

PLENARY ASSEMBLY ON INCOMPLETE WORKS: WHEN WHAT HAS BEEN BUILT CANNOT BE SAVED

The Council of State, in its maximum composition, integrates the Building Consolidated Act (TUE) with a new important interpretative piece, ruling on works carried out by virtue of a building permit, that subsequently expired, and were consequently left incomplete. The Plenary Meeting, with the sentence of 30 July 2024 no. 14, clarifies **(i)** the legal qualification and **(ii)** the consequent sanctioning regime applicable in such cases, not explicitly contemplated by the TUE.

The case

The Second Section of the Council of State submitted, through the non-final ruling of 7 March 2024 no. 2228, the following question to the Plenary Assembly: *"which is the legal discipline applicable to works partially carried out by virtue of a building permit, that has expired, and that have not been the subject of completion intervention by virtue of a new building permit"*.

The matter arises from a complex and articulated case, concerning the missed completion of the construction of an underground garage. Specifically, the works had been suspended shortly after being started due to a criminal proceeding that had essentially concerned the issuing of the building permit, deemed illegitimate for the violation of the territorial urban planning plan, general regulatory plan, municipal urban planning plan and the municipal implementing regulation for the construction of parking garages. The Administration, without annulling the mentioned permit, proceeded to declare its expiration due to missed completion of the works, emphasizing that the works had been approved in conflict with the urban planning and landscape regulations. Furthermore, the Municipality rejected all the different projects that were presented for the completion works as they concerned an area where only public building interventions were permitted. It was therefore ordered *"the restoration of the state of the places as it was prior to the execution of the works partially carried out by virtue of the building permit"*, which was followed by another ordinance for the acquisition of the entire parcel to the municipal heritage.

The pivotal issue that this dispute highlights is the following: is it correct to apply the sanctioning system strictly envisaged for works carried out in the absence of a building permit to cases not expressly contemplated, that is to works started following the issuance of a building permit by the Administration, even if not completed due to expiration of the title? The referring Section, in other words, questioned the possibility, in light of the current legislation, for the Administration to order the demolition of partially executed works, not completed due to the lack of a new title, considering the partially completed works to be qualifiable as a non-compliant artifact with the approved one. According to the Second Section, the demolition *"could come into conflict with the previously mentioned case law"*.

The reasoning of the Plenary Assembly

The Plenary Assembly does not consider the thesis according to which the controversial works could not be considered abusive and, therefore, susceptible to an order of demolition and restoration in pristine condition. The starting point of the judges' reasoning is that *"the construction must take place in strict compliance with the principle of conformity between the work resulting from the project approved in the building permit and the one actually built"*. Hence, the non-conformity does not occur exclusively in the case of unauthorized extensions, but also in the event of a final construction which is *in minus* compared to what was approved, being in the same way an *aliud pro alio*.

«In cases of 'divergence between what is permitted and what is built', the 'unfinished architecture' is included, which can be identified when the works built are structurally and functionally incomplete, so much so it identifies a different artifact from the one authorized, or when there has been a modification of the status of the locations with the creation of something that does not even allow a 'volume' to be noticed».

As confirmation of what has been reported, the Assembly retraces the definition that the consolidated administrative jurisprudence gives to the term "construction", identifiable whenever *"the building intervention produces an effective and significant impact on the territory and, therefore, in relation to the works of any kind with which one operates in the soil and on the soil, if suitable for modifying the state of the places causing a significant transformation"* (Council of State, Section VI, 3 April 2024 no. 3031). Therefore, even the case in question – where the interventions consisted of earth excavations, complete drilling of foundation piles including the pouring of concrete mix, excavation of the plant system of the land, even if consisting of "preparatory" works – falls within the definition cited.

The principle of law

The Plenary Assembly, after having briefly recalled the relevant legislation and case law, clarified that if, before the expiry of the building permit, unfinished works have been carried out, it is necessary to distinguish whether the mentioned incomplete works are autonomous and functional or not:

- *"in the case of constructions without the mentioned requirements of autonomy and functionality, the Municipality must **order their demolition and restoration to the original status pursuant to art. 31 of Presidential Decree no. 380/2001** (i.e., writers' emphasis), as they were carried out in total non-compliance with the building permit;*

- *if the building permit has provided for the construction of a plurality of functionally autonomous buildings (for example, villas) that comply with the building permit by considering it as fractional, the properties - without prejudice to the necessity of verifying whether the urbanization works have been carried out and without prejudice to the necessity for them to be carried out in any case - must be considered based on a suitable permit, even if the buildings are not totally completed, but - as they are characterized by all the constituent and essential elements - only require minor works that do not require the issue of a new building permit;*

- *however, if the incomplete, but functionally autonomous works show non-con-*

formities that cannot be classified as serious, the Administration may adopt the sanction provided for by art. 34 of the Building Consolidated Act;

- the interested party is entitled, where all the conditions subsist, to obtain a title that allows the conservation of the existing construction and the request for the verification of conformity pursuant to art. 36 of the Building Consolidated Law in the case of "minor" works (in terms of perimeter, volumes, heights) compared to those approved, in order to provide the building - functional and usable in itself - with a suitable title, in terms of its urban planning regularity".

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