



QORTI TAL-APPELL

(KOMPETENZA INFERJURI)

(TRIBUNAL TA' REVIZJONI TAL-AMBJENT U L-IPPJANAR)

ONOR. IMHALLEF MARK CHETCUTI LL.D.

Illum L-Erbgha, 22 ta' Gunju, 2016

Numru 3

Appell Nru. 3/2016

Jonathan Falzon

vs

L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar

Il-Qorti,

Rat ir-rikors tal-appell ta' Jonathan Falzon tal-14 ta' Marzu 2016 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-25 ta' Frar 2016 li cahad l-appell ta' Jonathan Falzon rigward ic-cahda tal-hrug ta' permess 'to sanction extension to existing confectionery' fi Triq il-Kappuccini, Zabbar PA 2703/12;

Rat ir-risposta tal-Awtorita li ssottomettiet li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata;

Rat l-atti kollha u semghet lid-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra :-

Illi l-appellant applika sabiex jissanzjona bdil fl-uzu ta' garaxxijiet ghal estensjoni ma' confectionery;

Illi l-izvilupp propost jinsab f'residential area. Il-Kummissjoni tal-Ambjent u l-Ippjanar irrifjutat il-proposta ghal dawn is-segweni ragunijiet :-

"1. The extension of the confectionery, through the interconnection of the adjacent garages is unacceptable in a residential area as it would have a deleterious impact on the amenity of the area and of existing adjoining residential uses. Proposal therefore constitutes bad neighbour development and so conflicts with Structure Plan policy BEN 1, which seeks to protect the amenity of existing uses. The proposed development also runs counter to the South Malta Local Plan Policy SMHO 02 in view of the excessive floorspace, which is not accepted in a Residential Area.

2. The canopy is unacceptable since it does not comply with policy 15.7 of Development Control Policy & Design Guidance 2007, which does not permit canopies in front of retail outlets in residential areas. Moreover it is incompatible with the urban design and environmental characteristics of the area and would not maintain the visual integrity of the area and so does not comply with Structure Plan policy BEN 2.

3. In view of the proposed signs, the proposal does not relate to its surroundings and is therefore contrary to Structure Plan policy BEN 6 and the Malta Environment & Planning Authority's Design Guidelines for Billboards and Signs.";

Ra l-appell ipprezentta mill-Perit Tancred Mifsud li jaqra kif gej :-

With reference to the refusal on the above application, I would like to comment on the following:

Reason for refusal 1- Commercial/ customer floor area as proposed is of 65.6 sq.mts, which is less than the 75 sq.mts for local shops. 23 sq.mts. for storage. and 23 sq.mts for loading / unloading of goods.

Reason for refusal 2- re canopy. The canopy can be removed from site. and drawing sand photo evidence of the removal will be provided if requested by EPC.

Reason for refusal 5 can be addressed as we are willing to remove the additional shop signs to comply with BEN 6.";

Ra is-sottomissjonijiet tal-Awtorita' dwar l-appell li jaqraw kif gej :-

“5.0 COMMENTS ON APPELLANT’S ARGUMENTS & REFUSAL NOTICE

5.1 The appellant is mainly justifying this appeal on the grounds that:

- The commercial/customer floor area as proposed is 65.6sq.m, which is less than the 75sq.m permitted for local shops, 23sq.m for storage, and 23sq.m for loading/unloading of goods;
- The canopy can be removed from site, and drawings and photo evidence of the removal will be provided if requested;
- He is willing to remove the additional shop signs to comply with BEN 6.

5.2 The Authority has the following comments to make:

5.2.1 Preliminary Plea

On a preliminary point, the Authority respectfully asserts that this Tribunal cannot hear and decide on the merits of this appeal, as this application does not seek to sanction all of the illegal developments on site, and hence the provisions of Article 14 of L.N. 514 of 2010 are applicable. The illegal development consists of a retractable canopy.

The provisions of Article 14 (1) of LN 514/10 clearly states that where illegal development is present on a site, new development on that same site will not be considered unless it is regularized.

The canopy is not shown in the drawings and the appellant is claiming that he is ready to remove them. However, the appellant had every chance to remove this fixture after that the Authority flagged this illegality in the DPAR. Yet, this remains in place.

The Authority also explained in the DPAR that the canopy cannot be sanctioned even if requested to since it runs counter to policy 15.7 of the DC2007 which permits retractable canopies only acceptable within Town Centres, Entertainment Priority Areas, Tourism Zones and other areas specifically indicated in the Local Plans.

Consequently, this appeal should be dismissed for the above reason.

5.2.2 Re: Retail space

The site is located within a designated residential area and convenience shops are limited to a gross floor area of 75sq.m as per Policy SMHO 02 of the South Malta Local Plan.

A Class 4 shop with an area of circa 66sq.m has been approved on site by way of PA8161/05. The proposed sanctioning of the extension to the existing confectionery will result in a Class 4 shop having a total commercial area of circa 122sq.m. This exceeds what is permitted by Policy SMHO 02 and therefore it is not acceptable on policy grounds.

This increase in the retail area has a negative impact on the amenity of the surrounding residential area as it generates more noise and traffic; hence it runs counter to Structure Plan policy BEN 1.

The appellant is arguing that the storage space and loading / unloading space should be calculated separately. On the other hand the Authority deems these spaces as an integral part of the shop and therefore form part of the shop's gross floor area.

5.2.3 Re: Parking

The existing confectionary also requires the provision of 3 off-street parking spaces (1 car parking space for every 50sq.m or part thereof).

However the proposal not only does not provide any on-site parking but the extension to the confectionary resulted in the loss two garages which catered for a one car parking space each. The proposal therefore runs counter also to Structure Plan Policy TRA 4 in view of lack of parking provision in the form of parking spaces for the commercial activity. The UIF mechanism cannot be used when loss of parking is involved as stated in Policy 4.18 of the DC2007.

Originally, the proposal also indicated that a third garage was connected to the confectionary. However in the latest set of drawings (vide red 70A in the PA file) this interconnection is shown as blocked in order to reduce the retail area. The Authority notes that this garage is labelled as parking in the latest drawings. This should be corrected to 'garage'.

5.2.4 Re: Removal of canopy and shop signs

The original signage on the splay was reduced in size during the processing of the application. The existing signage of the splay has been limited to the width of the commercial doorway. However, this modification has not been reflected on the drawings. Therefore a revised front elevation drawing is required to reflect the existing situation.

The remaining proposed two signs on the side elevation are considered excessive (even if one is shown as blank). These should be reduced to one sign on each elevation. It is to be note that in the previous permit PA8161/05/45A; only two roller shutters were approved on the side elevation.

6.0 REQUEST

6.1 For the above-mentioned reasons, the Malta Environment & Planning Authority respectfully requests the Environment and Planning Review Tribunal to confirm the decision of the EPC and to refuse this appeal for development permission.”;

Ra s-sottomissjonijiet tal-appellant li jaqraw kif gej :-

“PRELIMINARI

Illi permezz ta' applikazzjoni tas-16 ta' Lulju 2012 - Full Development Permission (PA 2703/12) l-appellant talab sabiex jissanzjona estensjoni ta'

confectionery gja ezistenti f'Maypole Confectionery, Triq Il-Kappuccini, Zabbar, Malta;

Illi gew sottomessi zewg ittri ta' objezzjoni datati 5 ta' Novembru 2012 u 19 ta' Novembru 2012;

Illi permezz ta' decizjoni datata 28 ta' Frar 2013 din l-applikazzjoni giet michuda ghas-segwentu ragunijiet:

1. The extension of the confectionery, through the interconnection of the adjacent garages is unacceptable in a residential area as it would have a deleterious impact on the amenity of the area and of existing adjoining residential uses. Proposal therefore constitutes bad neighbour development and so conflicts with Structure Plan policy BEN 1, which seeks to protect the amenity of existing uses. The proposed development also runs counter to the South Malta Local Plan Policy SMHO 02 in view of the excessive floorspace, which is not accepted in a Residential Area.

2. The canopy is unacceptable since it does not comply with policy 15.7 of Development Control Policy and Design Guidance 2007, which does not permit canopies in front of retail outlets in residential areas. Moreover it is incompatible with the urban design and environmental characteristics of the area and would not maintain the visual integrity of the area and so it does not comply with Structure Plan policy BEN 2.

5. In view of the proposed signs, the proposal does not relate to its surroundings and is therefore contrary to Structure Plan policy BEN 6 and the Malta Environment & Planning Authority's Design Guidelines for Billboards and Signs.

Illi l-appellant hass ruhu aggravat b'din id-decizjoni u interpona dan l-appell permezz ta' liema l-appellant ressaq is-segwentu aggravji:

Reason for Refusal 1 - Commercial/ customer floor area as proposed is 65.6 sq. mts, which is less than the 75 sq. mts for local shops, 23 sq. mts. for storage, and 23 sq. Mts for loading/ unloading of goods.

Reason for Refusal 2 - re canopy. The canopy can be removed from site, and drawings and photo of the removal will be provided if requested by EPC.

Reason For Refusal 5 can be addresses as we are willing to remove the additional shop signs to comply with BEN 6.

Illi inoltre fis-seduta tad-dsatax (19) ta' Novembru 2013 l-appellant talab is sospensjoni tas-smiegh ta' dan l-appell a bazi tal-Legal Notice 504/10 kif emendat bl-avviz legali 158/ 13;

RAGUNIJET:

(i) Sospensioni tal-applikazzjoni

Illi ai termini tar-Regolament 9 tal-avviz legali 514/10 kif emendat bl-avviz legali 158/13 l-Awtorita ghandha tissospendi applikazzjoni fuq t-talba ta' perit jew applikant;

Illi fis-seduta tad-dsatax (19) ta' Novembru 2013 l-appellant talab is-suspensjoni tal-applikazzjoni odjerna u konsegwentement tas-smiegh ta' dan l-appell a bazi tar-Regolament imsemmi;

Illi Jonathan Borg ghall-Awtorita oppona ghal din it-talba stante li 1 proposta hi f'kunflitt mar-Regolament 14 tal-Avviz Legali 514 tal-2010.

Illi primarjament jigi rrilevat illi l-applikazzjoni in kwistjoni ma gietx michuda minhabba kunflitt mar-Regolament 14 tal-Avviz Legali 514 tal-2010. Fil-fatt ir-ragunijiet tal-Awtorita huma cari u jidhru mill-istess decizjoni. Konsegwentement din ma tistax titqajjem f'dan l-istadju;

Illi inoltre bl-applikazzjoni odjerna l-appellant qed jittenta jissana l-izvilupp odjern sabiex jaghmlu kompatibbli mal-policies u ligijiet tal-Malta rigwardanti l-ambjent u l-izvilupp;

Illi prezentement hemm diskussjonijiet rigward revizjonijiet:

- (1) Fil-Ligi Sussidjarja 504.09 Ordni dwar il-klassijiet ta' uzu fl-ippjanar tal-izvilupp;
- (2) Revizjonijiet tal-Pjanijiet Lokali;
- (3) Interim Retail Planning Guidelines 2004

Illi l-pjan lokali huwa maghmul minn policies. Fost dawn il-policies hemm policy SMHO 02 li proprju tirrigwardja areas residenzjali filwaqt li tipprovdi li convenience shops bhal dan in kwistjoni m'ghandhomx jeccedu floor area ta' 75 metri kwadri, tissogetta ukoll tali hwienet sabiex ikunu konformi ma' paragrafi 1.4.16 u 1.4.18 tal-Interim Retail Planning Guideline. Dawn il policies, ossia Interim Retail Planning Guideline u il-Pjanijiet lokali jinsabu fil-fazi ta' revizjoni u hemm possibilta li jkun hemm revizjoni fil-floor area ta' tali hwienet.

Illi konsegwentement gjaldarba l-applikazzjoni tal-applikant tista' tigi milquta b'tali policies li jinsabu fil-fazi ta' revizjoni, l-applikant jitlob umilment lil dan l-Onorabbli Tribunal sabiex l-applikazzjoni tigi sospiza sakemm jidhlu fis-sehh il-policies imsemmija.

(ii) Floor space

Jigi rrilevat illi l-estensjoni li qed jitlob l-applikant ser tkun qed tigi utilizzata kif isegwi:

- Il-hanut bi floor area ta' 65.6 metri kwadru;
- Storage ta' 23 metru kwadru; u
- Area ghal loading u/jew unloading tal-merkanzija ta' 23 metru kwadru;

Illi jigi rrilevat illi l-area ghall-loading/unloading ta' merkanzija ma ghandiex tkun konsiderata bhala parti mill-hanut;

Illi inoltre kif intqal fl-appell numru 727/11 CF fl-ismijiet Michael Galea kontra l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar:

"Jigi nnotat pero li l-awtonta qatt ma ggustifikat ghaliex, skond il-pjan lokali, 75 metru kwadru hija area accettabbli ghal convenience shop fzona bhal din waqt li l-area ta' 91 metru kwadru mihiex accettabbli."

Illi fil-fatt il-pjan lokali qieghed hemm biex jaghti direzzjoni izda jekk l-kejl ikun ikbar minn dak impost fil-pjan lokali u dan ma jkunx ta detriment ghal area u r-residenti tal-area in kwistjoni, tali applikazzjoni m'ghandiex tigi michuda;

Inoltre gew approvati diver si applikazzjoni li l-estensjoni taghom kienet teccedi il-75 metru kwadru fosthom:

- Appell Numru 727/ 11CF fl-ismijiet Michael Galea kontra l-Awtonta ta' Malta dwar l-Ambjent u l-Ippjanar fejn nonostante li l-area tal-hanut propost qabez il-limitu impost mill-pjan lokali, it-Tribunal laqa' l-appell, hassar ir-rifjut tal-applikazzjoni PA 04945/10 u ordna lill Awtorita sabiex tohrog il-permess relattiv;

- Appell Numru 276/ 11CF fl-ismijiet Stephen Mifsud ghal V. Mifsud Ltd. kontra l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar fejn nonostante li biz-zieda proposta qabzet il-limitu impost, it-Tribunallaqa' l-appell, hassar ir-rifjut tal-applikazzjoni PA 1068/10 u ordna lill-Awtorita sabiex tohrog il-permess relattiv bil-kondizzjoni li l-loading u 1 unloading tal-merkanzija issir dejjem gewwa l-istabiliment u mhux mit-triq;

Illi inoltre din l-estensjoni ma hix ser tkun ta' theddida ghall-karattru residenzjali tal-lokalita u dan stante illi:

(i) il-hanut ser ikun izghar minn 75 metru kwadru u konsegwentement ma hux ta' daqs kbir;

(ii) il-hanut ser ikun negozju lokali u ma hux ser ikun qed jattratta vizitaturi minn barra l-lokalita anke minhabba n-natura tan-negozju;

(iii) il-hanut ser jibqa jaqdi l-istess klijentela li ghandu prezentament u sigurament ma hiex manuvra sabiex jizdiedu klijenti;

Konsegwentement l-appellant jinsisti illi tali estensjoni ser tkun qed tnaqqas l-inkonvenjent ghar-residenza u ghalhekk ma jarax kif tali estensjoni jista jkollha impatt negattiv stante li ghall-kuntrarju ta' dak sottomess mill Awtorita fir-risposta tal-appell, l-applikazzjoni ser tkun qed tnaqqas it traffiku u l-istorbju kif ser jigi spjegat iktar l-isfel;

(iii) Policy BEN 1

L-iskop ewlieni tal-Policy BEN 1 hu li jissalvagwardja l-uzu residenzjali minn traffiku zejzed, hsejjes u tniggis tal-arja kif stabbilit bil-Policy BEN 1;

Illi jigi rrilevat illi l-confectionery tal-appellant kien gia jezisti qabel din l-applikazzjoni u tali fond huwa diga munit b'permess ghal hanut, ossia, confectionery. Fil-fatt bl-estensjoni ser tkun qed tikber l-area ghall-istore u area sabiex fiha isir il-loading u unloading;

Illi konsegwentement dak li jrid jigi determinat fil-kaz odjern huwa jekk l-applikazzjoni tal-appellant ossia l-issanzjonar ta' estensjoni ta' confectionery gja ezistenti hux ser iggib maghha l-inkonvenjenti elenkati fil-policy BEN 1;

Illi jigi rilevat illi b'din il-proposta, kemm il-darba tigi approvata, il-loading u unloading ser isir gewwa l-istabbiliment u dan stante li wiehed mill garaxxijiet ser ikun proprju qed jintuza ghall-loading u unloading. Dan ser ikun qed inehhi l-inkonvenjent li l-loading u unloading tal-merkanzija isir fit-triq kif qiegheed isir bhalissa. F'kaz li din l-applikazzjoni tigi michuda, illoading and unloading ser ikollu jibqa' jsir fit-triq;

Illi inltre l-appellant jixtieq izid l-area ta' storage u dan sabiex ikun jista' jakkomoda l-istock kollu li jinhtieg fis-sit. B'hekk jigi evitat skarigg ta' merkanzija mis-sit ghal band'ohra u skarigg ghal izjed loading/ unloading frekwenti bil-konsegwenzi li din is-sitwazzjoni tista iggib maghha;

Illi inltre dan l-izvilupp ma hux ser jinvolvi zieda fmakkinarju jew airconditioners u dan stante li l-estensjoni ser tkun qed tigi utilizzata parti bhala store u parti bhala loading and unloading area;

Illi ghaldaqstant fl-umli opinjoni tal-appellant l-ewwel ragunjuni ghar-rifjut ma hix gustifikata u inltre stante li kien hemm applikazzjonijiet ohra li eceedew il-floor area rikjesta, liema applikazzjonijiet gew awtorizzati, 1 appellant ihoss li tkun ser issir diskriminazzjoni jekk tali applikazzjoni tigi michuda;

(iv) Tinda ossia 'Canopy' u shop signs

Rigward it-tinda, ossia canopy, din hija mezz ta' protezzjoni u sabiex tipprovdi dell. L-appellant dispot illi jew icekken id-daqs tat-tinda jew inehhi ghall-kollox it-tinda skond kif l-Awtorita ta' Malta dwar l-Ambjent u 1 lppjanar thoss li huwa necessarju.

Inltre rigward it-tabelli proposti l-appellant dispot ukolli jirrinunzja ghal dawn it-tabelli;

Konsegwentement zgur li it-tinda u it-tabelli m'ghandhomx jaffettwa il-ghoti tal-permess odjern;

Konkluzjoni:

Illi fil-fehma umli tal-appellant l-estensjoni mertu ta' din l-applikazzjoni ghandha sservi sabiex in-negozju tal-appellant jigi gestit b'iktar efficjenza u semai inaqas kwalunkwe inkonvenjent lir-residenti.

Ghaldaqstant l-appellanti jitlob umilment lil dan l-Onorabbli Tribunal sabiex ghar-ragunijiet fuq esposti:

(i) jilqa' t-talba tal-appellant ossia ghas-suspensjoni tal-applikazzjoni odjerna sakemm jidhlu fis-sehh il-policies li qieghdin jigu riveduti stante li 1 applikazzjoni tista' tigi milquta b'tali policy; u

(ii) f'kaz li dan l-Onorabbli Tribunal joghgbu jichad l-ewwel talba, l-appellant jitlob umilment lil dan l-Onorabbli Tribunal jilqa' l-appell, ihassar ir-rifjut tal-applikazzjoni odjerna, u jilqa' din il-applikazzjoni bil-kondizzjonijiet imposti fil-permess mill-Awtorita.'";

Ra l-verbal tad-diversi xhieda;

Ra l-verbal tax-xhieda tal-enforcement officer;

Ra s-sottomissjonijiet ulterjuri tal-partijiet;

Ra ukoll l-PA files bin-numru 2703/12 u 8161/05 u l-enforcement file ECF 517/11;

Ikkunsidra ulterjorment;

Illi f'dan l-istadju, it-Tribunal iqis illi l-fatturi ewlenin li ghandu jigi indirizzat qabel ma wiehed jidhol fil-mertu huwa l-fatt maqjjem kemm mill-Awtorita' kif ukoll mill-objectors; il-fatt illi l-appellant, fil-kors tas-smiegh ta' dan l-appell ma rregolax ruhu fir-rigward tal-Avviz ta' infurzar 517/11 fuq l-imsemmi hanut u garaxxijiet, mertu ta' dan l-appell.

Mill-evidenza provduta fil-process, kif ukoll hekk kif xehdet l-enforcement officer tal-Awtorita', Fleur Bonett, jirrizulta illi l-appellant baqa' ma rregolax ruhu ghajr ghal xi provvedimenti zghar li fil-fehma ta' dan it-Tribunal kienu biss kosmetici.

Dan it-Tribunal jaghmel referenza ghall-Artikolu 86(10) tal-Kap. 504 u b'mod partikolari fejn hemm is-segwent i:-

"(10) Kull applikazzjoni biex tirregolarizza l-attività jew l-iżvilupp għandha tiġi miċħuda minnufih jekk rekwiżit fl-ordni jew avviz ikun iwaqqaf jew jipprojbixxi aktar attività, xogħol jew żvilupp, jew li jkun jeħtieġ il-waqfien ta' xi użu, ma jkunx, kemm qabel jew waqt li tkun għadha qegħda tiġi trattata l-applikazzjoni, ġie mħares jew jekk xi penali jew f'las ieħor li persuna tkun wehlet taħt dan l-Att fir-rigward tal-attività rilevanti jew żvilupp ma jkunux tħallsu jew jekk l-applikazzjoni ssir biex tirregolarizza żvilupp elenkat fis-Sitt Skeda."

It-Tribunal ghalhekk skond id-dispost tal-Artikolu 86(10) tal-Kap 504, qed jichad dan l-appell u jikkonferma ir-rifjut tal-applikazzjoni PA 2703/12.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Id-decizjoni tat-Tribunal ta' Revizjoni hi ultra petita ghax l-aggravji mressqa fl-appell bl-ebda mod ma kienu jinkludu l-artikolu citat mit-Tribunal cioe l-artikolu 86(1) tal-Kap. 504 izda kienu aggravji li jirrigwardaw ir-ragunijiet ta' rifjut ta' permess moghtija mill-Awtorita, liema ragunijiet qatt ma inkludew dak imsemmi mit-Tribunal permezz tal-artikolu 86(1). Ir-ragunijiet ta' rifjut kienu jirrigwardaw excessive floor space; impatt fuq iz-zona residenzjali; canopy li kienet in vjolazzjoni tal-policy 15.7 tad-Development Control Policy and Design Guidance 2007; senjaletika fuq il-faccata. Ebda appell ma sar mill-Awtorita u t-third party objectors fuq ir-raguni ta' rifjut imsemmi mit-Tribunal;
2. It-Tribunal ma setghax japplika l-artikolu 86(10) tal-Kap. 504 ghax l-Awtorita ma qajmitx il-kwistjoni tal-enforcement notice 517/11 bhala raguni ta' rifjut. Issemmiet biss ir-retractable canopy li ma kinitx parti mill-enforcement notice, liema canopy l-appellant kien lest li jnehi. L-artikolu 14 tal-Avviz Legali 514/2010 illum artikolu 14 tal-S.L. 504/103 jghid li l-Awtorita tirrifjuta applikazzjoni jekk zvilupp illegali mhux inkluz fis-sanzjonar. L-appellant nehha l-illegalitajiet konsistenti f'forn u sistema ta' ventilazzjoni, u ghal bqija ghamel applikazzjoni ta' sanzjonar. L-artikolu 86(10) lanqas japplika ghax l-enforcement hu sospiz ai termini tal-artikolu 86(9);
3. Id-decizjoni tat-Tribunal ma knitx motivata. It-Tribunal qal biss illi l-appellant ma rregolax ruhu bla ebda kondizzjoni ulterjuri apparti ma saret ebda referenza ghall-Avviz Legali 514/2010 li tippermetti sanzjonar ta' illegalitajiet basta l-illegalitajiet kollha huma inkluzi fis-sanzjonar;
4. It-Tribunal naqas milli jikkonsidra l-aggravji tal-appellant u invece cahad l-appell fuq konsiderazzjonijiet ultra petita.

It-tielet aggravju

Il-Qorti ser tibda minn dan l-aggravju billi hu ta' importanza ghar-risoluzzjoni tal-vertenza odjerna. Bhala fatti jidher illi l-appellant kellu enforcement notice mahrug

kontrih 517/11 li kien jghid “ghandek zvilupp li mhux approvat kif fil-permess 8161/05 mahrug fis-27 ta’ Novembru 2006, u dana billi “ghandek forn fejn qed isir tisjir u dan bi ksur ta’ kondizzjoni numru 2 fl-imsemmi permess; gew imniffda tlett garaxxijiet mal-hanut biex b’hekk tkabbar il-hanut u kif ukoll bdilt l-uzu ta’ dawn il-garaxxijiet ghal confectionery, iffurmajt sistema ta’ ventilazzjoni tal-forn ghal mal-faccata; ghandek tabella b’reklam mal-faccata fil-pjan terran”. Azzjoni fuq dan l-enforcement notice hu sospiz pendent applikazzjoni ghal sanzjonar. Dan fil-fehma tal-Qorti ma jfissirx illi l-enforcement ma fadallux sahha izda biss li azzjoni dwaru mhix ser jittiehed qabel ma tigi deciza l-applikazzjoni ghas-sanzjonar tal-illegalitajiet.

Dawn kienu t-termini tal-enforcement notice, liema termini ghandhom jinqraw u jiftehmu kif maghmula u xejn aktar. L-Awtorita hi marbuta ma’ dak li hi tkun avvanzat bhala vjolazzjoni ta’ permess u ma ghandux ikun hemm lok ghal xi interpretazzjoni jew estensjoni tal-avviz ta’ enforzar jekk dan ma jirrizultax minn xi avviz iehor separat.

Jidher illi l-appellant talab sanzjoni tal-illegalitajiet fis-sens minnu mitlub. Jidher li fuq x’instab u ma nstabx fil-fond in kwistjoni fl-accessi maghmula mill-enforcement officer fil-mori ta’ dawn il-proceduri jirrizulta mix-xiehma tal-istess jew almenu hekk ghandu jirrizulta ghas-sodisfazzjoni tat-Tribunal.

Tqum ghalhekk il-kwistjoni dwar il-motivazzjoni maghmula mit-Tribunal fejn fl-ewwel konsiderazzjoni tieghu mit-tnejn li hu ghmel biex wasal ghad-decizjoni kienet il-kwistjoni jekk l-appellant aderix ruhu mal-enforcement notice 517/11.

It-Tribunal wasal ghal fehma illi l-appellant ma rregolax ruhu mal-enforcement ghajr ghal affarijiet kosmetici. It-Tribunal ma spjegax u ma tax sodisfazzjoni lil partijiet x’kienu l-illegalitajiet kolpiti bl-enforcement u fil-fatt x’irrizulta li sar u ma sarx, u x’uzu kien qed issir fil-fond fil-mori tal-proceduri tal-applikazzjoni sub iudice.

Wara li wasal ghal fehma tieghu t-Tribunal rrifera ghall-artikolu 86(10) tal-Kap. 504 li jghid hekk:

Kull applikazzjoni biex tirregolarizza l-attività jew l-izvilupp ghandha tigi michuda minnufih jekk rekwizit fl-ordni jew avviz ikun iwaqqaf jew jipprojbixxi

aktar attività, xoghol jew zvilupp, jew li jkun jehtieg il-waqfien ta' xi uzu, ma jkunx, kemm qabel jew waqt li tkun ghadha qeghda tigi trattata l-applikazzjoni, gie mhares jew jekk xi penali jew hlas iehor li persuna tkun wehlet taht dan l-Att fir-rigward tal-attività rilevanti jew zvilupp ma jkunux thallsu jew jekk l-applikazzjoni ssir biex tirregolarizza zvilupp elenkat fis-Sitt Skeda.

Wara li kkwota l-artikolu t-Tribunal ikkonkluda li sab ksur ta' dan l-artikolu u cahad l-appell.

Il-Qorti ma tistax ma taqbilx mal-appellant illi d-decizjoni tat-Tribunal hi nieqsa minn kull motivazzjoni ossia ness bejn il-fatt ta' vjolazzjoni (liema fatt mhux specificat car) u dak li jwassal ghal ksur tal-ordni ta' projbizzjoni u li per konsegwenza jgib awtomatikament ic-cahda tal-applikazzjoni ta' sanzjoni. B'obbligu t-Tribunal kellu japplika l-artikolu 86(10) kieku nstab tali vjolazzjoni ghax dan l-artikolu hu ta' ordni pubbliku pero biex jigi applikat it-Tribunal kellu jaghti ragunijiet cari ghall-applikazzjoni tieghu. Il-mod generiku kif it-Tribunal tratta l-kwistjoni hi nieqsa ferm minn dak li trid il-ligi.

Ghalhekk dan l-aggravju qed jigi milqugh.

L-ewwel aggravju

Dan l-aggravju hu fis-sens illi t-Tribunal iddecieda ultra petita ghax il-kwistjoni mqajma minnu bl-artikolu 86(10) qatt ma qam quddiem it-Tribunal. Il-Qorti tqis illi l-appellant ghandu ragun pero trid tirmarka illi tali kwistjoni setghet u messet tqajmet ex officio mit-Tribunal biex il-partijiet jirregolaw ruhhom dwarha fil-mori tal-proceduri bil-fakolta li jtellghu provi u jitrattawha u ma jigux sorprizi mit-Tribunal bid-decizjoni. Ghalhekk fis-sens strett it-Tribunal mar ultra petita mhux ghax ma setghax iqajjem il-kwistjoni hu, izda ghax ma tax avviz tal-problematika legali li kien qed jipprospetta u ta l-fakolta lil partijiet li jiddefendu l-pozizzjoni taghhom.

Ghal ezattezza l-Awtorita, fir-risposta tal-appell pprospettat kwistjoni differenti u rrilevat l-applikazzjoni ta' artikolu 14 tal-Avviz Legali 514/2010 fis-sens illi s-sanzjonar mitlub ma kienx jinkludi l-illegalitajiet kollha u senjatament ir-retractable canopy. Din

kienet il-lanjanza mressqa quddiem it-Tribunal mill-Awtorita, lanjanza li setghet titressaq fil-mori tal-appell kuntrarjament ghal dak sottomess mill-appellant billi tali ilment, jekk fondat joqtol l-applikazzjoni ab initio sakemm l-appellant ma jiehux mizuri ta' rattifika qabel mat-Tribunal jasal ghad-decizjoni tieghu. Dan l-ilment hu kjarment differenti mill-konsiderazzjoni maghmula mit-Tribunal ai termini tal-artikolu 86(10) li jittellem principalment dwar kontinwazzjoni ta' attivita, xoghol jew zvilupp mwaqqaf mill-Awtorita bl-enforcement notice pendent applikazzjoni ta' sanzjonar.

Ghalhekk fil-limiti ta' dak kunsidrat dan l-aggravju wkoll qed jigi milqugh.

It-tieni aggravju

Din il-Qorti mhix ser tinoltra ruhha f'dan l-aggravju billi r-risposta ghalih gia jinsab f'dak kunsidrat u deciz fl-ewwel u t-tielet aggravji.

Ir-raba' aggravju

Il-Qorti ser tastjeni milli tippronunzja ruhha fuq dan l-aggravju peress illi t-Tribunal kien ikun obligat jidhol fil-mertu tal-aggravji kemm-il darba ma kienx ser isib nuqqasijiet a bazi tal-artikolu 86(10) mgharraf lil partijiet qabel jiddeciedi dwaru, u l-ilment permissibbli maghmul fir-risposta tal-appell tal-Awtorita in konnessjoni mal-Avviz Legali 514/2010 artikolu 14, illum artikolu 14 tal-S.L. 504.103.

Decide

Ghal dawn ir-ragunijiet il-Qorti qed tilqa' l-ewwel u tielet aggravji tal-appellant u in linea ma' dak deciz, qed tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-lppjanar tal-25 ta' Frar 2016, u turrinvija l-atti lura quddiem it-Tribunal biex l-appell jerga' jigi deciz mill-gdid. Spejjez jibqghu bla taxxa.

Onor. Mark Chetcuti LL.D.
Imhallet

Anne Xuereb
Deputat Registratur