

THE LAWFUL STATUS OF BUILDINGS CONSTRUCTED BEFORE 1967: MITIGATION OF THE PRIVATE PARTY'S BURDEN OF PROOF WHERE DOCUMENTED EFFORTS TO OBTAIN EVIDENCE HAVE BEEN MADE AND JUDICIAL FACT-FINDING HAS PROVED INCONCLUSIVE

On 13 October 2026, the Regional Administrative Court of Lazio issued its Judgment No. 16014, concerning a complaint for the annulment of a municipal demolition order concerning two groups of structures, including two masonry buildings with accessible roof terraces used as garages, as well as the paving of the courtyard and the associated water drainage system. According to the municipality's submissions, these works had been carried out without a building permit on land registered in the name of a third party but possessed by the complainant.

The applicant challenged the conduct of the Administration, alleging that it had failed to carry out an adequate investigation into the date on which the works had been constructed, and submitting evidence intended to establish that the structures predated 1 September 1967, the date on which Law No. 765 of 6 August 1967 entered into force. By amending Article 31 of Law No. 1150 of 17 August 1942, that statute extended the requirement to obtain a building permit to constructions erected outside the boundaries of built-up areas and urbanised zones.

The complainant had, in turn, taken all reasonably practicable steps to obtain evidence capable of establishing the date of construction of the buildings, which had been erected by a different party. However, those efforts were unsuccessful, owing to the unavailability of documentation that could reliably establish their date of construction. The Court therefore ordered a technical expert examination to determine whether the buildings had been constructed before 1 September 1967.

The Court upheld the ground of complaint alleging that the building dated back to a period prior to 1 September 1967 and consequently annulled the demolition order concerning the works in question.

In the present case, decisive weight was attached to the findings of the expert examination ordered by the Court, which had established that, on the basis of the available documentation, it was not possible to confirm or rule out, with a sufficient degree of certainty, that the buildings had been constructed before 1 September 1967. The available evidence consisted of certain images from the SIAT aerial survey conducted in 1979/1981, relied upon by the municipal Administration, and cadastral records, in the absence of any further photographs or relevant official documentation. In particular, the court-appointed expert observed that the poor resolution of the aerial photographic material did not permit a reliable determination of whether the structures were present or absent. Similarly, the examination of the cadastral records yielded no evidence capable of establishing with certainty the date on which the buildings had been constructed. Upon completion of the examination, the expert therefore concluded that it was not possible either to confirm or to exclude that the buildings had been erected before 1 September 1967, highlighting the objective limitations of the available documentation for the purposes of the required determination.

Referring to an approach previously adopted by the Regional Administrative Court of Liguria, Section II, in Judgment No. 83 of 17 January 2023, the Court then made the following observations.

As a general rule, and in accordance with the established case law of the administrative courts, the burden of proving that the works fall within the category of constructions for which no planning permission was required *ratione temporis*, on the basis that they were lawfully carried out without such permission, rests with the private party. This burden is grounded in the principle of proximity of evidence, since the private party is ordinarily the only person in possession of doc-

uments and other evidence capable of establishing, with a reasonable degree of certainty, the date on which the structure was constructed.

However, where the owner has exhausted all reasonable efforts to establish the date of construction of the building and the court has also, where appropriate, ordered an evidentiary inquiry for that purpose, yet the inquiry has failed to produce conclusive findings, the consequences of such an evidentiary deficit cannot be imposed upon the private party.

Indeed, the fact that, prior to 1967, no building permit was required for constructions located outside built-up areas and urbanised zones mitigates the private party's obligation to retain supporting documentation, such as invoices or plans, which was not required by law at the time. In the Court's view, it would therefore be inequitable to impose sanctions, more than fifty years later, for the failure to retain documentary evidence that was neither required nor prescribed by the legislation in force when the works were carried out.

A further factor considered decisive was that the structure, having been erected before 1967, had never been subject to enforcement action by the Public Administration.

Finally, consideration was given to the general principle set out in Article 1147 of the Italian Civil Code, pursuant to which the good faith of persons subject to the legal system is presumed unless proven otherwise.

Accordingly, in the Court's view, where even the court-appointed expert is unable to establish, with certainty or a reasonable degree of accuracy, the date on which the structure in question was constructed, the adverse consequences arising from that objective impossibility of ascertainment cannot, in light of the interpretative principles outlined above, be borne by the owner, also by virtue of the principle affirmed in Article 1147 of the Italian Civil Code.

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