

THE BUILDING PERMIT IN DEROGATION: NATURE AND CHARACTERISTICS OF THE INSTITUTION

Article 14 of the *Testo Unico dell'Edilizia* (Presidential Decree 6 June 2001 no. 380) regulates the building permit in derogation; it is an institution that allows municipal Administrations to authorise, in particular situations, land transformation works in derogation of town planning instruments.

The legislator, taking into account the peculiarities of the building permit in question, has provided for its application only in certain cases, precisely delimiting the scope of its operation in order to avoid that a careless use would in practice become a surreptitious circumvention of town planning.

Specifically, the power to derogate from town planning can only be exercised to pursue public interests, such as the construction of public buildings and facilities or those in the public interest (paragraph 1) or, in the case of building renovations, for the purposes of urban regeneration, the containment of soil consumption and the social and urban recovery of the settlement (paragraph 1-*bis*).

The exceptions may concern the limits of building density, height and distance between buildings as set forth in the implementation rules of the general and executive town planning instruments, without prejudice to compliance with health and safety regulations.

As the Council of State has pointed out (*ex multis*, see Council of State, Sec. IV, 28 January 2022 no. 616), the building permit in derogation is an institution of an **exceptional** nature with respect to the ordinary building permit, and represents the expression of a widely **discretionary** power that takes the form of a decision of a town planning nature.

For this reason, it is quite clear that **the issue of the permit in derogation is not a compulsory act**, which the Administration is necessarily obliged to perform once the existence of the legal requirements has been ascertained; these requirements constitute **the minimum necessary, but not sufficient** conditions for the eligibility of the intervention, since the Administration retains a broad discretionary power as to the *an* and the *quomodo* of the possible consent (see T.A.R. Sicilia - Palermo, Section II, 3 November 2022 no. 3096).

In other words, the Municipality is not obliged to accept any request for building in derogation submitted by private parties for the sole fact that it allows the construction of buildings in the public interest, the rationalisation of the existing building stock, with disused buildings or buildings in the process of being decommissioned, or the redevelopment of degraded urban areas.

Precisely by virtue of the exceptional nature and discretionality that distinguish the building permit in derogation, the Administrative Judge considers that the rule of silence-assent, provided for the procedure for the issuance of the building permit

by article 20, paragraph 8, of Presidential Decree no. 380/2001, is not applicable *"given the need for a full assessment of the public interests involved in the town planning"* (T.A.R. Campania-Napoli, Sec. II, 11 October 2021 no. 6376; T.A.R. Campania-Napoli, Sec. VII, 28 October 2019 no. 5107; Council of State, Sec. IV, 26 July 2017 no. 3680; T.A.R. Abruzzo-Pescara, Sec. I, 11 December 2017 no. 352).

Not to mention that a tacit consent could never be obtained in the presence of a request for a building permit in derogation to the town planning regulations, since in such a case the municipal Administration is required to assess, with the utmost discretion, the existence of the conditions of public interest for the introduction of specific exceptions to the town planning regulations in force and to the intended uses imposed and permitted by the same in the general town planning regulations.

The building permit in derogation of art. 14 of Presidential Decree 380/2001 is characterised by **a case of progressive formation** that unfolds, following the application of the interested party, in two distinct phases.

First of all, the Municipal Council is called upon to express its opinion on the application submitted by the private, comparing the latter's interest with the public interest; this is the so-called *"discretionary moment"* of the procedure for the granting of a building permit in derogation, since it is precisely here that the verification takes place as to whether or not it is appropriate to grant the derogation, through an adequate comparison of the underlying public interests and those underlying the rules to be derogated.

Although the Administration's choice falls within the scope of the so-called *"administrative merit"* – as is well known, subtracted from the review of the Administrative Judge, except in cases of manifest unreasonableness or contradiction –, this does not detract from the fact that the council resolution must be **adequately motivated**, highlighting in a precise and rigorous manner the pre-eminence of the collective interest with respect to the applicability of the derogated rules (most recently, see T.A.R. Lazio – Rome, Sec. II, 24 June 2020 no. 7058, which deemed illegitimate a building permit in derogation not accompanied by adequate motivation to support the exercise of the exceptional power conferred by law).

At a later stage, it will be up to the technical Office to adopt the final measure, on the basis of the indications provided by the Council body.

Therefore, the preliminary resolution of the Municipal Council – although constituting a necessary element of the administrative procedure leading to the issuance or denial of the building permit in derogation – *"is configured as an internal act of the procedure, not immediately detrimental, which can be challenged together with the acts of the same nature merged in the procedure itself, only jointly with the final act, once issued"* (T.A.R. Campania-Napoli, Section VIII, 23 July 2014 no. 4110).

Finally, it should be noted that since with the issuance of a building permit in derogation, the local Authority performs town planning functions, art. 14, paragraph 2, of the *Testo Unico* requires the necessary involvement of the interested parties pursuant to art. 7 of Law 7 August 1990 n. 241, to whom the technical office must send the **communication of the start of proceedings**, provided that they are identified or easily identifiable, even with the help of the applicant.

The purpose of this communication is to allow participation in the procedure by the subjects that may be affected by the building intervention in order to enable them to exercise their rights under Article 10 of Law 241/1990.

The private party will thus be able to contribute useful information and elements for the preliminary investigation, guaranteeing the Municipal Council a better and more conscious weighing of interests, in harmony with the constitutional principles of good progress and impartiality of administrative action pursuant to art. 97 of the Constitution, and representing its own interests in the proceedings, thus anticipating the cross-examination during this phase also with a deflationary view (T.A.R. Lazio-Roma, Sec. II quater, 4 July 2022 no. 9089).

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