

Report held on the 29th August 2019 in Ljubljana at the Meeting of the environmental group of the european administrative judges

CASES RECENTLY DISCUSSED BEFORE THE ADMINISTRATIVE COURTS
OF VENICE AND BOLOGNA ON THE PROTECTION OF THE LANDSCAPE
AND OF THE CULTURAL TREASURES

1. THE REGULATORY FRAME - THE LANDSCAPE EUROPEAN
CONVENTION

2. THE PLANT OF LIQUEFIED PETROLEUM GAS IN THE CITY OF
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**1. THE REGULATORY FRAME - THE LANDSCAPE EUROPEAN
CONVENTION**

I'm going to tell you about 3 cases which have come recently before the administrative courts of Venice and Bologna.

In these cases there is a common feature: the safeguard of the landscape and of the cultural treasures.

The safeguard of the landscape is promoted by the landscape European convention which was signed in Florence in the year 2000 in the context of the Council of Europe.

The landscape is shaped not only by natural features, but by the architectural and cultural heritage too. The article 1 of the European landscape convention defines in fact the landscape as an area, as perceived by people as common heritage, whose character is the result of the action and interaction of natural and/or human factors.

In the context of the Council of Europe other important conventions, connected to the protection of the landscape, were signed in Granada in the year 1985 about the Protection of the Architectural Heritage of Europe and in Faro in the year 2005 about the protection of the cultural heritage.

The preamble of the European landscape convention explains the reasons of the protection.

"Concerned to achieve sustainable development based on a balanced and harmonious relationship between social needs, economic activity and the environment;

Noting that the landscape has an important public interest role in the cultural, ecological, environmental and social fields, and constitutes a resource favourable to economic activity and whose protection, management and planning can contribute to job creation;

Aware that the landscape contributes to the formation of local cultures and that it is a basic component of the European natural and cultural heritage, contributing to human well-being and consolidation of the European identity;

Acknowledging that the landscape is an important part of the quality of life for people everywhere: in urban areas and in the countryside, in degraded areas as well as in areas of high quality, in areas recognised as being of outstanding beauty as well as everyday areas;

Acknowledging that the quality and diversity of European landscapes constitute a common resource, and that it is important to co-operate towards its protection, management and planning;

Wishing to provide a new instrument devoted exclusively to the protection, management and planning of all landscapes in Europe,"

An indirect reference to the landscape protection is contained in the articles 191 and 167 of the Treaty of Functioning of European Union:

Article 191

"1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment"

Article 167

"1. The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe."

Among the European directives we can point out the "Habitats directive" on the conservation of natural habitats and of wild fauna and flora and the directive of the conservation of wild birds.

In this last perspective the habitat is a natural feature which is part of the landscape, although the habitat doesn't exhaust the landscape.

It's also possible that an area doesn't have a natural feature, which is recognized by the Habitats directive, but this area is perceived and therefore recognized as a landscape.

Moreover the safeguard of landscape and cultural treasures is a fundamental principle of the Italian constitution (article 9).

There are therefore in Italy areas that are protected because of their landscape. This protection derives from the law or from the public planning, where the modifications of the landscape or are not possible or are possible after a permission issued by the public authority, because the modifications are deemed compatible with the landscape.

2. THE PLANT OF DEPOSIT OF LIQUEFIED PETROLEUM GAS IN THE CITY OF CHIOGGIA.

In the first case they are building a plant of deposit of liquefied petroleum gas in the city of Chioggia.

Chioggia is a city of 50.000 inhabitants in the southern part of the Venice lagoon.

The plant is 300 meters away from the houses of the city. It's 70 meters long, 30 meters wide and 20 meters high.

The rules and the planning impose the safeguard of the landscape on the whole territory of the city and of the lagoon nearby. This means that if someone wants to build something, they have to obtain in advance the landscape authorisation.

This is a plant of deposit of liquefied petroleum gas which needs the landscape authorization.

For this type of plants Italian legislation imposes that the landscape authorization is replaced by the final environmental permission, which is given at the end of a conference where all public administrations participate, without needing a single permission by the single different administrations.

Italian legislation foresees that if the representative of the different administrations doesn't participate or participates in the conference without expressing opposition, it is considered that he has given consent to the final permission.

In this case the landscape authorisation had to be given by the town council of Chioggia.

The town council of Chioggia participated in the conference without expressing opposition and without expressing any assessment of the compatibility of the plant with the landscape.

At the end of the conference the environmental permission was granted.

This environmental permission included the tacit landscape authorisation.

The town council of Chioggia didn't challenge the environmental permission before the court.

After the time for challenging the permission was passed, the town council of Chioggia issued an administrative act that ordered the demolition of the construction. The motivation was that the evaluation of the compatibility with the landscape was not done.

The company challenged the administrative act before the administrative court of Venice.

In the month of June 2018 the court decided in favor of the company and this decision was confirmed by the Council of State in the month of February 2019. The court considered that the consent of the town council was given by the tacit consent which had been shaped according to Italian legislation. Furthermore the environmental permission was not timely challenged by the town council in front of the court.

This decision is not satisfactory because it implies that the landscape authorisation can be given by a tacit consent.

The Italian Constitutional Court (n. 26/1996 and 404/1997) has established that the authorisation in environmental matters (among them the landscape's authorisations) cannot be given by tacit consent.

Perhaps a reference to the Italian Constitutional Court had been possible.

This has to be mainly considered as we are discussing also about the importance of techno-scientific evaluations in environmental matters, because the tacit consent excludes any kind of technical evaluations. The principle of good administration

established by the article 97 and the principle of protection of the landscape established by the article 9 of the Italian Constitution seem injured.

3. THE CASTLE OF CATAJO IN THE EUGANEAN HILLS

The company aims to build a shopping center at the foot of the euganean hills. It includes a building of about 38.000 square meters of covered surface, 300 meters long, 100 meters wide and 15 meters high. It is 1 Kilometer from the Castle of Catajo, not far from the city of Padua.

The project has not yet been permitted. They were discussing with the town council about the necessary modifications of the zone planning.

They foresee building an artificial hill for impeding the sight of the shopping center from the castle.

The state office of cultural treasures, in the month of April 2018, has imposed a restriction of the use of soil, including the unsuitability of building, on an area of 3 square kilometers, which covers the site where the shopping center is planned.

The company challenged this act of the state office.

We can notice that with this type of act the public administration imposes a general restriction on the area which was in the main part free of such restrictions. With these types of restrictions the area is preventively regulated about what is possible or not in using the soil.

This is a first great part of the acts that the Italian state office of cultural treasures has the ability to issue.

A second category of acts that the Italian state office of cultural treasures is able to issue are the permissions for using the soil in areas that have been already restricted by the public administration, where the use of soil is possible as long as a specific permission is given. This is not the type of act challenged in this case.

The motivation of the restriction imposed around the castle of the Catajo is based on a scientific report and on a documented report.

So it is affirmed that the restricted area constitutes an environmental frame which has a visual and perspectival relation with the castle and contributes to determine its feature as exceptional. This exceptional feature is given not only for the architectural aspect of the castle (from the sixteenth century), but for the relation with the surrounding territory as well.

This relation regards not only the slopes of the hills but the surrounding plain too. The plain is featured by the crossing of many channels, gardens, country houses, agricultural buildings. The presence of the castle gives significance to the whole landscape.

The safeguard of the visual perspective of the castle had already been foreseen in the environmental planning of the euganean hills that was approved by the Veneto Region in the year 1998.

In this planning of the year 1998 the prohibition of every construction or extension which could intercept and preclude the visual perspective or the usability of the castle was introduced.

This planning of the year 1998 was however not sufficient for the protection of the landscape in this case. Infact they projected the building of an artificial hill between

the castle and the shopping center in such a way to prove that the shopping center could not intercept the visual perspective of the castle.

The recent introduction (with the restriction of April 2018) of the absolute unsuitability of building in the area makes preventively not possible the proof of the interception of the visual perspective of the castle. In fact every construction is prohibited. The protection of the landscape receives so more strength.

Although it is possible to challenge the assessment before the court, the merit of the evaluation of the public administration about the landscape's worth and the choice of the necessary measures to safeguard the landscape is not contestable, considering that the merit of the administrative evaluation is supported by the scientific evaluation.

A judge cannot replace the assessment of the public administration with their own assessment. The judge can ascertain that the premises of fact of the assessment of the public administration don't correspond with the reality.

The claim was rejected by the administrative court of Venice on April 10, 2019.

The company has proposed an appeal before the Council of State, which is pending.

4. THE PALACE OF THE DIAMONDS IN FERRARA

The palace of the diamonds in Ferrara is protected as a tremendous example of the architecture of the sixteenth century. The cultural restriction on the palace was imposed in the year 1914 and protects as well the visual perspective between the palace and the green space belonging to the palace.

Not every construction is prohibited, but every project has to be previously authorized by the State office for cultural treasures.

The town council decided to create new spaces, adjacent to the palace, for widening the museum's rooms. These new spaces are projected over one area of the green spaces of the palace.

The town council tried to choose a project which had a good impact on the visual perspective of the palace. They projected wide glass windows and the color of the construction had to be white.

However the state office of cultural treasures, that has to give the authorisation, rejected the project.

The motivation of the denial of the project is the following:

the project does not respect the restriction imposed on the palace in the year 1914, because it damages the visual perspective between the palace and the green space of the palace.

The state office explained that the palace is not protected for its capacity to contain things. The aim to find new exposition rooms can be satisfied searching rooms that are placed elsewhere.

The state office reminded the Faro Convention, signed by Italy in the year 2005, about the protection of the cultural heritage and particularly article 10 letter c), which establishes that "in order to make full use of the potential of the cultural heritage as a factor in sustainable economic development, the Parties undertake to:

- a) raise awareness and utilise the economic potential of the cultural heritage;
- b) take into account the specific character and interests of the cultural heritage when devising economic policies;

c) ensure that these policies respect the integrity of the cultural heritage without compromising its inherent values.

The town council challenged the denial of the state office in front of the administrative court of Bologna.

The court denied on May, 9 2019 the application for the interim order. The court held as sufficient the motivation given by the state office, at least in the context of the typical summary stage of the precautionary decision.

In this case there is not a monster project as we saw in the previous projects. But the assessment of the competent state office is plausible. There could be scientific reports that could support both solutions. In this case the exclusive competence of the state office for cultural treasures has to be valued. Therefore the denial of compatibility of the project is legitimate.

Moreover the possible existence of different scientific reports is not sufficient to deny the scientific report provided by the public administration, if this is plausible.

During the next merit decision the trial examination will be deeper and the result could theoretically change.

But the merit decision will not happen. In fact in the month of June 2019 there have been in the town council of Ferrara new elections. The previous administration has lost. The new administration has withdrawn the challenge.