



## **QORTI TA' L-APPELL**

**ONOR. IMHALLEF  
MARK CHETCUTI**

Seduta tat-2 ta' Mejju, 2013

Appell Civili Numru. 196/2012

**Peter Bugeja**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell tal-Awtorita ta' Malta dwar tal-Ambjent u l-Ippjanar tal-31 ta' Dicembru 2012 kontra d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-11 ta' Dicembru 2012;

Rat ir-risposta tal-appellat Peter Bugeja li ssottometta li l-appell ghandu jigi michud;

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

B'applikazzjoni tal-21 ta' Frar 2012 - Full Development Permission - PA 00772/12 fejn l-appellant, f'Bugeja garage, Triq il-Merkanti, Ghajnsielem, Ghawdex, talab:

"To use approved class 4 shop as a fishmonger"

Permezz ta' rifjut mahrug fit-22 ta' Gunju 2012 l-Awtorita dwar l-Ambjent u l-Ippjanar cahdet it-talba ghall-hrug tal-permess relativ ghar-raguni segwenti:

"1. The proposed development is unacceptable in view of BEN 1 since fishmonger is considered nuisance in residential area."

Permezz tal-appell tieghu l-Perit Bondin ressaq l-aggravji tal-applikant kif gej:

"Please find attached payment for appeal. It is important to note that the proposed development was approved by sanitary engineering officer and the directorate of environmental health found no objection. Moreover The Gozo and Comino Local Plan. Policy GZ-HOUS-1, permits class 4 shop in residential area, provided floor area for comparison or convenience do not exceed 75 sq.m. (in our case 40 sq. m.) and provided it will not exacerbate parking problems.

Being an already approved class 4 shop (PA 2255/10) the main issue are noise and smell pollution. A Noise and Ventilation Pollution Report was submitted by a warranted engineer listening the number of requirements to reduce and mitigate noise and smells pollution. Infact the directorate recommended grant subject to certain conditions.

Consequently with due to respect I cannot accept the decision of the EPC to refuse our proposal when the only reason of refusal was addressed during the application by

the submitting a Ventilation and Noise Report as a mitigation measure."

Permezz tar-rapport taghha l-Awtorita wiegbet inter alia kif gej:

"5.1.4 The approved development consists of a Class 4 shop surrounded by residential units. Overlying, the development under appeal, are residential units. Moreover, the predominant use of the existing immediate area of this development is residential, as shown in the photos below. The Authority is adamant to safeguard third parties and the neighbourhood. In fact, it is the intention of the Authority not to permit proposals which would have a deleterious impact on the surrounding and already existing and/or planned uses. Structure Plan Policy BEN 1 encourages this.

Development will not normally be permitted if the proposal is likely to have a deleterious impact on existing or planned adjacent uses because of visual intrusion, noise, vibration, atmospheric pollution, unusually high traffic generation, unusual operating times, or any other characteristic which in the opinion of the Planning Authority would constitute bad neighbourliness.

In fact, in order to substantiate the above argument, when the shop was approved as a Class 4 shop in permit PA 2255/10, a condition was imposed whereby stating:

e) The approved shop shall be put to any Class 4 use as defined in the Development Planning (Use Classes) Order 1994, excluding supermarket, minimarket, butcher, fishmonger and pharmacy.

The Appellant stresses that a Ventilation Report has been done. This was submitted prior the EPC sitting, therefore forming part of the set of documents taken into consideration during the EPC sitting. It is to be noted that part of the proposed ventilation system, comprises of an extract fan outlet which is positioned in the backyard, as shown in drawing 31B of the Ventilation Report Document

31A. All the unwanted smells would be extracted and discharged only a few centimeters away from the upper floor residential unit's balcony, causing obvious nuisances. The residential units in the immediate vicinity would experience unwanted fumes and odours discharged via this extraction outlet. This would cause unacceptable situations, due to its unsympathetic nature of the whole operation of fish selling. Furthermore, other nuisances would be caused by vans unloading the fish into the shop and vans loading waste bins. Such a process would entail foul water drippings, awful smells etc. into the street. The Authority imposed such a condition in PA 2255/10 and refused the development under appeal, in order to safeguard third parties and the neighbourhood from such situations.

Permezz tal-kummenti responsivi tieghu Dr Brincat wiegeb kif gej:

"We write on behalf of appellant Peter Bugeja and present our submissions in response to the comments and reasons for refusal detailed by MEPA to this Honourable Board to consider.

Basic Points of this Application.

The said premises is already licensed and approved as a Class 4 shop. The intention of the applicant is to use same as a Fishmonger Shop for Fresh and Frozen Fish products.

As detailed in the MEP A Site History item 2.2 there are not Site constraints.

The Only point of refusal of this application by EPC was based solely on good neighbourliness and the intention to safeguard third parties.

Neighbourhood and Illegitimate Objectors

We humbly insist that this Application should be approved as the safeguard towards the neighbourhood must be justified, real and legitimate. This is definitely not the case.

At EPC stage our client was informed that the Board had received unanimous letters as regards the proposed change of use. Although MEPA does not and is not expected to enter into merits any of a Civil Nature as all permits are issued subject to third party rights, it was submitted and is again submitted with respect that the unanimous objectors are relatives of the applicant. A Civil Litigation string of cases exists between the Bugeja brothers as to the ownership, division and compensation of the

Bugeja Fishmarket Partnership. Our client Peter Bugeja is opting to leave the said partnership to operate one corner away from the present site that is on Mgarr Road, Ghajnsielem, where a Class 4 Shop, is operated as a Fishmonger Fish Market, the same as the one sought for in this application. It is in this light that the so called objectors are objecting to the intended similar operation.

With respect the said Fishmarket outlet is also to be found in an area within the limits of Development of Ghajnsielem and similarly consists of a ground floor level and a two storey high building.

Therefore from a planning point of view the premises is permitted and authorized The Development pertaining to the so be objectors has the same characteristics but is allowed to operate and be used as a fishmarket just as the present applicant is requesting. The *pari paribus* rule should in such a circumstance be applied.

Illegitimacy of the objections is a salient feature of this appeal as this Honourable Board has not been presented by any MEPA reports reporting on the truthfulness of these alleged objections. If they wished to verify the effects on the neighbourhood they could have easily verified the neighbourhood situation as a fishmonger of relatives of the Applicant exists within a few metres from the said site. If it is in the interest of the neighbourhood that the objectors are filing their objections they should insist that conditions of a sanitary nature are imposed and not that the operation and use of the premises is declined.

## Present Trade in Fisheries

When anyone considers fishmongers the first reaction is the smells and possible nuisances of the trade. This was so half a century ago where hygiene regulations, freezers, chiller, ice machines and flakes were not part of the trade. Today all fish shops have all the amenities possible including air conditioned premises, walk in freezers eliminating totally odours and smells.

The ventilation report although considered at EPC level was commented unfairly upon in that, extracted odours could be extracted and discharged on the overlying premises. This is not the case as an on site visit could confirm. The scope of the extractor is to circulate air inside the premises permits a twice daily routine washing out and draining that eliminates odours and keeps the whole area of the shop in a spotless and odourless condition. The issue is rather an issue of routine hygiene and systematic daily cleaning as the fish products themselves are kept refrigerated. It is in the interest of the applicant himself to preserve the products in refrigerated areas and thus the main concern for refusing such an operation unfairly described as an "unsympathetic nature of the whole operation offish selling" is a far cry from the actual reality and old perception of the trade.

Nowadays, and this is the case of the Operation of the applicant, fish is daily imported from abroad and this is delivered express via Aircraft. Further emphasis that the nature of fish selling has changed drastically!! If it can be transported easily abroad on an aircraft one could imagine that it is absolutely possible to exclude all odours even in a neighbourhood. Besides fresh fish being imported by aircraft transport, sanitary regulation imposes that the fish is transported to the fish store in refrigerated vans and placed directly into refrigerated cold rooms. This implies complete elimination of the odours that are arousing concern to MEPA.

The Perplexity remains that MEPA officers themselves have produced no first hand proof of the alleged possible

odours but the objection was based on unanimous letters alone. As detailed above the objectors are relatives of the applicant who operate a fish market metres away from the said application and have all the interest to object not because of nuisances and odours but simply to eliminate any financial competition besides endless cases in Law Courts between the parties. MEPA is in this case being used unfairly and if from a Planning Point of view as detailed in the MEPA Report (vide 2.2) there are no site constraints, than this Planning Review Board is in duty bound to approve this application as the applicant merits to change a regular class 4 shop for the intended operation, albeit imposing a strict hygiene regime that the applicant automatically is used to in the trade he operates.

Today's fish products also consist of packed and frozen foods that remain frozen until delivered to consumers; so the issue of the unsympathetic description of the operation is totally being eliminated further avoiding any alleged spills and drippings which is an allegation and concern mentioned in the report without a true consideration of today's reality in such a trade.

## Conclusion

As detailed above the fishmonger trade has drastically changed due to development of refrigeration machinery intended to keep the fish produce to its very best, to reach consumers in the best condition as no fishmonger can afford any wastage or loss of the product. This implies and converts itself to totally eliminating odours and in this day and age MEPA should know much better that such operations have developed highly to very high standards. The Sanitary Government Officers on the other hand inspect these type of premises on a regular basis and once again we stress that from a planning point of view any objections are unjustified and in any eventuality the only implication would be one of enforcement if not observance to strict hygiene regime is not adhered, which as stressed above is not in the interest of the applicant as odours imply wastage and certainly fish products imported and purchased at a very elevated cost imply loss of

earnings, definitely not in his interest. This Honourable Board cannot but consider the blatant abuse of third party unanimous objectors who remain disguised under unanimous letters. Generally when MEPA is driven to refuse a permit that is otherwise permitted under the Policies, as is the case, faces the presence of genuine objectors who do their best to be present and explain and justify their concerns. This is not the case and in refusing this application This Review Board would be falling into the abuse perpetrated by the so called hidden objectors as no such concerns for bad neighbourliness actually occur on the said site.

We humbly insist that false reports and objections should be verified if MEPA wishes to base a refusal on such grounds that are inexistent and cannot be associated anymore to the fish trade as it has developed drastically both in operation and hygiene. If fish can be transported in an aircraft certainly no doubt should arise that technology has made the mark and no boundaries remain in keeping a Class 4 shop odourless when all machinery and ventilation measures have been put in place and good order.

Whilst we feel that this Honourable Review Board should appreciate our submissions we feel strongly that this application merits an approval even more so on the *cerimus paribus* principle enunciated strongly by our Law Courts time and time again and this in line with the existing fish market approved and fully operational meters away from the said site, operated by the so called objector relatives of the applicant.

With respect and with reservations to produce documentary evidence related to false reports and judicial reports to substantiate our submissions if this Board so requests."

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba biex hanut, b'area ta' 40 metru kwadru, approvat fi Class 4 jintuza bhala



fishmonger. Fuq is-sit kien hareg il-permess PA 2255/10 biex jissanzjona il-wisa' tal-bieb fuq quddiem tas-sit u c-change of use ta' parti mill-garage fi Class 4 shop.

Il-Gozo and Comino Local Plan jindika li s-sit in ezami jinsab gewwa z-zona residenzjali ta' Ghajnsielem fejn japplika height limitation ta' two floors plus three courses basement.

Din l-applikazzjoni giet rifjutata peress li l-uzu ta' dan il-hanut bhala fishmonger, fl-opinjoni tal-Awtorita, johloq inkonvenjent ghar-residenti u ghalhekk jikser il-policy BEN 1 tal-pjan ta' struttura.

L-argumenti li tqajmu mill-partijiet fil-kors tas-smigh ta' dan l-appell jistghu jigu migburin fil-qosor kif gej:

L-appellant jissottometti li:

- Is-sanitary engineering officer approva dan il-progett;
- Id-directorate of environmental health ma sabx oggezzjoni ghal dan il-progett;
- Il-pjan lokali jippermetti li jkun hemm Class 4 shop f'din l-area sakemm dan ikun inqas min 75 metru kwadru u li ma jkunx hemm problem ta' parking;
- It-tnaqqis ta' parkegg jista jigi rimedjat permezz ta' kontribuzzjoni ghall-Urban Improvement Fund ai termini tal-Policy 4.18 ta' DC2007;
- Waqt li jidher li l-oggezzjoni minn naha tal-Awtorita hija minnhabba storbu u rwejjah, l-appellant ipprezenta Noise and Ventilation Pollution Report biex jindirizza dawn l-oggezzjonijiet; u
- Id-Direttorat kien irrakomanda li l-proposta tigi approvata bl-impozizzjoni ta' numru ta' kundizzjonijiet.

L-Awtorita tissottometti li

- Hija determinata li tikkontrolla l-uzi f'zoni residenzjali biex ir-residenti ma' jbatux inkonvenienti li jistghu jinholqu minn dawn l-uzi u dan skond il-policy BEN 1 tal-pjan ta' struttura;
- In fatti kienet giet inkluzza kundizzjoni fil-permess PA 2255/10 li kienet tghid li l-Class 4 shop li kien qed jigi

approvat ma setax jintuza bhala fishmonger u numru ta' uzi ohra;

- L-appellant jghid li sar ventilation report pero gie nnotat li bis-sistema proposta l-irwejjah kienu ser jintefghu vicin hafna r-residenzi ta' fuq u dan b'inkonvenjent ghar-residenti; u
- Ser jinholqu inkonvenjenti wkoll meta jingieb il-hut fil-hanut biex jinbieh u kif ukoll meta jigi imnehhi l-iskart mill-hanut.

F'sottomissjoni sussegwenti l-appellant jispjega, inter alia, li:

- L-iskop tas-sistema ta' ventilazzjoni kif proposta hija li ticcirkola l-arja gewwa l-hanut fejn l-operat isir f'temperaturi kontrollati u fejn il-prodotti jinzammu gewwa freezers u mhux li tarmi l-irwejjah li jkun hemm gol-hanut il-barra;
- Kollox jiddependi minn kif jigi operat il-hanut, kif jigu mizmuma l-hut, kemm il-darba jinhasel il-hanut, il-kontroll tat-temperatura ecc.;
- L-appellant ilu f'dan ix-xoghol u huwa intis f'sistemi moderni li jintuzaw illum biex jigi gestit hanut bhal dan.

L-Awtorita ma ghamlet ebda replika ghal dak li ntqal mill-appellant fuq dawn il-punti. L-issue centrali f'dan l-appell hija li, skond l-Awtorita, dan it-tip ta' uzu jmur kontra il-policy BEN 1 peress li jikkaguna inkonvenjent ghar-residenti tal-madwar u li kundizzjoni f'dan is-sens kienet giet imposta fil-permess originali fejn kien gie approvat il-Class 4 shop in ezami.

Kif qal f'numru ta' okkazzjonijiet ohra, dan it-Tribunal huwa tal-fehma li l-Awtorita ghandha tendenza li tkun sweeping izzejjed f'certi impossizzjonijiet. Wahda minn dawn l-impossizzjonijiet generici zzejjed hija li tghid li f'kull kaz ma' jistghux jinfethu fishmonger f'lokalitajiet residenzjali.

Meta illum hawn tendenza li n-nies ifittxu li jixtru l-hut u prodotti ohra tal-bahar ghaliex qed jaspiraw ghal kwalita ta' hajja ahjar u meta kif jaf kullhadd hawn numru kbir ta' fishmongers f'zoni residenzjali li jzommu l-hanut taghhom f'kundizzjonijiet mill-aktar igenici ghax jafu li inkella in-nies

ma' jidhlux fil-hanut, huwa inkonsistenti li tipprova titfa dawn il-hwienet il-barra miz-zoni residenzjali. Wara kollox hawn tradizzjoni twila ta' fishmongers sitwati vicin fejn jghixu n-nies f'pajjizna u anke f'pajjizi Europej ohra. In fatti li tnehi dawn il-hwienet mic-centri residenzjali jista' jigi interpretat li jmur kontra l-principji tal-pjan ta' struttura ghaliex qed tikrea sitwazzjoni fejn biex tixtri l-hut trid jew tmur bil-karozza jew inkella tixtri prodotti tal-hut ipprocessat u ppakkjat.

Hemm fattur iehor li jrid jigi kkunsidrat f'dan l-appell. Ghalkemm l-Awtorita irrifjutat din l-applikazzjoni minhabba l-inkonvenjent li tista' tikkrea attivita' bhal din fuq ir-residenti tal-madwar, ma jirrizulta li hemm ebda objector f'dan il-kaz.

It-Tribunal ghalhekk in vista tal-kunsiderazzjonijiet hawn fuq maghmula qiegħed jilqa' dan l-appell limitatament b'dana illi l-izvilupp jigi approvat bil-kundizzjonijiet normalment imposti f'applikazzjoniet simili u f'dan il-kaz, b'kundizzjonijiet partikolari li għandhom jindirizzaw dawk l-issues fl-operat ta' dan il-generu ta' Class 4 shop li jistghu johlqu inkonvenjent għar-residenti tal-madwar (smoke, ventilation, vibrations). Hawnhekk għandu jigi nnotat dak li ntqal fuq dan mid-Direttorat fid-DPA report.

L-Awtorita għandha, sa 30 gumata mill-lum, tohrog il-permess mitlub mill-appellant b'dana li l-izvilupp jigi approvat bil-kundizzjonijiet normalment imposti f'applikazzjoniet simili u f'dan il-kaz partikolari billi jittiehed kont ukoll tal-kundizzjonijiet speċjali li għandhom jigu ppreparati mill-Awtorita biex jintlahqu l-għanijiet speċifikati hawn fuq. Wara li l-Awtorita tkun sodisfatta bil-pjanti u s-sottomissjonijiet mitluba mill-appellant, għandha tibgħathom għall-approvazzjoni finali ta' dan it-Tribunal.

### **Ikkunsidrat**

L-aggravji tal-Awtorita huma s-segwenti:

1. It-Tribunal għamel zball meta kkonkluda li ma kienx hemmx objectors għal din l-applikazzjoni biex ixerjen l-argument tal-Awtorita tal-inkonvenjent li din l-attività

tikkreja fuq ir-residenti tal-madwar. Fil-fatt hemm objectors letter a fol. 37 tal-process u t-Tribunal inkorra zball ta' ligi meta zkartaha qua prova.

Din il-Qorti xejn ma hi konvinta minn dan l-aggravju. Fl-ewwel lok qari tad-decizjoni tat-Tribunal juri illi d-decizjoni tieghu ma kinitx ibbazata fuq in-nqqas ta' objections izda fuq il-fatt illi l-Awtorita applikat principju generali dwar l-ubifikazzjoni ta' hwienet tal-hut minghajr ma kkonsidrat il-fattispecie tal-kaz.

Il-Qorti hi tal-fehma illi biex zball ta' fatt ikun jikkostitwixxi punt ta' ligi applikabbli hu biss meta dan il-fatt, injorat jew applikat b'mod zbaljat kien il-fattur ewlieni u determinanti ghad-decizjoni tat-Tribunal. Din hi kwistjoni li trid tigi ezaminata minn kaz ghal kaz izda mhux kull zball jew nuqqas ta' konsiderazzjoni ta' fatt anki jekk meqjus importanti mill-appellant quddiem it-Tribunal, jaghti lok ghal decizjoni monka minhabba punt ta' ligi meqjusa determinanti mit-Tribunal.

In oltre anki bhala kwistjoni ta' fatt din il-Qorti ma tqis li t-Tribunal inkorra zball ta' fatt ghaliex ittra anonima ma tistax titpogga fl-istess keffa ta' registered objector ai termini tal-artikolu 68(4) tal-Kap. 504. Ittra anonima minnha nfisha ma tixxif x'interess verament ghandu minn kitibha cioe jekk ghandux interess legittimu fuq bazi ta' ippjanar fl-izvilupp propost. Ghalhekk ghamel sew it-Tribunal li ma qies l-ittra anonima bhala oggezzjoni li ghandha tinghata xi piz fid-deliberazzjonijiet tieghu.

### **Decide**

Ghalhekk il-Qorti qed tichad l-appell tal-Awtorita ta' Malta dwar tal-Ambjent u l-Ippjanar u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-11 ta' Dicembru 2012. Bl-ispejjez kontra l-istess Awtorita.

**< Sentenza Finali >**

Kopja Informali ta' Sentenza

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