

JUDGMENT

Regional Administrative Court for Campania, section II - Salerno, 27/12/2022, No. 3663

ITALIAN REPUBLIC

ON BEHALF OF THE ITALIAN PEOPLE

The Regional Administrative Court for Campania

Salerno branch (Second Section)

has pronounced this

JUDGMENT

on appeal No. 1025 of 2018, supplemented by additional grounds, brought by Osservatorio per la Tutela dell'Ambiente e per lo Sviluppo Umano di Pisciotta, in the person of its legal representative *pro tempore* represented and defended by Domenico Parrella, lawyer, with domicile digital address as in PEC from the Registers of Justice;

against

Municipality of Pisciotta, in the person of the Mayor *pro tempore* represented and defended by Antonio Brancaccio, Pasquale D'Angiolillo, with digital address as in PEC from Registers of Justice and with an address for service at the office of the former, in Salerno, largo Dogana Regia, 15;

for the annulment

of the resolutions of the Pisciotta City Council No. 101 of 22 November 2017 and No. 5 of 14 March 2022, of the resolutions of the Municipality of Pisciotta No. 35 of 20 March 2017, No. 70 of 26 June 2017, No. 18 of 11 March 2019, No. 62 of 28 June 2019 and No. 25 of 6 March 2020, of the Ordinance of the Mayor of the Municipality of Pisciotta No. 30 of 15 December 2017: approval of the Municipal Urban Plan.

Having regard to the appeal, the additional grounds and the annexes thereto;

Having regard to the notice of appearance of the Municipality of Pisciotta;

Having regard to Articles 35(1) and 85(9) of the code of administrative procedure;

Having regard to all the acts of the case;

Relator at the public hearing on 16 November 2022, Dr. Olindo Di Popolo and heard the parties' lawyers as specified in the minutes;

Held and considered in fact and in law the following.

FACT AND LAW

(omissis)

6. Turning now to the examination of the appeal, the plea of inadmissibility for lack of standing raised by the respondent administration is, first of all, creditable.

6.1. On this subject, Council of State, Plenary Session, No. 6/2020 recalled that "registration in the list referred to in article 13 of Law No. 349/1986 does not determine a rigid automatism, since the judge, after verifying the actual representativeness, may also admit to the exercise of the action non registered associations, according to the criterion of the so-called "double track" that distinguishes between the legitimacy *ex lege* of the recognised national environmental protection associations (which does not require verification) and the legitimacy of other associations (among others, Council of State, section IV, 2 October 2006, No. 5760; section VI, 13 September 2010, No. 6554)"; and that "the latter must be ascertained in each of the concrete cases with regard to the existence of three prerequisites: the bodies must pursue environmental protection objectives in a non-occasional manner, they must possess an adequate degree of representativeness and stability and they must have an area of reference that can be linked to the area in which the asset for collective use that is allegedly harmed is located (*ex plurimis*, Council of State, section IV, 16 February 2010, No. 885)".

In this perspective, the diffuse interest that can be protected by the associations for the protection of diffuse interests is an autonomous legal situation brought before the courts by the collective entities in question, which assert an 'interest of their own' and which is identified by means of an express legislative typification or by means of an implicit legislative provision resulting from a jurisprudential typification carried out through the provision of the need for the entity to possess the requirements as set forth above (see Council of State, section I, No. 530/2022),

And, if it is true that the 'living law' contemplates the aforementioned "dual track" criterion, which places alongside the national environmental protection associations, legitimated *ex lege* to protect in the courts the values statutorily pursued against the damage to them, the other collective entities, legitimated to do so by virtue of their own substantial and effective characteristics, it is equally true that the suitability of the latter for the exercise of the action indefectibly requires a case-by-case, rigorous and concrete verification by the court hearing the case, otherwise there would be an uncontrolled proliferation of popular actions, which are not

permitted by the legal system, except in very exceptional cases (see Council of State, section IV, No. 1838/2018): "on the subject of the active legitimacy of associations and committees, it is appropriate to distinguish between the legitimacy *ex lege* of recognised national-level environmental protection associations and the need to verify, in concrete terms and in accordance with general principles, the legitimacy of all other associations, committees and bodies at local level that claim to be bearers of widespread environmental protection or historical-cultural interests; to this end, the assessment, in order to avoid an unreasonable extension of the judicial protection beyond the boundaries of a credible identification of such interests, must be conducted in a very rigorous manner, having regard to a plurality of indexes, referring both to the greater or lesser temporal origin of the entity, and to its proven sphere or degree of representativeness, to the initiatives and actions undertaken for the protection of the interests of which it proclaims itself to be the bearer, to any recognition it has received in the performance of administrative action" (Regional Administrative Court for Piemonte, Turin, section I, No. 2292/2009).

In this sense, Council of State, section VI, No. 3234/2008 ruled that: "... for the purposes of the legitimacy to appeal of a non-recognised association or equivalent subjective figure, not included in the list referred to in Article 13, Law No. 349 of 8 July 1986, it is not sufficient to allege that the subjective figure has environmental protection among its statutory purposes and operates in the province in which the area affected by the contested administrative measure is located or has been established specifically for the protection of the same area. The vagueness of such an allegation does not allow the elements qualifying in concrete terms the differentiation of the applicant's position to be considered proven, such as, necessarily, the stable connection with the territory concerned, that is to say, objectively consolidated over a significant period of time, as well as an associative action with adequate consistency and representativeness of the interests which it is intended to protect, also with reference to the number and quality of the associates, so as to illustrate the reality and referability, to a specifically delineated interest, of the injury attached".

In the same vein, it has been stated that: "a non-recognised association, territorially delimited, must guarantee the possession of the requisites, as to purpose, representation, territorial articulation, non-occasionality or contingency, constant activity of promoting initiatives aimed at increasing interest in environmental values proper to the territory of reference not dissimilar, in due relation to the territorial scope of reference to those proper to recognised associations, such requirements having been identified by the law in an exceptional way and in the right mediation - as a tempering of the principle of personal nature of the action with reference to the protection of a personal and current interest - as a necessary condition for the recognition of a procedural initiative for the protection of environmental interests involving diffuse interests of the community" (Regional Administrative Court of Tuscany, Florence, section II, No. 567/2011;

No. 915/2016; see also Council of State, section IV, No. 7907/2020; Regional Administrative Court for Lombardy, Brescia, section I, No. 398/2011).

6.2 Well then, on the basis of the remarks made below, in the case of OTASUP, a non-recognised association not registered in the list ex art. 13 of l. no. Well, on the basis of the remarks made below, OTASUP, an unrecognised association not registered in the list pursuant to Article 13 of Law No. 349/1986 or in the single national register of the Third Sector, does not meet the requirements of legitimacy as set forth in the law and sealed by the Court of Justice; namely: a) the statutory pursuit of environmental protection objectives; b) the adequate degree of collective representativeness and temporal stability of the organisation; c) the connection of the latter to the area where the protected environmental value is located (see, in addition to Council of State, Plenary Session, No. 6/2020 cited, *ex multis*, Council of State, section IV, No. 885/2010; No. 1001/2010; section V, No. 3107/2011; No. 3808/2013; No. 4928/2014; section IV, No. 2236/2020; section VI, No. 4022/2021; section II, No. 4952/2021; section I, No. 530/2022; section IV, No. 1937/2022; No. 3921/2022; Regional Administrative Court for Latium, Rome, section I, No. 7041/2021).

It is, in fact, "to exclude the legitimacy to challenge administrative acts of an association (club) of citizens that lacks the character of exponential body on a stable and continuous basis and is not endowed with adequate representativeness" (Council of State, section IV, No. 7799/2022).

6.2.1. On the statutory purpose and object of the OTASUP.

According to Article 2 ("Purpose") of its Statute, OTASUP "aims to pursue in Pisciotta and the Pisciotta area the purposes set out in the 2010 Human Development Report, published by the United Nations Development Programme (UNDP), according to which "Human development consists in increasing the freedom of people to lead long, healthy and creative lives, to work towards the realisation of other goals dear to them, and to participate actively in the promotion of the equitable and sustainable development of a shared world. People are both the beneficiaries and the driving force of human development, both individually and as a group'.

The following Article 3 ('Social Object') states that: "In order to pursue the above-mentioned aim, the Observatory constitutes a permanent assembly of citizens who, by birth or by choice, consider the landscape of Pisciotta and the Pisciotta area a common good belonging to the whole of humanity. The Observatory will study, protect and enhance the natural, landscape, historical and anthropic heritage of the Pisciotta area, with particular care for the defence of the land and sea environment, the territory, the monuments and public goods, the popular culture and traditions that represent its most authentic identity. To this end, the Observatory produces initiatives and projects of wide interest and participation, also in collaboration with associations, entities and organisations outside its territory, from the recovery of historic centres and rural buildings to the increase of maritime and agricultural activities (typical products), to the

preservation of the oldest arts and crafts, which are in any case opportunities for the development and rooting of young people. The observatory will promote a culture of support for the typical nature of the place, of quality tourism, with the improvement of services and widespread hospitality, presenting the 'Pisciotta logo' to the world as a place of tranquillity and natural beauty, so as to present itself as a preferable destination for sustainable tourism, which is also being developed in the neighbouring mountain municipalities, which have embarked on the practice of recovery also with the help of the European Economic Community. The observatory also proposes to stimulate civic debate on issues of common interest by advancing its own analyses and solutions on the same topics, with the aim of actively participating in community life and organising demonstrations, events, meetings and debates aimed at increasing democratic participation in civic life and in the diriment choices that will condition the human development of the Pisciottana area. To these ends, the Observatory, exercising the participatory rights ensured by Article 9 of Law No. 241/1990, undertakes to supervise all administrative procedures that at national, regional, provincial or municipal level may lead to the adoption of a measure, from which harm may be caused to the purposes specified above and to the interests protected. The Observatory will take part in all the proceedings provided for by the laws on environmental protection, the laws on the government of the territory, and the laws on the protection of hygiene and health, and will especially exercise in the interests of its members and citizens all the rights guaranteed to associations by the Statute of the Municipality of Pisciotta (Title III, Chapter I).

Now, the vagueness of the objectives and the statutory object of the institutional activity of the appellant association is self-evident, where the vocation, which, for the purposes of the subsistence of the legitimacy of the institution of the present proceedings, should have been electively environmental, is diluted in the broader, elliptical and indefinable perspective of the promotion of 'human development'.

The OTASUP's statute, setting out generic and all-encompassing purposes of promoting the development and historical and cultural identity of the territory, as well as environmental protection, without even from the outset contemplating the possibility of legal action for its protection, lacks, that is, the specific differentiation in terms of purpose that would be necessary to confer the plaintiff's legitimacy to bring proceedings (see Council of State, section IV, No. 3111/2014). Where, 'in the face of a statute setting out multiple purposes ... and variegated fields of associative action, the allegation and proof of the concrete pursuit of the environmental interest and the allegation and proof of the other requirements of legitimacy must be more precise and rigorous, so as to allow the administrative judge to test that the judicial initiative is not extemporaneous and contingent, but corresponds to the effective expression of the associative activity" (Council of State, section IV, No. 3885/2022).

6.2.2. On the level of representativeness of the OTASUP.

At the time of its constitution (on 29 April 2017), the applicant had 31 members (including the 24 founders who met on 15 April 2017: see minutes of the same date).

In a note dated 19 December 2017, prot. No. 12355, addressed to the Mayor of the Municipality of Pisciotta and acknowledged by the latter in a note dated 22 December 2017, the President (Infante Giovanni) of OTASUP notified the resignation or resignation of himself and 19 other members.

As a result, the already small association of 31 members was further reduced, first to only 11 and then to only 10 members (two of whom, moreover, were mere holidaymakers in Pisciotta, systematically represented by third-party proxies at association meetings), as proven, respectively, by the exhibited list accompanying the minutes of the meeting of 6 May 2020 (rep. No. 4453; file No. 3441) and by the exhibited minutes of the meeting of 28 May 2022.

It is, therefore, completely implausible to recognise to such a structure - which has seen 3 presidents in its short associative history - a consistency and associative-organisational quality capable of guaranteeing an adequate level of representativeness of the local socio-environmental instances and a stable connection with the territorial context of reference, since it is, rather, a mere projection of the interests of the few subjects that have joined together extemporaneously and instrumentally in view of the exercise of a specific jurisdictional action (on this point, see Regional Administrative Court for Tuscany, Florence, section II, No. 567/2011; section I, No. 397/2012; No. 1150/2014; No. 145/2016), which, as such, cannot be said to be the continuous bearers of widespread interests rooted in the territory (see, ex multis, Council of State, section V, No. 1830/2007; section VI, No. 3507/2008; No. 6050/2011; Regional Administrative Court for Apulia, Bari, section III, No. 866/2009; Regional Administrative Court for Latium, Latina, No. 670/2009; Regional Administrative Court for Tuscany, Florence, section I, No. 6710/2010; Regional Administrative Court for Liguria, Genova, section I, No. 941/2017).

6.2.3. On the occasionality of the OTASUP.

Already the chronological overlap between the constitution of the OTASUP (on 27 April 2017, the day after the adoption of the PUC of Pisciotta, just DGC No. 120 of 28 December 2016), the issuance of the acts of the opposed planning procedure (DCC No. 5 of 17 February 2017; DGC No. 35 of 20 March 2017; DGC No. 70 of 26 June 2017; DCC No. 101 of 22 November 2017; Trade Union Ordinance No. 30 of 15 December 2017) and the lodging of the original appeal (by means of an extraordinary appeal to the Head of State notified on 14 March 2018) denotes the precipitous instrumentality and extemporaneousness of the underlying associative initiative divided by a few individuals with a view to the judicial challenge of the PUC of Pisciotta.

Such eloquently circumstantial *consecutio temporum* is, moreover, corroborated by the finding that the discussions held and the resolutions adopted in the meetings of the assembly and administrative bodies of the collective entity appear electively focused, at least at the outset of the association's activities, on the preparation, establishment and continuation of the present proceedings (see the minutes of the Board of Directors of 9 March 2018 and 19 May 2019; minutes of the Assembly of 17 June 2017, 30 December 2017, 6 May 2020 and 28 May 2022).

"If it must be an entity whose statute provides as an institutional purpose the protection of a given asset for collective use, i.e. of a given widespread or collective interest, - states, in this regard, Council of State, section VI, No. 3507/2008 - the entity itself must be able, due to its organisation and structure, to concretely achieve its purposes and be endowed with stability in the sense that it must carry out its activity externally on a continuous basis". "It is therefore necessary that the judicial action be capable of meeting the requirements of protection of the substantive situation, of which the entity is the owner, worthy of consideration by the legal system. The aim is to exclude the legitimacy of so-called associations of convenience, whose activity does not reflect real collective needs, or of merely occasional social organisations, lacking the character of stability in representing those specific interests of which they claim to be bearers. The restrictive criteria for the purposes of representativeness are intended to avoid recognising the legitimacy of bodies that have been set up instrumentally, for the exclusive purpose of pursuing the jurisdictional path, outside of the hypotheses, indeed limited and peremptory, in which the system recognises the remedy of popular action" (Regional Administrative Court for Campania, Salerno, section II, No. 13718/2010; section I, No. 1767/2011).

No operational stability can be attributed, then, to OTASUP's activities other than the reports and complaints addressed to various administrative authorities always with the aim of contesting and opposing the approval process of the PUC of Pisciotta.

And this, both because these are initiatives subsequent to the institution of the present proceedings, not improbably preordained to the surreptitious creation of a 'curriculum of legitimacy' *ab origine* insubstantial (on this point, see Regional Administrative Court for Emilia Romagna, Parma, No. 132/2019, according to which, "on the subject of the legal standing of associations representing exponential interests, the requirements of procedural admissibility are to be identified in the representativeness, stability and continuity of the activity carried out, at the time the appeal is lodged, in order to exclude the possibility that an exponential body without previous representativeness and stability is created for the sole purpose of bringing a judicial appeal, in elusion of the rule of the personality of the interest in the appeal"); both because - apart from the documentary references to events that are not even unequivocally attributable to the OTASUP's operations - these are episodic and irrelevant initiatives in relation to the *res in dispute* (such as, for example, the creation of the OTASUP, the creation of a body with no previous representativeness and stability, and the creation of a body with no previous

representativeness and stability for the sole purpose of bringing an appeal, in circumvention of the rule of the personality of the interest in the appeal) , the running of a column in the local periodical 'Cronache Cilentane', the distribution of copies of the daily newspaper 'Il fatto quotidiano', the sending of a letter to Trenitalia calling for trains to stop at the disused Caprioli railway station, the collection of signatures for the 'Rodotà' bill on common goods, the organisation of the 'Pork Festival' and a tasting of cheeses from Cilento, the promotion of a botany event entitled 'Edible Plants for Man and Animal in the Cilento Tradition', the cultivation of the olive grove owned by an associate and given to the association, called 'Orto dei semplici', the petition for the recognition of the so called 'Cenotaph of Palinuro' as being of relevant archaeological interest), which are incapable of denoting an assiduous, coherent and targeted commitment to safeguarding the urban and landscape values potentially affected by the planning instrument under approval.

7. The noted inadmissibility is further corroborated by the at least partial lack of qualified, concrete and current interest of OTASUP in bringing proceedings.

Indeed, in the series of complaints submitted by the applicant association, the complaints centred on procedural defects in the planning activities carried out by the Municipality of Pisciotta (see paragraphs 2.a-d, 2.f, 2.l, 2.o, 2. s-t), in respect of which the perimeter of protection of the environment lato sensu generically and elliptically reserved by the Statute to the operations of the applicant association remains also mediately extraneous, and in respect of which the subjective position of the latter is not harmed, are flanked by those only elliptically and exploratively focused on the information-participation deficit vis-à-vis the collective body concerned (cf. (see retrospect, paragraph 2.e.) and substantial defects in the town-planning scheme (see retrospect, paragraphs 2.h-i, 2.m-n, 2.p.), as well as in the compatibility with the landscape (see retrospect, paragraphs 2.g and 2.r) and the environment (see retrospect, paragraph 2.q) of the Pisciotta PUC.

In this regard, it should be recalled that, according to settled case law, such interest in bringing proceedings cannot be established when a representative association of citizens - such as, precisely, the self-styled OTASUP - brings an action before the courts "in order to pursue, in a general manner, the proper exercise of administrative power or for the purposes of mere justice, it being necessary to identify, in such cases an injury of legitimate interests of the association itself or a direct and current injury of widespread interests of the persons protected by the same, without prejudice, however, to the need to verify the existence of an interest in the appeal consisting in the identification of an advantage, or at least of the expectation of an advantage, current and direct, that may result from the annulment of the contested measure" (Council of State, section III, No. 2892/2014).

In this perspective, "the challenge of an urban planning instrument ... cannot be based on the generic interest in better planning of its own land, which as such does not differ from the equal

interest that *quisque de populo* might have. This is a principle of a general nature, valid in all cases in which procedural defects are raised in relation to the procedure for the formation of a town-planning instrument, and which has also been specifically declined with reference to the defects of the strategic environmental assessment procedure. The interest in challenging the planning instrument, therefore, cannot be limited to the generic expectation of a better planning of the land ...". (Regional Administrative Court for Campania, Salerno, section II, No. 375/2019; see Regional Administrative Court for Lombardy, Milan, section II, No. 2228/2018).

It is also worth remembering, with regard to the objective scope of the purposes for which environmental associations - to which OTASUP can only be declaredly and loosely attributed - may take legal action, case law - in line with the restrictive approach to active legitimacy - has affirmed, in some rulings, that such associations may take action only to protect the environment in the strict sense of the term (see Council of State, section IV, No. 8234/2003), with the exclusion, *inter alia*, of the qualified interest in challenging acts of mere urban planning content (see Council of State, section IV, No. 5202/2005), while it has maintained, in other rulings, that the interest in question also extends to the challenge of acts with a value that is not strictly environmental, provided that it is ascertained that their annulment is instrumental to environmental protection (see Council of State, section IV, No. 5760/2006; section VI, No. 5560/2007) (on this point, see Council of State, section VI, No. 6223/2013).

(omissis)

FOR THESE REASONS

The Regional Administrative Court for Campania, Section of Salerno (Second Chamber), definitively ruling on the present appeal and its additional grounds, declares them inadmissible.

Orders the deletion of the unbecoming and offensive expressions, as indicated in the grounds. Condemns the "Osservatorio per la Tutela dell'Ambiente e lo Sviluppo Umano di Pisciotta" to pay, in favour of the Municipality of Pisciotta, the costs of the proceedings, which shall total €2,000.00 (plus accessory charges where due).

Order that this judgment be enforced by the administrative authority.

Thus decided in Salerno in the council chamber of 16 November 2022 with the intervention of the magistrates:

Nicola Durante, President

Olindo Di Popolo, Councillor, Extender

Laura Zoppo, Referendary

FILED WITH THE SECRETARY'S OFFICE ON 27 DEC. 2022.
