



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tat-2 ta' Mejju, 2013

Appell Civili Numru. 142/2012

**Ray Aquilina f'isem u in rappreżentanza
tas-socjeta' Madliena Developments Ltd.**

VS

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Ray Aquilina f'isem u in rappreżentanza tas-socjeta Madliena Developments Ltd. tal-24 ta' Settembru 2012 kontra d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-4 ta' Settembru 2012 li cahdet l-applikazzjoni PA 2607/08.

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

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

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

A. Il-Kummissjoni ghall-Kontroll tal-Ambjent u l-Ippjanar, fit-18 ta' Gunju 2011, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 2607/08 "Site at Triq Ta' l-Ibragg, San Gwann: Creation of two separate garages for stone turner and related works and three further garages for warehousing/distribution."

Iz-zewg ragunijiet ghar-rifjut kienu s-segwent:

"1. The proposed additional warehouses constitute intensification of industrial development outside the development zone and hence conflicts with Structure Plan Policy SET 11, which does not permit urban development outside existing and committed built up areas. The development does not fall into a category of non-urban development which may be permitted outside existing or committed built up areas in accordance with Para. 7.6 of the Structure Plan.

2. There is no justification for the proposed warehousing within this site as required by Structure Plan policy SET 12. There are no apparent reasons from a planning point of view why the proposed development cannot be located in an area designated for development or in an existing built up area."

B. In-nota tal-Perit Noel Debattista ghall-Appellant nomine, ipprezentata fis-26 ta' Lulju 2011 inkluzi xi korrezzjonijiet li saru mill-istess perit konsulenti waqt is-Seduta numru 66 mizmuma fit-22 ta' Settembru 2011, senjatament il-punti segwenti:

"The DPAR recommends approval as the site in question has been granted permission through PA 2790/06. this has been granted after achieving approval under ODP - PA 3991/03. As stated in the DPAR, the application is for the filing of a gap site which is located within the same

quarry boundary. The proposal does not increase any visual impact as the development is below the street level.

The DPAR also continues favourably that the intensification of the industrial/communal activity is being reduced by 50% and the potential resultant nuisance and/or impacts are decreased.

The current permit covers an area of circa 1325 sq.m. this application is applying an additional 9.9 sq.m. of development, thus just under 7% of the commitment already approved. This is due to the shortening of the units to allow adequate turning circle and maneuverability of the vehicles coming down the ramp and using the resultant forecourt. This extra 1.3% does not constitute intensification of the industrial development. This allows for a more flexible manageable development that is more sustainable.

With regard to SET 12, considering the near identical development of area as that approved, this policy is not applicable since in our opinion, once again, the area committed to date is equivalent to that being requested under this new permit application."

C. In-nota responsiva ta' Edward Borg ghall-Awtorita, ipprezentata fl-20 t'Ottubru 2011, inter alia l-hames punti segwenti:

"5.1.3 Reference is made to the assessment as carried out in the DPAR and which included:

This planning application is seeking development permission for additions and alterations to create two garages for stone turning works and three warehouses.

The site in question has been granted permission through PA 2790/06 for the construction of premises for the operations of a stone turner. The principle of this development has also been approved through the issuance of the previous outline development permission

PA 03991/03. As outlined above, the site is an old quarry and hence development is located below street level.

In addition to the above, it should be outlined that the stone turner and other related works are now limited to two garages only. The remainder of the existing floorspace plus additions is proposed to be converted to storage space (warehouses). When comparing the development approved in permit PA 2790/06, where all the garages were intended for stone turner (covering an approximate total area of 1080 sq. metres), to that proposed in the current planning application.

5.1.5 The [...] site is located outside development zone (Map SG 1 and SG2) in the locality of San Gwann as per North Harbour Local Plan (July 06) Site at present contains garages used as stone turner and forms part of a quarry. The Tribunal may wish to note that when comparing the current permit PA 2790/06 where according to approved plan Red 2790/09/3E only 15 sq.m. were designated for the actual activity of a stone turner, all the rest was storage space as ancillary to the stone turner.

5.1.6 Hence, in spite that the Directorate had prepared a positive report, the EPC still assessed the requested development as shown in latest plans Reds 22 which in fact differed substantially from the already approved development in PA 2790/06/3E which, [...] had approved a building footprint of circa 1344 sq.m. but the actual activity area was limited to circa 15 sq.m. and all of the rest roofed area was approved as ancillary storage as ancillary to the approved 'stone turner'. The development under appeal differs substantially from that approved since the new layout (apart from having more than 100 sq.m. in the requested roofed area) now requests: 2 separate stone turners and an additional 3 separate 'warehousing / distribution' units. It is very important to stress that all the proposed 5 'separate' activities would inevitably create a more intensive use than the previous approved 'stone turner' as regards to noise, number of employees, number of customers and inbound / outbound

traffic to and from the site as well as issues relating to dust and pollution emissions as well as more traffic into the narrow main road.

5.1.7 Furthermore, the previous permit had included a side open area which acted as a buffer to mitigate the visual effect from the adjacent land and even from far away long distance views which area so critical in such ODZ areas. The removal of the side open space also intensified the massing of the resultant building, which, although being at a lower level from the main road would still result in a building without any mitigation measures on its side vis-a-vis the surrounding ODZ area.

5.1.8 In addition to the above, it is to be noted that the EPC Board took special attention to the fact that the site is ODZ and that such a request to intensify the already approved commercial activity does not intensify and expand in such an ODZ area. [...]"

D. In-nota ulterjuri tal-Perit Noel Debattista ghall-Appellant nomine, ipprezentata fis-17 ta' Novembru 2011, precizament il-punti segwenti:

"The main points to consider is that the site is committed by two previous permits, namely the outline dev[elopment] permit and the subsequent full permit, therefore the activity within the site is approved.

The site is beneath road level, is flanked by similar developments to the new reasoning of buffer zones and visual impacts is created to justify a refusal.

The EPC Board came to the Board meeting so intent that the file application should be refused, it only became apparent to the undersigned, a couple of weeks later in another sitting, that the Board was under the firm impression that the file had a negative recommendation.

The policies that approved the first permit, are equal to this application and a committed site should be viewed as such - a committed site, with adequate approach turning

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circles for vehicles, adequate loading/unloading area at the floor level to the warehouses and ramp that can take the required loading and built with the approved slope as requested by MEPA.

At the end of the day, the justification came from just 7% increase in land use, in an old quarry that is already committed to the proposed activity and is surrounded on three sides by similar activity.”

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda proposta sabiex f'sit konsistenti minn parti minn barriera qadima li tinsab il-barra miz-zona tal-izvilupp (ODZ) ta' San Gwann, jinbnew zewg garaxxijiet (cjoeworkshops) ghax-xoghol tal-lavur tal-gebla bit-torn (stone turner) u tlett garaxxijiet (cjoedistribution stores) ghall-hazna tal-istess produzzjoni.

Jigi rilevat li l-parti l-oħra biswit is-sit in ezami, illum tinhadem bhal art agrikola.

Precedentement kienu diga gew intavolati diversi applikazzjonijiet fuq dan il-fond. L-ewwel wahda (PA 6845/00) kienet outline application sabiex jinbnew ghaxar garaxxijiet fuq zewg livelli - basement u ground floor - ghall-istess xoghol tas-sengha, izda din kienet giet irrifjutata. Sussegwentement giet intavolata outline application oħra (PA 2070/03) sabiex jinbnew tmintax-il garaxx - sitta minnhom taht l-art - izda din ukoll kienet giet irrifjutata. Imbagħad, gie sottomessa it-tielet outline application (PA 3991/03) ghal operational premises, ukoll ghall-lavur bit-torn li pero giet milqugħa u segwita b'full permit application (P A 2790/06), li ukoll giet milqugħa.

Ir-raguni għar-rifjut jistrieħu fuq il-fatt li l-proposta in ezami tirrizulta f'intensifikazzjoni ulterjuri ta' uzu industrijali fl-ODZ, u di konsegwenza hi in kontravvenzjoni kemm tal-policies SET 11 u SET 12, kif ukoll tal-paragrafu 7.6 tal-Pjan ta' Struttura. In oltre, mhemm l-ebda gustifikazzjoni

ghaliex attivita bhal din ma tistax issir f'zoni li huma idoneji ma' produzzjoni ta' natura ndustrijali.

L-aggravji tal-Appellant nomine huma bbazati fuq il-premessa li s-sit diga huwa munit b'permess validu ghal tali operat; li l-proposta odjerna issegwi r-rekwiziti kollha tal-policies (jew ahjar ma tiksirhomx); u li mhix ser tikkawza l-ebda ntruzjoni visiva ghax taqa' taht il-livell tat-triq. Jargumenta wkolli l-proposta tieghu hi ntiza sabiex jintela vojti li hemm fl-istess barriera qadima u li ghandha l-iskop li tagevola l-produzzjoni u l-manifattura tax-xoghol li jahdem.

L-Appellant nomine jirrileva li bhalissa, is-sit ikopri madwar 1325 metri kwadri ta' attivita ndustrijali, u li bl-applikazzjoni odjerna, qed jintalbu kwazi mitt metri kwadri ohra; cjoe zieda (biss) ta' seba fil-mija fuq dak li diga gie approvat bil-permess PA 2790/06.

Mill-banda l-ohra, l-Awtorita targumenta li l-permess PA 2790/06 kien jippermetti arja ta' madwar hmistax il-metru kwadru (biss) ghax-xoghol tal-lavur per se, u l-bqijja tal-ispazju kien kollu intiz ghall-hazna. Skond l-Awtorita, anke jekk prezentement il-permess ikopri arja ta' 1325 metri kwadri, minn dawn, hmistax-il metru kwadru biss huma ddedikati ghall-produzzjoni innifisha; il-bqijja tal-ispazju jista' jintuza biss ghall-hazna tax-xoghol lest.

Fil-fatt, minn titwila hafifa lejn il-pjanti approvati mill-permess PA 2790/06, jirrizulta li d-drawing PA 2790/06/3E indikata bhala 'Basement Level Plan', turi spazji (f'din is-sekwenza:) ghal 'raw material', 'stack raw material', u 'stone turning', kif ukoll zewg areas ghal 'temporary storage' u 'final material out', tlett areas ghal 'storage for distribution' u 'extra storage under access ramp'. Minn dan johrog car li bil-permess originali approva hames garaxxijiet (wiehed minnhom jirrizulta f'it izghar ghax qieghed taht ir-rampa); fejn daqs nofs garaxx minnhom jista' jintuza ghax-xoghol tal-lavur per se (cjoe bhala stone turning area), u l-bqijja ghall-hazna (kemm tal-materja prima, etc. kif ukoll ghax-xoghol meta jitlesta).

Ezaminati fid-dettal is-sottomissjonijiet tal-partijiet, jirrizulta li l-permess ghall-attivita ta' xoghol tal-lavur f'din il-barriera qadima, minn dejjem sabet resistenza mill-Awtorita. Sahansitra zewg outline applications kienu gew irrifjutati, u jidher car li meta eventwalment hareg il-permess tal-outline permit (irid jinghad li dan hareg wara rikonsiderazzjoni - ghax originarjament kien ukoll gie rifjutat), kien intiz ghall attivita ferm iktar ristretta, milli kif qed jigi propost illum. Dan gie anke kkonfermat meta nhareg il-permess li jkopri l-attivita prezenti.

Jirrizulta wkoll li ghalkemm illum qed tintalab zieda minima tal-ispazju kopert bil-permess originali (i.e. 7% kif dikjarat mill-Appellant nomine), madankollu l-ispazju riservat ghall-operat tat-torn per se, (kif tajjeb rilevat l-Awtorita) ser jizdied bi gmielu. In oltre, dan it-Tribunal hu tal-fehma kkunsidrata li ma hemm l-ebda komfort mill-fatt li barriera qadima, meta ma baqghetx tintuza aktar, minflok ma giet ripristinata u bbonifikata (reclaimed - bhalma gara fil-parti biswit is-sit in ezami) inhargilha permess ghall-attivita kwazi daqstant impenjattiva fuq l-arnbjent; u fic-cirkostanzi peress li din it-talba tirrizulta minn intensifikazzjoni (ulterjuri) ta' attivita' industrijali fl-ODZ, ma timmeritax kunsiderazzjoni favorevoli.

Ghalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, u fuq kollox sabiex ikun konformi mal-policies tal-ippjanar vigenti, dan il- Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma ir-rifjut ghall-PA 2607/08 mahrug mill-Kummissjoni ghall-Kontroll tal-Ambjent u l-Ippjanar, fit-18 ta' Gunju 2011.

Ikkunsidrat

L-aggravji tal-appellant huma tnejn:

1. It-Tribunal iddipartixxa sostanzjalment mill-kuncett ta' commitment billi ta' kaz biss il-pjan lokali u injora l-element ta' commitment gia ezistenti fuq is-sit innifsu;
2. Il-policies li strah fuqhom it-Tribunal huma inapplicabbli ghal kaz, u ghandu japplika ghal kaz dak kontenut f'policy SET 12.

L-ewwel aggravju

Qabel xejn jigi ccarrat illi din il-Qorti taghmel distinzjoni netta bejn meta l-kuncett ta' commitment jitqajjem mill-parti u jigi konsidrat u deciz mit-Tribunal ta' Revizjoni u fejn dan l-aggravju mressaq mill-applikant jigi skartat bla konsiderazzjoni jew jigi addirittura injorat. Fl-ewwel kaz din il-Qorti ma tassindakax id-decizjoni tat-Tribunal fuq il-kwistjoni deciza sakemm ma jkunx car li d-decizjoni bbazata fuq dan l-aggravju biss hi manifestament ingusta jew id-determinazzjoni tat-Tribunal kienet ibbazata fuq fatti kjament zbaljati. Fit-tieni kaz hu car illi d-dritt ghal smigh xieraq jinkludi d-dritt li l-parti tigi mismugha f'dak li hu essenzjali ghal kwistjoni dibattuta u jinghata sodisfazzjoni ghalfejn l-appell tieghu ikun qed jigi skartat. Ma jfissirx b'daqshekk illi kull aggravju irid jigi ndirizzat mit-Tribunal ghax fin-nuqqas jaqa' fl-imbekkata tan-nullita izda n-nullita tinsorgi fejn kwistjoni wahda biss tigi trattata u deciza u fejn kwistjonijiet ohra ugwalment tal-istess piz u portata mqajjma setghu kieku indirizzati mit-Tribunal wassluh ghal gudizzju divers.

Maghdud dan bhala l-punt ta' tluq, l-appellant jikkritika lit-Tribunal li ma ndirizzax sew il-kwistjoni ta' commitment mqajjem mill-istess appellant, kemm ghal dak li jirrigwarda permess simili fl-inhawi u kemm ghal dak li jirrizulta mill-istess sit kopert gia b'permess 2790/06.

Harsa lejn id-decizjoni tat-Tribunal il-Qorti tara illi t-tribunal ma injorax il-kwistjoni tal-commitment tas-sit. Is-sit, kif qal it-Tribunal hu kommess ghal dak li jistipula l-permess mahrug PA 2790/06. It-Tribunal ma ccensurax tali permess u lanqas b'xi mod ma interferixxa fuqu, kwistjoni li anqas kieku ried, ma kellu dritt jaghmlu. Pero t-Tribunal kellu l-obbligu li jara jekk dak li qed jintalab u dan a prescindere mill-fatt illi l-area zejda li kien qed jintalab permess ghalha kinitx wahda zghira fic-cirkostanzi kienx imur oltre dak li kellu permess ghalih l-applikant. It-Tribunal ikkonsidra illi l-applikazzjoni l-gdida ghalkemm kienet tirrigwarda l-istess sit kienet qed tiddel l-uzu ta' parti apprezzabli ta' dak li kien inghata permess ghalih precedentment. It-Tribunal sab oggezzjoni bbazat fuq il-

pjanijiet u policies vigenti ghal dan it-tibdil ta' uzu. Kwindi l-kwistjoni ta' commitment kif ikkonsidrata mit-Tribunal ma gietx injorata qua permess gia ezistenti fuq is-sit izda jekk tali commitment kinitx ukoll tinkludi tibdil fl-uzu tal-istess sit fis-sens ta' intensifikazzjoni ta' attivita ta' produzzjoni u mhux ta' hazna.

It-Tribunal ghalhekk ma injorax il-commitemnt u trattaha debitament u wasal ghal konkluzzjonijiet tieghu li din il-Qorti ma ghandhix il-poter tassindaka kif fuq spjegat.

Ghalhekk dan l-aggravju qed jig michud.

It-tieni aggravju

L-appellant qed jargumenta illi t-Tribunal applika policy SET 11 b'mod errat ghax is-sit hu 'committed' u kellha tapplika policy SET 12 ghax ma kien hemm xejn li jimmitaw kontra li jigi applikat din il-policy cioe SET 12.

Jigi rilevat mill-Qorti illi l-kwistjoni tal-commitment ezistenti fuq is-sit gia gie trattat fl-ewwel aggravju u ghandu jigi mifhum f'dan is-sens u fit-tieni lok it-Tribunal ikkonsidra l-applikazzjoni fl-isfond taz-zewg policies u fl-isfond li l-izvilupp u bdil ta' uzu fis-sens ta' intensifikazzjoni ta' uzu produttiv li kien qed jintalab f'ODZ. Fejn jirrigwarda l-policy SET 12 dan ighid illi f'certi cirkostanzi, avolja applikazzjoni tista' tinfringi l-policy SET 11 cioe zvilupp li jsir barra ODZ u fil-kaz in partikolari zvilupp ta' area oltre gia dak permess kien qed jig mitlub apparti l-bdil ta' uzu kif fuq spjegat din il-policy thalli fid-diskrezzjoni tal-Awtorita u mbaghad it-Tribunal jekk fic-cirkostanzi ghandhix tintlaqa' l-applikazzjoni. Dawn il-kwistjonijiet, kif inhuma fil-kaz prezenti, huma ta' natura teknika, evalwazzjoni ta' fatti materjali u teknici inkluz ta' planning. Dawn kollha jmorru lil hinn mill-kompetenza ta' din il-Qorti li tista' tisma' biss appelli fuq punti ta' dirtt.

Ma jistax jinghad li t-Tribunal nqas li jikkonsidra kemm policy SET 11 u SET 12, anzi kkonsidra t-talba a bazi ta' dawn il-policies u kkonkluda li l-applikazzjoni ma setghetx tintlaqa' la taht policy u anqas taht 'l ohra ghar-ragunijiet

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moghtija minnu, cioe illi l-intensifikazzjoni tal-attivitá inkluza permezz ta' din l-applikazzjoni kienet gravuza wisq ghas-sit f'ODZ.

Din id-diskrezzjoni li biha hu adebit it-Tribunal ma jistax jigi mittiefes mill-Qorti sakemm ma jirrizultax zball manifest ta' fatt jew ta' ligi li fuqu hi msejsa d-decizjoni, li mhux il-kaz.

Decide

Ghalhekk il-Qorti qed tichad l-appell tal-appellant u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tal-4 ta' Settembru 2012. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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