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EQUALIZATION IN URBAN DEVELOPMENT

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1. INTRODUCTION

Equalization is the central theme of urban development legislation in Italy today. The term equalization, in the context of town planning, refers to the technique of conformation of the territory and real estate under development, for which the regulatory plan must equally distribute the advantages and disadvantages of urban planning. In other words, the aim of equalization is to fairly distribute development rights and obligations towards the municipality, or other qualified public entities, between those property owners affected by the transformation brought about by urban development. The principle of equalization allows the public administration (in Italy, the municipalities, and in the near

future, their associated forms) to acquire free of charge from private individuals, in exchange for benefits granted to them, areas to be allocated to works of public interest.

The equalization principle is not established by state law, but has been implemented in practice over the past twenty years with the drafting of some regulatory plans and regional laws.

What is lacking, however, is a state law that recognizes and upholds the equalization principle.

The lack of a state law has led to great uncertainty, as urban development legislation in Italy is a matter dealt with by the "territorial government", as the state law has the task of setting out the principles of the matter, while regional laws can only enter into detail (Art. 117, Constitution).

This report will indicate:

a) how regulatory plans and regional laws have implemented the equalization principle in the absence of state legislation;

b) the position of the doctrine and jurisprudence on the admissibility or otherwise (from a constitutional perspective) of the equalization principle in the absence of a state law of principles;

c) the approach of the national legislature, also in light of changes introduced in 2011.

2. EQUALIZATION IN URBAN DEVELOPMENT AND REGIONAL LAW

In the absence of national legislation, the first notable example of a regulatory equalization plan in Italy was that of Casalecchio di Reno (near Bologna). Among those that followed, the most studied cases include Reggio Emilia, as well as Ravenna, and finally, Rome and Milan.

There are various models of equalization provided for by regulatory plans. The best known are equalization by sector and generalized equalization. Urban development equalization by sector allows those property owners gathered in a sector where construction can take place (the definition of this sector being the minimal territorial context within which construction activity must be carried out in a unified manner by title holders) to agree among themselves as to the concentration of volume within a determined area, so as to allow for distribution among themselves in proportion to their mutual advantages and disadvantages. Generalized equalization in urban development is based on an estimate of an index of what can be built that is uniform throughout the entire municipal area.

The principle of equalization is by now acknowledged by numerous regional laws: Basilicata (Art. 33, LR 11 August 1999, No 23), Calabria (Art. 54 LR 16 April 2002, No 19), Friuli-Venezia Giulia (Art. 31, LR 23 February 2007, No 5), Emilia Romagna (Article 7, LR 24 March 2000, No 20), Lombardy (Art. 11 LR 11 March 2005, No 12), Apulia (Art. 7, LR 13 December 2004, No 24), Tuscany (Art. 60, LR 3 January 2005, No. 1), Umbria (Art. 29, LR 22 February 2005, No 11), Ontario (Art. 35, LR 21 October 2004, No 20). A more recent example is the law of 4th March 2008, No 1 of the autonomous province of Trento (Art. 53).

There are essentially three invariants that arise from this regional legislation. In the first place, equalization must occur taking into account the state of affairs and the applicable law where the land is situated. Secondly, the dynamics of equalization are left to the negotiations between the owners concerned and the municipality, through the preparation and conclusion of agreements. Finally, freedom of choice is given to the

municipalities, in the choice of equalization technique to follow (by sector, generalized, mixed, etc.).

Several attempts have been made by the national legislature to introduce the equalization principle, attempts that, however, have still not resulted in a state law of principles.

3. EQUALIZATION IN URBAN DEVELOPMENT IN DOCTRINE AND IN LAW

In doctrine there exist different positions on the legality, from a constitutional perspective, of equalization in urban development.

In one train of thought, both regional laws and regulatory equalization plans contrast radically with the Constitution, as the discipline of private property, as with town planning, is the responsibility of the legislative power of the state. The absence of a state discipline of reference on equalization in urban development would therefore result in the unconstitutionality of the same.

Another doctrinal position holds that equalization, while different from zoning, for example, is still a private property conformation technique. Equalization appears to be constitutionally justified, from this point of view, in so far as the power of conformation of private property is clearly attributed under state law to regulatory plans (law 17 August 1942, No 1150).

The jurisprudence is largely in favour of recognizing the legality of the equalization principle. A recent decision of the State Council on the regulatory plan for Rome is crucial in this regard, as it was stated that " *the ... equalization mechanisms related to the allocation of future land use of additional cubage are an integral part of the*

legitimate exercise of the power of planning and conformation of the territory" (State Council, section V, 13 July 2010, No 4545).

The first fundamental judgment on the subject regarded the Reggio Emilia equalization plan, where it was stated that equalization is in harmony with "*the most recent cultural and legal developments in the urban development field*" (Regional Administrative Court of Emilia-Romagna, Bologna, section I, 14 January 1999, No 22; in keeping with the Regional Administrative Court of the Campania region, Salerno, section I, 5 July 2002, No 670). And furthermore, it was held that the equalization method complies with "*the constitutional principles regarding the protection of private property, so that, in applying the equalization principle, the benefits and expenses arising from planning are distributed strictly in proportion to the size and extent of the individual properties*" (Regional Administrative Court of Lombardy, Brescia, 20 October 2005, No 1043).

More recently it has been possible to observe that equalization in town planning "*allows… for the acquisition of areas destined for public use, while avoiding expropriation proceedings through their sale to the City, thereby obviating litigation arising from the reiteration of constraints involving land targeted for public use, and above all makes it possible to be able to count on the cooperation and participation of the private owners themselves, through the proposition of projects and urban redevelopment plans that have the capacity to improve the urban fabric. In essence, the objective of eliminating the inequalities created by the planning process, in particular those caused by zoning and the direct localization of standards, can be achieved through the use of equalization in urban development, at the very least within the areas under transformation, thereby creating the conditions necessary to facilitate agreement among the private owners of the areas in question, and to encourage private initiative*" (Regional Administrative Court of Veneto, section I, 19 May 2009 , No 1504).

Other decisions of note include that of the State Council on the regulatory plans of Padua (State Council, IV, 22 January 2010, No 216) and that of the Administrative Court of Lombardy on the regulatory plans for Buccinasco (Regional Administrative Court of Lombardy, Milan, 17 September 2009, No 4671).

4. DEVELOPMENTS IN 2011

The issues concerning the constitutionality or otherwise of equalization in urban development should have been resolved definitively by recent legislative action in 2011. In fact, art. 5, paragraph 3, of legislative decree May 13, 2011, No 70, which came into law July 12, 2011, No 106, introduced an innovation to the Civil Code, making it obligatory for the transcription of *"contracts that transfer, constitute or modify development rights, however they are denominated, as provided for by state or regional regulations, or by instruments of territorial planning"* (Article 2643, paragraph 1, 2-bis, Civil Code).

In substance, with this provision, the national legislature intends to create a discipline that creates certainty in relationships involving the exchange of development rights that come into effect according to the equalization principle. The provision of the state in this way gives a definitive constitutional cover to the equalization system, recognizing the transcribable nature of development rights, as generated by the instruments of territorial planning, and in any case recognized by regional laws.

The provision in question, while having the merit of having solved two fundamental problems involving equalization in urban development, or better, to have found a constitutional basis for equalization, and the need to ensure certainty in the exchange of volumetric titles, also brings with it new questions.

Firstly, with the new legislation the legal nature of development rights is not completely clear: are they assets subject to rights, or rights to be enjoyed in themselves? Are they legitimate interests?

Secondly, the question arises as to whether the transcription of the rights in rem could constitute an insurmountable barrier to the ability of regulatory plans to modify and conform private property, derogating from the general principle by which *ius aedificandi* can be degraded by the power of the regulatory plan.

These are questions that will perhaps be answered in the next annual report.

5. BIBLIOGRAPHY

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