

RESIDENTIAL BUILDING CONSTRUCTED IN THE COURTYARD OF VIA FAUCHÈ: THE COUNCIL OF STATE CONFIRMS THAT IT QUALIFIES AS NEW CONSTRUCTION RATHER THAN AS A RENOVATION

Factual Background

The dispute originates from the appeal lodged against the judgment issued by the Regional Administrative Court for Lombardy – Milan. The Court had annulled the measure by virtue of which the Municipality of Milan certified the building and planning compliance of a demolition and reconstruction project entailing a change of use from industrial to residential. Namely, the project concerned a building located in Milan, Via Fauchè. The plot involved in the project consisted of an inner courtyard with access to the public street, shared with an adjoining super-condominium.

In 2018, the construction company had filed with the Municipality of Milan an initial SCIA (certified notice of commencement of works), subsequently followed, in 2022, by a further SCIA as an alternative to the building permit, filed pursuant to Article 23 of Presidential Decree No. 380/2001, for the demolition and reconstruction of the building concerned.

The pre-existing building, dating back to 1910, consisted of two building wings and was intended as a workshop. The project envisaged, in its place, the construction of a two-storey residential building above ground, with a height equal to 7.6 metres, including a basement level with underground garages.

In 2023, an application was submitted to the Municipality of Milan by certain condominium owners and by the Administrator of the adjoining super-condominium, requesting the exercise by the Municipality of its supervisory and enforcement powers with a view to the suspension of the ongoing works. Faced with the Municipality's failure to respond to such request, the same parties brought an action before the Regional Administrative Court for Lombardy.

Pending the conclusion of said proceedings, the municipal administration subsequently adopted an express measure certifying the building and planning compliance of the works in question. That measure was therefore challenged by the complainants through additional grounds of complaint within the same proceedings.

The First-Instance Judgment and the Appeals

In 2024, the Regional Administrative Tribunal upheld the application for the annulment of the municipal measure. It was stated that that the planned building would have a gross floor area and a height exceeding those of the pre-existing structure—excluding the unlawful portions, namely the canteen, which had been constructed without a valid permit. Consequently, the Court held that the developer should have obtained a building permit, given the absence of the "continuity" between the demolished and the reconstructed building.

In 2025, the Municipality of Milan lodged an appeal against that judgment. It first contended that the calculation of the floor area and height of the building to be demolished should have included the canteen, since - notwithstanding the absence of the original construction records - unequivocal evidence confirmed its lawful existence. The Municipality further argued that the planned building was lower (7.30 metres) than the one demolished. Lastly, it maintained that the project presented elements of “continuity” with the pre-existing building and that it resulted in a reduction—or at least not an increase—of the demand for urban facilities and services.

The construction company filed an incidental appeal against the same judgment, challenging the T.A.R. classification of the works as “new construction”. It argued that the works covered by the SCIA alternative to the building permit fell within the concept of “renovation through demolition and reconstruction”, a category that inherently entails a mitigation of the strict requirement of “continuity” with the previous building.

The same judgment was likewise appealed, through separate filings, by the company managing the super-condominium and by two individual condominium owners. The latter emphasised, among other grounds of appeal, that several portions of the pre-existing building lacked any valid building permit and that such volumes were not intended for the permanent presence of people; therefore, they could not lawfully be converted to residential use. They further alleged that the construction works constituted unlawful subdivision of land (*lottizzazione abusiva*), resulting in a breach of the applicable urban development plan due to the absence of the building permit and the lack of a detailed plan.

It should also be noted that the matter under dispute had been the subject of investigation by the Milan Public Prosecutor’s Office, which issued a notice of completion of the preliminary investigations. The Public Prosecutor found that the offence of unauthorised building works had been committed on grounds similar to those upheld by the Regional Administrative Tribunal and therefore ordered that the case be brought to trial.

The Decision of the Council of State

The Council first examined the issue concerning the classification of the works as “new construction” rather than as “renovation”, and the implications regarding the identification of the appropriate building permit required to authorise said works.

After reviewing the legislative developments that, most recently in 2022, led to the current version of Article 3 of the Consolidated Building Act (*Testo Unico dell’Edilizia*), which defines the different categories of renovation works, the Council of State identified three types of renovation that may result in a building that is wholly or partly different from the previous one.

The first is “conservative renovation”, which does not entail the demolition of the existing structure and may nonetheless involve significant modifications, including, as a rule, the addition of new volumes or alterations to the building’s shape. The second is “reconstructive renovation”, characterised by the demolition and reconstruction of a building. Lastly, there is “demolition-reconstruction”

(demoricostruzione), which consists in restoring a building that has collapsed or been demolished.

Article 23 of the Consolidated Building Act – to which reference is also made by Lombardy Regional Law No. 12 of 11 March 2005 (Law on Territorial Governance) – allows the execution, by means of a SCIA filed as an alternative to a building permit, of “renovation works referred to in Article 10(1)(c)”, which, in turn, encompasses the most significant forms of building renovation. Such building permit constitutes a chargeable building authorisation, entailing the obligation to pay a construction cost pursuant to Article 16 of the Consolidated Building Act, calculated on the basis of both the site development charges and the construction cost, and requiring not to start the works until thirty days have passed from the filing of the SCIA.

Works exceeding the scope of that notion qualify as “new constructions”, which are subject to the prior issuance of a building permit issued by the Public Administration or, alternatively, to the formation of tacit consent, after sixty days from the filing of the application, pursuant to Article 20(8) of the Consolidated Building Act (unless the site is subject to hydrogeological, environmental, landscape or cultural constraints).

It is worth noting that the private party nevertheless retains the right to apply for a building permit even for works that would otherwise be subject to SCIA. The Council of State further highlighted the legal consequences deriving from the classification of a project as “renovation” rather than “new construction”.

Indeed, in the case of “demolition-reconstruction”, the owner may use the same building volume as the demolished on. In the case of “new construction”, the owner may only utilise the remaining building volume deriving from the plot. Furthermore, “reconstruction” is permitted within the limits of the lawfully pre-existing distances, while “new buildings” must comply with the distances between buildings prescribed by Article 9 of Ministerial Decree No. 1444 of 1968.

Having established these general legal coordinates, the Council of State observed that the legislative evolution of Article 3(1)(d) of the Consolidated Building Act has been characterised by a progressive departure from the original requirement of identical reconstruction.

Indeed, both in administrative and criminal case-law, a consolidated interpretative approach has emerged, according to which the existence of a “continuity link” between the pre-existing building and the one resulting from the works constitutes an essential requirement of “reconstructive renovation”. The absence of such a link entails the reclassification of the building activity as “new construction”.

The Council of State provided a detailed explanation of the substance of the “continuity” requirement.

In particular, the Council noted that, under a proper reading of the law, demolition cannot create a so-called “volume credit” that the owner may use while still claiming the work is a “renovation.” The project must instead meet the limits and conditions set out in Article 3(1)(d) of the Consolidated Building Act, which define

the boundaries of any claim of “continuity.”

First, the Council clarified that, based on a literal interpretation of said provision, an intervention may lawfully qualify as “reconstructive renovation” only if it concerns a single building. In other words, the aggregation of volumes previously pertaining to distinct structures, as well as the subdivision of an original volume into multiple newly constructed buildings, is precluded.

The Council further observed that an element contributing to the characterisation of works as building renovation is the simultaneity between demolition and reconstruction, resulting in a single and unified intervention, authorised and executed under one and the same building permit.

Finally, it emphasised the importance of the compliance with the “pre-existing consistency” of the demolished or collapsed building. The new structure must respect the volumetry of the building that no longer exists. Indeed, Article 3(1)(d) of the Consolidated Building Act expressly provides that the volume of the reconstructed building may not exceed that of the demolished one, since any volumetric increase is admissible “only in cases expressly provided for by the applicable legislation or by municipal planning instruments.”

In this respect, the Council clarified that, where the building still exists when the application for a building permit or a SCIA is filed—the consistency of the structure can be verified by the administration during the preliminary investigation aimed at the issuance of said permit or during the exercise of its supervisory and enforcement powers under Article 19(3) of Law No. 241 of 1990. Conversely, where the works concern a building that no longer exists, the private party shall prove its “pre-existing consistency” through objective evidence, such as the original construction records or the building permits issued in relation to the previous structure.

To sum up, the Council explained that the common denominator of the concept of building renovation developed over the years lies in the requirement that the intervention must remain “neutral” in terms of its territorial impact. Such a condition is consistent with the conservative rationale of the institution, codified in Article 3 of the Consolidated Building Act, which is to ensure the recovery of existing building stock and to limit land consumption.

In light of these interpretative principles, the Council of State classified the works at issue in the present case as “new construction”, thereby requiring a building permit.

First, the Council noted the absence of simultaneity between the demolition and reconstruction phases, since the pre-existing building had been demolished in 2018, whereas the SCIA was filed only in 2022.

Furthermore, given that the project was presented as a demolition and reconstruction, the pre-existing volume and footprint of the demolished building should have been demonstrated by means of objective evidence, which was neither produced during the administrative procedure nor subsequently in the judicial proceedings.

Lastly, it was established that the works carried out involved the aggregation

of volumes that were previously distinct. Specifically, the volume of the main warehouse was combined with that of a small storage building, which was an entirely separate structure endowed with its own volume. The Council clarified that aggregating the volume of an ancillary structure to that of the main building breaches the “neutrality” requirement inherent in demolition-reconstruction works. In fact, while the original impact on the territory was limited to the main building—given the irrelevance of the volume of the ancillary structure—the reconstruction would produce an increase in volume with greater effect on the surrounding area.

Moreover, the Council found that the “neutrality” threshold was exceeded because the works went beyond rebuilding the pre-existing volume. They entailed earth excavation, construction of a retaining wall, and the creation of a basement level, a vehicle ramp, and an internal access road. Such works involve a reshaping of the land’s morphology.

Therefore, the overall intervention — which, according to settled case-law, must be assessed in its entirety rather than through a fragmented analysis — is classified by the Council of State as “new construction.”

Concluding Remarks

This judgment provides an essential interpretative clarification of the notion of “reconstructive renovation” or “demolition-reconstruction.” The ruling defines its boundaries with precision, responding to the long-standing need for legal certainty expressed by both public administrations and private operators. This legal concept is regarded by the legislature as an essential instrument for achieving the objectives of urban regeneration, limitation of land consumption, and promotion of investment. However, at the same time, it allows operators to carry out interventions that can significantly influence the intended development of the territory.

Therefore, for a demolition-reconstruction project to be lawful, a clear element of “continuity” between the new building and the previous one shall be detected. In practical terms, this requires compliance with three conditions: the building concerned by the intervention must constitute a single structure, the demolition and the reconstruction shall occur within the same timeframe, and only the pre-existing building volume shall be utilised, without any further alteration of the land’s morphology.

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