



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tat-2 ta' Mejju, 2013

Appell Civili Numru. 79/2011

Charles Ellul

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Charles Ellul tat-28 ta' Dicembru 2011 kontra d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-14 ta' Dicembru 2011 li cahad l-applikazzjoni PA 0706/09;

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

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

Rat id-decizjoni tat-Tribunal li tghid hekk:
Ikkunsidra:-

Il-Kummissjoni għall-Kontroll tal-Iżvilupp irrifjutat l-applikazzjoni, PA 0706/09 f'sit, fi Hazy View, Triq il-Bajja c/w, Triq San Nikola, Marsascala - "construction of washrooms at roof level over approved permit, PA 5658/05" għas-segweni raguni:-

"1. The proposed construction of washrooms over the existing building would further exceed the three storey height limitation as designated by the the Local Plan for the area, and would result in excessive overdevelopment of the site. This would not be in the interests of the amenity of the area as a whole, running counter to Structure Plan policy BEN 1.":

Fl-appell tieghu, il-perit Joe Grech għall-appellant issottometta s-segweni:-

"With reference to the refusal dated 18th June, 2009 issued in connection with the above-mentioned application kindly note that we would like to appeal against the decision in view of the fact that the development lying on the opposite corner of Triq San Nikola has been approved with four floors and overlying washrooms. Refer to the attached planning application details for PA 6924/96).";

L-Awtorita ipprezentat ir-rapport tagħha fil-31 ta' Awwissu 2009 u kkumentat kif gej:-

"5.0 COMMENTS ON APPELLANT'S ARGUMENTS

5.1 The Authority has noted the arguments as brought forward in appellant's request for appeal and shall address these issues hereunder:

5.1.1 In this request for appeal, appellant is stating that in view that there is another building in the area which is also 4 floors with washrooms at roof level, this request for development should also be accepted.

5.1.2 However, the Authority disagrees with this statement on various accounts. As an initial issue the Authority states that the cited permit PA 6924/96 was approved on 13th March 1998 which is long before the issuing of the South Malta Local Plan which has now designated an official height limitation of 3 floors with semi-basement.

5.1.3 The Authority also acknowledges that the existing building underlying the proposed washrooms had been approved with 4 floors by the Planning Appeals Board in view of the amount of other existing buildings within this area which are also 4 floors. However, this decision rendered the building in excess of the provisions of the SMLP and hence, any request for additional development has to be considered in the light of this particular circumstance.

5.1.4 This decision rendered the building with an overall height of 14.5m and which exceeds that permitted in para 2.1 of PDG 2007 which limits the total height in metres for an area with 3 floors plus semi basement to 14 metres. Such a situation now prohibits the granting of washrooms or penthouses since the resulting building would exceed the permitted height as established by the SMLP and PDG 2007.

5.1.5 This issue was already highlighted in the DPA report which also explained that the massing of the requested 9 washrooms is very similar to that of a penthouse level and thus the resultant massing would entail a building of 4 full floors plus a receded floor (the volume of so much washrooms would create a visual effect of a receded floor / penthouse development) in an area which has an official height limitation of 3 floors plus semi basement.

5.1.6 As regards the previous decision by the PAB, the Authority states that the decision as delivered on 7th November 2008 only granted 4 full floors and there was no decision regarding structures at roof level. Hence, one cannot somehow tie that particular decision to any presumed right for further development at roof level since every decision entails that whilst accepting a particular

development, it is not forwarding any particular right for further development. In fact, the concluding paragraph of this decision states that:

... u jilqa' l-appell billi jordna illi fi zmien xahar mil-lum l-appellant jinghata permess għall-izvilupp għall-applikazzjoni tiegħu PA 5658/05 u dan taht kull kundizzjoni solita li l-Awtorita tista' timponi.

This clearly states that whilst the Board acceded in approving the height of the building in principle, the development has still had to abide with all the relevant policies / conditions for such development. This also means that any right for the construction of washrooms at roof level which would normally be acceptable in cases where the building is erected in line with the height limitation of an area, different planning considerations would be applicable and if the resultant building would infringe the relevant policies, than, even washrooms at roof level would not be acceptable.

5.1.7 In this case under appeal, the Authority is reiterating that:

- a) The proposed washrooms cannot be acceptable since the existing building already exceeds the permissible height limitation of the area, both as regards the provisions of the Local Plan and those relating to PDG 2007.
- b) the cited approved washrooms were approved on 13th March 1998, ie long before the Local Plan and the issued of the Policy and Design Guidance documents.
- c) while there is no contestation regarding the already approved four floors, that PAB decision was strictly limited to the approval of four full floors and cannot be interpreted that this decision exonerated appellant from abiding with the present relevant policies if further development is requested.
- d) The resultant overall height if the requested washrooms were to be constructed would exceed that of a building with 3 floors with semi basement plus a penthouse above and hence, the resultant overall height would be that

similar to a structure above penthouse level and which is not permissible.

5.1.8 In view of the above, it is clear that the resultant total height of the building with the washroom exceeds the permitted height of the area and the Authority sees no reason why such policies should be breached. Reference is also made to recent planning board decisions wherein the board constantly emphasises that present policies are to be abided with and the presence of other buildings which had been approved through different planning policies do not necessary entail the breach of present policies. The two citations of recent planning board's decisions below refer:

PA 5727/05 - Decided on 4th February 2009 as per PAB 161/07 RT

Il-Pjan Lokali kien specifikament mahsub sabiex jaghti direzzjoni ta' kif zoni differenti ghandhom ikomplu jigu zviluppati. Kieku wiehed kellu jinjora l-pjan lokali u johrog permessi abbazi biss ta' xi tip ta' committment dan ikun ifisser illi l-ghanijiet tal-Pjan Lokali ma jkunu jistu qatt jintlahqu u l-ezercizzju kollu tal-pjanijiet lokali jkun sar ghal xejn.

PA 1154/05 - Decided on 29th July 2009 as per PAB 205/06 RT

Il-Bord ikkunsidra wkoll illi permessi mahruqa taht policies differenti minn dawk tal-lum ma jistawx awtomatikament iservu ta' precedent sabiex illum jinhargu permessi li jmorru kontra l-policies in vigore fil-prezent.

5.1.9 Conclusively, the Authority states that whilst taking note of appellant's arguments in this request for appeal, the Authority notes that there are no sound planning justifications which could justify a breach to the above cited policies. Hence, reference is made to the reports as presented by the Directorate and to the DCC's decision which dismissed this request for development since the

DCC Board had based their decision on the valid relevant policies applicable to this area.

5.2 MEPA therefore reiterates that it acknowledges and confirms that the reasons for refusal can be justified on sound planning considerations which took into consideration all the relevant facts, planning policies, legislation and submissions as required by article 33/1 of Chapter 356 of the Laws of Malta, and thus, respectfully requests the Planning Appeals Board to confirm the decision of the Development Control Commission and to refuse this appeal. The Authority reserves the right to forward further submissions during the appeals process as necessary.";

It-Tribunal ra n-nota responsiva tal-Perit Joe Grech ghar-rapport tal-Awtorita fejn issottometta s-segwenti:-
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"With reference to the report prepared by the Directorate in connection with the above-mentioned appeal, please note our comments as follows:

- It is to be noted that the official height limit of the area in which our proposal lies has been set as three floors and a semi-basement level way back in 1988 when the temporary provision schemes were
- approved. In spite of this limitation in height, PA 6924/96 was still approved on the premise that there was already a heavy commitment of four floor structures in the area.
- In such an instance the issue of excessive overdevelopment and negative impact on the amenity of the area is not applicable since most of the surrounding buildings have the same height as that being proposed in our application.
- The report is stating that the overall height of the building is 14.50m however the actual physical height from highest street level as measured on site is 13.60m and therefore the structure still lies within the 14m limit acceptable for 3 floors and a semi-basement.
- Considering that the official height limit of the area is 3 floors, a semi-basement and a penthouse and we are requesting the addition of washrooms over a structure

which lies within the permissible height limit (refer to attached drawing) we conclude that refusing our application on the issue of massing is highly unjustified.

- The report erroneously states that in the previous permit issued by the PAB and granting 4 full floors, there was no decision regarding structures at roof level. The attached approved drawing reveals that the stairwell and the lift shaft were approved. This means that, as opposed to other circumstances where PAB decisions specifically include conditions eliminating the possibility of constructing roof structures, in this case' a roof structure has already been approved without any concern whatsoever

It is thus very clear that all points mentioned in 5.1.7 and 5.1.8 of the report are not completely correct and we therefore urge the Appeals Board to accept our proposal and issue all relevant permits.";

Maria Sciciuna, għall-Awtorita presenta second statement fejn irribatta illi:-

"The Authority has noted these submissions and states:

The massing and typography of a particular streetscape is primarily established by the number of floors which also limits the density of a particular area. Hence the existing development could only be referred to as a 4 storey building irrespective of whether its overall height in meters could have been developed in another manner.

The last permit which granted the uppermost floor had in fact consented a full 4 storey building which thus creates a clear limitation for further development in view that it is already above the Local Plan's height limitation of 3 floors plus semi-basement.

The Authority's report did not state that washrooms were denied in the previous permit but that the approved plans did not show any approved washrooms (apart from a stairwell and lift shaft of circa 16.7 sq.m.) Drg Red 1H.

As regards the photos submitted by applicant, it is to be noted that their relevant permits were not cited so as to verify whether such developments were in fact approved prior or after the issuing of the Local Plan. This is because, appellant's arguments that other 4 storey buildings exists in this stretch of road would be relevant in a challenge to the Local Plan's height limitation by an official objection through a different fora. In fact, the 4 floor issue is no longer relevant since the existing building is already approved as a 4 (full) floor building and there is no pending contention whether the 3rd floor (the 4th storey) could be approved or not.

The relevant issue as regards the washrooms in this appeal relates to (as per the only reason for refusal) the fact that 9 washrooms (clustered together with an external appearance and massing similar to a penthouse) are now being requested (these were not requested in previous application which was upheld by the PAB) at roof level. Such photos would have been more relevant if these would have proved that similar washrooms (i.e. with such a massing as that being requested in this appeal) were in fact erected within this stretch of road and were also approved (as is being requested in this appeal) after the coming into force of the Local Plan. In the absence of such proof, the submitted photos are not directly related to the specific request for 9 washrooms in this appeal.

Furthermore, the Authority has also noted a discrepancy between the last approved elevation in previous permit as per elevation plan PA 5658/05/1K as approved by the Planning Appeals Board and the elevation plan PA 706/09/1E in this application under appeal. This is because the 3rd floor as shown in the approved drawing by the PAB was approved with a height of 11 crs whilst the elevation as shown in the elevation drawing of the existing building (in this appeal) shows that the 3rd floor was built on 12 crs. This difference in height is also reflected in the height as measured in metres. This issue is also relevant since the application under appeal is limited to the construction of (new) 9 washrooms at roof level and does not seek to sanction the difference in

height of the 3rd floor which was approved by the PAB. Such a difference should have resulted in an official request for sanctioning in both the official proposal as well as clearly shown in the drawings through conventional colours. However, since no sanctioning is being requested in this application and since the latest plans show that the height of the building differed from that as approved by the Planning Appeals Board, the Authority states that no further development could be considered on this site prior to its sanctioning. In such circumstances, the provisions of PA Circular 2/96 apply since the difference in height of the 3rd floor level has direct impact on the level in which the requested washrooms are to be constructed.

In this regard, the Authority reiterates that in line with its previous reports, the requested development goes against the present planning policies relevant to this area and states that the DCC's decision to dismiss this request for development was justified and hence respectfully requests the Planning Appeals Board to dismiss this request for appeal on both the grounds as cited in the refusal notice as well as for the provisions of PA Circular 2/96.";

Fis-seduta quddiem dan it-Tribunal tas-17 ta' Frar 2011 l-Avukat Dr. Anthony De Gaetano għall-Awtorità dwar l-'commitment' peress li l-kwistjoni hi fuq l-gholi tal-izvilupp għamel referenza għall-proviso tal-Artikolu 69(2)(i) tal-Att X tal-2010.

Sar access mit-Tribunal fl-24 ta' Gunju 2011; il-Perit Joe Grech għall-appellant indika l-izvilupp in kwistjoni li jikkonsisti fi blokk appartamenti fil-kantuniera mibnija fuq erba' sulari. Il-proposta hija li jinbnew washrooms. L-appellant qed jgħid li jrid jagħmel disa' washrooms, wahda għal kull apartment.

Ir-rapprezentanti tal-Awtorità irrilevaw illi, is-sular ta' fuq ingħata b'decizjoni tal-Bord tal-Appell; u li l-proposta prezenti ta' bini ta' washrooms hija in eccess tal-height limitation tal-lokal.

Ikkunsidra ulterjorament;-

Il-kwistjoni principali li jinhtieg li tigi kkunsidrata u deterrninata f'dan l-appell hi l-'vexata questio' jekk tistax tigi approvata proposta ta' zvilupp li l-gholi tkun in eccess ta' dak indikat fil-Pjan Lokali.

Subordinatament l-Awtorita qed tirrileva li fic-cirkostanzi partikolari ghandhomjapplikaw l-provvedimenti ta-Cirkolari 2/96 billi jirrizulta li t-tielet sular, approvat b'decizjoni tal-Bord tal-Appell dwar l-lppjanar kellu jkun mibni fuq 11-il filata, mentri mill-pjanti pprezentati dan jidher li gie mibni fuq 12-il filata. Skond l-Awtorita l-appellant kellu l-obbligu li jitlob 'sanctioning' dwar dan, li ma giex mitlub f'din l-applikazzjoni.

L-appellant jimmotiva l-appell tieghu principalment fuq il-fatt li l-izvilupp fil-lokalita hu ta' erba' sulari. Dwar dan, il-perit tal-appellant, annetta man-nota tieghu ipprezentata fit-18 ta' Frar 2010 erba' ritratti, li juru zviluppi fil-lokalita mibnija fuq erba' sulari.

Kif irrizulta mir-rapporti pprezentati mill-Awtorita, effettivament l-kwistjoni mhix jekk isir zvilupp fuq erba' sulari jew le, billi l-appellant inghata permess ghal '4 full floors' bis-sahha tad-decizjoni tal-Bord tal-Appell; il-proposta prezenti hi ghall-kostruzzjoni ta' disa' washrooms, sovrastanti s-sular koncess mill-Bord tal-Appell; u ghall-Awtorita' l-washrooms proposti m'ghandhomx jigu approvati billi jkunu in eccess tal-height limitation ghal dawk li huma sulari, billi skond l-Pjan Lokali l-height limitation hi ta' '3 floors plus semi-basement'.

Applikazzjonijiet ghall-permess ghall-izvilupp jigu determinati skond il-kriterji imposti mill-Artikolu 69 tal-Att X tal-2010, Kap. 504; precedentement skond l-Artikolu 33 tal-Kap. 356. Dan l-ahhar Artikolu gie revokat b'effett mill-31 ta' Dicembru 2010 bl-Avviz Legali 512 tal-2010.

L-Artikolu 69 tal-Kap. 504 dahal fis-sehh fl-istess data cioe 31 ta' Dicembru 2010, bl-Avviz Legali 511 tal-2010.

Skond l-imsemmi artikolu l-applikazzjoni tigi kkunsidrata fil-kuntest tal-plans, policies u kull kunsiderazzjoni materjali ohra fosthom ambjentali, estetici u sanitarji li l-Awtorita jidhrilha rilevanti.

Il-proviso tas-sub-incis (i) fl-Artikolu 69(2) jistabbilixxi li ghal dak li hi gholi, l-'commitment' ta' bini fil-vicinanze ma jistax jigi nterpretat billi jizdied il-height limitation indikata fil-'plan'.

Dwar il-proviso policies skond l-Artikolu 69(1)(a)(ii) jinghad li dawn ma japplikawx retroattivamente fuq permessi gia moghtija.

Ma jistax jinghad f'dan il-kaz li i-Policies qed jigu applikati retroattivamente, billi dak li l-appellant akkwista b'decizjoni precedenti tal-Bord tal-Appell - cioe zvilupp ta' '4 full floors' b'ebda mod ma ser jigi pregudikat, nonostante l-fatt li i-height limitation indikata fil-Local Plan hi ta' 3 floors plus semi-basement.

Il-washrooms proposti huma ghalhekk abundantament in excess ta' dak koncess mill-Local Plan, u fit-termini tal-Artikolu 69(2)(i), fuq citat, ma jistghux jigu approvati.

It- Tribunal ghalhekk qed jiddisponi minn dan l-Appell billi jichad l-istess u jikkonferma r-rifjut tat-28 ta' Gunju 2009 ghall-applikazzjoni PA 0706/09.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal applika hazin l-artikolu 69(1)(ii) tal-Kap. dwar 'height limitations' retroattivamente kontra dak li jiddisponi l-istess artikolu billi pjanijiet sussidjarji u policies ma ghandhomx jigu applikati b'mod retroattiv ghal drittijiet akkwistati li jirrizultaw minn zvilupp validu;
2. It-Tribunal applika l-artikolu 69(2) tal-Kap. 504 ghal kaz meta dan ma kienx legalment applikabbli.

L-ewwel aggravju

L-appellant qed jallega li kellu permess validu favur tieghu u ghalhekk kellu dritt li jinghata permess ghall-applikazzjoni odjerna billi tali permess kien biss il-konsegwenza ta' dritt gia akkwistat precedentement. Avolja fl-appell ma jissemmiex esplicitament, l-appellant qed jirreferi ghal permess 5658/05 liema permess, ghalkemm mhux esebit ma' dawn l-atti jidher li kien jikkoncerna zieda ta' sular iehor mat-tlett sulari gia ezistenti b'permess precedenti 7069/04. L-applikazzjoni ghaz-zieda ta' sular giet approvata nonostante li kien hemm height limitations peress li gie addottat il-kuncett tal-'commitment' ta' erba sulari fl-area vicina dik mertu tal-permess.

L-appellant qed jikkontendi illi l-applikazzjoni odjerna kienet tikkostitwixxi dritt kwezit bil-permess 5658/05. Il-kwistjoni hi wahda ta' ligi u ghalhekk hi kwistjoni legali dibattibbli quddiem din il-Qorti. La darba l-appellant qed ipoggi quddiem din il-Qorti l-aggravju tad-dritt kwezit, sta ghalih li qabel xejn igib a konjizzjoni tal-Qorti dan id-dritt rizultanti minn permess gia ezistenti. Dritt kwezit ma jfissirx dritt pretiz jew dritt assunt jew dezunt. Irid jirrizulta car. Jekk jigi ppruvat allura din il-Qorti taqbel mal-appellant li ghal fini tal-applikazzjoni odjerna iridu jigu applikati l-ligijiet, pjanijiet u policies ezistenti fiz-zmien tal-permess li minnu hareg id-dritt.

L-appellant pero ma gabx il-prova li l-permess 5658/05 kien jinkludi xi permess ghal bini ta' strutturi oltre r-raba' sular li nghata bil-hrug tal-permess. L-appellant isostni illi d-drawings fil-pjanti esebiti juru shaft tal-lift u tarag ghal bejt. Dawn ipprezumew il-bini ta' struttura ohra fuq il-bejt. Il-Qorti ma tqis li l-fatt li pjanta li turi shaft ta' lift u ta' tarag li jwassal ghal bejt tinkorpora xi awtorizzazzjoni esplicita jew implicita ghal bini ta' xi struttura. Il-permess 5658/05 ma kienx jinkorpora bini ta' 'washrooms' kif qed jintalab bl-applikazzjoni prezenti. Anki jekk jista' jinghad li t-tarag u s-shaft huma approvati, l-appellant ma jistax jiddezumi xi dritt oltre dak moghti bil-permess 5658/05. Kwindi la darba ma giex provat li l-appellat kellu xi dritt kwezit rizultanti mill-permess 5658/05 ma jistax jargumenta dwar applikazzjoni hazina tal-artikolu 69(1)(ii) tal-Kap. 504

liema artikolu fl-intier tieghu hu applikabbli fis-sens li ma kienx jezisti dritt kwezit mill-appellant kif qed jippretendi, u ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju qed isir billi l-appellant isostni illi l-applikazzjoni mit-Tribunal tal-artikolu 69(2) dwar height limitations ma messux gie applikat ghax dan dahal in vigore fl-1 ta' Jannar 2011 metri l-applikazzjoni saret fl-2009, meta l-ligi ma kinitx teskludi l-kwistjoni ta' 'commitment'.

Din il-Qorti gia kellha okkazzjoni ittenni illi l-ligi, pjanijiet u policies ghandhom jkunu dawk applikabbli fiz-zmien tad-decizjoni tat-Tribunal, kemm jekk dawn jagevolaw u kemm jekk ma jagevolawx lill-applikant. Dan il-principju hu ben assodat fil-gurisprudenza. Ara fost sentenzi ohra **Philip Micallef vs Awtorita ta' Malta dwar l-Ambjent u l-Izvilupp** (App Inf 26/04/2007) u **Stella Buttigieg et vs Awtorita ta' Malta dwar l-Ippjanar** (App Inf 29/01/2009).

L-ilment tal-appellant li ghalhekk it-Tribunal injora kwistjonijiet ta' commitemnt ghax applika l-artikolu 69(2) tal-Kap. 504 billi dam sentejn u nofs biex gie deciz l-appell quddiem it-Tribunal u b'hekk ir-regim legali gdid ma ffavorhix ma jikkostitwix nuqqas tali li jitqiesu idoneji ghal finijiet ta' appell fuq punti ta' dritt quddiem din il-Qorti. F'dan is-sens il-Qorti tqis ir-referenza tal-appellant ghal kawza Garden of Eden Garage Control vs Awtorita dwar it-Trasport ta' Malta, deciz fid-29 ta' Settembru 2011 bhala mhux idoneju ghall-aggravju mressaq peress illi l-proceduri msemija ittiehdu wara decizjoni amministrattiva a bazi tal-artikolu 469A tal-Kap. 12 b'fattispecie li huma kompletament differenti minn dawk sotto ezami, fejn il-konsiderazzjonijiet tal-Qorti kienu bbazati fuq abbuz tas-setgha ta' Awtorita pubblika u tnikkir fil-qadi ta' dmirijiet u funzjonijiet tal-awtorita wara decizjoni tal-Ufficju tal-Kompetizzjoni Gusta kif konfermat mill-Kummissjoni ghal Kummerc Gust u meta kien gia hemm qafas legali fuq hiex timxi l-istess awtorita u naqset li timxi fuqha.

Kopja Informali ta' Sentenza

Ghalhekk dan l-aggravju wkoll qed jigi skartat.

Decide

Il-Qorti ghalhekk qed tichad l-appell ta' Charles Ellul u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-14 ta' Dicembru 2011. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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