THE BUILDING AMNESTY IN CONSTRAINED AREAS

A recent ruling by the Council of State returns to the subject of building amnesties and, specifically, the type of building abuses which, in areas subject to constraints, may be the subject of the extraordinary amnesty under decree-law 30 September 2003 no. 269, converted with amendments by law 24 November 2003 no. 326 (the so-called "third building amnesty").

The case

In an area subject to landscape constraints, the plaintiff had carried out an unauthorised work, consisting in an extension of a pre-existing building intended for residential use (i.e. a veranda) with the construction of additional cubic capacity.

In the light of the extraordinary amnesty procedure introduced by article 32 of decree-law no. 269/2003, in order to regularise its position, the interested party proceeded to submit an application for building amnesty, which was subsequently rejected by the Terracina (LT) Municipality.

The Regional Administrative Court of Lazio-Latina, called upon to rule on the legitimacy of the contested measure, rejected the appeal, stating that the enlargement of a veranda with an increase in cubic capacity constitutes an increase in volume that is not remediable if committed in an area subject to landscape constraints.

The solution of Palazzo Spada

Section VI of the Council of State – in its judgement 29 February 2024 no. 1983 – confirmed the non-amnesty of the intervention at issue.

According to the Court, *"the construction of new volumes in areas subject to constraints, regardless of the date of imposition of the constraint and the nature of the absolute or relative non-building constraint, is outside the scope of application of the regulations dictated by the third building amnesty, as set forth in Law no. 326 of 2003 and Lazio Regional Law no. 12 of 2004, and as constantly applied by administrative jurisprudence"* (Council of State, no. 1983/2024, cit.).

According to the Administrative law Judge, the date on which the restriction was imposed is of no importance, given that under Article 3 of regional law 8 November 2004 no. 12 – which is more restrictive than the national law – *"it is irrelevant that the restriction was imposed after the illegal works were carried out, since such works, in relation to certain types of works such as the one in question, are in any case considered not amenable to amnesty even if they were carried out before the restrictions were imposed"* (Council of State, no. 1983/2024, cit.).

Once again, this confirms the well-established jurisprudence according to which only so-called minor works, *i.e.* those of restoration, conservative renovation and extraordinary maintenance, may be amnestied in a restricted area; on the other hand, all so-called major abuses which, like the one in question, entailed the construction of new surface areas and new volumes, cannot be amnestied under any circumstances, regardless of their compliance with town planning regulations (cf. Council of State, Section VI, 2 November 2022 no. 9504).

This distinction also appears to be in line with the ruling of the Constitutional Court which, in its judgment 28 June 2004 no. 196, circumscribed the applicability of the so-called third amnesty only to minor abuses, and with the orientation of the constant criminal jurisprudence (ex multis, Court of Cassation, Section III, 27 November 2020 no. 673).

In the light of what was recently expressed by the above-mentioned judgement, for the sake of completeness, it is also necessary to recall that – in the wake of what has been ruled in relation to the repression of building abuses – the decisions on the curability of unauthorised works are the expression of a binding activity due by the Public Administration; consequently, the application for amnesty, whether positive or negative, cannot be vitiated by excess of power due to inconsistency or unequal treatment (defects inherent in discretionary acts) and the failure to communicate the reasons for the refusal pursuant to article 10-*bis* of law 7 August 1990 no. 241 is considered irrelevant (see T.A.R. – Palermo, Sec. II, 24 October 2022 no. 2973).

Conclusions

While the jurisprudence formed within the Sixth Section of the Council of State on building amnesties is unequivocally consolidated, and the application practice of municipal Administrations is homogeneous (without prejudice to due distinctions based on regional regulations), the real problem is undoubtedly that of the disposal of the backlog of building amnesties.

Throughout the country there are still thousands of pending applications; this – as claimed by several parties – slows down, for instance, the implementation of the Land Registry reform and raises several questions about the coveted new building amnesty that, however, while still a proposal, should have an even more limited scope than the 2003 one and will not allow the regularisation of significant and serious abuses.

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