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URBAN LAW IN THE ITALIAN EMERGENCY DECREE: THE ECONOMIC CRISIS AND BEYOND

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1. INTRODUCTION

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The object of this paper is to undertake a study of recent developments in state planning legislation, dealing with measures taken following the collapse of Lehman Brothers in September 2008.

This disorganized legislation was essentially adopted as a matter of urgency, in an attempt to revive the economy. The construction industry is a crucial sector in the current economic depression, as the financial crisis is directly related to market failure in the building industry, stemming from an excess of supply over demand. It should not be forgotten that the U.S. crisis, as mirrored in Europe, derived from the fact that the demand for housing was spiked by the ease with which sub-prime mortgages were granted. Analogous forms of market interference occurred in Spain, and to a lesser, but still significant extent, in Italy.

From a methodological point of view, rather than following a strictly chronological reconstruction of events, the attempt will be to categorise the urban planning regulations that have come into play over the last five years according to the principal political, economic, and legal measures evident in the Italian emergency decrees. These decree laws have as their object simplification, liberalization, deregulation, and a gradual opening up to competition, alongside measures arising from the fiscal compact, such as the valorisation of public property, and an increase in taxation. The latter can be seen to lead to measures that may be categorised as sustainable development.

The purpose of this paper is therefore to verify if the measures taken, through the introduction of urban planning provisions, have reached, or are capable of reaching, their expected goal of helping to stimulate economic recovery.

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2. URBAN LAW AND RECOVERY IN THE CONSTRUCTION INDUSTRY

It is well known that the construction sector occupies a significant position internationally, in terms of GDP, and it is also common knowledge that, according to classical political economy, in times of crisis, the construction sector is identified as a driving sector in leading a country out of recession.

The Italian legislature has felt, therefore, the need to introduce a series of measures to revive the construction industry, starting with the elimination of some regulatory aspects that slow down planning processes, or which pose obstacles to the free exercise of entrepreneurial activity: these are problems - one could say of an atavistic nature - that affect urban law and construction, and the public administration in Italy in general, such as overly complicated procedures, the excessive administrative burden on private companies (which does not comply with the principle of proportionality), limits to freedom of competition, hyper-regulation, etc. These issues will be addressed in depth, beginning with the policy of administrative simplification.

2.1 Semplificazione delle procedure urbanistiche

As noted, one of the first steps taken by the government was to simplify the planning process, by eliminating improper charges and speeding up administrative procedures.

Overlooking the numerous previous attempts that have taken place during the last twenty years, this paper will examine the simplification that has occurred over the last five years.

In this regard, it was firstly decided to transfer the competence for the approval of implementation plans, in accordance with the regulatory plan, to the Municipal Board of the local council: to this end, it is provided that "*the implementation of plans, as referred to*

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by regional legislation, in accordance with the general planning regulations in force, shall be approved by the Municipal Board" (art. 5, subsection 13, letter. b), Decree Law May 13, 2011, n. 70, conv. in l. July 12, 2011, n. 106). In the previous legislation implementation plans were approved by the Municipal Council (the assembly that holds legislative power in municipalities), and not by the Municipal Board (the executive body of the municipality), which slowed the approval process down significantly, as it was subject to the interplay between the majority and opposition: the transfer of responsibility to the Board should as a result simplify and facilitate the approval of plans, given that, within the executive at least, there should be a greater compactness and political cohesion.

Secondly, some measures which are intended to simplify and speed up the process of urban planning variants should also be noted: the most important regards the plan for alienation and real estate valorisation (PAVI). In particular, PAVI consists of a plan by which local authorities carry out the valorisation of their real estate by making it possible to vary both building rights and the intended use of such property, before giving them over to the private market, or conferring them in real estate funds. In order to accelerate the valorisation procedure, it was established that the regions should introduce simplified variation procedures; in the case where a region remains inert it is, in any case, expected that PAVI be transmitted by the municipality to the authority responsible for its approval (which may be a region or province, depending on the regional law). This authority is required to offer its opinion within a period of 120 days, or else, in the case of inertia, silent assent is assumed (art. 58, subsection 2, of Decree Law June 25, 2008, n. 112 conv. in l. August 6, 2008, n. 133, as amended by art. 27, subsection 1, Decree Law December 6, 2011, n. 201, converted with amendments by the Law December 22, 2011, n. 214).

Further simplification has been provided for by the SEA (Strategic Environmental Assessment under Directive 2001/42/EC), which provides that ad hoc variants to urban planning procedures do not need to be submitted to the above appraisal: it is, in fact, provided that "*for the modification of existing plans and programs prepared for territorial planning, or land use, resulting from measures to authorize individual works, which by law have the effect of variant of such plans and programs ... strategic environmental assessment is not necessary for the localization of individual works*" (art. 6, subsection 12, Legislative

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Decree no. 152/2010, as stated in art. 2, subsection 3, letter. h, leg. Jun. 29, 2010, n. 128). More recently it has been established that implementation plans should not be subjected to Strategic Environmental Assessment, in the case where the higher level in the hierarchy has been subjected to evaluation; in the event that the implementation plan is a General Development Plan variant, the Strategic Environmental Assessment should only cover those aspects that were not already subject to evaluation in higher-level plans (art. 16, l. August 17, 1942, n. 1150, as amended by art. 5, subsection 8, of Decree Law 70/2011).

2.2 The impact of liberalization on planning regulations

The liberalization that the Monti government consistently (and perhaps in vain) sought to introduce also involved urban law. This was affirmed by the need to abrogate the provisions for planning and territorial planning that are an obstacle to the full realization of the principle of competition (art. 1, subsection 1, lett. b), Decree Law January 24, 2012, n. 1, conv. in l. March 24, 2012, n. 27th). The task of abrogation has been entrusted to Municipalities, Provinces and Regions. As part of their responsibilities, they are obliged to repeal - through administrative channels - the above provisions by December 31, 2012 (subsection 3); a failure to comply with this obligation is expected, on the one hand, to result in the exercise of substitutive power by the state, and on the other, penalisation in terms of revenue transfers, for failing to reach the parameter of virtue (subsection 3). Liberalisation should take place taking into account that the removal of anti-competitive urban planning regulations is limited by the need to preserve perceived constitutionally strong interests: to this end, subsection 3 identifies as a limit to administrative abrogation the need to safeguard "*the limits, programs and controls that are necessary to prevent possible damage to health, the environment, the landscape, artistic and cultural heritage, security, freedom, human dignity, and possible conflicts with social utility, with public order, the tax system, and the EU and international obligations of the Republic*".

This is an ambitious plan that will, however, no doubt encounter significant obstacles to its implementation, in the form of special interest groups, lobbyists and

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corporations, as evidenced by the troubled course already taken by the Legislative Decree regarding liberalization.

The provision that has liberalized intended use, with regard to local business, is auto-applicative in nature, and therefore of immediate validity: it provides that "*changes in the intended use of the rooms used for business operations*" can be performed without the requirement of a qualifying title (art. 6, subsection 2, lett. e-bis), Presidential Decree June 6, 2001, n. 380 - t.u. construction - as introduced by art. 13 of l. August 7, 2012, n. 134 Conv. of Decree Law June 22, 2012, n. 83). This provision applies only to construction, since the liberalization of intended use involves the neutralization of functional zoning as provided for in General Development Plan. The logic of deregulation therefore prevails, even if limited to real estate held by companies.

2.3 The abolition of rules favouring competition

In contrast with the liberalizing pro-competition rules introduced in the previous months, and in an apparent contradiction, the Monti government stated that primary urbanization works that have a value below the EU threshold (known as "below the threshold contracts"), and which are set up against urbanization charges, are not subject to the discipline of public evidence of the contracts code (Leg. 163/2006): in order that primary urbanization works (public roads, electricity, telephone and gas networks, car parks, etc.) can be carried out in settlement by the actuator (art. 16, subsection 2-bis t.u. construction, as introduced by art. 45, paragraph 1 of Decree Law December 16, 2011, conv. in l. December 22, 2011, n. 214). This lead to the requirement that such urbanization works be carried out using a negotiating procedure (in accordance with European principles) open by invitation to at least five economic operators.

This deregulation decision is certainly correct in terms of European law, as The Court of Justice has long since made it clear that such works are subject to the obligation of public evidence only when they have a clear cross-border interest (EU Court of Justice, 21 February 2008, C-412/04, *Commission v. Italian Republic*). Doubts as to the need to extend

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the rules of competition regarding this kind of works had also been expressed in the literature.

3. UNPLANNING MEASURES AND URBAN DEROGATION INSTITUTIONS

Some measures, which aim to make deregulation provisions at variance with urban planning law, should be highlighted.

In the first place, in order to incentivize the renovation of the existing building heritage (known as the stimulated redevelopment of urban areas), the possibility to obtain building permits in derogation of urban planning instruments is provided, in a case where the regions remain inert, allowing for an increase in volume – also in contrast with the General Development Plan – of above twenty per cent for residential buildings, or ten per cent for non-residential buildings, as it is possible to obtain a change of use, notwithstanding the General Development Plan. All things considered, such derogations – in terms of both volume and intended use - do not apply in urban areas and in areas where building is absolutely forbidden, can not cover illegal buildings, and remains subject to compliance with the regulations for the protection of constitutionally strong interests, such as the landscape, cultural heritage, the environment, seismic safety, and hygiene (art. 5, subsections 9, 10 and 14, Decree Law 70/2010).

Secondly follows the possibility to apply for building permits with the aim of achieving by means of derogation changes in use, even without new works taking place, provided that the change of intended use is compatible or complementary to that provided for by the General Development Plan (art. 5, subsection 13, letter. b), Decree Law 70/2011).

Finally, what is known as the "piano casa" housing plan must be taken into account: This was a measure intended to stimulate activity in the construction sector, this time regulated by an agreement between the State and the Regions of April 1, 2009. In said

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agreement the regions committed to introduce, with their own regional law, as Italian urban law is in fact an area of concurrent legislation between the State and the Regions, which encourages the renovation of buildings through the recognition of a volumetric credit equal to 20% of existing volume. In the case of the demolition and reconstruction of a property, there is a recognized increase in volume of 35% on the demolished building. This increase is of course in derogation of the dimensions provided for by the General Development Plan. The vast majority of regions have implemented the content of this agreement with their own regional laws.

4. DEVELOPMENT RIGHTS REGULATION

An innovation of great importance contained in Decree Law n. 70/2011 is an explicit recognition by the state legislature of what are known as development rights, a veritable "monstrous legal chimera." Development rights, broadly speaking, have as their object, as essential assets, the amount of cubic volume, recognized through development rights and the system of rewards and compensation, which can be moved from fund to fund, and may circulate inside the municipal area and beyond.

It was, in fact, provided for that contracts intended to negotiate development rights must necessarily be transcribed, "*to ensure certainty in the circulation of development rights*", "*contracts that transfer, constitute or modify development rights, however denominated, provided by state or regional regulations, or by territorial planning instruments*" (art. 2643, subsection 2-bis, cod. civ., as introduced by art. 5, paragraph 3, of Decree Law 70/2011).

The provision in question is the first among those so far examined that deserves some minimal degree of appreciation, since it has the merit of being systemic in nature, and resolves a long-standing controversy on the constitutional legitimacy of development rights.

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It is to be noted that the circulation of development rights was born by way of ordinary practice, without the protection of state legislation: therefore the best doctrine held, in the recent past, that the system was fundamentally unconstitutional, given that the matter of the discipline of private property (in the civil code) is the exclusive responsibility of the State.

With the amendment of the Civil Code, the State, therefore, recognizes the system of development rights "*provided for by government or regional regulations, or better, by territorial planning instruments*", thus providing them with constitutional protection cover.

There remains, however, the fact that such a system would merit, as long advocated by legal doctrine, together with that of urban doctrine, at least one framework of state principles of law that would make the circulation of development rights, not only certain, but also transparent and impartial.

5. THE DRAFT LAW ON SOIL CONSUMPTION

In clear contrast with all other interventions in the sector over the past five years, on September 14 2012 the Monti government approved an ambitious bill on soil consumption. This initiative falls within the context of current EU policies aimed at limiting the consumption of soil (European Commission 12.4.2012 SWD (2012) 101 final – *Guidelines on best practice to limit, mitigate or compensate soil sealing*), on the basis of some European experiences, including that of Andalusia. In fact, the consumption of agricultural land, as a result of increasing and uncontrolled construction, is decreasing the agricultural production capacity of Europe (running the risk of losing self-sufficiency), and creates untold damage, in both landscape and hydrogeological terms.

For this reason, the bill aims to protect the soil as a vital resource, not only from the standpoint of the agro-food industry, but also in terms of the environment and landscape. In particular, it introduces the principle of a maximum limit on surface agricultural building, limiting the "land which can be amended by planning instruments in

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order to permit an construction use". Such planning is delegated to a ministerial decree, while the allocation of limits in terms of building permission among regions is handled by the State - Regions Conference.

The aim of the bill is ambitious, highlighting the principle of sustainable development: it is not, however, difficult to imagine that the bill will encounter significant obstacles, both inside and outside the Parliament.

6. CONCLUSIONS

After a careful examination of this complex legal puzzle the following conclusions can be drawn.

The legal system believed that the implementation of a comprehensive policy of deregulation would be an effective response to the construction crisis, alongside a simplification of the planning process, which was implemented in an episodic and uncoordinated manner.

The result is a failure, because the recession is still in full effect, and the building industry remains stagnant.

The excessive supply in real estate, the credit crunch, and the fiscal compact remain insurmountable obstacles. And interventions such as the recent city plan, which has been allocated just over €200 million to jump-start several major urban renewal projects (Article 12 dl 83/2012), (art. 12, d.l. 83/2012)[1], appear to be as effective as an aspirin dropped into a stagnant pond.

[1] The city plan is expected to provide for the stipulation of urban development contracts consisting of a set of coordinated interventions, with reference to degraded urban areas, indicating: a) the description, the

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In reality, a credible economic policy should; moderate the oversupply of buildings, through regulatory measures and the containment of volume, as suggested in the draft law on soil consumption; put in place more substantial supporting economic measures, with the aim of the valorisation of the existing city, in the light of the principle of sustainable development, in order to support and develop new economies, such as the green economy, or the cultural economy; provide clear and transparent rules, by means of a rewriting of the regulations governing local government.

In conclusion, more than a haphazard deregulation of urban law, what should be introduced, on the contrary, is a worthy, enlightened, and uncomplicated regulation of urban law.

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characteristics, and the subject of urban transformation and development, b) investments and the necessary funding, both public and private, inclusive of any co-financing with the proposing municipality c) relevant stakeholders d) any possible rewards e) the time scale of the interventions to be undertaken f) technical and administrative feasibility.

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