JUDGMENT

Council of State section IV - 05/04/2022, No. 2520

ITALIAN REPUBLIC

IN THE NAME OF THE ITALIAN PEOPLE

The Council of State

sitting in judicial capacity (Fourth Chamber)

has pronounced this

JUDGMENT

on appeal No. 7166 of 2021, brought by Messrs Ma. Da., Pi. Sp. and Al. Sp. and Legambiente Novellara, represented and defended by Giovan Ludovico Della Fontana, lawyer, with digital address as in the Registers of Justice and domicile address for service at the Chambers of Alfredo Placidi in Rome, via Barnaba Tortolini, no. 30;

against

the Municipality of Novellara, in the person of the Mayor *pro tempore* represented and defended by Francesca Preite, lawyer, with domicile address for service at the Antonella Benveduti's office in Rome, via Asiago, no. 9;

against

the Province of Reggio Emilia, in the person of the President *pro tempore* represented and defended by Francesca Preite, lawyer, with domicile address for service at the office of office of the lawyer Antonella Benveduti in Rome, via Asiago, no. 9;

for the reform

of the judgment of the Regional Administrative Court for Emilia Romagna, section of Parma, No 102 of 27 April 2021.

Having regard to the affidavits of the Municipality of Novellara and of the Province of Reggio Emilia;

Having regard to all the acts in the case;

Relator at the public hearing on 20 January 2022 the Councillor Emanuela Loria;

Having regard to the motions for judgment filed on 14 January 2022 by Giovan Ludovico Della Fontana and Francesca Preite;

Held and considered the following in fact and law.

FACT AND LAW

(*omissis*)

5. The first ground of appeal is unfounded.

5.1. It challenges the finding that the appeal brought by the local branch of Legambiente is inadmissible.

5.2. The board of arbitrators observes that, on the subject of the legitimacy of environmental protection associations, the jurisprudence of this Council of State has been developed (see Plenary Session No. 6 of 2020, and subsequently section IV, No. 1535 of 2021 and No. 1137 of 2020), a series of principles have been developed that apply to the case under examination and that correctly led the first judge to exclude the active legitimacy of the association Legambiente Onlus, Novellara office.

In particular, the principles enunciated are as follows:

(a) even associations challenging measures for the protection of the environment must prove in court the existence of all the conditions of the action, i.e. interest in bringing proceedings, legitimatio ad causam, title or legitimacy to bring an action)

(b) as regards the legitimacy of the action, that is, the ownership of a different interest from the quivis de populo, it is established ex lege for national associations entered in the special register kept by the Ministry of the Environment (articles 13 and 18 of Law No. 349 of 8 July 1986)

(c) for associations (and sections) of a local nature, on the other hand, strict proof must be provided of the following three requirements: (i) that the association protects in an effective and non-occasional manner certain diffuse interests; (ii) that it has in its statutes a specific provision qualifying the protection of these interests as the purpose of the association; (iii) that an actual harm to the protected legal interests at the heart of the association's activity can be configured.

5.3. In the present case, the requirement relating to the effective and lasting representation of diffuse interests is lacking.

In fact - as correctly pointed out by the Regional Administrative Court on the basis of the articles of association of Circolo di Legambiente di Novellara lodged at first instance - it appears that the appellant association was formed on 2 May 2019, i.e. after the lodging of the application

initiating proceedings at first instance (lodged on 4 December 2018), and therefore, since it does not meet the requirement of being in existence at the time the application was lodged, it cannot be recognised as having standing; nor has it been seriously demonstrated that the association has an adequate degree of representativeness and stability in the area concerned.

Moreover, as far as can be inferred from the articles of association, the activity carried out by the association for the protection of the environment is of an occasional nature.

In short, the requirement set out in point 5.2(c)(i) is lacking.

6. On the substance, the pleas in law put forward in support of the application at first instance are all unfounded.

6.1. The first plea alleges that the contested measures are unlawful on the ground of breach of Article 4 of Regional Law No. 24 of 2017, since the POC could not have been adopted by the Municipality since Article 4, paragraph 4, provides that in the period between the date of entry into force of that law (1 January 2018) and the date of expiry of the deadline for the commencement of the procedure for the approval of the General Urban Plan (PUG) established by Article 3, paragraph 1, above, only specific variants to the urban planning in force may be adopted on a transitional basis and not new urban planning instruments governed by the repealed Regional Law No. 20 of 2000, as the applicants consider the contested POC to be.

Moreover, the POC adopted and approved could not be considered legitimate as a variant to a previous POC because 'in our case the previous POC of the Municipality of Novellara are no longer in force as they have been annulled in the courts as recognised in the contested resolutions themselves. Moreover, the POC approved by Municipal Council Resolution No. 31/2006 would no longer be in force even regardless of its annulment, since pursuant to Article 30 of Regional Law No. 20/2000 the POC is effective for a period of five years.

Therefore it would not have been possible to adopt a variant to a POC no longer in force.

6.1.2. The plea is unfounded.

It is useful to quote verbatim from Article 4(4) of Regional Law No. 24 of 2017, in force at the time of the adoption of the two contested resolutions of the Novellara Municipal Council, which reads as follows: *“4. Without prejudice to the issuing of building permits for the provisions of the plans in force subject to direct intervention, within the term referred to in paragraph 1 the following acts may also be adopted and the approval procedure for the same may be completed that was initiated before the date on which this law came into force:*

a) specific variants to the urban planning in force, including variants to adapt to mandatory provisions contained in general or sectorial laws or plans

b) the implementation plans of the municipal regulatory plans in force, also in variant, referred to in Article 3 of Regional Law no. 46 of 8 November 1988 (Supplementary provisions on the control of building and urban transformations)

c) the Implementation Urban Plans (Piani urbanistici attuativi - PUA), of public or private initiative, referred to in Article 31 of Regional Law No. 20 of 2000

d) the urban regeneration programmes (PRU), referred to in Regional Law No. 19 of 3 July 1998 (Norme in materia di riqualificazione urbana)

e) the negotiated acts and special procedures for the approval of projects that entail the effect of a variant to the territorial and urban planning instruments".

According to the aforementioned provision, the prohibition on the adoption of new urban planning instruments in the period from 1 January 2018 to the expiry of the three-year term for the approval of the P.U.G. is subject to certain exceptions.

The fundamental issue, therefore, on which the first judge correctly focused, is the identification of the nature, among the various qualifying alternatives, of the P.O.C. adopted and approved by the Municipality of Novellara with the contested resolutions: i) new general P.O.C. (which, as such, would be unlawful insofar as it is in conflict with the provisions of the above-mentioned Article 4 of Regional Law No. 24 of 2017, which allows only specific variants to the urban planning instruments in force and not the adoption of new general urban planning instruments); ii) variant of the previous P.O.C. (as such illegitimate since the last general P.O.C. of the Municipality of Novellara was annulled by the Regional Administrative Court with Judgment No. 63 of 2016 and, therefore, a variant to an urban planning instrument no longer in force cannot be adopted); iii) implementation planning instrument in compliance with the P.S.C. that provides for the location of the public work and affixes the pre-expropriation constraint to the areas concerned.

6.1.3. From a plain reading of the contested resolutions, it can be inferred that they were intended to express the authority's will to approve a single public work, namely the second section of the municipality's "Tangenziale nord" (Northern Bypass): in resolution no. In fact, Resolution No. 12 states that it concerns the adoption of *'a new town planning instrument to allow the construction of the lot relating to the second section of Novellara's northern ring road'* and, in the subject-matter, it is stated that it concerns the *'Adoption of the POC aimed at the construction of the second section, first lot, axis three'.*

Therefore, the contested resolutions No. 12 of 2018 and No. 43 of 2018 concerned the adoption and approval of an "excerpt" P.O.C., concerning the approval of a single public work, i.e. one of the excerpts of the ring road, therefore these are acts that fall within the provisions of Regional Law No. 20 of 2000, which expressly mentions "*specific variants to the urban planning*

in force, including variants to adapt to mandatory provisions contained in general or sectoral laws or plans".

This is expressly permitted under Article 4, paragraph 4, of the new Regional Law No. 24 of 2017, since it is in any case a P.O.C. that complies with the provisions of the P.S.C., as is the case here (see resolution No. 12, p. 4, last considered).

No breach of Article 4 of Regional Law No. 24 of 2017 can therefore be identified in this respect.

Moreover, it is convincing what the administration's defence pointed out (p. 13 memorandum of 1 September 2021) when it stated that: *"beyond what may be considered a lexical imprecision, which, however, has no consequences on the correctness of the reasoning (the POC, in fact, does not constitute a "variant" to the PSC, but can only make "... non-substantial corrections to the perimeters of the suitable areas and to the corridors identified by the PSC" - Article 36-bis, paragraph 1, R.L. No. 20/2000), the Judgement under appeal perfectly grasped the purpose of Article 4, paragraph 4 of Regional Law no. 20/2000: the provision cannot be understood in the sense put forward by the plaintiffs, as excluding - in addition to any general variant to the urban planning instruments in force - also any intervention to implement the same, which is not configured, according to a purely formal reading, as a "specific variant". This reading, moreover, in municipalities that lack a general POC (such as the municipality of Novellara), would mean the complete paralysis of the PSC's implementation activities until the approval of the new PUG (and, in particular, would determine the impossibility of implementing the PSC as regards public works). This could not have been the intention of the regional legislator in the act of inserting the transitional provisions in the new urban planning law (well aware of the difficulties and the necessarily not short timeframe for the drafting of the new planning instrument): the principle of continuity and good performance of the administrative activity - as well as a canon of conduct for public subjects - rises to a hermeneutic rule in the activity of application of the regulatory provisions and prevents the regional provision in question from being considered compatible with the dictate of Article 97, paragraph 2, of the Constitution, if it were applied in the manner suggested by the applicants".*

6.1.4. In addition, the contested resolutions, in locating the public works in question, have imposed the expropriation constraint and have fully implemented the prescriptions of the Ministry of Cultural Heritage and Activities and the Regional Directorate for Cultural and Landscape Heritage of Emilia Romagna set forth in Decree No. 1945 of 2009, which exceeded and amended the prescriptions of Decree No. 145 of 2005 issued by the same Directorate.

6.2. The second plea alleges the unlawfulness of the contested measures on the ground that they are contrary to the regional EIA legislation ratione temporis in force.

According to the applicants, the unlawfulness consisted essentially in the fact that the Regional Council's resolution No 2688 of 2004 (the effects of which expired in 2007), which ruled out the need for the Novellara bypass project to be subject to environmental impact assessment, was still in force.

6.2.1. The plea is unfounded.

Firstly, Article 17 of Regional Law No. 9 of 1999, as replaced by Regional Law No. 3 of 20 April 2012 (subsequently repealed by Article 32(4) of Regional Law No. 4 of 20 April 2018), thus stated:

"10. In accordance with Article 26, paragraphs 5 and 6, of Legislative Decree No. 152 of 2006, in no case may work commence without the I.I.A. measure having been issued and projects subject to I.I.A. must be carried out within five years from the publication of the I.I.A. measure. After this period, unless an extension is granted, at the request of the proponent, by the authority that issued the measure, the EIA procedure must be repeated."

The provision, therefore, envisaged a constraint on the duration of the EIA, but not on the measure that, at the outcome of the screening, excluded precisely the need to subject the public work to an EIA, as was the case here.

6.3. Entirely hypothetical - and as such inadmissible - is the third ground (pp. 8 to 10) of the appeal at first instance where it is based on the possible future jurisdictional annulment of the 2009 Director's Decree with an equally hypothetical revival of the requirements set out in the 2005 Decree.

7. In conclusion, the appeal must be dismissed with confirmation of the judgment at first instance.

8. The costs of the proceedings shall, as a rule, follow the award of costs, and shall be paid as set out in the operative part.

FOR THESE REASONS

The Consiglio di Stato sitting in judicial capacity (Fourth Chamber), definitively ruling on appeal No. 7166/2021, as in the epigraph, dismisses it.
Condemns the appellants, jointly and severally, to pay the costs of the proceedings in favour of the Municipality of Novellara, which it settles in the amount of EUR 10,000.00 (ten thousand), plus accessories as required by law if due.

Compensate the costs of the proceedings in favour of the Province of Reggio Emilia.

Order that this judgment be enforced by the administrative authority.

Thus decided, in Rome, in the council chamber of 20 January 2022 with the intervention of the magistrates:

Vito Poli, President

Francesco Gambato Spisani, Councillor

Alessandro Verrico, Councillor

Giuseppe Rotondo, Councillor

Emanuela Loria, Councillor, Extender

LODGED WITH THE SECRETARIAT ON 05 APR. 2022.