

NEWS ON THE MATTER OF USE AND OCCUPANCY: COMPLIANCE AS A (REAL) REQUIREMENT

In two recent rulings, the Council of State case law has led to some peculiarities – which are suggestive of further developments – concerning the requirements of the use and occupancy certificate. Indeed, in the sentences no. 180 of 2023 and no. 2461 of 2023, the judges designate building and urban planning compliance as a prerequisite for use and occupancy. In order to fully understand the peculiarity of this interpretative step, a prior overview of the consolidated jurisprudence on the topic is necessary.

A consolidated distinction

The Council of State has consistently stated that the use and occupancy certificate is exclusively aimed at protecting the hygiene, healthiness, and safety of the building, and is not also aimed at guaranteeing the building and urban planning compliance. Consequently, full compliance cannot be derived from an incidental assessment carried out when issuing the use and occupancy of the building (lastly, Council of State, Sec. VI, 11th of April 2023 no. 3650). This assumption is based on a consolidated principle, according to which there is a clear distinction between use and occupancy on one side and compliance on the other side. Council of State, Sec. VI, 10th of May 2021 no. 3666, affirms, *ex multis*, that "the building permit and the use and occupancy certificate are linked to different conditions, which do not overlap, as far as the use and occupancy certificate has the function of ascertaining that the property has been built according to the technical standards in force regarding safety, healthiness, hygiene, energy saving of buildings and systems, while the building permit is aimed at ascertaining compliance with building and urban planning regulations". Therefore, there are various rulings which clarify that, on the basis of these assumptions, the incidental assessment carried out at the time of issuing the occupancy permit cannot guarantee building and urban planning compliance, being the latter substantially different and distinct from the first (Council of State, Sec. III, 28th of June 2019 no. 4457).

A further step

However, it follows from this case-law that - from an inverted perspective - a conformity assessment is preliminary to the assessment of the use and occupancy of a building. The mentioned rulings make this connection explicit, stating that "the non-conformity of the premises for the urban and building aspect translates into their unusability also on the commercial side" (Council of State, Sec. VII, 8th March 2023 no. 2461). Therefore, "it is not legitimately possible to issue a use and occupancy certificate without compliance with the regulatory parameters of urban and/or building planning", to such an extent that "the lack of a building permit indicates the illegitimacy of the use and occupancy certificate" (Council of State, Sec. VII, 5th January 2023 n. 180). This bond had already been made explicit previously, stating that "the request for the use and occupancy certificate necessarily presupposes the conformity of the works carried out with the building permit and in the consequence the issuance of the mentioned certificate must be denied in the case of unauthorized work or work that is not compliant with the

building permit released" (Council of State, Sec. II, 22th March 2021 no. 2451; see also Council of State, Sec. II, 17th May 2021 no. 3836).

Conclusions

The specificity that we want to highlight here is the general statement that building and urban planning compliance represents an essential requirement for use and occupancy, even if the latter is aimed at certifying the existence of different specific qualities. Consequently, the following question arises: on the basis of what has been explained so far, can we state that, by creating discrepancies or unpermitted constructions, these would undermine the already certified usability of the property? Although this statement may appear disproportionate, it would seem difficult to coordinate a negative response with the interpretation finally adopted by the judges.

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

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