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Equalisation and Compensation Mechanisms in the New Rome Urban Development Plan

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Abstract

The adoption of equalisation and compensation mechanisms within the urban plan for Rome proved to be quite controversial. The regional law provides nearly no provisions for governing such planning tools, and the regulations set out by the plan introduce a somewhat complex system. The present paper, after a brief presentation of the history of land ownership and development within the city, will focus on the main features of equalisation and compensation practices which aim at governing the distribution of development rights among landowners and developers.

1. Introduction

Within the different regional experiences of urban law, the case of the Lazio Region has a unique feature: the presence of Rome. The analysis of

equalisation and compensation mechanisms adopted in this region can be focused on the Roman experience, and in particular on the new Rome Urban Development Plan (UDP), which came into force in 2008. This choice seems inevitable, not only for the importance of Rome, but also because the new plan contains significant provisions about compensation and equalisation (i.e. equal distribution) of building and development rights.
After illustrating the regional legal framework, attention will be focused on three issues: the Rome planning experience, the new UDP, and the mechanisms of urban compensation and equalisation, regulated by the norms set out in the UDP.

2. The "silence" of regional law

Compared with other Italian regions, Lazio has legislation characterised by the absence of specific norms on urban equalisation and compensation. The regional urban law no. 38/1999 does not contain this kind of provision[1]. Although this law was approved when other regions had already issued rules in this direction (Colonna, 2007) – and despite some important precedents at a local level, such as the Rome urban development plan variant of 1997 – the decision made in 1999 was to maintain a traditional planning system, faithful to the national town planning act of 1942.
Therefore, the Lazio planning legislation reproduces, without any particular innovation, the norms set by national law on "comparto edificatorio" (i.e. an area in which forms of equalisation of building rights amongst owners are adopted)[2]. Of course there have been, since 1999, attempts to introduce some innovations, but none of them have been put into effect[3].

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1 The term "perequazione" (i.e. equalisation) appears only once, in Article 30, subpara. 1, letter h, where it is stated that master plans shall indicate which modifications should be implemented by public acquisition of exactly identified properties or by equalisation forms, identified by urban development plans.

2 See Articles 39 and 48, Lazio regional law n. 38/1999, and Articles 21 et seq. of Lazio regional law n. 35/1978. In reference to "programmi integrati", see Article 2, Lazio regional law n. 22/1997.

3 Among these attempts, the most relevant was in 2003, when a Code that collected all the previous regulations was drafted, but it was never approved; in that text there was an explicit provision regarding urban equalisation and compensation.

In this context, the case of the Urban Development Plan for Rome provides one of the most important experiences of equalisation and compensation mechanisms in Italy (for a general discussion see Bartolini et al, 2009; Police, 2004; Crosetti, 2004; Perongini, 2005; Casini; 2005).

3. The case of Rome

Before examining the solutions designed in the new Urban Development Plan (UDP) of Rome, it is useful to underline some features of this unique city (for an overview see Marcelloni, 2003; Ricci, 2005). Firstly, Rome, 129,000 hectares in size, is the largest municipality in Europe: the metropolitan areas of Bari, Bologna, Catania, Florence, Genoa, Milan, Naples, Palermo and Turin, added together, have more or less the same area as Rome, namely 136,800 hectares.

Secondly, the history of Rome and its urban development presents significant features. In particular, the Roman territory has been the subject of speculation since 1800. Émile Zola, in 1896, described "un vol de spéculateurs, venu de la haute Italie" which "s'était abattu sur Rome, la plus noble et la plus facile des proies", and he wrote that a "jeux exasperé, un jeux formidabile dont la fièvre avait remplacé la petit train réglementé du loto papal, un jeux à coups de millions où les terrains et les bâtisses devenaient fictifs, de simples prétextes à des opérations de Bourse"[4]. Since then, development projects within the city have continued incessantly, including illegal projects, the so called "abusivismo di necessità" (Insolera, 1971).

Thirdly, in spite of such a huge expansion, the situation of the private property in Rome has been characterised by large properties owned by a few families. When Rome became the capital of Italy, around 40% of the whole territory, i.e. 76,000 hectares, was owned by only eleven families, such as

4 Zola É., *Rome* (1896), Paris, 1999, 395. This story is in Catini R., "Roma dopo la crisi edilizia con gli occhi di Émile Zola", in "La costruzione della Capitale. Architettura e città dalla crisi edilizia al fascismo nelle fonti storiche della Banca d'Italia", in *Roma moderna e contemporanea*, 2002, n. 3, 543.

Torlonia, Borghese and Doria Pamphili[5]. In the twentieth century, important development companies have acquired similar large areas of property, inevitably exercising strong influence on planning decisions and decision making processes (Insolera, 1971). The planning process, which has led to the new Rome urban development plan, started in 1994 and has been extremely long and complex. A fundamental stage within this process was the adoption of the "Piano delle Certezze" in 1997, which set the basis for future decisions. Indeed, the "Piano delle Certezze" provided a specific compensation mechanism that was unsuccessfully challenged in the courts[6]. This mechanism was applied to development rights, cancelled by the "Piano delle Certezze" itself, in order to realise a new environmental safeguard system. Such development rights were to have been used within two kinds of areas – the "City to be transformed" and the "City to be completed" – which were not regulated by the "Piano delle Certezze". The new urban development plan had to regulate and relocate development rights deriving from the compensations disposed of by the Piano delle Certezze.

3.1 The New Urban Development Plan (UDP) of Rome

In 2003 the city of Rome adopted its new Urban Development Plan (UDP). The Plan was then re-adopted in 2006, after the consultation process, and finally approved in 2008, almost fifty years after the previous plan (Rome City Council decisions n. 33, 19-20 March 2003; n. 64 21-22 March 2006; n. 22, 12 February 2008).

As to the plan making process, it is worth mentioning two circumstances. The first concerns the length and complexity of the proceedings which led to the adoption and approval of the plan. The second regards the fact that, in order to have the plan approved before the expiry of the so-called "safeguard

5 See N. Flores, *Dalla terra all'edilizia. L'avventura speculativa di Paolo Borghese nella Roma di* tardo Ottocento, in *La costruzione della Capitale*, cit., 583 ss., in particolare 587 ss.

6 Lazio Regional Administrative Court, section I, judgement n. 1652/1999. Some companies appealed against the Plan's decision of changing building areas back into agricultural areas. However, the claim was rejected on the basis of the "public nature" of the compensation tool provided within the plan, which was to be considered within the process of land use planning as an indemnity, in the form of "equalisation", for the loss of the betterment value and urban rent cancelled in favour of environmental quality.

measures", a new collaborative planning procedure between the Municipal Authority, Province and Region has been used[7] (Mazzarelli, 2007). In fact, the length of the process, mostly due to the large dimensions of the city of Rome, determined the legal implications of the safeguard measures (Council of State, n. 2 /2008). Over 7,000 written representations were submitted, of which some 30% were totally or partially accepted.

As regards the Plan's contents, the city has been divided into three different systems: urban system (about 36,000 hectares - 28%)[8]; environmental and agricultural system (about 88,000 hectares - 68%)[9] and infrastructures and community facilities system (about 5,000 hectares - 4%)[10]. The Plan has allocated about twenty million square metres of gross floor area[11] for future admissible developments (in terms of volume, about sixty six million cubic metres). In this respect, the gross floor area amounts to an increase of about 9% to the existing city, with a future estimated population of over three million inhabitants.

In this context, the UDP has defined different equalisation and compensation tools for its implementation. During plan preparation, the norms, made up of 109 articles, were subject to important modifications, especially with regard to the articles regulating these planning practices and mostly with regards to equalisation. Indeed, the fundamental importance of equalisation is underlined by the first article, subsection 2, where it is stated that:

> *"the Plan pursues regeneration and revitalisation objectives on the basis of sustainable development and equalisation principles, following criteria such as efficiency, effectiveness, transparency and simplification of administrative actions, complying with the legislation in force"*.

Articles 17-22 regulate equalisation criteria and mechanisms.

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7 See article 66-bis, Lazio Regional Act n. 38/1999, introduced by the article 70, subsection 7, Lazio Regional Act n. 4./2006.

8 Including: Historical City, Built-up City, City to be Regenerated, City to be Transformed, Structuring Projects, Areas with restricted developments.

9 Composed of: Protected Natural Areas, Hydrological network, agricultural land and parks.

10 Including public services, private services and play areas, mobility and technological infrastructures.

11 Gross Floor Area is defined by the UDP norms as the sum of the floor surfaces comprised within the perimeter of the building.

3.2. Criteria and mechanisms for the equal distribution of development rights

Article 17, subsection 1, of the UDP norms clarifies that the plan introduces, as a general rule, the need to parcel out development rights between areas and individuals, according to principles of equality and uniformity, and taking into account: pre-existing urban plans; legally existing building(s); the pursuit of public or general interest"[12]. Indeed, the equalisation system provided by the new plan aims at parcelling out the "advantages" and compensating the "disadvantages" produced by new planning provisions, as well as compensating the "disadvantages" caused by previous conditions of decay of existing building property. Therefore, it is a widespread and *a priori* equalisation, in terms of both finances and of building volumes.

In particular, five cases of equalisation are described in articles 18 et seq. These are: areas of compensation; planning compensations; special contributions; incentives for building renewal; compensatory transfers. These equalisation methods, singly or combined, and access to incentives or compensation therein provided, are applied through bid processes and a specific planning instrument ("Programma Integrato"), and are consistent with State regulations for participation in administrative procedures. Moreover, the UDP distinguishes building rights exercisable *in situ* from those to be transferred to other areas, as well as – in the same area - building rights assigned to owners from those reserved to the local government.

Firstly, the *areas of compensation* are specific portions of land where the UDP distinguishes between development rights assigned to owners (quantified according to pre-existing urban planning), on one hand, and

12 Article 17, subsection 6, clarifies that, with the exception of criteria for differentiated allocation of building forecasts, the UDP ensures fair distribution of building forecasts for owners concerned with executive planning instruments, apart from specific destinations assigned to each area and proportionally to the owned areas.
Moreover, apart from criteria and methods to allocate building forecasts, the UDP ensures that the distribution of charges due to the administration is proportional to the assigned building forecasts and it distinguishes ordinary building forecasts - which correspond to ordinary charges - from additional building forecasts – which correspond to extraordinary charges.

development rights, reserved to the local government for the public interest (urban redevelopment, environmental protection, social housing, urban services), on the other hand (article 18 of UDP norms). In such areas, intervention can be indirect, either public or private. This implies that, when the implementation planning instrument is approved, the owners (of the defined areas) have to transfer, with no charge, the property which conforms to the planned developments to the local government itself or to a third party appointed by the local government.[13]

Secondly, *planning compensations* are related to building rights "promised" by the "Piano delle Certezze" but not yet assigned. Indeed, one of the purposes of the new UDP has been to implement the compensations identified by that planning variant.[14] Building rights must be located firstly in the compensation areas, but they can be located in other building areas, only if owners and compensation holders reach an agreement. It should be pointed out that building rights to be located are determined – as far as quantity and land use are concerned – assuming that the real estate value and the building rights to be compensated are equivalent. Finally, bid processes are provided to assign areas to those who receive compensation.[15]

Thirdly, a *special contribution* is applied to the most relevant real estate enhancements produced by the new Plan, compared with pre-existing urban plans (Article 20 of UDP norms). This contribution is worth two thirds of the real estate value which can be obtained due to the dispositions of the Plan (it may either increase or reduce). The contribution can be paid directly to the local government or be deducted through the direct execution of works.

Fourthly, *incentives for building renewal* are used to achieve urban standards, to realise and manage public works and services and to renovate the existing building stock. In the latter case, the incentives consist of the

13 If the final receivers of building forecasts reserved to local government is the owner of the assigned area, the conveyance doesn't take place.

14 Article 19, UDP norms. In a second instance, compensations provided for "Tor Marancia" and "Casal giudeo" were added to "Piano delle Certezze" compensations.

15 Apart from these procedures, within 12 months after the UDP approval, the local government issues a specific notice addressed to compensation receivers, so that they can send in the proper application within the final term indicated in the notice (not less than six months).

increase of the existing Gross Floor Area, which – if not localised *in situ* - can be transferred to the areas of compensation, according to the criterion of economic equality. "Programmi integrati" will set the interventions and the modalities and levels of incentives, as well as the timing of a possible transfer of incentives to other areas.

Lastly, *compensatory transfer* is an alternative tool for the expropriation of areas for public use (Ricci, 2005). These areas can be bought through giving the owners development rights, which have to be localised *in situ* or transferred to the areas of compensation. Therefore, the areas are acquired by conceding rights to build, based on the extension of the area, but this can be concentrated just in a part of the area or transferred to another area; the transfer of the areas must be done through a registered and transcribed public act. The acquisition of an area takes place either with a direct intervention or through participation in the "Programma integrato". In the first case, the rights to build are 0,04 square metres, to be realised on 10% of the area, against the transfer to the Municipality of the remaining 90%[16]. In the case of participation in the "Programma integrato", the right to build is about 0,06 square metres and will be transferred to the City, to be restructured, or in other areas of compensation, adopting permitted land uses, while the whole area will be given over to the Municipality[17].

4. Conclusions: "Le livre tuera l'édifice"?

The system described above is very complex and is the result of the use of different equalisation techniques: equalisation, compensation, and incentives. In sum, and with specific reference to the rights to build, there are three consequences: there is the use of a general principle of equalisation, mainly used through "Programmi integrati"; urban compensations are limited to specific circumstances; forms of compensatory

16 On the area that remains in public use only some specific uses are allowed, such as small private services.

17 The private Gross Floor Area, generated from the application of the "compensatory transfer" to the City to be regenerated, can be transferred only within the same kind of areas from which they come.

transfer are regulated and they are applicable in order to find areas designated for public use.

One of the most interesting aspects is that the above-mentioned mechanisms create a very complex system of "supply" and "demand" (Stella Richter, 2006). The demand is constituted by the building rights to be localised (resulting from interventions within the areas of compensation), compensatory transfers and urban incentives or even in some cases of special contribution. On the other hand, the supply side, in addition to the areas regulated by the "Programmi integrati", is constituted by the "Ambiti di compensazione". These operate like containers in which the building rights to be localised can be concentrated. For this aspect, the most significant example is the so called "*Ambiti di riserva a trasformabilità vincolata*", unbuilt areas formerly assigned to Agro Romano, which now have a mainly residential allocation (for a total of 79 ha and almost 300.000 square metres of Gross Floor Area)[18].

The new Rome UDP thus contains a number of provisions concerning mechanisms of both compensation and equalisation. Such a system is based on three main factors: the former plan, the existing built city and the new plan's objectives (goals). From those factors some "guiding rules" are then extracted and the characteristics of the system are defined that is "unitary, organic and generalised"; it does not substantially affect existing urban development rights; it provides for extraordinary disbursements only to

18 Within such areas the average building index is 0.3 square metres/square metres, ranging from 0.15 to 0.45 on the basis of planning decisions and directives made within action plans. Of such a building index, 0.06 square metres are attributed to landowners while the remaining part is attributed to the Commune. Implementation of urban developments is subject to approval of action plans which should involve the whole development area ("Ambito di riserva"). These plans are drawn on the ground of a planning decision, based on article 13 subsection 3 and article 14, which should provide, even in different phases: determination of requirements, necessities and priorities; determination of criteria on the basis of which to define those "Ambiti di riserva" which are to receive development rights; modalities and deadlines for activating expropriation procedures. The above planning decision and directive can foresee a general plan which concerns, where needed, along with the "Ambiti di riserva", other essential infrastructures so that access through any means of transport can be guaranteed. After the planning decision is made, and based on it, the Commune can prepare for an open bidding procedure with the objective of encouraging or verifying the availability of developers and landowners to form an "Ambito di riserva".

"new and wider planning provisions"; it does not affect the whole plan's provisions; it is implemented through bid processes; it complies with legislation" (Rome City Council, 2008).

From a broader perspective, looking at the dynamics of the interests involved, it emerges that these solutions involve both public and private interests. Firstly, there is the interest in delivering services and public works, and in creating an extensive environmental system (almost 70% of the entire municipality). The new UDP, in fact, pays due attention to the public sector for an appropriate allocation of services, the achievement of which is pursued through innovative tools introduced by the Lazio regional legislation, such as compensation transfer.

Another aspect of the public interest that the plan aims to preserve through equalisation and compensation mechanisms is the protection of competition, secured through bid processes[19]. However, such mechanisms provide an advantage to the actor directly involved in the specific development in respect to other potential investors.

On the other hand, in the new UDP, the interests of the land owners seem to be the main concern, similar to what is provided by the "Piano delle certezze", where the owners could achieve substantial advantages for their land through equalisation and compensation; they could even increase of their previous building rights. In that case, in fact, the reduced or cancelled development provisions in relation to the then existing plan were considered as "granted development rights". That is in contrast with a correct interpretation of constitutional provisions (Article 42), whereby the social function of property allows the limitation of building rights, even without compensation. The change of the building indexes is in fact in the ordinary power of the public administration (Urbani, 2007).

In any event, the lawfulness of equalisation and compensation arrangements prepared by the new UDP does not seem to be in question, since they are based on a consensus of the land owners and are designed to extend his/her guarantees (Urbani, 2008). In addition, the use of powers to provide reserves of generalised areas and building rights in favour of the Municipal Authority

19 See Italian Constitutional Court decisions no. 129/2006 and no. 269/2007.

of Rome, that in other Regions has been challenged before the courts[20], has been considered lawful by the Italian supreme administrative court ("Consiglio di Stato")[21].

These options, so favourable to the private sector, sometimes are designed merely to solve problems of consent. They could even be unsustainable economically, that is why the alternatives should not be considered optimal as such, as they are based on arguments of a political nature. They should be seen as one possible solution among others, to be chosen if it is economically advantageous (Miceli and Segerson, 1996; Heller and Krier, 1999; Cooter, 2000).

The complexity of such mechanisms, along with their costs, may mean that they may not prove to be as efficient as expected. At the same time, the costs of implementing a wide environmental system through the acquisition and management of green areas could be so high that benefits to the community could disappear. In fact, the complexity of such tools represents one of the major issues in the plan's implementation (De Petris, 2007). For example, in the case of the "Ambiti di Riserva", in these areas, development interventions cannot be carried out until an implementation plan has been approved.

However, the main doubts concern the excessive complexity of the UDP norms. Although such dense regulation could be justified by the lack of a specific regional legislation, the number of provisions set by the new Rome UDP could remind us of Hugo's warning: "*Le livre tuera l'édifice*" or "*l'imprimerie tuera l'achitecture*".

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20 Case law of Council of State, IV, n. 4833/2006, which stated as unlawful the decision of the Veneto Region relative to the modifications to the plan of Bassano del Grappa. Such decisions modified the plan's norms by providing that "a 50% share of development rights is attributed to the Municipal Authority". In fact, the administrative jurisprudence stated that in the absence of national legislation, such a provision does not find any legislative background which can justify such a restriction on property rights, outside the guarantee of the Article 42 of the Constitution.

21 See decision no. 4545/2010, of July 13 2010, which reversed the decision no. 1524/2010 of Lazio Administrative Court, regarding the compensatory transfer and the incentives regulated by the UDP. On these issues, see Corrado R. (ed.), L'urbanistica italiana dopo le sentenze del TAR sul PRG di Roma, Roma, 2010.

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