



QORTI TA' L-APPELL

**ONOR. IMHALLEF
PHILIP SCIBERRAS**

Seduta tat-18 ta' Meju, 2005

Appell Civili Numru. 9/2004

Joseph Muscat

vs

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

Il-Qorti,

Fil-15 ta' Ottubru, 2004, il-Bord ta' l-Appell dwar l-Ippjanar ippronunzja s-segwenti decizjoni:-

“Il-Bord,

Ra l-appell ipprezentat mill-perit Dr. Edwin Mintoff ghall-appellant ipprezentat fid-19 ta' Dicembru 2003;

Ra r-rapport tal-perit Joseph Bezzina ghall-Awtorita` pprezentat fis-17 ta' Frar 2004;

Kopja Informali ta' Sentenza

Ra n-noti ulterjuri tal-partijiet, dik ta' l-appellant ipprezentata fis-16 ta' Lulju 2004; ta' l-Awtorita` pprezentata fl-20 ta' Awissu 2004;

Ra l-file PA 5093/94 - permess ta' 1 ta' Settembru 1995 rnoghti lil Albert Gauci biex minn garage ezistenti ssir uzu kummercjali ghall-karozzi u tiswijiet;

Ra l-permess PA 3825/93, mghoti lil Martin Gauci fit-30 ta' Lulju 1993 biex isiru alterazzjonijiet f' garage u zidiet fil-first floor u second floor ghall-uzu residenzjali.

Ikkunsidra:

B' applikazzjoni outline tas-16 ta' Mejju 2002, PA 2829/02, l-appellant talab li jibni basement garage, ground, first and second floor apartments and a duplex at third and penthouse level, fi Triq x-Xaghra tal-Bandieri, San Pawl il-Bahar;

L-applikazzjoni giet michuda fit-2 ta' Dicembru 2003, ghar-raguni li: "access at the back is from a non-schemed road."

Il-Perit Dottor Edwin Mintoff irrileva li fl-istess triq inghataw diversi permessi fosthom dawk minnu ndikati:

PA 5093/94 - Existing garage to be used as commercial for vehicles and mechanic repairs.

PA 0474/92 - To erect garage with concrete road and store.

PA 3173/91 - Proposed residential premises at first floor and second floor over existing garage.

PB 3181/82 - To erect dwelling with garage for private cars

PB 0871/70 - a) to erect farmhouse subject to conditions of Form 2, etc.

b) to erect stores and garages.

In oltre gie relevat li b' decizjoni ta' dan il-Bord inghata permess fil-vicin immedjat tal-plot in kwistjoni PA 5580/95

“to demolish existing building, and re-erect penthouse, flats and garages”.

L-Awtorita` permezz ta' rapport fuq imsemmi, ippreparat mill-perit Joseph Bezzina tas-17 ta' Frar 2004, talbet li l-appell jigi michud ghar-ragunijiet segwenti:

“5.0 Discussion

5.1 This is an appeal against refusal issued by DCC for the reasons that the proposed development is accessed from the back from a non-schemed road.

5.2 Appellant is contending that MEPA refused the application since according to current policies, the road at the back is not a schemed road and is in fact ODZ. Appellant requested the attention of the Appeals board to the fact that several applications with frontage over the road at the back have in fact been approved and referred to PB 0871/70, PB 3181/82, PA 3173/91, PA 474/92 and PA 5093/94. Appellant added that the Appeals board has decided in favour of the deliberation of permits in the immediate vicinity of his client (PA 5580/95 -To demolish existing building and re-erect penthouse, flats and garages). Appellant concluded that he expects the Appeals board to consider this application in the same context as others that have been approved and is reluctant to await the outcome of the local plan, particularly since other applications in the same street have been favourably approved in the absence of the publication of the local plan

5.3 For this particular case, the Planning Appeals Board must consider two main issues, which are the following:

- i. the height limitation of the site;
- ii. the status of Triq il-Bandieri, that is the upper road.

5.4 Policy BEN 2 stipulates that a “development will not normally be permitted if ... it is incompatible with the good urban design ... and is unlikely to maintain the good visual integrity of the area in which it is located. There will be a

presumption against development which does not generally observe the design guidelines issued by the Planning Authority for built-up areas.”

5.5 The proposed development is considered as excessive and it exceeds the height limitation of the area, for the reason that the development will take place on a seven-storey building plus the underlying garage. This would have an adverse impact on the urban skyline of St. Paul's Bay in particular when this area is included as part of the village core. In this respect, proposal infringes Policy UCO 10 which seeks to protect views of and from Urban Conservation Areas.

5.6 It should be noted as well that the height limitation is given within the approved building zone and official street alignments. In this regard, the height limitation for this particular site, should be applied solely on Triq San Pawl, and not for the upper road as well (for Triq ix-Xaghra tal-Bandieri), since the latter road is located outside the limits for development and is not an approved schemed road. It should be noted that according to the Temporary Provisions Schemes, the limits for development are indicated along the back yards of the buildings with frontage on Triq San Pawl, excluding Triq ix-Xaghra tal-Bandieri.

5.7 As regards the status of Triq ix-Xaghra tal-Bandieri, whether it is a public or a private road, one needs to examine the available documentation. The following documentation is considered important to the issue of the ownership of this particular road:

a. In file GF 116/96 which refers to Triq il-Bandieri, one can find a copy of the Government Gazette of 6.6.97 that includes a presidential declaration referring to the land including the mentioned road “should be examined possibly with the intention of being required for a public purpose.” This indicates that at least by June 1997 the land was not in public ownership. In addition it only shows “the intent to possibly require” which is a different thing altogether from an acquisition order.

b. In PA 3701/98 some 44 persons said to be heirs of Concetta Cilia objected to any development on ‘their’

property. In this same application which is a request to “prolong the road”, the applicant, i.e. the Roads Department, signed Certificate of Ownership B notifying the Gauci Family as the owner. This certificate is used when the applicant is not the owner of the land in question. This is a clear indication that at the time of submission of the application on June 1998 the Roads Department, acknowledged that the land was privately owned.

c. The Planning Appeals Board in a decision relating to an Enforcement Order issued on a site with access on the same street (PAB 312/95EKA, ECF 528/95, Ronnie Micallef vs Planning Authority) has decided that:

“Mix-xiehda prodotta quddiem il-Bord jirrizulta li t-triq in kwistjoni mhix ‘an approved public road’ ghalkemm din it-triq hija ezistenti.”

Also in the same decision:

“L-izvilupp ikun jista’ jitkompla wara li t-triq tigi approvata bhala triq pubblika ...”

During the hearing, the officer from the Land Department on the 11th March 1997, witnessed that:

“Mir-records taghna jirrizulta li t-triq mhix pubblika ... Qatt ma kienet tal-Gvern.”

d. Moreover, according to meeting held on 21st April 2003, the DCC informed architect in question that “It has been established that Triq il-Bandieri is not a schemed road and in fact this lies within Outside Development Zone ...” (refer to copy of letter as sent to architect, Red 32).

e. According to policy NWUS 1 of the North West Local Plan (Draft), no changes in this particular area are being recommended.

5.8 Having established that Triq il-Bandieri is neither a schemed road nor a public road and the site in question is not bounded at the back by the country lane, then the implications are clear and twofold:

- i. the height limitation of the building cannot be measured from this road but only from Triq San Pawl, and
- ii. the building cannot have access on this road.

5.9 The Appeals Board should note that in the immediate vicinity of the site there are other appeals on the same street. Certainly in approving this development would certainly constitute a significant change in the Town Planning Scheme and to the maximum permissible height in the area and the boundaries.

5.10 Such issues can only be addressed through the local plan process and Structure Plan review and this has been repeatedly confirmed by the Planning Appeals Board in several decisions namely 200/93KA, 106/94KA and 112/94KA to list just a few. Moreover, decisions in respect of appeals 439/98KA and 446/98KA have been also confirmed by the Court of Appeal.

5.11 The proposed development will therefore infringe Structure Plan policy SET 8 since the development would constitute a change in the conditions and the boundaries of the Temporary Provisions Schemes. Policy SET 8 requires that the conditions and boundaries of the Temporary Provisions Schemes will only be changed, if necessary, as the result of a comprehensive Structure Plan review, which takes place after approval of the related Local Plan and the Temporary Provisions Scheme boundaries will not be reviewed piecemeal.”;

L-Avukat Dottor Peter Borg Costanzi ghall-appellant b' nota tat-23 ta' Gunju 2004, issottometta kif gej:

“Attached with this letter please find a site plan with various properties marked with an indication of the appropriate permits which were issued on the sites in question. The map also indicates my client's property.

In brief the permits in question are as follows:

1. PA 5093/94 - garage fully licensed to carry out VRT tests.

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2. PA 3480/96 - permit for a terraced house
3. PA 087 1/70 - permit for garages
4. PA 3173/91 - permit for three storey terraced house with garage
5. PA 0474/92 - three storey terraced house with garage
6. PA 4770/00 - permit issued for a garage and two overlying apartments
7. PA 3480/93 - permit issued for a garage and two overlying flats
8. PA 0181/82 and 3173/91 and 5580/95 - to demolish building and re-erect penthouse, flats and garages.
9. PA 2620/93 - construction of basement garage, flat at 3rd floor and penthouse
10. 1639/93 erection of semi-basement garage and apartment at 3rd floor and penthouse
11. 208 9/93 garages at basement level, two flats at 3rd floor and penthouse

I am also attaching with this letter a copy of a letter issued by the Ministry for Environment (Works Division) which confirms that Triq ix-Xaghra tal-Bandieri was asphalted and then re-instated by the districts department of the Public Works as indicated in the plan also signed by Mr. Joseph Galea.

Also attached please find an extract from the local paper 6 December 1999 - Albert garage, Xaghra tal-Bandieri, San Pawl il-Bahar

1. One of the mistaken concepts upon which the refusal was based is that the development is ODZ. This is not the case. The development was in fact within the zone.
2. Triq ix-Xaghra tal-Bandieri was asphalted by the Government. It was also resurfaced. Public entities such as Enemalta have installed public electricity poles and lights thereon.
3. As stated above, a number of development permits have been issued both by the DCC as well as by

the Planning Appeals Board. The road is in fact committed and actually exists.

4. In actual fact, due to the existence of the road a permit was recently issued for a VRT business operation as shown on the attached local paper. (Albert's Garage).

5. One cannot ignore the existence of the said street and the fact that it has been committed for development.

6. The issue of commitment cannot be ignored as highlighted by the judgement recently delivered by the Court of Appeal in the case "Consiglio D'Amato vs il-Kummissjoni ghall-Kontroll ta' l-Izvilupp" decided on the 24 May, 2004 (Citazz 170/99) wherein it was stated:

"Pero`, ghandu jigi enfasizzat li fil-kaz odjern il-kwistjoni ma kienitx jekk il-Bord kellux din is-setgha jew le izda kienet wahda strettament ta' fatt, u cjoe' jekk l-izvilupp propost mill-appellant kienx accettabbli in vista tal-commitment on site. Din il-Qorti jidrilha li kemm l-Awtorita' ta' l-Ippjanar kif ukoll il-Bord ta' l-Appell dwar l-Ippjanar, it-tnejn ghandhom is-setgha, minghajr ma jbiddu t-Temporary Provisions Schemes li jevalwaw kull kaz fuq il-mertu u fuq il-fattispeci propriji tieghu. inoltre, fejn ikun jirrizulta car li hemm cirkostanzi specjali ta' commitment, kemm l-Awtorita' kif ukoll il-Bord ghandhom is-setgha gurisdizzjonali li johorgu permess ta' zvilupp li jkun jiddipartixxi, per ezempju mill-maximum height limitation imposti fit-temporary provision schemes."

Regarding the height limitation, one cannot ignore the fact that the proposed development is exactly in line with the building touching it. There is absolutely no justification why my client should not be granted a similar permit.

Contrary to what was stated in previous reports, the height should be measured from Triq ix-Xaghra tal-Bandieri. The road is within the zone, it is committed, other permits have been issued on the basis of the said road. It has been rendered public for all intents and purposes of law. It is not Government policy to expropriate minor roads (vide Zoqdi Developers Ltd. vs Commissioner

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of Lands (GV 16/10/2003 - which concerned Mahatma Ghandi Street in Fgura). For planning purposes Triq ix-Xaghra tal-Bandieri is a public road. It is there. It exists. The land has been committed.

Consequently it is respectfully submitted that from a planning context, the application for a development permit requested by my client should be granted.”;

L-Awtorita` permezz ta' second statement ippreparat minn Lorinda Vella B.Sc. (Hons) ipprezentat fl-20 ta' Awissu 2004 irrispondiet bis-segwenti:

“The appellant has quoted numerous development permits that have been issued along Triq Xaghra tal-Bandieri, and also presented proof that this road has been asphalted and is therefore in use.

The Planning Directorate would like to clarify that the issue of contention with regards to this proposed development is the proposed height of the building being 6 floors and an additional receded floor above Triq San Pawl. The main justification presented by the appellant for the height of the proposed building has been based on the fact that the site is between two streets, being Triq San Pawl and Triq ix-Xaghra tal-Bandieri.

The development permits quoted by the appellant all relate to sites along Triq ix-Xaghra tal-Bandieri, however which are all outside the development zone boundary. These applications were assessed against policies applied to sites outside the development zone, whereas the site in question is within scheme and therefore subject to different assessment on the grounds of policies applied to developable sites. The site for development is within an Urban Conservation Area and therefore the permissible building height for this development is determined through Sections 10 & 11 of the UCA Policy & Design Guidance. This policy guidance clearly states that **the height of buildings within Urban Conservation** Areas shall be assessed with respect to the scale and rhythm of the

streetscape and that the predominant height along such streets should be respected.

The attached table and corresponding map show a building height survey carried out for the stretch of buildings between Triq San Pawl and Triq ix-Xaghra tal-Bandieri, and it may be clearly noted that, with the exception of site 10, the predominant height above Triq San Pawl is 4 floors plus an additional receded floor. The proposed development shall result in a height of 6 floors and a receded floor above Triq San Pawl, and this would clearly result in a conflict with planning policy, exceed the height limitation of the area, and set a precedent for further such development along Triq San Pawl.

Furthermore, policy 2.5 of the DC Policy & Design Guidance cannot be applied in this case, as although the site is between Triq San Pawl and Triq ix-Xaghra tal-Bandieri, the buildings along Triq ix-Xaghra tal-Bandieri do not have frontages but back gardens facing this road. This is due to the fact that Triq ix-Xaghra tal-Bandieri is not an officially schemed road and is also outside the limits to development boundary. In such cases adopting the height limitation policy between two streets as set out by the DC Policy & Design Guidance is not applicable.

In fact the Roads Department had applied for the 'Prolongation of Triq il-Bandieri to join existing street, Triq Ghajn Razul' through PA 3701/98. However, this proposal was refused development permission as it was deemed appropriate that the status of Triq il-Bandieri should be determined through the Local Plan for the area. The North West Local Plan (Public Consultation Draft, June 2001) does not identify Triq ix-Xaghra tal-Bandieri to be included within the development boundary and/or to be considered as an official road.

Furthermore, the Board may wish to note that although during the site inspection held on 14th May 2004, it was noted that to the left of the site there were two storey buildings along Triq ix-Xaghra tal-Bandieri, these buildings to the left are subject to Enforcement Notices ECF528/95

& ECF342/95 which were issued due to the illegal construction of these floors above Triq ix-Xaghra tal-Bandieri.”;

Il-Bord ra d-decizjoni ta' dan il-Bord tat-23 ta' Marzu 2001 PAB 306/98 KA PA 7941/94 Joseph Muscat vs. Kummissjoni ghall-Kontroll ta' l-Izvilupp, ikkonfermata mill-Onorabbli Qorti ta' l-Appell fis-27 ta' Ottubru 2003 fejn gie deciz li Triq ix-Xaghra tal-Bandieri ma kienitx schemed road billi l-faccata tal-bini kien jghati ghal Triq San Pawl, u ghal fuqha kien jghatu l-btiehi; fl-istess decizjoni kien gie suggerit li dan l-izvilupp jigi regolarizzat bil-Pjan Lokali.

Dwar dan il-Bord jirrileva li minn dak iz-zmien 'l hawn l-Area hi definitivament “committed” billi nghataw diversi permessi ghall-bini fl-imsemmija triq. Fil-Pjan Lokali ta' l-inhawi ma jistax ma jittiehidx kont tal-izvilupp li jezisti fl-imsemmija Triq.

Dwar il- ‘commitment on site’ l-insenjament tal-Qorti ta' l-Appell hu kif gie citat mill-appellant fil-kawza “Consiglio D’Amato vs. il-Kummissjoni ghall-Kontroll ta' l-Izvilupp” deciza fl-24 ta' Mejju 2004 u cjoe li fejn is-sit hu committed ghandu jinghata l-permess.

Fil-kawza fl-ismijiet “Alex Montanaro noe vs. il-Kummissjoni ghall-Kontroll ta' l-Izvilupp” (Cit. Nru. 215/98) deciza fid-9 ta' Frar 2001 intqal illi:

“Meta fl-investigazzjoni ta' l-applikazzjoni ghall-permess ta' l-izvilupp, issir l-allegazzjoni li fl-inhawi diga` jezisti zvilupp, bhal dak li qed jintalab permess ghalih, kemm l-Awtorita` u kemm ukoll il-Bord ghandhom, fil-fehma konsidrata ta' din il-Qorti d-dover li jivverifikaw sewwa din l-allegazzjoni. Izda dan mhux fl-ambitu ta' investigazzjonijiet ta' drittijiet fundamentali, izda unikament fl-ambitu ta' konsiderazzjonijiet ta' l-ippjanar, u cjoe, biex jaraw jekk, tenut kont ta' l-izvilupp attwali fl-inhawi tas-sit in kwistjoni, ikunx gust u sewwa li l-permess mitlub jigi akkordat”.

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L-istess kuncett dwar 'committed area' gie ribadit fis-sentenza ta' l-Onorabbli Qorti ta' l-Appell fit-28 ta' Gunju 2002 fil-kawza fl-ismijiet "Filomena Attard vs. Alfred Fabri noe et.";

Ikkunsidra ulterjorment:

Id-divergenza bejn il-partijiet tikkonsisti fil-fatt li ghall-Awtorita` Triq ix-Xaghra tal-Bandieri m'hiex "an officially schemed road", u barra z-zona ta' l-izvilupp - mentri skond l-appellant, fl-imsemmija triq sar zvilupp konsiderevoli u t-triq hi fil-fatt regolarment iffurmata u nghataw is-servizzi mill-entitajiet Pubblici.

Jinghad in oltre li l-oggezzjoni ta' l-Awtorita` hi li gholi propost mill-appellant; u li jekk jigi awtorizzat jikkostitwixxi precedent.

Fl-okkazjoni ta' l-access, kif ukoll kif jidher mir-ritratti fil-file PA 2829/02 gie kkostatat li prattikament t-triq kollha fuq n-naha fejn jinsab is-sit in kwistjoni llum gie zviluppat. Kuntrarjament ghal dak sottomess mill-Awtorita` u cjoe` li l-bini f` din it-triq ghandu biss "back gardens" jghatu ghal fuqha, irrizulta li hemm ringiela shiha ta' zvilupp kollu bil-faccata fuq din it-triq. Mill-istess ritratti jirrizulta li s-sit hu 'infill site' billi fuq iz-zewg nahhat adjacenti diga` sar zvilupp.

Adjacenti s-sit in kwistjoni l-Bord fl-access gie muri block ta' bini fl-gholi propost mill-appellant, li wkoll ghandu l-faccata tieghu ghal Triq ix-Xaghra tal-Bandieri, - permess moghti b'decizjoni ta' dan il-Bord diversament kostitwit - PA 5580/95.

Din ic-cirkostanza partikolari, ma tistax ma tinghatax l-importanza dovuta mill-Bord. Applikazzjonijiet simili jirrikjedu trattament identiku. Id-decizjonijiet f` dan ir-rigward, u l-konsiderazzjonijiet li jwasslu ghal dawn id-decizjonijiet necessarjament jinhtieg li jkunu konsistenti. L-inkonsistenza ghandha bhala konsegwenza l-kontestazzjoni gustifikata, id-diskriminazzjoni l-inegwalanza, u mill-aspett soggettiv ta' l-applikant, l-

ingustizzja. Illi peress li l-izvilupp fis-sit adjacenti gie approvat, hu diffiċli għal dan il-Bord li jasal għal konkluzjoni differenti.

Il-Bord għalhekk qed jiddisponi minn dan l-appell billi jilqa' l-istess, jordna li l-appellant jinghata l-permess kif minnu mitlub fi zmien xahar, bil-kondizzjoni, fost l-ohrajn generalment imposti, li l-izvilupp ta' l-appellant ikun ta' l-istess għoli u ma jeccedix dak tas-sit adjacenti, fuq ga msemmi; u li jigu mposti fuqu l-istess set-backs imposti f' PA 5580/95."

Minn din is-sentenza appellat l-Awtorita` ta' l-Ippjanar li talbet ir-revoka tagħha. Hi tobbjetta bl-aggravju illi l-Bord ta' l-Ippjanar ma għandux is-setgħa li jiddeciedi u jiddipartixxi mill-provvedimenti tat-Temporary Provision Schemes u tal-Pjan ta' Struttura għaz-zona fejn jinsab is-sit. Filwaqt li tikkontendi li bid-decizjoni tiegħu l-Bord agixxa *ultra vires*, issostni li dan għamel zball evidenti meta kkonkluda li l-area hi definittivament "*committed*" għax inghataw diversi permessi tal-bini fl-imsemmija triq. Fil-fatt tissokta tobbjetta li l-kuncett ta' "*commitment*" gie prattikat hazin mill-Bord;

Għal dan l-aggravju l-appellat irribatta b' dawn it-twegibiet:-

(1) L-appell interpost kien irritu u null stante li ma giex intavolat fuq punt ta' ligi deciz mill-Bord;

(2) Il-punt ta' *ultra vires* ma tqajjimx quddiem il-Bord u għalhekk la gie dibattut u wisq anqas kien hemm decizjoni dwaru;

(3) Il-Bord ikkonsidra l-aspetti saljenti għall-kaz li kellu quddiemu u jidher li l-Bord gie influwenzat bin-numri ta' permessi li hargu fil-lokalita` in kwestjoni;

(4) Jissottometti finalment li nhargu numru ta' permessi ta' zvilupp fuq proprjeta` li ma kienetx sitwata

gewwa *scheme*, ossija kienet “Outside Development Zone”;

Jibda biex jigi osservat b' riflessjoni ta' indoli generali illi bhal fil-kaz ta' diversi tribunali u bordijiet ohra kwazi gudizzjarji, il-ligi tipprovdi lic-cittadin applikant appelli statutorji fuq zewg livelli: wiehed lil Bord ta' l-Appell dwar l-Ippjanar li hu generali [Artikolu 15 (1) ta' l-Att dwar l-Ippjanar ta' l-Izvilupp]. A differenza ta' ligijiet ohra specjali - b' ezemplari Kapitolu 69 dwar l-Ordinanza li Tirregola l-Kera, Kapitolu 123 dwar l-Income Tax - fil-kaz ta' l-appell lil din il-Qorti dan irid ikun dwar punt ta' ligi deciz mill-Bord [Artikolu 15 (2)] u ghalhekk definit espressament fis-sentenza appellata. Ma huwix ghalhekk sufficcjenti li l-punt ta' ligi li fuqu jsir l-appell jirrizulta involut jew implicitu fid-decizjoni;

Hi ormai giurisprudenza ben stabbilita illi din il-Qorti ta' revizjoni:-

I. “tista' tirrevedi biss kwestjonijiet dwar punti ta' dritt li jkunu decizi mill-Bord. Dan ifisser li ma hemmx appell fuq kwestjonijiet ta' fatt, fuq kwestjonijiet ta' apprezzament ta' provi. Ma hemmx dritt lanqas fuq punt ta' ligi sakemm dawn ma jkunux espressament decizi fid-decizjoni appellata” - “**Emanuel Mifsud -vs- Awtorita` ta' l-Ippjanar**”, Appell, 31 ta' Mejju 1996;

II. m' ghandhiex guridizzjoni li, fir-rigward ta' interpretazzjoni u applikazzjoni tal-*policies*, “tissindika jew tid-disturba sakemm ma jkunx car li tkun saret, ser tigi sanzjonata ingustizzja manifesta minhabba applikazzjoni hazina tal-ligi kif enunzjata fl-istess decizjoni” - “**Angelo Farrugia -vs- Chairman ta' l-Awtorita` ta' l-Ippjanar**”, Appell, 24 ta' April 1996; “**Daniel Spiteri -vs- L-Awtorita` ta' l-Ippjanar**”, Appell, 30 ta' Mejju 2001;

Minn dan huwa intwittiv li din il-Qorti ma tistax tissindika l-gudizzju tal-Bord dwar kwestjonijiet ta' fatt u allura ma

tistax tindahal fir-raguni ghaliex ma gietx adottata s-sottomissjoni ta' l-appellanti quddiemu jew id-difiza ta' l-appellat meta dik ir-raguni tkun wahda prettament ta' fatt. Il-Qorti allura jenhtiegilha tezamina jekk il-kwestjoni deferibbli lilha hix dwar punt ta' ligi, o meno, kif hekk propost mill-appellat fl-ewwel eccezzjoni tieghu ghall-aggravju interpost;

L-appell huwa bazat fuq il-motiv li l-Bord agixxa *ultra vires*. Certament, minn dan il-punto di vista l-allegazzjoni, kif impostata, timporta kwestjoni li tinvolvi punt ta' dritt. Ara a propozitu "**Joe Cortis -vs- L-Awtorita` ta' l-Ippjanar**", Appell, 27 ta' Frar 1996 u "**Gino Trapani Galea nomine -vs- L-Awtorita` ta' l-Ippjanar**", Appell, 29 ta' Ottubru 1999;

Qabel ma tghaddi biex tinvestiga dan l-aggravju din il-Qorti thoss li jkun opportun li tanalizza l-motivazzjoni tad-decizjoni appellata tal-Bord biex tippuntwalizza l-hsieb tal-Bord li wasslu ghall-akkoljiment ta' l-appell;

(1) Fl-ewwel lok il-Bord ikkonstata, mill-access mizimum minnu kif ukoll mir-ritratti esebiti, illi prattikament it-triq kollha fejn jinsab is-sit in kwestjoni llum giet zviluppata. Irrileva, difatti, illi fuq iz-zewg nahat adjacenti ta' l-*infill site* ta' l-appellant dawn kienu diga` zviluppata. Ghalhekk irraguna, anke fuq l-ezami tieghu ta' permessi ohra, illi applikazzjonijiet simili ghandhom jinghataw trattament identiku;

(2) Una volta rrileva li l-area hi difinittivament "*committed*" billi nghataw diversi permessi ghall-bini fl-istess triq, irrimarka li fil-pjan lokali ta' l-inhawi ma jistax ma jittiehedx kont ta' l-izvilupp li jezisti;

(3) Il-Bord ghalhekk ikkonkluda li l-"*commitment*" fattwali li hemm fil-lokalita` kien tali li wahdu kien jaghti d-dritt lill-appellant quddiemu li jinhariglu l-permess mitlub minnu;

Dan premiss, anke jekk jigi, *gratia argomenti*, accettat li l-aggravju ta' l-Awtorita` appellanti huwa proceduralment ritwali u ammissibbli quddiem din il-Qorti, dejjem jibqa' l-fatt li jrid jigi investigat jekk dan l-istess aggravju huwiex fondat fil-meritu;

Jibda biex jigi konsiderat jekk il-Bord kienx korrett li filwaqt li josserva d-disposizzjonijiet tas-subartikoli (1) u (2) ta' l-Artikolu 33 fir-revizjoni tieghu tad-decizjoni ta' l-Awtorita`, kif hekk jissanzjoni l-Artikolu 15 (12) ta' l-Att I ta' l-1992, kellux ukoll il-fakolta li jikkonsidra l-materja ghab-bazi tal-*“commitment”* ta' l-area;

Il-Qorti ta' l-Appell fis-sentenza taghha fl-ismijiet **“Michael Gatt -vs- L-Awtorita` ta' l-Ippjanar”**, 19 ta' Novembru 2001, kienet iccensurat lill-Bord talli dan, nonostante li zamm access u kkonsulta diversi *files* ta' l-Awtorita` dwar bini vicini, naqas imbaghad milli jinvestiga t-tezi ta' l-appellant dwar il-*“commitment”* ta' l-area. Intqal a propozitu fiha illi “dan qieghed jinghad ghaliex il-kwestjoni li kellu quddiemu l-Bord ma kienetx xi kwestjoni semplici li setghet tigi rizolta semplicement billi wiehed ihares lejn il-*maximum height limitation* imposta fit-Temporary Provisions Scheme u semplicement jieqaf hemm. Infatti, il-kwestjoni nvoluta kienet tikkomprensi kemm punti diversi ta' fatt, kif ukoll punti ta' dritt li gustament kellhom jigu ndirizzati mill-Bord”;

Dawn il-punti ta' fatti kienu jikkonsistu fl-allegazzjonijiet li fil-vicinanze kien hemm diga` bini li jeccedi l-*maximum height limitation*, li l-istess bini kien kopert b' permessi validi ta' zvilupp u li l-istess bini kien f' koncazzjoni ntensa bizzejjed biex jindika li l-awtoritajiet kienu ddecidew li jaghmlu dawk l-inhawi *“committed”* ghal dak it-tip ta' gholi ezistenti fl-istess inhawi aktar mil-gholi mpost fil-*maximum height limitation* impost fit-Temporary Provisions Scheme;

Issokta jinghad f' dik l-istess sentenza illi “fl-ipotesi li l-Bord kellu jsib li dawn l-allegazzjonijiet li ghamel l-

appellant quddiemu kienu fattwalment fondati, allura kien mistenni li l-Bord jindaga liema hija precizament il-ligi applikabbli ghall-kaz. Kellu jara jekk il-pjan ta' struttura stess, jew xi regolament jew policy, jew *supplementary planning guidance* kienetx applikabbli ghall-kaz, u jekk din kienetx taghtih is-setgha li jezercita xi diskrezzjoni li kienet tintitolah li ma jsegwix fl-ghama r-restrizzjoni tal-*height limitation* imposta fl-iskema msemmija”;

Gja l-istess Qorti ta' l-Appell f' sentenza anterjuri kienet irrilevat illi “meta fl-investigazzjoni ta' applikazzjoni ghall-permess ta' l-izvilupp, issir l-allegazzjoni li fl-inhawi diga` jezisti zvilupp, bhal dak li qed jintalab permess ghalih, kemm l-Awtorita` kif ukoll il-Bord ghandhom, fil-fehma konsiderata ta' din il-Qorti, id-dover li jivverifikaw sewwa din l-allegazzjoni ... fl-ambitu ta' konsiderazzjonijiet ta' l-ippjanar, u cjoe, biex jaraw jekk, tenut kont ta' l-izvilupp attwali fl-inhawi tas-sit in kwestjoni, ikunx gust u sewwa li l-permess mitlub jigi akkordat” - “**Alex Montanaro nomine -vs- Il-Kummissarju ghall-Kontroll ta' l-Izvilupp**”, 9 ta' Frar 2001;

F' dan l-ahhar kaz accennat il-Bord ghamel tali ezercizzju izda ma sabx li fis-sit kien hemm dak il-“*commitment*” necessarju li jippermetti rilassament tal-*height limitations*. Similment, kien hekk gie deciz mill-istess Qorti fil-kazijiet fl-ismijiet “**Vivian S. Bianchi nomine -vs- Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp**”, 15 ta' Jannar 2001 u “**Peter Galea -vs- Kummissjoni ghall-Kontroll ta' l-Izvilupp**”, 19 ta' Novembru 2001;

Huwa desumibbli minn dawn is-sentenzi illi:-

(i) Anke jekk is-sit fejn hu propost li jsir bini hu proprjament O. D. Z., ir-regolamenti ta' l-ippjanar jippermettu li f' kazijiet specifici jkun jista' jinhareg permess ta' l-izvilupp f' zoni bhal dawn;

(ii) Di regola, il-Bord jadotta u japplika l-iskemi u l-*policies* stabbiliti pero` jezistu kazijiet fejn ic-cirkostanzi partikolari taghhom jesigu, meta hekk jokkorri, li l-Bord jiddipartixxi mid-dettami mposti fihom;

(iii) Hekk il-Bord ghandu d-dover li jinvestiga l-allegazzjoni dwar il-*“commitment”* ta' l-area biex jistabilixxi jekk din hijiex verament fondata;

(iv) Il-Bord kellu jara wkoll jekk iz-zona kienetx bizzzejjed *“committed”* b' bini biex it-talba ghall-hrug tal-permess tkun tista' tigi milqugha skond il-*policies* fis-sehh;

Fermi dawn l-osservazzjonijiet, huwa aktar minn ovvju li fil-kaz in ezami l-Bord ikkonduca l-investigazzjonijiet tieghu b' mod konformi ghall-attribuzzjonijiet lill-konferiti mil-ligi u llimita ruhu, fuq il-konstatazzjonijiet u verifiki li ghamel, illi seta' f' dan il-kaz jiddipartixxi mit-*temporary provisions scheme* u l-*policy* PLP 20. Il-konkluzjoni li wasal ghalha kienet suggerita lill-mill-access li zamm fuq il-post, il-fatt tal-hrug tal-permessi ghal siti ohra fl-istess triq, u l-element tal-bini fl-inhawi li ma kienx wiehed traskurabbli. Dan kollu inducih biex isib li l-area kellha l-karatteristika ta' *“commitment”* u allura dik il-gustifikazzjoni li kienet tintitolah jiddipartixxi mill-gholi impost fl-iskema relattiva. Il-principju regolatur in materja, kif enuncjat mill-Bord, hu evidenti hafna a propozitu fis-sentenza appellata. Mill-bqija, fl-istess decizjoni m' hemmx hlief apprezzament ta' fatt;

Kif manifest, l-appellant jittanta jaghti bixra legali lill-kwestjoni ta' fatt involuta fl-aggravju. Certament quddiem il-Bord ma jirrizultax li qam il-punt legali issa ventilat dwar l-*ultra vires* u allura, skond l-appellat, dan il-punt legali ma giex deciz espressament fid-decizjoni appellata. B' danakollu, ghal din is-sottomissjoni ta' l-appellat fir-risposta tieghu, jista' jigi ripetut dak rimarkat mill-Qorti ta' l-Appell, fuq osservazzjoni konsimili, fis-sentenza fl-ismijiet **“Charles Polidano -vs- Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp”**, 30 ta' Marzu 2001 “mid-decizjoni stess,

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jista' jigi nferit jew dedott li l-Bord iddecieda u qata' li kellu l-*vires* necessarju biex jiddeciedi kif iddecieda. Decizjoni dwar punt legali li issa qeghda tigi kontestata f' dan l-appell. Fil-fehma tal-Qorti wiehed ma jistax jassumi li l-Bord ma ddeciediex din il-kwestjoni ghaliex huwa nkoncepibbli li tribunal responsabbli ma jzommx dejjem quddiem ghajnejh u jkun dejjem konxjament gwidat mid-disposizzjoni tal-ligi li tikkonferixxi fuqu s-setgha gursidizzjonali necessarju biex huwa jwettaq id-dmirijiet imposti fuqu skond il-ligi li kkrejatu”;

Skartata din l-eccezzjoni ta' l-appellat, kif ukoll l-aggravju principali ta' l-appellant li l-Bord agixxa *ultra vires*, u dan ghall-konsiderazzjonijiet suespressi, fil-kumpless taghha s-sentenza appellata ma tikkontjenix hlief apprezzament tal-fatti, lucidament kompendjati fiha. L-ebda punt ta' dritt ma gie strettament deciz. Ghalhekk, oltre ghal din ir-raguni, din il-Qorti ma tistax takkolji l-inviti ta' l-Awtorita` appellanti biex tirrevedi, u tirrevoka, is-sentenza appellata.

Ghal dawn il-motivi din il-Qorti tichad l-appell migjub quddiemha mill-Awtorita` kontra s-sentenza tal-Bord ta' l-Appell dwar l-ippjanar, u b' hekk tikkonferma s-sentenza appellata, bl-ispejjez kontra l-istess Awtorita` appellanti.

< Sentenza Finali >

-----TMIEM-----