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Tacit Approval in Building Permits with Zoning Non-Compliance and Self-Remedy

Council of State (Consiglio di Stato), Judgment no. 1878 of 2026: the tacit building permit consolidates even in the event of zoning non-compliance and may be removed solely through ex officio administrative annulment within twelve months, subject to the outer boundary of structural unconfigurability

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Current Legal Framework as of 9 November 2026: The Council of State (*Consiglio di Stato*) definitively departs from prior case law that conditioned the formation of tacit approval upon the substantive compliance of the proposed works, establishing that zoning non-compliance gives rise merely to voidability through administrative self-remedy within twelve months, whereas only the omission of mandatory essential documents entails the structural unconfigurability of the application.

ABSTRACT

This contribution examines the landmark ruling of the **Council of State** (*Consiglio di Stato*) redefining the scope and operation of **tacit approval with zoning non-compliance** within Italian building and land-use law. Departing from long-standing case law that treated full substantive compliance as a constitutive prerequisite for the formation of an administrative measure *per silentium*, the appellate administrative court holds that conflicts with municipal zoning instruments do not prevent the perfection of the tacit permit, but instead render it unlawful and removable exclusively through **ex officio annulment** under Article 21-*nonies* of Law no. 241 of 1990 within the twelve-month statutory forfeiture period (*decadenza*). At the same time, the judgment draws the strict boundary of **structural unconfigurability**, clarifying that failure to submit the mandatory essential documents prescribed by Article 20 of the Consolidated Building Act prevents the statutory scheme from coming into existence, thereby denying any curing effect to the inaction of the public administration.

Key Takeaways

- **Departure from the dogma of substantive compliance:** Tacit approval is perfected upon the expiry of the statutory deadline even where an application does not conform to statutory provisions or suffers from zoning non-compliance, since no stricter substantive admissibility threshold applies than that governing ordinary express applications.
- **Concept of structural unconfigurability:** The absence of the essential requirements exhaustively listed in Article 20(1) of Presidential Decree no. 380/2001 (including the certified technical declaration of compliance with energy efficiency standards) prevents the duty to issue an express decision from arising and precludes the formation of the tacit permit.
- **Judicial protection of the applicant and formal certification:** To overcome legal uncertainty, the private party may bring special judicial proceedings against administrative silence-default under Articles 31 and 117 of the Code of Administrative Judicial Procedure to obtain the formal certificate of expiry of procedural deadlines governed by Article 20(8) of the Consolidated Building Act.
- **Administrative self-remedy and statutory forfeiture deadline:** A tacit building permit formed in breach of urban planning provisions is unlawful yet legally effective, and can be set aside solely through ex officio annulment under Article 21-*nonies* of Law no. 241/1990 within twelve months.
- **Non-curability through administrative inaction:** Municipal silence cannot cure a lack of constitutive elements of the statutory model; the public authority retains the power to declare the application ineffective even after the ordinary procedural time limit has elapsed.

CASE DOSSIER

JURISDICTION
Italy (Civil Law)

SUBJECT AREA
Administrative Law & Construction & Urban Planning

LEADING DECISION
Council of State (Consiglio di Stato), Judgment no. 1878 of 2026 — Holds that zoning non-compliance does not bar the perfection

Legal Principle / Editorial Headnote

With regard to the issuance of a building permit, the tacit approval governed by Article 20(8) of Presidential Decree no. 380 of 6 June 2001 is perfected upon the mere expiry of the procedural time limit even if the application exhibits zoning non-compliance or fails to conform fully to statutory requirements, as such substantive unlawfulness may be removed by the public administration solely through the exercise of its power of ex officio annulment pursuant to Article 21-nonies of Law no. 241 of 7 August 1990 within the twelve-month time limit. Conversely, no tacit enabling permit is formed in cases of structural unconfigurability of the application, which occurs whenever the filing lacks the essential elements and documents exhaustively prescribed by Article 20(1) of the Consolidated Building Act — including the certified technical declaration attesting compliance with energy efficiency regulations — since the fruitless expiry of the procedural deadline cannot cure a radical genetic absence of the minimum prerequisites indispensable to trigger the statutory simplification mechanism.

01. THE FORMATION OF THE TACIT BUILDING PERMIT BETWEEN PROCEDURAL SIMPLIFICATION AND LEGAL CERTAINTY

The evolution of the general framework governing administrative procedure, marked by successive statutory amendments to Article 20 of Law no. 241 of 7 August 1990 and incorporated into the specialized micro-system of the Consolidated Building Act under Presidential Decree no. 380 of 6 June 2001, reflects a decisive shift toward standardized statutory models of accelerated procedural simplification. Within the domain of land-use and urban governance, legally meaningful administrative silence serves the primary goal of streamlining the exercise of public authority and eliminating the paralyzing repercussions of bureaucratic inaction on the property and development rights of private citizens. Nevertheless, the delicate balance of public and private interests underlying land transformation requires assessing whether **tacit approval with zoning non-compliance** can validly operate as a statutory substitute for express authorization, or whether the absence of substantive compliance irreparably precludes the enabling building title from coming into existence in the first place.

The statutory framework laid down in Article 20(8) of Presidential Decree no. 380 of 2001 provides that, once the deadline for adopting the final measure has expired without a reasoned refusal having been issued, tacit approval is deemed to have formed on the building permit application, save for proceedings involving environmental, landscape, hydrogeological, or cultural heritage constraints. This provision is designed to place strict temporal boundaries upon public power in order to safeguard the stability of legal relations, preventing a breach of the administrative duty to decide from penalizing the private applicant indefinitely. Administrative courts have long debated the actual reach of this temporal safeguard, oscillating between restrictive conceptions aimed at preserving the mandatory nature of municipal zoning plans and guarantee-oriented readings focused on protecting legitimate expectations and enforcing statutory forfeiture deadlines (*decadenza*).

The concrete application of these doctrinal coordinates finds an emblematic illustration in the complex dispute adjudicated by the **Council of State** (*Consiglio di Stato*) in Judgment no. 1878 of 2026[1]. The litigation originated in

December 2011, when a property owner filed an application with the Municipal Administration of Vasto seeking a building permit for the residential conversion of an attic space pursuant to Abruzzo Regional Law no. 15 of 26 April 2004. Faced with prolonged silence maintained by the competent municipal technical offices for over a decade, the owner submitted a formal request in March 2022 to obtain certification attesting the expiry of the procedural time limits and the consolidation of the tacit permit. The municipality formally rejected the certification request, objecting that the original application lacked indispensable certified declarations concerning seismic safety regulations, an energy performance certificate, and proof of payment of administrative fees and construction charges.

The judicial challenge brought against that negative determination was dismissed at first instance by the Regional Administrative Court (*TAR*) for Abruzzo, which ruled out the formation of tacit approval due to the failure to enclose mandatory statutory documentation. On appeal, the claimant maintained that the initial filing contained all the structural elements required to identify the proposed works in their planimetric and volumetric materiality, arguing that formal omissions or evidentiary gaps could neither undermine the abstract statutory model nor legitimize a belated refusal issued outside the procedural safeguards governing administrative self-remedy. The dispute directly engages the distinction between the substantive validity of a tacit permit and its threshold procedural configurability, an issue already addressed by sector-specific case law regarding the legal consequences of an application lacking technical drawings in a building permit with an incomplete application.

The decision of the Council of State (*Consiglio di Stato*) performs a clarifying function of primary systemic importance. Starting from a comparative examination of the conflicting judicial approaches, the Appellate Panel conducts a thorough inquiry into the constitutional and European Union foundations of legally meaningful silence, ultimately delineating the precise boundary between the unlawfulness of a tacit measure formed in breach of substantive law and its radical structural unconfigurability stemming from the absence of the minimum documentary prerequisites mandated by building legislation.

02. TACIT APPROVAL WITH ZONING NON-COMPLIANCE AND THE PREREQUISITES FOR ADMINISTRATIVE SELF-REMEDY

2.1 — Overcoming the Requirement of Substantive Compliance for the Perfection of the Permit

The doctrinal characterization of the tacit building permit has historically witnessed a sharp divide between two antithetical interpretive lines within administrative case law. Under a long-standing and restrictive line of authority developed primarily in building and planning disputes, **substantive urban planning compliance** of the proposed works constituted a *conditio sine qua non* for the perfection of the statutory mechanism. Proponents of that view maintained that tacit approval operated purely as an instrument of procedural simplification rather than economic deregulation, making it legally untenable to allow the mere passage of time to confer a substantive legal advantage lacking the statutory prerequisites for approval. According to that reading, any inconsistency with the municipal master plan or local building regulations prevented the permit from coming into existence at the outset, reducing the fruitless expiry of the procedural deadline to legally inconsequential inaction.

The ruling of the **Council of State** (*Consiglio di Stato*) seals the definitive abandonment of that reconstruction, exposing its irreconcilable systemic contradictions with regard to tacit approval and zoning non-compliance in administrative proceedings[1]. The judgment observes that Article 20 of Law no. 241 of 1990 does not subject activation of the statutory device to intrinsic substantive merits requirements different from the general **threshold admissibility requirements** for filing an application. Had the legislature intended to condition the substitute enabling effect upon the full substantive legality of the project, it would have enacted an express derogatory rule; instead, the procedural statute attaches a binding

duty to decide to the filing of the application, making an explicit upstream value judgment for situations in which the public authority remains silent. Reaching the opposite conclusion would frustrate the statutory objective of accelerating economic procedures, condemning private applicants to perpetual uncertainty over the legal standing of tacit consent.

A threefold set of European Union, constitutional, and statutory considerations supports this conclusion. At the supranational level, Directive 2006/123/EC on services in the internal market enshrines the **principle of tacit authorization** specifically in order to prevent distortions of competition caused by temporal uncertainty in licensing regimes. On the constitutional plane, Article 97 of the Italian Constitution requires interpreting **good administration** not as the unilateral sacrifice of private initiative to public interest, but as an institutional duty to bring decision-making processes to a timely conclusion, prioritizing administrative effectiveness and sanctioning opaque administrative inertia. Consequently, discrepancies with urban planning parameters do not block the perfection of the permit *per silentium*; rather, they taint its substantive validity, shifting legal protection from the threshold plane of existence to the remedial plane of administrative invalidity.

2.2 — The Exercise of Ex Officio Annulment and the Temporal Limits of Administrative Self-Remedy

The proposition that a tacit permit can be perfected even where an application fails to conform to substantive law finds decisive textual confirmation in Article 21-*nonies* of Law no. 241 of 1990. The statutory provision governing **ex officio annulment** expressly contemplates the exercise of second-tier review powers over authorization measures or grants of economic advantages formed pursuant to Article 20. Were one to endorse the thesis of mandatory substantive compliance, an unlawful tacit measure amenable to removal through administrative self-remedy could never arise in practice, because any breach of statutory law would already have prevented the measure from forming upstream. Instead, the legislature explicitly envisaged the scenario in which tacit approval generates a defective administrative act, stipulating that its removal must strictly comply with the substantive and temporal safeguards governing self-remedy.

> *Any non-compliance of the proposed intervention with urban planning parameters does not preclude the emergence of the tacit permit, but renders it voidable through administrative self-remedy within the peremptory twelve-month deadline, upon the expiry of which the private party's legal position remains consolidated and immune from municipal revocation.*

The statutory framework governing building self-remedy requires the public authority to act within a reasonable period, now fixed by national legislation at a peremptory ceiling of **twelve months** from the perfection of the tacit title. Nor may the exercise of *ius poenitendi* be reduced to a mechanical restoration of breached legality: the municipality is under a strict duty to provide specific reasons demonstrating an **actual and concrete public interest** in setting aside the measure, weighing the collective interest comparatively against the legitimate expectations engendered in the beneficiary and the competing interests of any third-party stakeholders. An annulling determination resting solely upon the belated discovery of zoning non-compliance is unlawful for defective reasoning and breach of procedural reasonableness.

Furthermore, Article 2(8-*bis*) of Law no. 241 of 1990, inserted by Law Decree no. 76 of 16 July 2020, establishes the radical legal ineffectiveness of belated determinations adopted after procedural time limits have expired where tacit approval has already matured. A municipal administration that fails to issue a reasoned refusal within the ninety-day period prescribed by Article 20(8) of the Consolidated Building Act irreversibly forfeits its ordinary first-tier decision-

making power. Any subsequent repressive or obstructive measure adopted after the deadline cannot be treated as a valid late refusal; rather, it constitutes an ineffective act incapable of impairing the building permit that has already formed, leaving the formal initiation of self-remedy proceedings under Article 21-*nonies* as the sole lawful avenue for municipal intervention.

03. STRUCTURAL UNCONFIGURABILITY AND THE OUTER BOUNDARIES OF THE APPLICATION

3.1 — Essential Documentary Elements Prescribed by the Consolidated Building Act

The legal system's openness to the formation of tacit building permits does not degenerate into an indiscriminate cure for every procedural omission. The **Council of State** (*Consiglio di Stato*) draws a rigorous conceptual distinction between a merely incomplete application and a filing afflicted by **structural unconfigurability**, identifying the latter as the external and impassable boundary of the statutory simplification device[1]. Article 20(1) of Presidential Decree no. 380 of 2001 exhaustively enumerates the minimum prerequisites indispensable to give shape to a legally recognizable building permit application: proof of the applicant's legal standing and title to the property, the minimum architectural design drawings, and the certified declaration signed by a licensed design professional attesting the compliance of the project with urban planning instruments and sector-specific technical regulations, with explicit reference to anti-seismic, public health, and **energy efficiency** standards.

These documentary requirements are strictly mandatory: they constitute the constitutive elements of the procedural scheme, designed to define the physical object of the proposed building transformation and to demarcate the scope of the enabling effect produced by the statutory *fictio iuris*. Unlike supplementary detail requirements introduced by regional statutes or municipal building codes, national legislation governing the **essential prerequisites of the application** establishes an essential level of administrative service guaranteed under Article 117(2)(m) of the Italian Constitution, which may not be curtailed through ancillary bureaucratic burdens. Whenever even a single one of those core elements is missing, the submission lacks the minimum structural substance required to qualify as a building permit application and is consequently incapable of triggering any duty to decide on the part of the municipal authority.

From a systemic standpoint, the appellate administrative court performs a further analytical distinction by excluding the operation of tacit approval in cases of **legal unconfigurability**. That defect arises whenever a private party seeks to invoke the tacit mechanism in relation to applications that fall outside the standardized statutory model, such as filings submitted under special regional housing-plan legislation, applications for derogatory building permits under Article 14 of Presidential Decree no. 380/2001, requests to extend expired permits, or retrospective conformity assessment proceedings under Article 36, for which statutory law instead prescribes the distinct mechanism of tacit refusal. In all such scenarios, the fruitless passage of time cannot generate any substitute enabling effect equivalent to an express administrative grant.

3.2 — When the Lack of Minimum Requirements Precludes Consolidation of the Tacit Permit

Pinpointing the operational dividing line between mere documentary irregularity and structural unconfigurability carries decisive weight in characterizing the legal effects of administrative inaction. Where a building application exhibits simple documentary incompleteness concerning secondary aspects or non-essential attachments, the municipality bears a procedural duty to activate promptly the **procedural cure / clarification mechanism** (*soccorso istruttorio*) pursuant to Article 20(5) of the Consolidated Building Act, requesting the necessary supplementary items within the peremptory thirty-day time limit. Should the official in charge of the proceeding fail to request such supplementary elements before

the final deadline for concluding the proceeding expires, tacit approval is nonetheless perfected, without prejudice to the municipality's subsequent power to intervene under the rules governing ex officio annulment pursuant to Article 21-*nonies*.

By contrast, a **fundamentally different legal configuration** arises where the application omits the essential documents required under Article 20(1), as occurred in the dispute at hand due to the failure to attach the energy performance certificate and the certified technical declaration on energy consumption containment. Under such circumstances, the administration's failure to exercise its powers of clarification or regularization produces no **curing effect** whatsoever upon the filing. Administrative silence cannot bridge a structural void in the private party's initiating act, inasmuch as legally meaningful silence presupposes that the application possesses the very same attributes of subject-matter determinacy and certified technical completeness required of the express permit it is designed to replace.

This entails a practical consequence of major significance for **legal counsel** and urban planning practitioners alike: faced with a structurally unconfigurable application, the municipality does not forfeit its authority to declare the filing ineffective, and may lawfully give notice of the non-existence of the permit even after the ordinary ninety-day deadline has elapsed without having to initiate burdensome self-remedy proceedings. The rule protecting the intangibility of the permit upon expiry of the statutory period has no application where the legal scheme never came into existence owing to the radical absence of its constitutive prerequisites, leaving the public authority fully empowered to enjoin construction works or challenge the lack of an enabling building title in the exercise of its land-use enforcement powers.

3.3 — Misrepresentation of Facts and Exclusion of the Statutory Forfeiture Deadline for Self-Remedy

Alongside structural unconfigurability, the legal order provides a further far-reaching exception to the temporal stability of a building permit whenever the formation of consent was procured through deceptive conduct on the part of the applicant. Pursuant to Article 21-*nonies*(2-*bis*) of Law no. 241 of 1990, the twelve-month statutory forfeiture deadline (*decadenza*) governing ex officio annulment does not apply where the favorable administrative measure was obtained on the basis of a **material misrepresentation of facts** or false declarations. The scope of this principle was incisively clarified by the **Council of State** (*Consiglio di Stato*) in Judgment no. 1515 of 2026, concerning the annulment by way of self-remedy of a retrospective building permit granted on the strength of a misleading depiction of the existing physical state of the premises[2].

The appellate court reaffirms that displacement of the twelve-month time bar does not necessarily presuppose a final criminal conviction for ideological falsity; rather, it suffices that the untruthful depiction emerges with objective clarity from the records and documents gathered during the **administrative self-remedy proceeding**. Whenever a private applicant misleads the administration — including through calculated omission or silence regarding decisive urban planning circumstances — such *immutatio veri* precludes the emergence of any legally protectable **legitimate expectation**. Under those conditions, the public interest in restoring land-use legality prevails, justifying corrective administrative intervention even many years after the adoption of the original act or the expiry of procedural simplification deadlines.

Moreover, Judgment no. 1515 of 2026 underscores that the duty to state reasons incumbent upon the municipality is substantially attenuated in the face of macroscopic and deceptive breaches: the obligation to set out specific public-interest grounds is satisfied through documented reference to the party's **untruthful factual representation** and the protective rules infringed. In administrative litigation, the burden of proof rests upon the private party to demonstrate the actual truthfulness of the factual baseline submitted in support of the original application, and the applicant cannot

invoke municipal statutory forfeiture (*decadenza*) where drawings and descriptive schedules misrepresented the true volumetric scale or functional classification of the authorized works.

04. JUDICIAL REMEDIES, BURDEN OF PROOF, AND LITIGATION STRATEGIES

The substantive architecture shaped by administrative case law calls for a precise examination of the remedies available to private applicants both in their dealings with municipal offices and before the administrative courts. Expiry of the ninety-day procedural deadline frequently gives rise to objective legal uncertainty surrounding the actual consolidation of the enabling title, exposing the applicant to the risk of enforcement measures during building inspections or costly delays in commencing construction works. To overcome that impasse, national legislation introduced the dedicated mechanism of **certification of the expiry of procedural deadlines** under Article 20(8) of the Consolidated Building Act, requiring the municipal one-stop building office to issue, within fifteen days of the applicant's request, a formal certificate attesting the absence of pending evidentiary requests or refusal decisions.

Should the local authority persist in its inaction by failing to issue the requested certificate, the private party is not compelled to bring a complex and uncertain action for a pure declaratory judgment on the existence of the tacit permit, but may instead resort to the expedited special procedure against **administrative silence-default**. As authoritatively clarified by the **Council of State** (*Consiglio di Stato*) in Judgment no. 893 of 2026, an action brought pursuant to Articles 31 and 117 of the Code of Administrative Judicial Procedure serves to sanction the breach of the statutory duty to decide upon the certification request, compelling the municipality to adopt an express determination within a peremptory judicial deadline[3]. That remedy fulfills an essential function of certainty in legal and commercial transactions, enabling the developer to secure a formal instrument enforceable vis-à-vis lending institutions, prospective purchasers of the property, and territorial supervisory authorities.

Within **administrative litigation**, the allocation of the **burden of proof** varies significantly depending on the legal nature of the objection raised by the public authority. A private party invoking the formation of tacit approval bears the burden of providing documentary proof of the timely filing of an application complete with all essential prerequisites set forth in Article 20(1) of Presidential Decree no. 380 of 2001, including proof of submission of the certified technical declaration and specialized sector reports. Where the municipality raises the nullity or ineffectiveness of the application on grounds of structural defect, the claimant cannot merely point to the fruitless passage of time, but must adduce affirmative evidence establishing the threshold completeness of the design package as of the original filing date.

Conversely, where the municipal administration challenges the **substantive unlawfulness** of the proposed works or alleges a breach of municipal zoning parameters in the face of a structurally complete application, the burden of proof shifts to the public authority to demonstrate that its power of self-remedy was exercised in a timely manner within the peremptory twelve-month deadline. By way of defense, the applicant's **legal counsel** may effectively raise the plea of **statutory forfeiture** (*decadenza*) under Article 21-*nonies* of Law no. 241 of 1990, while simultaneously challenging any failure to state adequate reasons demonstrating an actual and concrete public interest in setting aside the tacit consent. That litigation strategy neutralizes belated municipal determinations that disguise an ineffective late refusal beneath the formal veneer of a belated review of the building file.

Finally, a fundamental analytical distinction warrants emphasis regarding protected-area regimes and prerequisite clearances: the general rule of tacit approval does not apply where environmental, landscape, or hydrogeological constraints exist, unless the applicant has previously secured a favorable clearance from the authority entrusted with safeguarding the constraint, as examined at length in the analysis of the interplay between building permits subject to landscape constraints and the procedural cure mechanism (*soccorso istruttorio*). Ultimately, the nomophylactic guidance

consolidated by 2026 administrative case law restores legally meaningful silence to its genuine function of safeguarding legal certainty, shielding the private party's legitimate expectations against culpable administrative inertia while preserving intact the mandatory minimum prerequisites established by national legislation for the protection of the wider community.

References & Authorities Cited

Statutory Provisions

- Presidential Decree no. 380 of 6 June 2001, Articles 10, 14, 20, and 36 — Consolidated Act of legislative and regulatory provisions in building matters, with particular reference to the essential prerequisites of the application and the rules governing ordinary tacit approval.

- Law no. 241 of 7 August 1990, Articles 2, 20, 21, and 21-*nonies* — General rules on administrative procedure, legal effectiveness of tacit measures, ineffectiveness of belated determinations, and substantive and temporal prerequisites for ex officio annulment by way of self-remedy.

- Code of Administrative Judicial Procedure (Legislative Decree no. 104/2010), Articles 31 and 117 — Judicial action against administrative silence-default and special expedited proceedings to obtain formal administrative certification of the expiry of procedural deadlines.

Case Law Cited

1. **Council of State (*Consiglio di Stato*), Judgment no. 1878 of 2026** — Holds that zoning non-compliance does not bar the perfection of tacit approval but renders it merely voidable through administrative self-remedy within twelve months, whereas the omission of essential documents under Article 20(1) of the Consolidated Building Act entails structural unconfigurability incapable of being cured by administrative inaction. Outcome: appeal dismissed. Para.: 6–12.

2. **Council of State (*Consiglio di Stato*), Judgment no. 1515 of 2026** — Establishes that the exception to the twelve-month time limit for ex officio annulment under Article 21-*nonies*(2-*bis*) applies whenever a misrepresentation of facts emerges objectively from the procedural record even in the absence of a criminal conviction, with a corresponding attenuation of the public-interest duty to state reasons. Outcome: appeal dismissed. Para.: 4.1.1–4.1.5.

3. **Council of State (*Consiglio di Stato*), Judgment no. 893 of 2026** — Recognizes the municipal administration's binding duty to decide upon a private party's request for certification of the expiry of procedural deadlines under Article 20(8) of Presidential Decree no. 380 of 2001, enforceable through an action against administrative silence-default pursuant to Articles 31 and 117 of the Code of Administrative Judicial Procedure. Outcome: appeal upheld. Para.: 7–11.

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