

## DOUBLE CONFORMITY: IS IT STILL TOO EARLY TO SAY GOODBYE?

Note to Council of State, Section VI, 22 September 2023 no. 8485

The recent ruling of the Sixth Section of the Council of State returns to the principle of double conformity (*principio di doppia conformità*) and therefore to the building permit in amnesty pursuant to article 36 of Presidential Decree 6 June 2001 no. 380.

As is well known, the principle of double conformity - incidentally recognised as a fundamental principle of the our legal system by the Constitutional Court in its judgement 29 May 2013 no. 101 - is an indispensable prerequisite for the issuance of a building permit in amnesty: in order to rectify a building abuse, it is necessary that the intervention complies both with the town planning and building regulations in force at the time of its implementation and with those in force at the time of the submission of the application for amnesty (art. 36 of Presidential Decree 380/2001).

This principle has been the subject, over the years, of careful jurisprudential reflections, which have not always been univocal on the point.

An interpretation (now abandoned<sup>1</sup>) had admitted - even in the absence of the so-called double conformity - the posthumous legitimisation of building works carried out without a permit or not in compliance with the same, provided that they complied with the town-planning and building regulations in force at the time when the Public Administration was called upon to issue the permit for amnesty.

In this respect, the Council of State spoke of "jurisprudential amnesty", an institution which the Plenary Assembly hoped would be codified in the new *Testo Unico dell'Edilizia* of 2001, "*considering it illogical to order the demolition of a quid that, as things stand, complies with the town-planning regulations in force and which, therefore, could legitimately obtain a new permit once demolition has taken place*" (Council of State, General Assembly, Section for Regulatory Acts 29 March 2001 no. 52).

However, in view of the existence of conflicting interpretations, the 2001 legislature preferred not to codify this provision, with the result that the principle of double conformity has considerably increased its importance.

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<sup>1</sup> On this point, see Council of State, Section VI, 17 May 2023 no. 4891, which defines the jurisprudential amnesty as "*an atypical act with measurement effects that is outside any regulatory provision and that, therefore, cannot be considered admissible in our legal system, marked by the principle of legality of administrative action and by the typical nature of the powers exercised by the Administration, in the same way as the principle of nominativity*".

In the case in question, the judges of Palazzo Spada ruled on the annulment or non-annulment of a decision refusing a building permit for amnesty in relation to a building consisting of a ground floor to be used as a gymnasium, a first floor intended in part as the caretaker's dwelling and in part as an office pertaining to the gymnasium, built on a property owned by the applicants.

Firstly, the municipal administration's refusal is justified in light of the inadequacy of the primary urbanisation works at the time the unauthorised building was constructed. In this regard, the Court ruled that *"the presence of the unauthorised road indicated by the appellant should be considered irrelevant, given that it is already the subject of a demolition project by the municipality, which certainly cannot be modified for the need to rectify a building that is itself unauthorised: the road in question cannot therefore be taken into consideration and the appellant has not demonstrated the existence of further suitable infrastructures"* (Council of State, no. 8485/2023, point 17.3.3)<sup>2</sup>.

Therefore, given the absence of the necessary urbanisation works both at the time the abuse was carried out and at the time the application was submitted, posthumous amnesty would not have been possible.

But there is more. In accepting the considerations of the Regional Administrative Court, the judges of Palazzo Spada identified a second obstacle to the attainment of the amnesty: the lack of a serious and detailed project submitted by the applicants and aimed at carrying out the necessary primary urbanisation works. Well, it is indispensable *"that the applicant submit, at the time of the application for the building permit, an executive project of the necessary works, while in this case the appellant has limited itself to producing an outline of an agreement without specifying what works are to be carried out in concrete terms"* (Council of State, no. 8485/2023, point 17.3.4).

Lastly, the judgment in comment confirms the consolidated jurisprudential orientation that sees the procedure for the verification of conformity pursuant to Article 36 of Presidential Decree no. 380/2001 results in a measure of an absolutely binding nature, *"which does not require any other motivation other than that relating to the correspondence (or not) of the unauthorised work to the town-planning and building prescriptions in force both at the time of the realisation of the abuse and at the time of the presentation of the application pursuant to art. 36 of Presidential Decree 380/2001"* (see Council of State, Section VI, sentence 14 March 2023 no. 2660)<sup>3</sup>.

If, for the moment, jurisprudence is in agreement in deeming double conformity an intangible principle of our legal system, recent discussions on the subject of building amnesty, together with the hoped-for reform of the *Testo Unico dell'Edilizia*, are

<sup>2</sup> It should be recalled that *"it is the duty of the party interested in the amnesty of the building abuse to provide evidence of the so-called town-planning double conformity of the work to be amnestied, both with reference to the time when it was carried out and to the time when the relevant amnesty application was submitted, as provided for by article 36, Presidential Decree no. 380/2001"* (see T.A.R. Campania - Salerno, Section II, 17 July 2023 no. 1735).

<sup>3</sup> As clarified by the same Section of the Council of State in judgement 6 April 2023 no. 3549, *"the corollary of this is that the amnesty permit cannot contain any further prescriptions, since otherwise it would postulate, in contrast with art. 36, not the 'double conformity' of the unauthorised works, but a sort of ex post conformity, conditional on the execution of the prescriptions and, therefore, existing neither at the time when the works were carried out nor at the time when the application for amnesty was submitted, but possibly only at the future and uncertain date when the applicant complied with those prescriptions"*.

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progressively bringing the possibility of anchoring the amnesty to the conformity of the work only to the building and town-planning regulations in force, thus progressively making the irrefutability of this principle disappear.

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