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Administrative Law

THE OBLIGATION OF SEA PROCEDURE IN URBAN PLANNING ACTIVITY

Gabriele Torelli

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1. The rules of environmental protection: command and control and the authorizations system.

Public administration has to face an environmental matter in such a way because the environment is a pre-existence asset, meaning it existed before the construction of the local society and its institutions. This is the reason why its safeguard is guaranteed with special checks and balances that are very different from the standard ones used by our system in order to protect the public interest. In fact, the primary objective of the standard checks and balances (authoritative functions) is to maintain public order and social cohesion, and to restrict private people's will, imposing on them certain sacrifices and behaviour. On the contrary, the administrative system in environmental issues is set up to reconcile human activities with the safeguard of this asset. In short, the standard binding character of administrative power is less potent in this case.

In line with this purpose, environmental law is strictly subservient to a system of authorizations and controls that influence the activities of individuals in society: this restriction and regulation establishes a mechanism of protection which is typically preventative and precautionary. The restriction of certain activities encourages behaviour that benefits society as a whole.

The policy of "command and control" belongs to this kind of approach: it implies a strict monitoring of activities that pollute or threaten to pollute the environment. This process is an important environmental safeguard: public administration offers "premium bonuses" and other financial incentives in order to

encourage private undertakers and traders to behave in a certain way therefore keeping, for example, pollution levels within a desired limit. The final objective of these policies is to establish standards which must be adhered to by undertakers and traders if they wish to be rated favourably by public governing bodies. Exceeding the limits leads to consequences and the infliction of a sanction, generally a fine.

On the contrary, respecting these pollution restrictions provides benefits to undertakers (*e.g.* better taxation). Despite the fact that administration does not employ standard authoritative power, or rule by force, it is still able to establish guidelines of industrial activities in environmental matters. In fact undertakers are strongly encouraged to respect the limits of pollution because, if they did not, economic benefits are not gained and the price of their products would rise. This means that this indirect method adopted by public bodies leads, as a consequence, to address the choices of consumers, who are more likely to prefer cheaper goods.

In this way, traders and undertakers are made aware of their responsibility as an integral part in the protection of the environment: the success of their business and the protection of the environment have almost become inextricably linked. In other words, by concentrating on incentives in business, environmental policy can be enforced.

Besides the policy of standards, environmental safeguard is guaranteed by precautionary and preventive authorization procedures, which represent the real task of this paper.

In particular, the measure that allows potentially harmful activities to environment is a very awkward issue because the damages may not be reversible. The authorizations should testify that the activity does not conflict with environmental interest and the undertakers must ensure the respect of the binding conditions of the measure for the duration of the project, the breaking of such conditions resulting in the project being withdrawn from the undertakers.

One of the most important authorization procedures is SEA (Strategic Environmental Assessment), approved by Directive 2001/42 CE, and acknowledged by Italian legislator in d.lgs. n. 152/2006 (*i.e.* Italian *Codice ambiente*). SEA describes in detail several guidelines for the public body that has to produce a planning deed. More precisely, SEA proposes to consider, while the layout is being developed and before it is approved, any negative effects that might impact on the environment from the proposed activity outlined in the planning deed. In short, SEA is a specific procedure that supports and legitimises the final administrative measure, and the latter can be influenced by the former. In fact, art. 6 d. lgs. n. 152/2006 indicates

which planning activities necessarily require SEA during their development (these generally are activities that involve the most controversial areas: *e.g.* agriculture, transport, energy, industry, urban planning) and which ones do not (in this case SEA is discretionary). The distinction is important, because the final administrative measure must be reversed if it has not been submitted to SEA in all cases, according to art. 6, it is obligatory.

Therefore, the issue is slightly different if the public body decides a planning activity is contained within a local area. In fact, in these cases, art. 6 pt. 3 d. lgs. 152/2006 asserts that SEA procedure is discretionary, provided that administrative plans will not have a significant impact on the environment. On the contrary, if the public body considers that there will be negative effects on the environment, SEA is necessary regardless of the small dimensions of the area.

The following sentence of *Consiglio di Stato* (the highest Italian Court of Administrative law) states that an urban planning deed must be submitted to SEA even if it regards a local area. In fact, the decision of the city council, which would have repercussions for the current functioning of the department of town planning, changes the function of a particular area within the city, making it more compatible with local business. This causes, as a consequence, the necessity of SEA procedure, that in cases such as this is mandatory.

2. Consiglio di Stato, sec. IV, 6 May 2013, no. 2446: the case.

The company *Pentagramma Piemonte S.p.a.* appeals to *Consiglio di Stato* to reverse a judgement by *T.A.R.* (Administrative Regional Tribunal) Piemonte[1]. The judge of first instance reversed the city council decision which had authorized a change in the town planning. This change had allowed *Pentagramma S.p.a.* to build an underground car park and a shopping centre in an area previously allocated to public interest activities, especially ecological preservation..

Consiglio di Stato is responsible for explaining whether SEA should (or should not) have been carried out in such a procedure.

[1] Piemonte is one of twenty Italian Regions. In the administrative judicial system there is at least one *T.A.R.* in every Region. The sentence stated by *T.A.R.* can be referred to the *Consiglio di Stato* for appeal.

3. The sentence.

Torino city council had ruled in favour of *Pentagramma S.p.a.* building a car park and a shopping centre without completing the SEA procedure. The politic body judged that this authorization, despite the change in the town planning, would not have had significant effects on the landscape and green belt. This is the reason why the city council believed the development of SEA was discretionary.

Nevertheless, *T.A.R.* Piemonte stated that this procedure was necessary because, in effect, the change in town planning, and the consequent building of an underground car park and a shopping centre, could have threatened the balance of the local park, river and landscape. Moreover, *T.A.R.* considered that the planning activity referred to an area that was not particularly small (60.000 sq). Therefore, SEA could not been considered, adherence to art. 6 pt. 3 d.lgs. n. 152/2006, discretionary.

In the appeal judgement, the *Consiglio di Stato* confirmed the previous sentence.

SEA's inclusion is necessary every time the city council permits one of the planning activities listed in Annex IV pt. 7 lect. b), d. lgs. n. 152/2006: the list contains also the building of a shopping centre and of a car park with more than 500 parking spaces (*Pentagramma S.p.a.* planned to build one bigger). Therefore, the decision of the city council must be reversed because the whole project must have obligatorily submitted to SEA. Moreover, the dimensions of the area are irrelevant, when considering the above point. The *Consiglio di Stato* considered that the law (Annex IV pt. 7 lect. b), d. lgs. n. 152/2006) had already indicated this kind of planning activity as a significant threat to the environment. In light of this, SEA is always necessary regardless of the dimensions of the area, in order to gain authorization for building a shopping centre and an underground car park bigger than 500 parking spaces.

In short, the *Consiglio di Stato* rightly believed that these planning activities should have been authorized only on the condition that the SEA procedure had been included. The effects on the environment are evident: the building of the shopping centre and the underground car park causes the influx of several visitors and customers, implying many negative effects on the impact to surrounding green belts. So the fundamental change in the status of the area (from green belt to commercial area) causes knock-on effects in the organisation of town planning and this is a further reason why SEA is necessary.

This is the best solution according to the principles of European law concerning the safeguard of the environment, which demands a high level of sensitivity and diligence in the foreseeing and prevention of potential future negative effects. SEA procedure – meaning to assess the compatibility between an activity and the surrounding area from the initiation of a project – allows the development of an effective assessment, including the comparative values of various approaches to completion of the project, which would otherwise be too complex a task.

Importantly, this method guarantees the fulfilling of the precautionary principle, which obliges the public bodies to adopt suitable measures in order to prevent any potential risk to public health, security, and the environment through the establishment of pre-emptive protection.

Obviously, the application of the precautionary principle should be objectively controlled, to prevent unnecessary restrictions on legitimate business activities. In fact, if the administrative system demanded the prevention of any potential risk to the environment, it would suffocate all business activities, and this is not a credible option. Industrial and commercial activities need protection and consideration too.

The balance between these two opposite interests is difficult to achieve, because the provision of both environmental safeguards and freedom of economic private enterprise are constitutional rights. For this reason every instance of a restriction on economic activities established in order to protect the environment, must be proportional and not overly severe. In line with this purpose, on one hand pre-emptive guidelines should ascertain if a certain activity could (or could not) have negative effects on the environment. On the other hand, the objective of these guidelines is to avoid public administration prohibiting an economic activity in the name of the precautionary principle, even if there is no real threat to the environment.

Public bodies could obstruct the development of an important business for political reasons alone (*e.g.* the city council does not authorize the building of a waste site, even if the undertaker has respected all the requirements, because it wishes to maintain its popularity with the electorate) and not because of real negative effects on the environment.

This means that once an initial decision on appropriate procedure (*e.g* the SEA) has been taken, that procedure cannot then be manipulated to further restrict the activities of private enterprise to the personal benefit of an individual or individuals. On the contrary, public bodies should follow guidelines established by

the law, that must indicates in which cases prudent behaviour is recommended in order to protect the environment from potential risk. Public bodies should not add further concerns to those established by the law, because should they do so, they would have unlimited power in preventing regular business activities. In such a case, a certain activity could be permitted depending on the judgement of the public body in charge of the procedure, and not depending on the real risk to the environment.

For this reason, the precautionary principle favours the establishment of the pre-emptive guidelines as a law task.