

SCIA IN AMNESTY, THE SILENCE IS INSUFFICIENT TO LEGITIMISE THE VIOLATION. THE SPECIAL POSITION OF THE MUNICIPALITY OF ROME

Regarding SCIA in amnesty, in the absence of a clear regulatory determination and in case of silence of the administration, conflicting jurisprudential orientations have developed. In fact, all possible interpretations have been supported: the qualified silence, sometimes as denial, sometimes as consent, and silence as non-execution. In this intricate panorama, it is particularly useful to point out the very latest landing place of the apical administrative jurisprudence to market operators.

The prevailing case law

Specifically, there are the two rulings of the Council of State, the sentence of 4 January 2023 n. 160 and the sentence of 20 February 2023 n. 1708. Therein, the administrative judges adopt the orientation which considers the silence of the administration to be a mere non-execution of its duty. The immediate consequence of this interpretation is that the useless passage of time for the issuance of inhibiting measures *is not considered sufficient for the definitive formation of the qualifying right in amnesty*. In fact, it is argued that *"in the specific case of the amnesty referred to in art. 37 of the Presidential Decree n. 380/2001, the hypothesis of significant silence in terms of consent is not conceivable, since the art. 37 does not explicitly provide for a hypothesis of silent consent, but rather it determines that the procedure ends with an express provision, with application and related quantification of the pecuniary sanction by the procedure responsible"* (Council of State 160/2023). Furthermore, in addition to the literal argument, the judges explain that this solution *"appears to be more compliant with the ratio of the amnesty of illegal work already carried out, which require an expressed evaluation by the administration on the existence of double conformity, compared to the regime of work still to be erected which the ordinary regulations of the S.C.I.A. apply to, as a method of simplifying the building permit regime"* (Council of State 1708/2023). It is also stated, to be thorough, that the recipient of a demolition order does not have any burden of appeal, being determined by the request a temporary ineffectiveness of the aforementioned order, until the adoption of a provision by the administration (*ibidem*).

The analysis of the violations contested in the concrete cases is also interesting. The first ruling involves: expansions and closures of spaces with some increases in surface area and volume, different distribution of spaces without alterations of useful surfaces and volumes and subdivisions with a presumed increase in the settlement load. In the second: balconies and openings on the weight-bearing structure, with the administration contesting the risks to the stability of the building. However, in previous rulings it emerges that this interpretative orientation has been assumed even when the building violations consist of modest internal and external work on the property (T.A.R. Campania-Napoli 1457/2018), accessory work with an absolutely limited extension (T.A.R. Campania-Napoli 2231/2017) and work of very modest size, without volume, incapable of causing the shape of the building to be

altered, without independent use as compared to the main building, to which it is ancillary (T.A.R. Calabria-Catanzaro 789/2015). Therefore, it emerges that – in support of the general terms in which the recently endorsed orientation is expressed – the need for an administration measure is not linked to a specific type of work nor to the incisiveness thereof.

The opposite theories

Quite the opposite, other jurisprudential orientations oppose the interpretation hereby, since other interpretative indications are identified. In fact, in the absence of a clear regulatory provision, on one hand, the SCIA in amnesty is assimilated to the permit in amnesty pursuant to art. 36 of the same Presidential Decree 380/2001, which qualifies the silence as a denial of the request; on the other, assimilating it to the ordinary SCIA and the related regime referred to in the art. 19 of the law 241/1990, is considered as silent consent. To confirm the last of the guidelines cited, the legislative decree 222/2016 would also help, because it expressly relates the SCIA in amnesty pursuant to art. 37 Presidential Decree 380/2001 among the interventions subject to the administrative regime of the SCIA pursuant to art. 19 of the law. 241/1990.

Conclusions

However, the orientation adopted by the rulings presented herein is prevailing; although there are still strong signs in practice in favour of the thesis that the SCIA in amnesty is subject to the same regime as the ordinary SCIA. In fact, the opinion of the Urban Planning and Implementation Department of the Municipality of Rome of 14 November 2023, register QI/2023/0200290, concludes: *"the issuing of an expressed provision by the Administration is not required, nor, even less, in the event of inaction, can there be a refusal or rejection of the private party's request"*.

The Firm will carefully follow the next developments, remaining available for any need.

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