance. Finally, paragraph six provides that the manager or the person in charge of the competent municipal office must issue a ruling "with a justified decision within forty-five days, after which the request is deemed granted". It therefore provides for silent consent, as opposed to the previous article, which provided for silent refusal.

Salva Casa (House Decree) Guidelines

The Ministry of Infrastructure and Transport published the Guidelines concerning the implementation of the *Salva Casa* Decree, converted into law in July 2024. The document provides operational guidelines for the interpretation and application of the new regulations, which are divided into four main areas:

1. On demonstrating the legitimate status of properties.
2. On changes in intended use.
3. On procedures for the regularisation of building irregularities.
4. On the recovery of attics, on free building activities and on the derogation of some of the minimum hygiene and health requirements currently in force.

The Guidelines provide operational clarifications and align the application of the new rules throughout the national territory, thus making it easier for citizens and professionals in the building sector.



Lombardy: Logistics sites of supra-municipal relevance

In force since 13 August, Regional Law No. 15/2024 establishes guidelines and criteria for the location of logistics sites (logistics platforms, warehouse or handling centres for goods and products, goods or vehicle depots) that assume supra-municipal relevance due to their size (more than three hectares). The regional regulations do not only regulate new sites, but also those that reach a supra-municipal operational dimension following expansion.

The law also introduces a number of amendments to Regional Law No. 12/2005 "law for the management of the territory", which concerns in particular the Provincial Territorial Coordination Plans (PTCP) and the Regional Territorial Plan in order to adapt the provincial and metropolitan planning procedures to the new provisions concerning logistics sites of supra-municipal relevance. In fact, it is up to the Provinces and the Metropolitan City to define the appropriate territorial areas (ATI) for the location and realisation of sites.

The Regional Council will establish the criteria and guidelines for the definition of ATIs, in compliance with certain principles that Regional No. Law 15/2024 makes clear: among others, the suitability of the location with respect to transport infrastructure, the accessibility and safety of the road network, the priority of disused areas, environmental and landscape protection.

In addition, any municipality that intends to amend its Planning Document in order to allocate one or more areas to ATIs is required to initiate the procedure for the stipulation of a co-planning agreement with the Region and the Metropolitan City or Province of the territory concerned. These territorial bodies are called upon to evaluate, for their respective areas of competence, the proposed amendments to the Planning Document with reference to ATIs.

Lien Extension in Condominiums and Notarial Aspects

Study No. 79-2023/C of the National Council of Notaries, which was approved in March 2024, explores the legal implications of liens in condominiums, focusing on whether a voluntary lien, established on an individual building unit, may automatically extend to the common areas of the building.

This topic has many practical implications for notaries, who find themselves dealing with complex collateral regulatory situations involving condominium assets.

First, the study distinguishes the various types of common areas, identifying those that are necessary to the structure of the building and those that, while performing a service function for the individual units, are not always condominium. This makes it clear how the possible extension of the lien may apply differently depending on the characteristics and intended use of the common areas. The principle of specificity of the lien, which requires the precise indication of the property on which it falls, is fundamental but not without ambiguity, especially for common areas with multiple functions, such as courtyards and roof terraces, which could be transferred to sole ownership.

The study then discusses the notarial practice suggested for the management of property that ceases to be communal, preferring the division by equalization rather than the sale of condominium shares in order to facilitate a more streamlined management of property transfers. Lastly, a discussion is devoted to the judicial foreclosure of liens, analysing the notary's role in the cancellation of such a lien when the claim is satisfied, and looking in depth at the administrator's representation in these transactions.

The analysis presented in Study No. 79-2023/C concludes by recommending that practitioners maintain a rigorous approach in identifying common assets and encumbered areas, highlighting the importance of clarifying from the outset the destination and legal status of such assets to avoid possible litigation.

Indirect cultural constraint and marketability of real estate

Study No. 53-2024/P of the National Council of Notaries focuses on indirect cultural constraints (in practice commonly called "façade" constraints), analysing their nature and effects on the movement of assets.

This constraint, which is separate from the direct constraint that protects assets of significant historical and artistic value, extends to surrounding properties to preserve the integrity and context of the main asset. The function of indirect constraint is to protect the environmental surroundings of the cultural asset, ensuring the maintenance of visual perspective, decorum and light conditions.

The study points out that the indirect constraint, while limiting some of the owner's rights, does not transform the property under constraint into a "cultural asset". Consequently, these properties are not subject to the same alienation restrictions imposed on cultural assets, such as prior authorisation and the right of first refusal in favour of the State. However, the presence of the constraint implies specific conservation obligations.

With regard to notarial transactions, the notary's role in providing accurate advice on the impact of the constraint, especially in relation to the marketability of the property, is highlighted. The notary must inform the purchaser of the limitations arising from the indirect constraint, such as possible construction restrictions and preservation rules, which could affect the use of the property. Finally, the need to find the provisions establishing indirect constraints, which are not always easily identifiable in the real estate registers, is examined.

Constitutional Court rules on mortgages and acquisition of abusive unauthorised properties

The Constitutional Court, through its Judgment No. 160/2024, addresses the constitutional legitimacy of Article 7, paragraph 3 of Law No. 47/1985 and Article 31, paragraph 3 of Presidential Decree No. 380/2001.

The issue concerns the fate of mortgages registered on land with unauthorised buildings subsequently acquired free of charge by the municipality.

The Court, in raising the question, pointed out that, according to settled case law, acquisition by the municipality extinguishes mortgages.

However, this redemption does not adequately protect the rights of mortgage creditors not responsible for the building abuse. Consequently, the aforementioned rules have been declared unconstitutional, insofar as, they did not preserve the mortgage rights of creditors not involved in the building abuse, ruling that this redemption was unreasonable and disproportionate.

The mortgage registration, of course, must have occurred at a date prior to the transcription of the deed of declaration of non-compliance with the injunction to demolish.

The decision is significant because it clarifies that the mortgage must remain valid when the mortgage holder is not responsible for the abuse and the property is not intended for predominant public interests.

Legance

www.legance.com