

The loss in value of land due to renewed planning restrictions introduced prior to compulsory purchase

Benedetto Manganeli

Loss in value, renewed planning restrictions, compulsory purchase, compensation, damage

Abstract

The concept of "loss in value" was introduced in the Appraisal discipline to resolve the issue of damage assessment determined by restrictions on the use of property. In particular, case law has used this concept to estimate the compensation of the damage caused by renewed planning restrictions introduced prior to compulsory purchase. Although the definition of loss in value is clear, the discussion about its exact location in the theoretical discipline is discontinued or not conclusive. Likewise, it does not seem that the literature provides a clear interpretation of this concept in the solution to the matter of damage assessment under discussion. The practice concerning the use of loss in value is discussed, highlighting the lack of coherence both in the mutual comparison between the adopted solutions and in the logic of the estimate. This paper also provides two contributions, a theoretical one on doctrinal issues that are still open, and a purely operational one.

Introduction

The Constitutional Court (judgment no. 179/99 and, previously, judgments n.55/68 and 575/89) stated «the need for legislative action on the assessment of compensation and the method of payment» for damage caused by renewed planning restrictions. It did not exclude, however, «that - even in the case of a persistent lack of specific legislative action that is determinant of the criteria and the parameters for the assessment of compensation - the competent court, having ascertained the restrictions introduced prior to compulsory purchase, may derive the assessment of compensation under the laws in force, as obligation of restoration of economic losses that a renewal or continuation of the limitation on land-use inflicts on its owners». The legislation has partially implemented what was established by case law in art. 39 of Presidential Decree 327/2001:

«In the case of renewed planning restrictions introduced prior to compulsory purchase, a compensation, commensurate to the damage actually produced, is due to the owner ». Article 39 however, does not state how to calculate the compensation. The absence of a definite indication of the national legislature has produced in some local regulations or, from time to time, in the judgments of the Court, criteria and different rules for the assessment of this compensation. This work offers a comparative analysis of these procedures and, through a critical relocation of the concept of "loss in value" within the discipline, it suggests the correct interpretation thereof as a reference for the

assessment of the damage related to the renewed planning restriction introduced prior to compulsory purchase.

Case law and administrative practice

Who has provided some guidance on how to estimate damage, is the Supreme Court in the cited judgment (see also Cass. N. 500/1999). Firstly, the Court set some limits on the discretion, establishing that compensation due to renewed planning restrictions is not comparable to a loss of property, but rather to the decrease in the market value or usability of the property. The Court therefore invited the legislator to «clarify the arrangements for the implementation of the principle of compensation due to planning restriction introduced prior to compulsory purchase», exercising the «choice between damages and compensation, and even, in some cases, between alternative measures even in a specific form [...] through the supply and allocation of other areas suitable to the needs of the person who is entitled to compensation».

Omitting the alternative solutions, it is first of all necessary to clarify the difference between damage and compensation. Damage is, in the present case, the integral payment owed to the owner of the real estate as a result of the renewal of the limitation on land-use, and thus refers to a specific condition produced by an act, be it legal or illegal, which has affected the market value of the real estate. Compensation, on the other hand, is the amount of money due as restoration to partially repair the decrease in value because of a lawful act (this decrease, therefore, follows facts that sacrifice the rights of others but which are legal because authorized or imposed by law). The compensation does not coincide with full reparation of the actual damage even if is inevitably related to it.

The judgment of 1999, in addition to the declaration of illegality of the criterion for the estimation of the damage based solely on the value of the property, has clarified that the result of the estimate should be proportionate to the actual loss suffered by the owner which is, in most cases, the non-use of the property under normal conditions, or a reduction of use, or a decrease in the market value (or rental value) with respect to the legal situation prior to the planning restrictions.

The legislator did not take advantage of the opportunity offered by the drafting of the Act (Presidential Decree 327 of 2001); although in the legal opinion attached to the draft of the text, the State Council, recognizing in this matter an ample degree of discretion of the legislator, suggested the

inclusion of a way to calculate such compensation (opinion 29/03/2001 n. 4) and suggested, for instance, to measure it equal to the fifth ($1/5 = 20\%$) of what it would be in the event of compulsory purchase. The assumption underlying the calculation is that the fifth was related to a maximum duration of the renewed restriction, in practice, five years and therefore 4% per annum.

In the absence of a final judgment of the legislature, guidance on standards or procedures for the assessment of compensation affected by renewed planning restrictions, have been included in local regulations or are in the judgments emitted by the Court.

For instance, Article 10 of the regional law of the Valle d'Aosta Region, n. 11/04 states that «the local administration can renew the revoked planning restrictions, for a period that does not exceed five years, and provided that the payment of an amount equal to 4 percent of compensation for condemnation, for each year or part thereof, of the new restriction is planned contextually in favour of the owners of the interested areas, even if unknown to the authorities at the time of the renewed restrictions ».

This provision thus refers to the suggestion offered by the State Council. The Autonomous Province of Trento (co. 6 Art. 52 of the law n.1 4/03/2008) and the City Council of Turin (DCC 20/01/2003) adopted a similar compensatory criterion. In these cases, however, the percentage that defines the compensation for each year of the renewed restriction (calculated at time of renewal) is commensurate to the legal interest.

There are also indications from judgments of the Italian and European justice systems. The European Court of Human Rights, 15/07/2004 (judgment Scordino v. Italy No. 2), established the compensation to renew the planning restrictions equal to the legal interest accrued for the entire period and applied to the market value of the real estate, estimated at the time of renewal. Note that in 2007, with Law no. 244, amendments were made to the Presidential Decree 327/2001 (co. 1 and 2 of art. 37), resulting from the need to bridge the regulatory gap determined from the ruling of unconstitutionality of the Constitutional Court n. 348 and n. 349 in 2007. These changes have sewed up the contrast of national rules with the principles ruled in the Charter of Fundamental Rights of the European Union and in particular with the meanings ascribed to them by the ECHR Court (judgment 11.05.2006 No. 191). Because of regulatory intervention, the compensation for compulsory purchase of building land is now equal to the market value and therefore the method of calculation of the compensation to renew the planning restriction, defined by the ECHR, coincides with that proposed by the Autonomous Province of Trento and the City of Turin.

The Administrative Justice has also indicated other ways to assess compensation for the renewal of the planning restrictions that do not seem to have a

common denomination. The administrative court of Abruzzo (Sec. Pescara 28/08/2006 n. 445) states that the damage can be measured in an equitable manner, by comparing it to the compensation established by law for the emergency occupations, less 50%. The reduction was made because, compared to the emergency occupation, here the areas were left in the availability of the owner. Given that the compensation for emergency occupation is established (co. 1 art. 50 of Presidential Decree 327/01) at one-twelfth of what would be payable in the event of compulsory purchase of the land for each year of occupation, 50% of it is equivalent ($1/24 =$) to 4.17% of expropriation compensation for each year of renewed restriction.

The Administrative Court of Puglia (Sec. I Lecce), with judgment n.1086 dated 13/05/2013 stated that the damages resulting from the renewed restrictions must be commensurate to the profitability of the property, which is usually equal to the legal interest rate on its market value. The AC of Puglia however reduces this amount equitably to half, so as to take into account the limited building capacity of the land and in the absence of proof of real estate negotiations. The reason for this reduction is not clear, given that any restriction of the building capacity of the land resulting from additional further planning restrictions is already reflected in the market value of the property. If it is then observed that in the last 10 years, the legal interest has fluctuated in the range between 1% and 2.5%, even without considering the reduction of 50%, this calculation method could lead to a much lower compensation than that established by other procedures also indicated by judgments of administrative courts.

The logic of the estimate

Below, the issue of the assessment of damages due to renewed planning restrictions introduced prior to compulsory purchase is discussed. The "loss in value", in Appraisal manuals, constitutes the reference for the assessment of economic losses inflicted on owners of urban land following variations in the intended use. Famularo (1960, 1963) identified this "loss in value" in the difference between the market value that the property would have reached at a given date in a hypothetical market and the market value attributable to the same property at the same date in a real market, namely "the difference between the market value at the same date that the same property can take on in two different markets, one of which is, generally, not real but hypothetical."

The courts have used this concept to assess the damage following renewed planning restrictions introduced prior to compulsory purchase: «it seems correct to assume that the hypothesis falls into the category of so-called "loss in value" as defined in Appraisal with reference to damage from restrictions imposed by the authorities» (Court of Nola, judgment dated 05/04/2007).

The "loss in value" has been subject of debate in literature with regards to its acknowledgement as an independent estimation criterion that is distinguishable from those known and accepted (in Italian Appraisal Literature): the market value; the cost value; the transformation value, the complementary value and the subrogation value.

Forte (1968), inspired by Famularo's idea, discussed the existence of a sixth estimation criterion. Although its existence is limited to particular circumstances, linked to expropriation and urban planning, he sustains that the identification of a new estimation criterion (Italian literature also talks of "economic aspects") is a possibility that is not theoretically excluded. In the illustration of specific cases which, in his opinion, would confirm the eligibility (and the necessity) of this sixth criterion, Forte describes the case of the evaluation of lands intended for urbanisation in a building area, such as the one intended for public housing (ex L. 167). He concludes his reasoning claiming that there is no coincidence between the loss in value and the transformation value of an entire district, methodologically defined by the product of the incidence of the land value and the value of the building and marketable volumes in the district, and applicable to those parts of the district intended for collective use.

The Author bases this assertion on the hypothetical nature that characterizes the transformation value of an entire district, achievable by assuming the introduction of the entire district on the market, which contrasts with the actual and null value that the land, within the same district but for collective use, would have after operational planning (roads, squares, infrastructure etc.).

The aforementioned coincidence between the two values, according to Forte, demonstrates the existence of this possible sixth criterion estimation, however according to other authors, it is the negation thereof. The transformation value of an entire district (Morano, 1972) coincides with the transformation value of a single plot of land except in the case of aggregated areas with non-uniform destinations and belonging to different owners.

Simonotti (1995), partially following the same reasoning, denies the autonomy of the "loss in value" by identifying the equivalence between it and the transformation value. According to the author, the "loss in value" represents the negative change in value induced by the potential change in the market, that is, when it goes from the hypothetical to the real market. This change can therefore be understood as lost income (therefore a cost). The transformation value of a property, susceptible to being transformed into something more useful, is defined as the discounted market value of the transformed good less the transformation cost. The first term refers to a future condition that can be assumed as hypothetical.

If one considers the inverse formula of the "loss in value", the value in the real market is similar to a

transformation value, according to Simonotti, defined as the difference between the potential value that it would have had in the hypothetical market (the projection of the current value in the absence of the restriction) and the lost income, understood as a cost. Although this interpretation is consistent, however, it does not lead to an equivalence, indicated by Simonotti, between the "loss in value" and the transformation value, unless the current actual value does not become zero (or is zero). This same critique can be used when Forte identifies the need to resort to such estimation criterion in the case of the evaluation of an occupied and unlawfully transformed land.

This is certainly a real possibility in the current Italian legislative framework. In these cases (as required by art. 42 bis of Presidential Decree 327/2001, introduced by Article 34, paragraph 1 of Law no. 111 of 2011) compensation should be equal to the market value of the real estate at the time when the deed of acquisition, which defines the transfer of ownership, is adopted because of this deed the previous zonings are no longer relevant. The time reference is not therefore when the property has been transformed (as per Tar Campania, Sec. II Salerno 1606/2011 and 201/ 2013, but in this sense also the ECHR). Even in this case it is necessary to estimate a hypothetical value, since it refers to a property that does not exist: that is, the property imagined untransformed and considered in a real condition, the current one (Manganelli, 2010; Cingano and Stellin, 2012). Stating that the "loss in value" is able to solve the estimation problem, involves that the actual current value is zero, which characterizes the land transformed with public constructions. This statement certainly is not likely.

In order to demonstrate the non-independence of the "loss in value" one must instead assert that it overlaps the complementary value. Forte himself, even though he inserts "loss in value" in "the Olympus of values," states the persistence of a "structural similarity" as well as logic with complementary value (also proposed by Famularo), as both resulting from a difference between two market values. The conceptual difference is in the contemporaneity of the two values referenced by the complementary value, which contrasts with the distant hypothetical prospective, to which one of the two terms of the loss in value is referred.

Against this claim, therefore, this study tries to give a logical and theoretical support of the view that the "loss in value", as the difference between two market values, is not independent from the criterion of complementary value.

The complementary value is attributable to a part of a complex (consisting of several parts), as the difference between the market value of the complex and the market value of the part that remains once removed from the part being evaluated. For instance, this criterion is applied in the estimation of compensation for partial acquisition. The complementary value expresses the difference

between two values of the market related to the real conditions of the property: one of them refers to an earlier time, when the property is intact, and the other at a later time, when a part is removed from the total. It is in practice the difference between the values (market) of a same property considered with and without an accessory or a part thereof. The "loss in value" is also the difference between market values attributable to the same property in two different conditions.

Unlike the generic definition of complementary value, in the case of "loss in value" the second condition, with respect to the first, does not reflect a change in the technical and physical character of the property but rather a change in its legal nature. Even in this case the difference is between an initial condition (property without modification), to which a value that expresses how this condition could evolve to a current and subsequent condition is assigned, which corresponds to the current value of the real estate to be changed. This view annuls the idea that the value is an independent criterion estimate and ascribes to it the meaning of a specification of the complementary value.

However, with respect to its operational aspect, the assessment at issue arises from the fact that the statement "without planning restrictions introduced prior to compulsory purchase" refers to a hypothetical condition of the property, but not to a market other than the real one. In the formula, the concept of "loss in value" can be summarized as such:

$$Vm = Vs - Vc \quad (1)$$

with

Vs = value of the property without restriction

Vc = value of the property with restriction

Referring again to the discipline and in particular to the assumptions that form the basis of the estimation of the complementary value, "loss in value" has an economic significance if the determination of the terms that make up the previous expression are possible (on the subject see also Rosato and Damian, 2009). The estimated failure (Vs) requires overcoming the difficulty of imagining the current condition of the property in the event that no restriction is imposed on it. The real estate should be considered with regard to the characters defined by legal restrictions affecting land in their current configuration (as interpreted by the ECHR 15/07/2004); it cannot be excluded that they may be changed from the time of the first planning restriction imposed prior to compulsory purchase. Instead, the current condition is certainly the legitimate reference for the analysis of the economic characteristics of the property. The market value of the asset should be anchored at the time of estimation, taking into account moreover the effects of a possible mutated urban layout of the areas surrounding those under consideration.

The assessment of the second term of equation (1) involves greater difficulties. Because of the restriction itself, the property is excluded from the market and has no reference of use to the comparison (buying and selling prices of comparable property). If it is assumed that the Vc equal to the maximum amount payable for the purchase of an asset, subjected to expropriation, which in turn coincides with the expropriation compensation, as a result of regulatory changes in the criteria for its calculation, and therefore today equal to the market value of the property - at the time of the sales agreement or the date of the condemnation, evaluating the impact of any kind of restrictions which do not qualify as compulsory purchase (co. 1 art. 32 TU) - the application of formula (1) would provide no compensation.

Viceversa, not even the Vc can be considered zero: in practice the property, due to the restriction, has no value. The result of (1) in this case would contrast with the principle laid down by the Constitutional Court that compensation may not be equal to the market value of the property. As a matter of fact, it is not a definite compression of the owner's right but a temporary one and for a maximum duration that corresponds to that of the renewed restriction. To estimate the "loss in value" the judgment of the Constitutional Court. 179/1999 indicates the following concepts as alternative procedures to the "decrease in market price (rental or purchase)";

"non-normal use of the properties", meaning an intended use different to that which is ordinarily recognized for similar real estate,

"reduction of use", means the use is normal but the benefits obtained from it, are less.

In these two cases a standard for the assessment of compensation is defined, referred to the difference in the income: respectively between income possible in "normal" conditions, without restriction, and income obtained by a different or limited / reduced use as a result of the planning restrictions (D'Amato, 2000).

Given the interchangeability of the criteria stated in the judgment and in accordance with the logic of the estimate, the capitalization of the lower income is therefore an indirect method for determining compensation, alternative to the assessment expressed by the equation (1).

It can therefore be stated that, instead of thinking in terms of "loss in value", the valuation issue can be resolved by considering the lost income. This is one more reason to deny the autonomy of the "loss in value" as an estimation criterion. The assessment of the incomes in the two conditions (the hypothetical and the actual) is possible, through the market survey, in the case of an agricultural land that following the planning restriction introduced prior to compulsory purchase, was not handled, preserved and transformed in the ordinary way. For instance, a vineyard (or another cultivation) that has not been subject to the ordinary care and maintenance, which in turn would have required the replacement of the dried or no longer productive vines (plants). The

assessment of the damage would be difficult to dispute if sufficiently documented. Note also that the co. 2 of Art. 39 imposes the obligation of liquidation at the occurrence of two assumptions: the request of the injured party and the demonstration of the damage suffered.

However, the legislator did not intend to provide for the possibility of compensation for renewed planning restrictions on non-building sites. As a matter of fact, the same Art. 39 of Presidential Decree regulates the issue of «the compensation payable in the event of incidence of urban forecasts on lands included in building zones.» Even the judgments of the Court before and after Presidential Decree 327/2001 acknowledge an expropriation of value and impose consequent damage only in cases of prolonged interdiction to the construction. Some local regulations have been more explicit: the Autonomous Province of Trento states that compensation «is not due in the case of restrictions affecting lands which are not specifically intended for construction.»

Therefore, although it is possible to imagine damage even in cases of renewed planning restrictions on agricultural land, in respect of the law - thus shifting the problem to the only case of building lands – the estimation of the lost income caused by a suspension of the economic potential of the real estate, would be very complex. In this case, the renewal of the planning restriction introduced prior to compulsory purchase, produces damage that is not connected to the removal of the right but to a temporary suspension thereof. At the end of such suspension when the expropriation occurs, this right is restored and is transferred along with the property. The expropriation compensation should be proportional to the building potential of the land and, among other things, added to the renewal potential (co. 5 art. 39). Should the restriction expire without having led to expropriation, the Administration would have to re-plan. Any delay in the adoption of this act would bring about other scenarios and various claims for damages outside this discussion.

It seems clear that the entity of the damage due to the renewal of the restriction cannot be compared to the loss of property, neither, as in this case of building land, can a standard for the assessment of the compensation equal to the market value of the property, be used (in this sense also the State Council, Opinion No. 1475/2009). As a matter of fact, if on the one hand the planning restriction freezes the right to buildable exploitation of the land, on the other, it does not prevent an alternative use, such as agriculture, parking or storage. The damage can therefore be assessed as the difference between the income related to the non-exploitation of the land to build on, and those obtained, at a minimum, from the use of agricultural land. The estimate of the first term can be done by imagining the temporary unavailability of the land, thus considering the loss of income to be at least equal to

the compensation provided for occupation (co. 1 art. 50 Presidential Decree 327/01).

This compensation is determined for each year of occupation in an amount equal to one-twelfth of what would be due in the event of condemnation and therefore, as already mentioned, the lost annual incomes are estimated at 8.33% of the market value of the property. Clearly, this percentage today is certainly greater than an ordinary rate of return on a property investment. On the other hand, in respect of the equalization principle, that percentage is a reference, and a different solution should be justified, for instance, by stating that it is not damages but compensation.

Once the solution adopted by some administrations or proposed by the Council of State (Opinion No. 4 of 2001), or indicated by the ordinary justice is accepted, the difference between the potential income associated with the exploitation of buildable land and the income that can be generated from an alternative use, is determined at a percentage of 4 or 4.17% of the market value of the property. Thinking about what the legislator has established as compensation for the occupation of a land, the above percentages suggest that to an agricultural use or an otherwise alternative use to construction, corresponds a utility, therefore a value, equal to about half of the value attributable to the same land intended to be buildable. This solution therefore would not seem reasonable or at least not very sustainable in the event of renewed planning restriction on building land. On the contrary, the determination of a probable relationship between the unit value of the land in its alternative use (i.e. agriculture V_c) and that of the same land in its actual urban condition, that is without considering the impact of the restriction (i.e. buildable V_s), defines a plausible and rational coefficient of reduction (x) to be applied to the damage caused by lawful occupation. If, therefore, V_s is the market value of the building land, damage to renew the restriction for each year can be set as:

$$V_s [0,0833 (1 - x)] = V_s [0,0833 (1 - V_c/V_s)] = 0,0833 (V_s - V_c),$$

therefore 1/12 of the loss in value, for every year of the renewed restriction. In practice, in the absence of proof that determines the damage for non-normal use of the real estate, as in the case of building land, it should be proportionate to a percentage of the loss in value. This percentage coincides with what Presidential Decree 327/01 plans to apply to the market value, in the calculation of the compensation for lawful occupation.

Conclusions

The analyses carried out have explored two aspects of the “loss in value” often used, or at least used as a reference to assess the damage caused by the renewal of the planning restrictions introduced prior to compulsory purchase. The analysis of the first

aspect, the logical-theoretical one, provides support to the theory of those who state that the value is not an autonomous estimation criterion but expresses, in different ways, the concept of complementary value. This speculative digression, which may seem anachronistic in a condition in which tendencies towards a standardization of the doctrine on international principles which focus mainly on operational aspects of appraisal, now seem to predominate, wants to emphasize the peculiarities of the Italian tradition of Appraisal, by trying to rekindle a discussion on apparent differences between the concepts of Italian tradition and international standards (Mollica, 2006). On the other hand, as Misseri (1977) rightly pointed out, far from denying the universal connotation of Appraisal, what varies within individual organized societies is the operational area of the discipline, especially when the conditions imposed by the law are present (and in this sense Italy is a special case on issues related to the expropriation or real rights on assets).

The second aspect is therefore the purely operational one. The analysis concluded that the "loss in value" is the essential reference for the assessment of the damage caused by renewed planning restrictions, but where it is possible to determine its amount as the difference between two market values, this calculation would make the hypothesis of permanent damage valid. The damage produced by the renewal of the restriction should therefore be determined as a percentage of the "loss in value" that can measure the annual loss for non-normal use of the property related to renewal of the planning restriction introduced prior to compulsory purchase.

Benedetto Manganelli, Associate Professor in Real Estate Appraisal at the University of Basilicata, email: benedetto.manganelli@unibas.it.

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