

# SPECIFICITIES OF THE GARDEN ARCHITECTURE MONUMENTS FROM THE LEGAL POINT OF VIEW

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## Abstract

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The article deals with legal specificity of garden art. First, it explains some specifics of garden art (namely historic gardens and parks), which arise from its character, as they are created by humans but consist of plants and woody plants interconnected with various ecosystems. The authors present legal regimes, within which garden art may be protected, and on the example of garden art monuments they focus on the issue of conflict of varied public interests, in particular heritage preservation interest and interests in the preservation of nature and landscape, waters and forest.

Keywords: garden art, historic garden, park, cultural heritage, cultural monument, garden architecture monument, nature and landscape protection, heritage preservation

## INTRODUCTION

Once a garden architecture monument is declared cultural monument under the Act No. 20/1987 Coll., on State Heritage Preservation as amended (hereinafter “Heritage Act”), it is cared of in the mode of heritage preservation as any other cultural monument, since the Heritage Act does not distinguish cultural monuments by their factual nature (e.g. “animate” and “inanimate”), but rather on the basis of their categorisation by only the degree of their cultural importance (cultural monument and national cultural monument). A historic garden or park is therefore in the heritage preservation legal regime a cultural monument of the same status as for example a chateau, castle, church, sculpture or painting. Although the historic garden or park is man-made piece of work, it consists of plants and woody plants that develop dynamically, and becomes a community of many other living organisms – plants and animals. Apparently, legal instruments of the preservation of inanimate cultural monuments, of a static nature, are not necessarily suitable or useful for animate monuments. Now there is a situation where a historic garden or park becomes, in addition to the heritage

preservation legal regime, also the subject of preservation on the level of conservation of nature and landscape or other sections of the environment, while the interests of the monument care and the interests of the environment protection may often be contradictory.

Therefore, authors explain the specificities of the garden architecture cultural monuments arising from their factual nature. They pay attention to the legal regimes within which monuments of garden art may be preserved, and in the given context, they concern with the conflict of public interests. The main research question is whether the spectrum of legal instruments for the preservation of cultural monuments complies with the specifics of garden architecture cultural monuments, and depending on the answer to the research question, the objective of this article is to suggest legal instruments to better meet the nature of garden architecture cultural monuments.

This paper is a partial output of the project “Methods and Tools of Landscape Architecture for Spatial Development” and is intended to serve the needs of other members of the project team – professionals in the field of landscape architecture.

## MATERIALS AND METHODS

Based on factual properties of garden art monuments, the authors analyse the specifics of this kind of cultural monuments, and by the method of induction and generalisation they produce the definition of such a monument. Using the methods of analogy and comparison they explain the legal regimes within which monuments of garden art can be protected, and they analyse the conflicts of public interests that may occur in the practice in relation with overlapping of legal regimes. The authors use the issue of removing woody plants in garden art monuments as an example to demonstrate the solution for conflicts of public interests of the heritage preservation and the protection of nature. In that context the authors deal with the issues of interpretation of the vague legal concept “public interest” in the application of legal norms while exercising said legal regimes.

## RESULTS AND DISCUSSION

### Garden Architecture Cultural Monuments and Their Specificities

Garden architecture cultural monuments discussed in this article shall in particular be understood as historic gardens, parks and composed landscapes, declared as cultural monuments by the Ministry of Culture (Heritage Act, § 2), or as national cultural monuments by the Government of the Czech Republic (Heritage Act, § 4). The Ministry of Culture declares cultural monuments as *immovable and movable objects of sets thereof, which are important evidence of historical development, way of life and environment of the society from the oldest times up to the present, as a demonstration of creative abilities and work of man from various fields of human activity, for their revolutionary, historical, artistic, scientific and technical values, or those which have a direct relation with significant persons and historical events* (Heritage Act, § 2 subsection 1). As national cultural monuments, the government

declares those *cultural monuments which represent a most important part of the cultural wealth of the nation* (Heritage Act, § 4 subsection 1).

One of the basic international documents of the International Council on Monuments and Sites (ICOMOS)<sup>1</sup> concerning the preservation of the cultural heritage, so-called Florence Charter on the Protection of Historic Gardens of 1981<sup>2</sup>, in its Article 1 defines a historic garden as follows: “A historic garden is an architectural and horticultural composition of interest to the public from the historical or artistic point of view. As such, it is to be considered as a monument”. This document also refers to plant material as living ingredient of the composition with the nature of transience and renewability, therefore with the necessity of its alteration and specific approach. The document also enumerates particular elements of the architectural composition of historic gardens (layout and various terrain profiles; plant matter: woody species, volume and colourfulness, distribution, mutual proportions; building or decorative elements and running and standing waters with corresponding reflections<sup>3</sup>) and emphasises the necessity to perceive a garden and park as the integral part of the building, composing together a valuable site.

In sum, garden architecture monuments may be defined as creations of human activity, for which men used, in addition to architectonic elements (e.g. fountains, green houses, gazebos, free-standing carvings, grottoes), also natural components, in particular plants or woody species in their living form, and water components (e.g. lakes, ponds, watercourses, cascades), where the conception of these creations counts with the natural components to stay alive. Garden architecture monuments are in fact an inseparable part of protected heritage objects and as such they present one of the substantial parts of historic cultural landscape. Also, there is a database of historic gardens and parks.<sup>4</sup>

Attention to garden architecture monuments has been paid in professional literature;<sup>5</sup> however,

- 1 International Council on Monuments and Sites (ICOMOS) is an international organization, dealing with the protection of the cultural heritage throughout the world. The organization was established in 1965, where its origin was initiated already in so-called Venice Charter of 1964. The seat of ICOMOS is in Paris and the organisation is the main advisory body of the UNESCO as concerns world cultural heritage. Available at: <http://www.icomos.org>. [Accessed: 2015. January 26].
- 2 Czech translation of this document can be found in e.g. VOŠAHLÍK, A. 2001. *ICOMOS International Documents on Cultural Heritage Preservation* [in Czech: *Mezinárodní dokumenty ICOMOS o ochraně kulturního dědictví*]. Praha: Český národní komitét ICOMOS, or POLÁKOVÁ, J. (ed.). 2007. *Mezinárodní dokumenty o ochraně kulturního dědictví*. 1<sup>st</sup> volume. Praha: NPÚ.
- 3 Art 4 of The Florence Charter. The ICOMOS-IFLA International Committee for Historic Gardens. Italy, 1981. Adopted by ICOMOS in December 1982. [Online]. Available at: <http://www.icomos.org/en/charters-and-texts>. [Accessed: 2015, January 26].
- 4 ŠANTRŮČKOVÁ, M., VÁVROVÁ, V. 2008. *A database of historic gardens, parks and the landscape, its origin and parameters* [in Czech: *Databáze historických zahrad, parků a krajiny, její vznik a parametry*]. [online]. Knihovna plus. Vol. 1–2. Available at: <http://knihovna.nkp.cz/knihovnaplus81/santruc.htm>. [Accessed: 2015. January 26].
- 5 E.g. JANČO, M. 2009. Historic gardens and parks and their renewal from the viewpoint of garden archaeological research [in Czech: *Historické zahrady a parky a jejich obnova z pohledu zahradního archeologického výzkumu*]. *Zprávy památkové péče*, 69(5): 358–370. PACÁKOVÁ-HOŠTÁLKOVÁ, B. et al. 2004. *Gardens and parks in Bohemia, Moravia and Silesia* [in Czech: *Zahrady a parky v Čechách, na Moravě a ve Slezsku*]. 2<sup>nd</sup> edition. Praha: Libri. DVOŘÁČEK, P. 2007. *Historické zahrady*. Brno: Centa.

the authors (namely garden architects, historians or archaeologists) deal with the topic through the prism of their respective professions. Some do so from the position of garden architects, who focus at the species of plants and woody species used in individual architectural styles and corresponding compositions, and they in particular notice the forms of building and typological inventories of the gardens. Others assess historical context of the origins of garden architecture monuments or significance and artificial qualities of particular artists who have performed the architectonic elements. Many other articles published in scientific literature deal with historic gardens or parks in specific locations (e.g. chateau gardens in Lednice-Valtice Estate,<sup>6</sup> Český Krumlov,<sup>7</sup> Austerlitz (Slavkov u Brna) and Jaroměřice nad Rokýtnou,<sup>8</sup> Bučovice,<sup>9</sup> or monastery gardens in Zlatá Koruna<sup>10</sup>).

### Conflicts of Public Interests and Their Reasons

Although being creations of human activity, garden architecture monuments are at the same time a part of the nature and landscape, therefore in them arises the conflict of various, often contradictory public interests, in particular conflicts between heritage preservation and public interests as concerns protection of the nature and landscape, water and forests. The reasons of those conflicts of interest are therefore given by the specific nature of the issue, since living organisms are concerned here, which do not remain static but they dynamically develop. These living organisms, which have been purposely formed and composed into intended

creation, are, in the natural environment, tied up with often unintended ecosystems.

The situation intensified in the conditions of Czechoslovakia in the late 20<sup>th</sup> century, when architectonic objects, though protected, were either not maintained at all or the care for them had been neglected. Therefore, it often came to destruction of the cultural segment of the monument, which was paradoxically often beneficiary for successful development of the natural segment. On decayed trees is seen occurrence of rare wood-destroying insects or specially protected plant species and development of multifarious communities. Those locations are still more valuable as the surrounding land, either residential or open (agricultural or wooded land), was destroyed by intensive economic utilisation. As in some cases rare natural enclaves have developed, many historic gardens and parks were declared as some kind of natural landscape reservation by Act No. 114/1992 Coll., on the Conservation of Nature and Landscape, as amended (hereinafter "Nature Conservation Act"), most frequently as natural monument,<sup>11</sup> nature reservation,<sup>12</sup> or wildlife park.<sup>13</sup> Examples may be the Libějovice Park Nature Reserve,<sup>14</sup> Natural Monument of Kostelec Chateau Garden Park<sup>15</sup> or Lysicko Wildlife Park, a part of which is the Lysice Chateau Garden.<sup>16</sup>

Specific reason for such preservation of historic gardens or parks may be the wide notion of the nature and landscape and protection thereof, which often has the ambition to include the protection of their "cultural values". Object of the protection, which within unites cultural and natural values of a particular area, is the term

- 6 NOVÁK, Z. 1993. Lednice-Valtice Estate as an important illustration of the landscape design in Central Europe [in Czech: Lednicko-valtický areál jako významný doklad krajinářské tvorby ve střední Evropě]. *Zprávy památkové péče*, 53: 1–6.
- 7 KUČOVÁ, V. 2007. Rotating Auditorium in Český Krumlov – Aspects of the Site Listed in the UNESCO World Heritage List [in Czech: Otáčivé hlediště v zámecké zahradě v Českém Krumlově – aspekty památky na Seznamu světového dědictví UNESCO]. *Zprávy památkové péče*, 67: 279–282.
- 8 VÍCHOVÁ, B., VÍCHA, F., VÍCHA, T. 2010. *Two Moravian Baroque Estates and their gardens* [in Czech: *Dvě moravská barokní sídla a jejich zahrady*]. Památky Vysočiny, Sborník NPÚ ú.o.p. v Telči, p. 77–109.
- 9 KRČMA, M., KRČMOVÁ, O. 2008. Renaissance of the Bučovice Chateau Estate [in Czech: Renesance zámeckého areálu v Bučovicích]. In: *Ingredere Hospes. Sborník Národního památkového ústavu v Kroměříži*, Kroměříž, p. 108–109.
- 10 HANSOVÁ, J. 2002. Gardens in the Cistercian Monastery Zlatá Koruna [in Czech: Zahrady v cisterciáckém klášteře Zlatá Koruna]. *Výběr: Časopis pro historii a vlastivědu Jižních Čech*, 39(2): 106–122.
- 11 *Minor location of concentrated natural values with the representation of ecosystems typical for the respective geographic region may be decreed a nature reserve; the respective body of nature conservation will set the terms of the protection thereof* (§ 33 subsection 1 of the Nature Conservation Act).
- 12 *Natural structure of a minor area, in particular a geologic or geomorphologic structure, rural mineral sites or endangered species in fragments of ecosystems, having regional ecologic, scientific or aesthetic significance, formed either by the nature and the man, may be decreed a Natural Site by the Nature Conservation authority, which will determine further details for the protection thereof* (§ 36 subsection 1 of the Nature Conservation Act).
- 13 *By a generally binding legal provision, the Nature Conservation authority may establish a nature park for the protection of a landscape character that contains significant concentrated aesthetic and natural values, which is not especially protected by Part Three of this Act, and determine limitations for such utilisation of the area that would mean destruction or damage of the site, or termination of the status thereof* (§ 12 subsection 3 of the Nature Conservation Act).
- 14 Decree of the District Authority of Strakonice No. 11/96 of 18. 10. 1996.
- 15 Decree of the Ministry of Education, Sciences and Art (MŠVU) of 31. 3. 1949, no. 38.044/49VI/1, the Decree of the District Authority in Rychnov nad Kněžnou of 1. 12. 1995, No. PŘ/190/11/95.
- 16 Lysicko Wildlife Park, of an area of 40.2 km<sup>2</sup>, was decreed in 1994.

“landscape”, defined by international law<sup>17</sup> and also by Czech national law.<sup>18</sup>

### Basic Principles of Legal Regulation of Cultural Preservation and Preservation of Nature and Landscape

Legal regulation of the cultural monuments preservation is given by the Heritage Act, namely in provisions of § 9.<sup>19</sup> After an object has been designated a cultural monument, the owner shall be obligated at his/her expense *to care for the conservation thereof, preserve it in good condition and protect it against threats, damage, deteriorating or alienation*. The owner may utilize the cultural monument in a limited manner, only the way corresponding its cultural significance, historical value and technical condition (Heritage Act, § 9 Subsection 1). The duty to care for the preservation of the cultural monument, to keep it in good condition and protect it against threat, damage, deteriorating or alienation is also owed by the person who uses the cultural monument or has it with him/her; however, s/he has the duty to bear the expenses related to this duty to care for the cultural monument only where it arises from a legal relationship between him/her and the owner of the cultural monument (Heritage Act, § 9 Subsection 2).

Protection of the set of components of animate and inanimate nature and landscape as a whole is provided the Nature Conservation Act,<sup>20</sup> which understands the said protection as *care by the State, physical and legal entities for wild animals, wild plants and communities thereof, paleontological findings and geological units, care for ecological systems and landscape units, as well as care for appearance and accessibility of the landscape* (Nature Conservation Act, § 2 Subsection 1). The Nature Conservation Act provides a demonstrative enumeration of instruments that the bodies of public administration or physical and

legal entities have at their disposal upon protection of nature and landscape (Nature Conservation Act, § 2 Subsection 2). As concerns the landscape protection – which cannot be precisely differentiated from the protection of the nature – it is in particular protection and creation of territorial systems of ecologic stability of the landscape (Nature Conservation Act, § 4 Subsection 1), protection of important geomorphologic and geologic phenomena and special protection of reserved minerals (Nature Conservation Act, § 51), protection of woody plants outside forest (Nature Conservation Act, § 7 to § 9), establishment of a network of specially protected areas and care for them (Nature Conservation Act, § 14 to § 45), participation in the process of spatial planning and building permit (application procedure), participation in the protection of the agricultural land resources (namely in re-parcelling), influencing of water management in the landscape upon preserving the natural character and nature-like appearance of watercourses, water areas and wetlands, renewal and creation of new ecosystems of natural value (e.g. at restorations and other similar changes in the structure and utilisation of the landscape) or the protection of landscape for ecologically convenient forms of economic utilisation, tourism and recreation.<sup>21</sup>

Even though the enumeration is merely demonstrative, it is apparent that it is dealt with a wide set of instruments for both general and special protection of landscape, which is being further specified, particularly in provisions of the Nature Conservation Act or in other acts concerning protection of particular sections of the environment (e.g. Water Act<sup>22</sup>, Forestry Act<sup>23</sup> or in Act on the Protection of Agricultural Land Resources<sup>24</sup>). The Nature Conservation Act in said provision also refers to spatial planning, building

17 An area, as perceived by people, character of which is the result of the action and interaction of natural and/or human factors [Art. 1 letter a) European Landscape Convention (Florence, 2000)].

18 A part of the Earth surface with characteristic relief, composed by a set of functionally interlined ecosystems and civilisation elements (§ 3 subsection 1 m) of the Nature Conservation Act).

19 For details cf. ZÍDEK, M., KLUSOŇ, J. 2005. *Act on State Heritage Preservation and its Implementing Regulations with Commentary* [in Czech: *Zákon o státní památkové péči a jeho prováděcí předpisy s komentářem*]. 1<sup>st</sup> edition. Praha: ABF – ARCH Publishers, 24–28.

20 For details cf. e.g. PRCHALOVÁ, J. 2010. *Act on the Conservation of Nature and the Landscape with and the NATURA 2000 with Commentary and Implementing Regulations* [in Czech: *Zákon o ochraně přírody a krajiny a NATURA 2000 s komentářem a prováděcími předpisy*]. 2<sup>nd</sup> updated and extended edition. Praha: Linde. Or MIKO, L., BOROVIČKOVÁ, H. et al. 2007. *Act on the Conservation of Nature and the Landscape. Commentary* [in Czech: *Zákon o ochraně přírody a krajiny. Komentář*]. 2<sup>nd</sup> edition. Praha: C. H. Beck.

21 For detail see e.g. STEJSKAL, V. 2007. *Nature Conservation and Landscape Protection Including the Natura 2000 Network in the Czech Legal System*. *Journal for European Environmental and Planning Law*, 2(2): 117–126. STEJSKAL, V. 2006. *Introduction to the legislation on protection of nature conservation and biodiversity* [in Czech: *Úvod do právní úpravy ochrany přírody a péče o biologickou rozmanitost*]. Monograph. 1<sup>st</sup> edition. Praha: Linde. Or STEJSKAL, V. 2006. *Enforcement of legal responsibility in protecting biodiversity* [in Czech: *Prosazování právní odpovědnosti v ochraně biodiverzity*]. Monograph. 1<sup>st</sup> edition. Praha: Eva Rozkotova – IFEC, 2006.

22 Act No. 254/2001 Coll., on water and on amendment to certain laws (Water Act), as amended.

23 Act No. 289/1995 Coll., on forests and on amendment to certain laws (Forestry Act), as amended.

24 Act No. 334/1992 Coll., on the protection of agricultural land resources, as amended.



permit procedure<sup>25</sup> and re-parcelling, i.e. the field regulated by special legal provisions (Building Act,<sup>26</sup> or Act on Re-parcelling<sup>27</sup>). However, said listing is only demonstrative; the Czech legal order contains other legal instruments to assist the landscape conservation. Noteworthy is the Act on Environmental Impact Assessment,<sup>28</sup> by which effects of intents and conceptions, *inter alia*, on the landscape and garden architecture monuments are assessed, and noteworthy also are legal regulations related to the state heritage preservation.

Out of the particular legal instruments on the conservation of the nature to protect the landscape and garden architecture monuments, including protection of historic gardens and parks, noteworthy are the concepts of significant landscape element<sup>29</sup> and landscape character.<sup>30</sup> Garden architecture monuments, registered by the nature conservation authority as significant landscape elements, are protected against damage and destruction. They may be utilised only the way that does not disturb their renewal or threaten and weaken their stabilising function. Interventions that could lead to damage or destruction of a significant landscape component, or threat and weakening of its ecologically stabilising function,<sup>31</sup> require a binding opinion issued by a nature conservation authority (Nature Conservation Act, § 4 Subsection 2), while the placement and permitting of buildings and other activities that could degrade or alter the landscape character, completed with garden architecture monuments, require an approval of the nature conservation authority (Nature Conservation Act, § 12 Subsection 2). In all these cases the nature

conservation bodies interfere, to a certain extent, in the scope of authority of other administrative bodies, in particular of spatial planning bodies and heritage preservation bodies. Typical example of such a collision may be the situation in the chartered city of Brno, where some historical municipal parks (e.g. Chateau Park Medlánky or Waterworks Park Lesná) were in the 1990's registered as significant landscape elements<sup>32</sup>, which significantly strengthened the influence of the nature conservation authorities in decision-making upon them.

### Conflicts of Public Interests and Consequences Thereof

The effort to restore cultural components of garden architecture monuments often faces resistance from the part of environmentalists, i.e. relevant bodies of public administration (e.g. nature conservation bodies) and non-governmental organisations protecting the interests of the environment protection. On one hand, the resistance is understandable since the protection of the values of the nature is a legitimate public interest and more valuable when the nature in the vicinity is devastated. On the other hand, equally legitimate is the public interest in the protection of cultural values and it must not be neglected that in its beginning the garden architecture monument is a human creation, to the conservation of which an intervention of a man to the nature is necessary.

Furthermore, not only physical preservation is concerned in cultural monuments, but also their usability and accessibility to the public. The issue

25 In § 2 subsection 2 letter g) of the Act on the protection of the nature and landscape, an explicit reference to the zoning procedure is missing; however, it follows from the nature of the issue that the participation of nature protection bodies is significant in this procedure conducted by the Building Act.

26 Act No. 183/2006 Coll., on spatial planning and the rules of building procedure (Building Act), as amended.

27 Act No. 139/2002 Coll., on land consolidations and land registries, and on amendment to Act No. 229/1991 Coll., on proprietary relations to land and other agricultural property, as amended.

28 Pursuant to § 2 of Act No. 100/2001 Coll., on the assessment of environmental impacts and on changes in certain relating acts (Environment Impact Act), as amended, the assessment applies to "impacts on the public health and the environment, including animals and plants, ecosystems, soil, rock formations, water, atmosphere, climate and the landscape, natural resources, tangible property and cultural monuments, determined by special legislature, in their mutual relations and context." For details cf. DVOŘÁK, L. 2005. *Act on the assessment of environmental impacts with Commentary* [in Czech: *Zákon o posuzování vlivů na životní prostředí s komentářem*]. 1<sup>st</sup> edition. Praha: ABF – ARCH Publishers, p. 20.

29 The Nature Conservation Act in § 3 subsection 1b) defines the significant landscape element as "*a valuable part of the landscape as concerns ecology, geomorphology or aesthetics, which creates the typical view of the landscape and contributes to the maintaining of the stability thereof*." Based on this provision, valuable areas of vegetation at settlements, including historic gardens and parks, may create a significant landscape element, established by registration by the Nature Conservation authority pursuant to § 6.

30 The Nature Conservation Act in § 12 subsection 1 defines the landscape character as "*a natural, cultural and historical characteristics of a certain site or area*". Based on this provision, the landscape character is protected from activities that lessen its aesthetic and natural value. Interventions to the landscape character, in particular the placement and permitting of buildings may be performed only with regard to preservation of significant landscape elements, in particular the protected areas, cultural dominants of the landscape, and harmonic relations in the landscape.

31 Such interventions include in particular the placement of buildings, land improvement, changes in land use, wetland drainage, improvement of watercourses and lakes and extraction of minerals.

32 MATUŠKA, P. 2007. *Significant Landscape Elements of the City of Brno* [in Czech: *Významné krajinné prvky města Brna*]. Brno: Odbor životního prostředí Magistrátu města Brna. [Online]. Available at: [https://www.brno.cz/fileadmin/user\\_upload/sprava\\_mesta\\_brna/OZP/krajinne\\_prvky\\_2007.pdf](https://www.brno.cz/fileadmin/user_upload/sprava_mesta_brna/OZP/krajinne_prvky_2007.pdf). [Accessed: 2015. January 26].

of operational safety of cultural monuments is considered as well. Should they be made accessible to the public, cultural monuments must be kept in such conditions so as not to endanger visitors. Discharge of the operational safety aspect may have consequences not only factual and economic (occurrence of damage to property or another harm), but also legal ones (occurrence of civil liability and liability to damages,<sup>33</sup> occurrence of ecological damage and the duty to remedy<sup>34</sup>, or even occurrence of criminal liability<sup>35</sup>).

### Vague Legal Concept – Public Interest

Public interest is a typical example of a vague legal concept. A vague legal concept is considered in circumstances where the legal norm uses a term which it does not define as to the content and which neither other legal norms specify. In the particular case, the content of such a concept is allocated by the respective body by a decision whether the solved situation fulfils the content of the vague legal concept or not.<sup>36</sup> Using vague legal concepts in hypothesis of a legal norm is a method of the legislators to capture various phenomena and actualities of real life, which the legislators cannot precisely foresee at the variability of the reality, and the legislators cannot even unambiguously define those phenomena by the imperfect language without excluding from the scope of the legal regulation certain situations that hypothetically may occur.

In legal literature, public interest is usually defined as “*interest or interests, which could be designated as general, public, or common interests, whose holders are closely unidentified, though roughly determinable circles*

*or associations, so-called the public, or interests in which the interests of the whole society are concerned (society-wide interests)*”.<sup>37</sup> “The public” under the Aarhus Convention<sup>38</sup> means one or more natural or legal persons or their associations, organizations or groups. In connection with public interest, it is obvious that the given public must always be in the position of so-called affected public, disposing with legitimate interest in the sought solution.<sup>39</sup> Public interests are so important for the public, its proper and efficient functioning and existence as such, that the protection and pursuing thereof is entrusted to public administration bodies, which upon rights and duties of individuals in insubordinate position decide authoritatively and regardless what ideas the individuals may have on the contents of the decisions.

As to the issue of determination of public interest, also the Constitutional Court expressed its opinion, stating that declaration of public interest by law for a particular case is unconstitutional. In respect with assessing constitutionality of § 3a of Act No. 114/1995 Coll., on Inland Navigation, as amended, the Constitutional Court stated that “*Public interest in a specific case is determined during the administrative proceeding, on the basis of assessment of various particular interests, while taking in consideration all contradictions and observations. Recital of the decision, the central point of which is the question of existence of public interest, must clearly state why the public interest has prevailed over a series of private, partial interests. Public interest is to be found in the process of decision-making on a particular issue ... and it cannot be a-priori set in that particular issue. For those reasons, determination of public interest in a particular case is typically the competence of executive power, not*

33 § 2894 et seq. of Act No. 89/2012 Coll., Civil Code.

34 Act No. 167/2008 Coll., on the prevention and remedying of environmental damage and on the change of several acts. For details cf. STEJSKAL, V., VÍCHA, O. 2009. *Act on the Prevention and Remedying of Environmental Damage with Commentary, Relating Legislature and Introduction to Ecological-Legal Liability* [in Czech: *Zákon o předcházení ekologické újmy a o její nápravě s komentářem, souvisejícími předpisy a s úvodem do problematiky ekologicko-právní odpovědnosti*]. 1<sup>st</sup> edition. Praha: Leges.

35 Considered in this respect are crimes against life and health, and crimes against property (e.g. harm done to a thing of another pursuant to § 228 of Act No. 40/2009 Coll., Criminal Code) or crimes against the environment. For details cf. e.g. STEJSKAL, V. 2012. Criminal liability as a means of promoting environmental protection in the European context [in Czech: *Trestní odpovědnost jako nástroj prosazování ochrany životního prostředí v evropském kontextu*]. *Acta Universitatis Carolinae – Iuridica*, 3: 45–56. Praha: Nakladatelství Karolinum. STEJSKAL, V. 2002. *Criminal liability in the field of environmental protection* [in Czech: *Trestněprávní odpovědnost na úseku ochrany životního prostředí*]. Praha: Univerzita Karlova v Praze, Právnická fakulta, pp. 19–170. STEJSKAL, V. 2009. The New Czech Criminal Code 2010 [in Czech: *Nový trestní zákon 2010*]. *České právo životního prostředí*, 25: 43–47. Or ZICHA, J., POKORNÁ, L. 2012. New Regulation of the Body of Crime at Environmental Crimes [in Czech: *Nová úprava skutkových podstat trestných činů proti životnímu prostředí*]. *Trestněprávní revue*, 4: 79–104.

36 See e.g. RASCHAUER, B. 2003. *Allgemeines Verwaltungsrecht*, 2<sup>nd</sup> amended edition. Vídeň: SpringerWienNewYork, p. 200 et seq., cf. e.g. PRŮCHA, P. 2007. *Administrative Law. General Part* [in Czech: *Správní právo. Obecná část*]. 7<sup>th</sup> edition. Brno: Masarykova univerzita and Doplněk, p. 55–56.

37 PRŮCHA, P. 1998. Basic Institutes of Administrative Law [in Czech: *Základní pojmy a instituty správního práva*]. Brno: Masarykova univerzita. Or PRŮCHA, P. 2007. *Administrative Law. General Part* [in Czech: *Správní právo. Obecná část*]. 7<sup>th</sup> edition. Brno: Masarykova univerzita and Doplněk, p. 55.

38 Notice of the Ministry of Foreign Affairs No. 124/2004 Coll. of International Treaties On the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

39 For details cf. Art 2 subsections 4 and 5 of Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. [Online]. Available at: <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>. [Accessed: 2015, January 26].

that of legislative power<sup>40</sup>. The Constitutional Court came to a similar conclusion when it decided upon the motion to repeal the Act No. 544/2005 Coll., on the Construction of the Runway for Take-Off and Landing of the Prague-Ruzyně Airport.<sup>41</sup>

Protection of public interest is one of the basic rules of activities of administrative bodies (Rules of Administrative Procedure, § 2 Subsection 4, first sentence). The rule of protection of the public interest and seeking a solution in conformity with the public interest does not mean that the administrative bodies should create and define the public interest as such,<sup>42</sup> but they merely judge whether the particular case be brought within the vague legal concept and therefore if the hypothesis of a legal norm has been fulfilled and the disposition thereof should take place.

As said hereinabove, it does not necessarily have to be a conflict of private interests and public interest, for this conflict is often accompanied by the conflict of various public interests, and, as a rule, it may not be possible for the adopted resolution to be in conformity with all concerned public interests. In the particular case that the administrative bodies solve, they are obliged to defend the public interest, though it is not defined, and in that particular case may be more separate public interests involved which are to be defended, even in the case where these particular public interests are contradictory. If the competent administrative body carries out the subsumption improperly, the decision will be unlawful, since the hypothesis and disposition of the legal norm will not correspond.

The relation of the public interest and the purpose pursued through its realisation is key for the determination and establishment of the public interest.<sup>43</sup> The public interest is sometimes defined by the legislator alone, through the formulation of its purpose. For example, the Building Act<sup>44</sup> enables the limitation or withdrawal of possessory title to lands and buildings, which is required for e.g. establishment of the elements of the landscape system of ecologic stability, or for the protection

of the archaeological heritage (Building Act, § 170 Subsection 1b).

Protection of the cultural and natural heritage is referred to in the Preamble to the Constitution of the Czech Republic and ordinary laws declare existence of public interests in those fields. For example, the Nature Conservation Act in § 58 Subsection 1 provides that “*the protection of the nature and landscape is of the public interest*”. Even though the Heritage Act does not expressly designate the cultural monuments preservation as public interest, the purpose of the Act (Heritage Act, (§ 1 subsection 1) and the enunciation of individual provisions (e.g. § 11 subsection 3, § 14 subsections 3 and 4 of the Heritage Act) prove that the cultural monuments preservation really is in public interest.<sup>45</sup>

### Solution for Conflicts of Public Interests

Seeking a solution in compliance with public interest (Rules of Administrative Procedure, § 2 subsection 4<sup>46</sup>) does not mean seeking of public interest in the sense of an abstract value, but rather a result of “weighing” several varied interests applied in actual conditions, as to the place and time.

Conflict of various partial public interests does not have any general solution; it cannot have any – as follows from the nature of the matter. The nature of vague legal concepts including “public interest” is based on the fact that they should cover various situations that may occur in the real world; there is therefore an infinite number of variants of situations which can be brought within the scope of that term. One cannot say that one public interest should take primacy over another; possible conflict must always be solved with regards to the specific conditions of the case.

A final solution, adopted by a competent administrative body upon execution its power, in a form prescribed by law, should be the result of a professional discussion of concerned bodies of public administration, representing those partial public interests. Therefore, it is up to the particular

40 Judgement of the Constitutional Court of 28. 6. 2005, Pl. ÚS 24/04. Available at: <http://www.usoud.cz>. [Accessed: 2015. January 26].

41 Judgement of the Constitutional Court of 17. 3. 2009, Pl. ÚS 24/08. Available at: <http://www.usoud.cz>. [Accessed: 2015. January 26]. For details cf. VÍCHA, O. 2009. The Constitutional Court of the Czech Republic has Repealed the Act on the Construction of the Runway for Take-Off and Landing of the Prague-Ruzyně Airport due to Contradiction with the Czech Constitutional Order [in Czech: Ústavní soud ČR zrušil zákon o výstavbě vzletové a přistávací dráhy Letiště Ruzyně pro jeho rozpor s ústavním pořádkem ČR]. *České právo životního prostředí*, vol. 9, 26(2): 91–94.

42 VEDRAL, J. 2012. *Rules of Administrative Procedure: Commentary* [in Czech: *Správní řád: komentář*]. 2<sup>nd</sup> edition. Praha: Bova Polygon Praha, 100–102.

43 PETRŮV, H. 2010. Constitutional Law Aspects of Assessing the Existence of Public Interest [in Czech: Ústavně právní aspekty posuzování existence veřejného zájmu]. *Acta Universitatis Carolinae – Iuridica*, 2: 102.

44 Act No. 183/2006 Coll., On Spatial Planning and Building Code (Building Act), as amended.

45 Court case law proves so as well. E.g. the Supreme Administrative Court inferred a public interest in declaring a real estate a cultural heritage object, in judgement of 28. 4. 2004, ref. No. 6 A 106/2002 – 81. Available at: <http://www.nssoud.cz>. [Accessed: 2015. January 26]. Constitutional Court in its judgement of 23. 6. 1994, ref. No. I. ÚS 35/94 stated that “*in public interest* (in the sense of article 11 para. 3 of the Charter of the Fundamental Rights and Freedoms) is undoubtedly the preservation of cultural monuments.” Available at: <http://www.usoud.cz>. [Accessed: 2015. January 26].

46 Act No. 500/2004 Coll., Rules of Administrative Procedure, as amended.



administrative body to harmonise, as far as possible, the partial public interests and decide so that none of the concerned public interests is prioritised to the detriment of the others.

However, the solution of a particular case is always bound by solutions adopted in previous similar cases. This follows from the principle of legal certainty and the rule of predictability (§ 2 subsection 4 *in fine* of the Rules of Administrative Procedure).

### Felling of Woody Species as an Example of Solution for Conflict of Interests

Conflict of public interests from the field of the conservation of monuments and protection of the environment are in particular reflected in the authorisation procedures of renewal of garden architecture monuments, may it be in the form casual maintenance, repairs, reconstructions, restorations or other alterations of the monuments or their surroundings. As an example on which the issue of the solution of public interest conflicts may be demonstrated, is the removing of woody species growing outside forests in historical gardens or parks.<sup>47</sup>

If the owner of an architectural culture monument intends to perform its renewal, maintenance of alteration, pursuant to § 14 subsection 1 of the Heritage Act, he is obliged to request in advance a binding opinion by the state heritage preservation authority. Similar requirements (pursuant to § 14 subsection 2 of the Heritage Act) apply to the owner (administrator, user) of a real estate that is not a listed building, but it is located in a protected historical area or protection zone. In the binding opinion, the state heritage preservation authority (municipal authority with extended powers, or a regional authority) will decide if the works indicated therein are permissible as concerns interests of the state heritage preservation, and will stipulate basic conditions under which the works may be prepared and performed (Heritage Act, § 14 subsection 3).<sup>48</sup>

Where the intention is felling or removing of woody species, the plan must prior to realisation meet the requirements arising from the Nature Conservation Act as well. Pursuant to § 8 subsection

1 of the Act, permission by the nature conservation authority is required for felling woody species, unless stated otherwise by this Act.<sup>49</sup> Permission is not necessary for the felling of woody species due to cultivation (e.g. renovation of the vegetation, thinning out bank vegetation at waterways management) and due to health reasons. Felling for those reasons must be in writing reported at least 15 days in advance to the nature conservation authority, which is entitled to suspend, limit or prohibit the felling if it contradicts the requirements for woody species protection (Nature Conservation Act, § 8 subsection 2). Further, the permission is not required for the felling of woody species of a set size, or by other characteristics, stipulated by Regulation No. 189/2013 Coll., on the protection of woody species and permits of the felling thereof.<sup>50</sup> According to § 8 subsection 4 of the Nature Conservation Act, permission is not required for the felling of woody species, if the conditions thereof apparently and imminently threaten life or health, or if a large-scale damage is to be feared. The one who performs the felling under such conditions is obliged to notify the nature conservation authority within 15 days from the felling.

Therefore, it is apparent that in the case of removing woody species in garden architecture monuments, both the concerned authorities – nature conservation body and heritage preservation body – should proceed in cooperation. In this respect it may be stated that currently it comes to renaissance the cooperation of public administrative bodies and their subordinate organisations, i.e. the Nature Conservation Agency (AOPK) and National Heritage Institute (NPÚ).<sup>51</sup> In the case of conflict of these public interests, where a process acceptable for both bodies of public administration would not be possible, it will be necessary to give preference to the public interest pursued by one of the bodies. In such cases, it is necessary for both authorities to proceed in close cooperation and to thoroughly judge the reasons for the preservation or removal of the woody species. Consequently, based on the assessment and appraisal of the particular situation, the variant is chosen which favours

47 For details see KNOTEK, J. 2006. Procedure at Removing Woody Plants Growing outside the Forest in Heritage Sites [in Czech: Postup při odstraňování dřevin rostoucích mimo les v památkově chráněných územích]. *Správní právo*, XXXIX(1): 1–14.

48 ČÍ, ZÍDEK, M., KLUSOŇ, J. 2005. *Act on the State Heritage Preservation and its Implementing Regulations with Commentary* [in Czech: Zákon o státní památkové péči a jeho prováděcí předpisy s komentářem]. 1<sup>st</sup> issue. Praha: ABF – ARCH Publishers, 39–49.

49 For details cf. DIENSTBIER, F. 2009. The Duty to Care of Trees and Legal Consequences of the Failure to do so [in Czech: Povinnost péče o stromy a právní následky jejího neplnění]. *Zahrada – Park – Krajina*, 1: 28–31.

50 Pursuant to § 3 of Regulation No. 189/2013 Coll., permit for the felling of woody plants (provided that they are not a part of a significant landscape component or alley) is not required for e.g. woody plants with the trunk of a perimeter up to 80 cm measured 130 cm above the ground, for connected-up vegetation where the total area of the felled connected woody plants does not exceed 40 m<sup>2</sup>, or for fruit plants growing on land in a built-up area, registered in the Land Registry as garden, build-up area or yard used as “green area”.

51 PEŠOUT, P. 2011. “Rediscovered” Cooperation in the Protection of the Nature and Heritage Sites [in Czech: „Znovuobjevená“ spolupráce při ochraně přírody a památek]. *Ochrana přírody*, LXVI(4): 7–9.



the protected values, on maintaining of which the public interest in the specific case prevails.

### Specific Legal Instruments for Garden Architecture Cultural Monuments

Now we are getting to the answer to the main question of the research – if legal instruments for the protection of cultural monuments comply with the specific needs of garden architecture monuments preservation.

As the basic element of the garden architecture monuments is vegetation, in particular woody species or stands of trees with their long-term development, long-term reactions to changes in the environment, either intentional or random, and to natural changes, these monuments require regular and consistent maintenance, unlike static of inanimate monuments.

For both types of listed objects (animate and inanimate) it would be appropriate to establish a conceptual instrument or long-term plan to set the desirable conditions and methods to reach it. However, the currently effective Heritage Act does not regulate such a conceptual instrument and even a draft of a new Heritage Act, or subject-matter thereof,<sup>52</sup> does not introduce such a kind of the conceptual instrument. In our opinion, even the plans of the conservation of heritage reservations and protection zones, supplemented to the Heritage Act by Act No. 307/2008 Coll., in order to simplify the performance of the state administration cannot be considered a conceptual instrument either.<sup>53</sup> These plans may be issued by regional authorities after consultations with the Ministry of Culture, spatial planning authority and the respective municipal body as concerned authorities, in the form of a general measure. The plan stipulates the way of securing cultural values of the heritage reservation or zone from the viewpoint of the state heritage preservation. The plans may determine at which real estates, that are not listed as cultural monuments, however located in a heritage reservation or zone, or for which kind or work thereon, including planting and felling of woody species in public spaces, is excluded the duty of the owner (administrator or user) to seek in advance a binding opinion by the state heritage preservation authority (Heritage Act, § 6a Subsection 1).

The Czech legislation already contains analogue conceptual instruments which may be useful in

the sphere of the heritage preservation. Upon preparation of the new Heritage Act, the legislators could get inspiration e.g. in legislature in the field of forest economy. So-called forest management plans as an instrument of the forest owner, are elaborated in accordance to the Forestry Act<sup>54</sup> (Forestry Act, § 24 Subsection 1). Forest management plans contain both binding and recommending provisions. Binding provisions of the plan are the maximum amount of extraction and a minimum share of soil improving and firming woody species upon renewal of the forest. Minimum areal extent of lopping in forests up to 40 years old (Forestry Act, § 24 Subsection 2) is also a binding provision for state-owned and municipality-owned forests. The forest owners are obliged to ensure preparation of the plans and they are obliged to follow the binding provisions thereof. With an approved forest management plan no other approval from professional forest manager is then required for e.g. logging in a forest (Forestry Act, § 33 Subsection 3). Similar legal regulation could be *de lege ferenda* introduced for permitting renewal (maintenance, adjustments or reconstructions) of garden architecture monuments.

The benefit of the conceptual document would be that individual interventions, provided that they would be performed in accordance with the approved conception, would not require any further permits or approvals by relevant bodies of public administration. The approval procedure of conceptual plans on the level of the heritage preservation should be participated by the concerned bodies of the public administration (for example nature conservation authorities, water management authorities, state authorities of the forestry management); however, they would have no powers in relation with partial interventions which correlate with the plan, since, as stated hereinabove, no formal procedure should further take place in respect of partial acts within the care of a protected object.

In conclusion, it should be highlighted that the common objective, which is the preservation of historic gardens or parks as cultural monuments, fulfilling the conditions for natural existence of protected plants and animals, is only possible to be reached through an agreement on the long-term process of the care of the location, in which the both mentioned public interests merge.

52 Resolution of the Government of the Czech Republic of March 6, 2013, No. 156 on the intended subject-matter of the Act on the heritage fund.

53 KUČA, K., KRATOCHVÍLOVÁ, I., KUČOVÁ, V. 2012. *Plans for the Protection of Heritage Reserves and Zones* [in Czech: *Plány ochrany památkových rezervací a památkových zón*]. Metodika NPÚ. Praha: NPÚ.

54 Act No. 289/1995 Coll., on forests and amendment to certain laws (Forestry Act), as amended.

## CONCLUSION

Garden architecture monuments, consisting in historic gardens and parks, are an inseparable part of sites of heritage protected objects. At present, garden architecture monuments are the subject of protection under the Heritage Act, in the same scope as heritage protected objects, in the vicinity of which they were founded, developed and maintained. In addition, historic gardens and parks are often the subject of protection under the Nature Conservation Act. The public interest in the protection of a cultural monument does not always have to be in accordance with the public interest in the protection of segments of the environment that compose the historic garden or park (e.g. protected plants, woody species or surface water). An example, used in this article to demonstrate a possible solution for conflicts of various public interests, is the removal of woody species in historic gardens or parks. It may be difficult for authorities of public administration to issue administrative decisions required for renewal of historic garden or park, which would comply with the Heritage Act and law on the protection of environment (e.g. the Nature Conservation Act, Water Act of Forestry Act) at the same time. The solution of this issue, suggested by the authors, could be the introduction of a conceptual instrument (plan) that would determine the desirable condition and methods of renewal of garden architecture monuments.

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