ANOTHER CLARIFICATION BY THE PLENARY ASSEMBLY ON THE TESTO UNICO DELL'EDILIZIA

Note to Council of State, Plenary Assembly, 11 October 2023 no. 16

The most recent ruling of the Plenary Assembly, dated 11 October 2023, resolves several doubts and questions concerning the sanctioning and repressive regime of building offences pursuant to Article 31, Presidential Decree 6 June 2001 no. 380 (*Testo Unico dell'Edilizia*, *TUE*).

Specifically, the Judges have better cadenced the phases of the repressive and sanctioning procedure under article 31, setting the deadlines and fulfilments to be carried out by the administrative Authority.

The administrative procedure aimed at the repression, and contextual sanctioning, of building offences is traditionally divided into **four phases**.

Firstly, the Administration is called upon to ascertain the presence of an abuse, verifying the execution of interventions in the absence of a valid title, in total non-conformity with the same, or with essential variations; if the inspection carried out by municipal technicians or municipal police officers reveals the non-conformity, the preliminary investigation concludes with an order enjoining the owner and the person responsible for the abuse to remove or demolish the building (**first phase**).

As the Plenary Assembly itself teaches in its judgement 17 October 2017 no. 9, such order must also be addressed to the blameless owner; for this purpose, it does not matter whether or not it is the person responsible for the abuse and whether or not it acquired ownership only at a time subsequent to the commission of the abuse.

In fact, the owner **(i)** has the availability of the property, **(ii)** may oppose the abuse, even through the courts, and **(iii)** may take action himself for its removal.

In other words, the abuse *follows* the property and the demolition order must unequivocally be addressed also to the owner, regardless of any kind of liability.

If the responsible for the abuse or the owner fails to demolish and restore the state of the places, within the term of ninety days from the notification of the demolition order, the **second phase** provides for the acquisition *ex lege* of the unauthorised property by the Municipality and the imposition, as established by paragraph 4-*bis*, of an administrative pecuniary sanction of an amount between Euro 2,000 and Euro 20,000.00.

Regarding the nature of said sanction – introduced by Law 11 November 2014 no. 164 – the contrast that arose within Section VI of the Council of State was evident: **(a)** one orientation – supported by Council of State, Sec. VI, 9 August 2022 no. 7023 – held that the sanction set forth in paragraph 4-*bis* punished the failure to restore the premises and the consequent permanence of the abuse, therefore to be considered applicable also to the abuses carried out before the entry into force of the legislation and remaining even afterwards, since they are considered as

permanent offences; **(b)** a second line of jurisprudence – referred to by Council of State, Sec. VI, 25 July 2022 no. 6519 – maintained that Article 31, paragraph 4-*bis* punished specific omissive conduct, consisting in failing to comply with an order of the Administration (in this case, the order of demolition and restoration).

Adhering to the orientation referred to in point (b), the Plenary Assembly states that *"the failure to comply with the demolition order within the time limit set by it entails the persistence of a* contra ius *situation and constitutes an administrative omissive offence* propter rem*, distinct from the previous first offence – also having criminal relevance – committed with the execution of the unauthorised works"* (Plenary Assembly, no. 16/2023, cit.).

From this it follows the applicability of the principle of non-retroactivity and, therefore, the impossibility of imposing the pecuniary sanction against those who – before the entry into force of Law no. 164/2019 – have already unnecessarily made the ninety-day period run and have been found to be non-compliant with the demolition order, even if such non-compliance was ascertained after its entry into force.

The **third phase** is triggered by the notification of the finding of non-compliance to the interested party, which is followed by the issuance of the deed of acquisition of the property to the municipal heritage and the transcription in the land registers, certifying once and for all the transfer of ownership of the property. This is a fulfilment *"that must be carried out promptly, represents an indispensable act in order to make public in relations with third parties the transfer of the right of ownership and consolidate its effects, so that [...] it must be considered as an element of individual performance evaluation, as well as of disciplinary and administrative-accounting responsibility of the manager and the defaulting official"* (Ad. Plen., no. 16/2023, cit.).

Finally, the asset – which has now become part of the municipal property – is definitively demolished by the Administration (at the expense of the person responsible for the abuse) or, exceptionally (see Constitutional Court, 27 July 2018 no. 140), the Municipal Council may decide to maintain it in the presence of justified public interests and in the absence of contrasts with significant urban, environmental or hydrogeological interests (**fourth phase**).

Although, with the ruling in question, the Supreme Council has ensured a better and correct interpretation of the provisions of the TUE, it is easy to see how this is yet another intervention by the administrative judge aimed at resolving jurisprudential contrasts and making up for the evident shortcomings of the current *Testo Unico*. In this way, operators, including public officials, are only partially facilitated, and are increasingly called upon to apply regulatory provisions that are the subject of continuous and disorganised regulatory changes.

We therefore await the hoped reform of the *Testo Unico dell'Edilizia* that, as already happened in the case of the new Procurement Code, can take into account the recent case law orientations.

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