



The Republic of Italy

In the name of the Italian people

The Regional Administrative Court of Umbria

(First Section)

has pronounced the present

JUDGMENT

on the appeal number 87 of 2012 registry, proposed by: Committee for the Protection of the Environment and the Health of Citizens, represented by its legal representative Dr. Stefania Ministrini, represented and defended by lawyer Urbano Barelli, domiciled in Perugia, via Cesare Beccaria 11;

against

- The municipality of Perugia, represented by its mayor, represented and defended by lawyers Luca Zetti and Sara Mosconi, with a domicile in Perugia, corso Vannucci 39, legal office;
- ARPA- Regional Agency for Environmental Protection of Umbria, represented by its legal representative, represented and defend by lawyer Paolo Sportoletti, domiciled in Perugia, via Baglioni 10;

against

Opere Pie Riunite of Perugia, represented by its legal representative Professor Angelo Frascarelli, represented and defended by lawyer Matteo Frenguelli, domiciled in Perugia, via Cesarei 4;

for the annulment

- of the administrative decision no. 31 of 23.11.2011, signed by the Director of the Private Building Unit of the Municipality of Perugia, published in the Bulletin Board of the Municipality of Perugia on December 6, 2011;
- of any other act that is presupposed, connected and/or consequent to it, mentioned in this appeal or unknown;
- if necessary, of articles 151-bis and 151-ter of the TUNA of the PRG of the Municipality of Perugia and of the ARPA Umbria opinion of November 11, 2011, number 0024224.

Having seen the appeal and its attachments;

Having seen the acts of constitution in court of the Municipality of Perugia, ARPA Umbria and Opere Pie Riunite of Perugia;

Having seen the defensive memories;

Having seen all the acts of the case;

The speaker in the public hearing on February 13, 2013 was Councillor Stefano Fantini, and the lawyers were heard for the parties as specified in the minutes;

Considered and considered in fact and law what follows.

FACT

The appellant Committee challenges the administrative decision no. 31 of November 23, 2011, by which the Municipality of Perugia determined the completion of the simplified authorization procedure (PAS) under article 6, paragraph 5, of Legislative Decree no. 28 of 2011, introduced by Opere Pie Riunite and relating to the construction and operation of a biogas electricity production plant, including a cogeneration plant, located in San Martino in Campo, Strada Pontenuovo.

The Committee raised the following objections in support of the appeal. The first four relate to the administrative procedure, the others to the decision challenged:

- 1) Violation of Articles 7 and 8, as well as 1 and 3 of Law no. 241 of 1990, of the principle of transparency and the Aarhus Convention; violation of the horizontal subsidiarity principle under Article 118 of the Constitution, complaining about the lack of involvement in the administrative procedure that ended with the challenged resolution, although the Committee, made up of residents and owners of properties in the area where the project is to be implemented, collected 450 signatures against the project (which initially included the construction of a livestock building) and then carried out a motivated objection against its realization, considering it harmful to the environment and the health of citizens, thus being qualified as an identified or easily identifiable subject for the purpose of starting the procedure communication.
- 2) Violation of Articles 9 and 10 of Law no. 241 of 1990; violation of the Aarhus Convention as a whole, and in particular Article 6, paragraph 4; violation of the horizontal subsidiarity principle under Article 118 of the Constitution, alleging that the City did not assess the content of the objection sent by the Committee on February 23, 2011.
- 3) Violation of Article 6 of Law no. 241 of 1990, in the assumption that the person responsible for the procedure did not verify the subject legitimacy requirements of the request; in particular, the entity "Perugia Works United," resulting from the merger of two IPAB, is a public law legal entity, and therefore has a purpose and goal incompatible with the construction of the plant in question. Currently, it carries out agricultural and livestock activities, albeit in conditions of severe economic crisis, which is very different from the energy production business activity.
- 4) Violation of Articles 14 and following of Law no. 241 of 1990 and of the Ministerial Decree of September 10, 2010, no. 47987.

The Ministerial Decree indicated above, in outlining the state guidelines for the authorization of plants powered by renewable sources, provides that the conference of services in the authorization procedures of renewable energy plants is of a decisive nature. This means that the relevant conference procedure must end with a motivated determination that replaces any authorization, concession, clearance or consent act, however named, of the competence of the participating or otherwise invited Administration; in the present case, however, the conference has merely taken note of the "completion of the enabling procedure".

- 5) Violation of Article 12, paragraph 7, of Legislative Decree No. 387 of 2003; violation of Article 174 of the EU Treaty and of Article 3-ter of Legislative Decree No. 152 of 2006, and in particular of the precautionary principle, complaining that the plant in question does not respect the components of biological diversity, resulting in about 270 hectares of land being taken away from

traditional, typical, and especially food use. On the contrary, the placement in an agricultural zone of renewable energy plants, although allowed by Article 12 of Legislative Decree No. 387 of 2003, cannot be considered unconditional, but is subject to precise compatibility checks, which in this case have not been carried out.

It also violates the fundamental principle of precaution (derivable from Article 174, paragraph 2, of the EU Treaty), as some dangers derived from the construction of the biogas plant, even reported by the Complaining Committee, have not been evaluated in the project; in particular, the area is vulnerable to nitrates, subject to hydrogeological risk and contamination of the aquifer, there is also the problem of odor emissions in a highly anthropized area due to the presence of populated centers, the problem of accessibility, and there are also landscape aspects of significance, with a risk of unnatural rural landscapes, and considering the presence of the 3S landscape unity constraint.

- 6) Violation of Part II, Title III of Legislative Decree No. 152 of 2006 and of Article 2, paragraph 4, letter b), of regional regulation No. 7 of 2011; excessive power due to lack of investigation.

The authorized plant, with an electrical power of 999 kWh, has been separated from the cattle breeding stable, in clear evasion of environmental impact assessment regulations; a unified evaluation of the two projects (stable and biomass plant) should have been carried out, also because the plant will also be powered by the sewage from the breeding stable.

- 7) Violation of Article 6 of Legislative Decree No. 28 of 2011, as well as of Article 216 of the Health Laws T.U.; violation of Articles 4 and 7 of regional regulation No. 7 of 2011; violation of Article 269 of Legislative Decree No. 152 of 2006; violation of Article 38 of T.U.N.A. of the Perugia P.R.G. Municipal Plan.

It is inferred from the technical report that the plant will also be powered by the sewage from the stable, currently held by the Opere Pie Riunite of Perugia in Pontenuovo di Torgiano, as well as from the one that may be built; it therefore falls within the first class insalubrious industries, for which Article 216 of the Health Laws T.U. requires that they must be isolated in the countryside and kept away from dwellings. The most relevant emissions from a biomass plant are those of ammonia and gas from the storage of digestates and their solid and liquid fractions separated, while the malodorous emissions, which will be felt at least up to a distance of one thousand meters, as recognized by regional regulation No. 7 of 2011 (Annex B), they can be produced in all departments of anaerobic digestion plants. The technical report only dedicates a few superficial lines to the problem of bad odour emissions and the Administration has not carried out an adequate investigation, also in violation of Article 269 of the environmental code.

- 8) Violation of Article 12 of Legislative Decree No. 387 of 2003, Article 6 of Legislative Decree No. 28 of 2011, Article 20 of Umbria Regional Law No. 27 of 2000 and Articles 31 and 38 of the Regional Urban Plan of the Perugia Municipality; violation of Article 3 of Law No. 241 of 1990; excessive power due to lack of investigation.

The contested measure did not take into account the provisions in support of the agricultural sector, with particular reference to the enhancement of local agri-food traditions, the protection of biodiversity, cultural heritage and rural landscape.

The area where the plant should be built is classified by the current Municipal Regional Plan of Perugia as "EA" (area of particular agricultural interest) and falls within Landscape Unit 3S. The presented report erroneously states the compatibility of the proposed intervention with urban planning provisions, as, on the contrary, Article 20, paragraphs 3 and 4, of Regional Law No. 27 of 2000 allows for the construction of infrastructure of significant public interest in areas of particular agricultural interest only when it is demonstrated that alternative solutions are not possible; in this perspective, Articles 151-bis and 151-ter of the Regional Urban Plan are also illegal.

Furthermore, with regard to Landscape Unit 3S, Article 38 of the Regional Urban Plan provides that "the construction of new buildings and their facilities for agricultural-livestock activity is not allowed in areas falling within Landscape Units 1N, 4N, 1S, 3S, 4S, and 9S". Neither can the statement by the President of the Charitable Works in date November 8, 2011, stating that the construction of the plant does not fall within the scope of the aforementioned Article 38 of the Regional Urban Plan, have any value, as it should at least have been signed by the authorized designer and, in any case, verified by the Administration during the investigation.

- 9) Violation of Article 4 of the Regional Regulation of the Umbria Region July 29, 2011, No. 7 and Article 6 of Law No. 241 of 1990; abuse of power due to lack of investigation and distortion of facts.

In the technical report on the project, it is stated, with regard to the location of the plant, that the area is suitable, as it is compromised from a territorial and landscape perspective, being adjacent to artisanal and industrial production areas, where, among other things, the large IKEA shopping center will be built, which, on the other hand, will eventually be located further north, adjacent to San Martino in Campo.

- 10) Violation of Article 6 and Article 14-ter of Law No. 241 of 1990, and Article 6 of Decree Law No. 28 of 2011; abuse of power due to lack of investigation; violation of Article 33, paragraph 3, of the T.U.N.A.; violation of Decree No. 10 September 2010.

The challenged measure was adopted as a result of a completely inadequate investigation.

In addition to what has already been stated regarding the lack of evaluation of the plant's atmospheric emissions, emblematically and purely by way of example, the last meeting of the conference of services on November 7, 2011, concluded favorably to the construction and operation of the plant, saving the acquisition of the final opinion of ARPA (which was received on November 23, 2011, the same day as the adoption of the determination), in contrast to what is provided by Article 14.1 of Annex 1 to Decree No. 10 September 2010, No. 47987.

The Opere Pie Riunite of Perugia, the City of Perugia and ARPA Umbria have joined the lawsuit, objecting to the inadmissibility of the appeal for lack of active legitimacy of the complaining committee, and in any case, its lack of merit.

At the hearing on February 13, 2013, the case was held for decision.

LAW

1. - The exception of lack of legal standing of the "Committee for the protection of the environment and the health of citizens (formerly No-Maxistalla)" raised by the opposing parties and in particular by the municipal administration must be examined first.

The exception, although not devoid of some problematic elements, especially relating to the time frame of the establishment of the Committee, shall not be assessed positively.

According to the prevailing case law concerning environmental associations that do not have legal standing under law no. 349/1986, legal standing to act can also be recognized to spontaneous committees established for the main purpose of protecting the environment, health and/or quality of life of the population living in a circumscribed territory; consequently, the administrative judge may recognize, on a case-by-case basis, legal standing to challenge administrative acts affecting the environment to local associations (regardless of their legal nature), provided that they pursue statutorily and non-occasionally environmental protection objectives and have an adequate degree of representativeness and stability in the area in which the allegedly harmed interest is located (Council of State, Section VI, July 26, 2001, No. 4123; Section VI, May 23, 2011, No. 3107).

These requirements seem to be fulfilled by the claimant committee in light of the three parameters traditionally referred to in the jurisprudence, namely the statutory purposes of the entity, the stability of its organizational structure and its vicinity to the substantial interest

allegedly harmed as a result of the administrative action for the protection of which the entity intends to act in court. And indeed, article 2 of the Statute of 28 January 2012 (...) indicates that the purpose of the Comitato is “to defend and protect the environment and health of the citizens living on the territory. The territory is meant to include the area of Santa Maria Rossa, San Martino in Campo, Viale and in the neighbouring areas of the Municipalities of Perugia, Deruta and Torgiano”; moreover, article 1 provides that “the Comitato has unlimited duration until otherwise decided by the assembly”; as for the requirement of *vicinitas*, it is undisputed that members of the Committee are residents and owners of immovable properties located in the area where the project for the construction of the biogas facility for the production of electrical energy is to be realized.

(omissis)

FOR THESE REASONS

The Regional Administrative Tribunal for Umbria (First Section)

finally pronouncing on the lawsuit, as proposed in the heading, rejects it.

It compensates the costs of the lawsuit between the parties.

It orders that this judgment be executed by the administrative authority.

So decided in Perugia in the council chamber on February 13, 2013 with the participation of the judges:

Cesare Lamberti, President

Stefano Fantini, Councilor, Drafter

Paolo Amovilli, Referendary

THE DRAFTER

THE PRESIDENT

DEPOSITED IN THE SECRETARY'S OFFICE

on May 23, 2013

THE SECRETARY

(Art. 89, paragraph 3, administrative procedure code).