



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-20 ta' Gunju, 2013

Appell Civili Numru. 124/2012

Daniel Borg

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Daniel Borg tas-7 ta' Awwissu 2012 kontra rifjut tal-applikazzjoni PA 4138/08 'outline' tieghu ghal 'erection of partly underground mushroom farm' deciz mit-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar fil-31 ta' Lulju 2012;

Rat ir-risposta tal-Awtorita li ssottomettiet illi li d-decizjoni tat-Tribunal kellha tigi konfermata;

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

Kopja Informali ta' Sentenza

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

B'applikazzjoni tat-22 ta' Awwissu 2008 - Outline Development Permission – PA/04138/08 fejn l-appellanti, f'sit fi Triq il-Qammieh, Mellieha, talab:

"Proposed erection of partly underground mushroom farm. "

Illi l-Awtorita cahdet l-applikazzjoni permezz ta' rifjut fit-22 ta' April 2010, ghar-ragunijiet segwenti:

"1. The proposal does not fall within one of the categories of development, namely structures or facilities essential to agricultural, ecological or scenic interests, which may be permitted in Rural Conservation Areas where they meet the principles and criteria set out in Structure Plan policy RCO 4. The proposal is not essential to, nor does it enhance agricultural, ecological, or scenic interests, within the proposed site and is also running counter to Policy 2.11: Buildings for other forms of agriculture of the Policy and Design Guidance, Agriculture, Farm Diversification and Stables.

2. The proposed development conflicts with the requirements of Structure Plan policy AHF 4 which seeks to protect agricultural land and mandates soil conservation on all occasions.

3. The proposed development conflicts with Structure Plan policy AHF 1 (encouraging improvements in agriculture subject that the countryside land resources are used efficiently and does not become derelict), RCO 8 (which requires that individual cultivators illustrate how an agricultural activity will not contribute to the detriment of the area and AHF 10 (encouraging agriculture by the promotion of grading and packing stations, generally on industrial estates).

4. Structure Plan policy RCO 4 provides that, particularly within Rural Conservation Areas, areas of scenic value

will be protected and enhanced. The area in which the site is located is of considerable scenic value. The proposal would detract from this, and so it would conflict with Structure Plan policy RCO 4.

5. The proposed development is not satisfying all requirements listed in Appendix 3 Section B10 (related to Policy 2.11). The clearances, declarations and other information were not all submitted.”

Illi fl-appell tieghu l-Perit Joseph Attard ghall-appellant jissottometti li gej:

"1. Currently the applicant is growing mushrooms in an urban area, and thus this application seeks to relocate such activity in an open and already committed area, where such activity would have no negative impacts. The current mushroom farm consist of only one room, having a size of approximately 3m x 4m, which can only supply 5 tons of mushrooms a year. In fact mushroom yield is only available for three weeks per three months.

Mushroom farms cannot be situated in urban area because of smell pollution caused both by the production of mushrooms and biocides used in the process. Mushroom is cultivated on compost based on chicken manure. These odours make it impossible to cultivate mushrooms in an urban development zone. Besides, a mushroom farm cannot be built in an industrial zone, due to the fact that certain fumes and chemicals used in certain industries such as car spraying, adversely affect mushroom growing. For mushrooms to grow a substantial amount of fresh air is required. Such pollutants would adversely affect mushroom production.

Thus, a rural area, like the one proposed by my client would be ideal for such development.

By constructing ten different growing rooms, constant supply would be assured which is necessary in mushroom cultivation. Besides, entry for new compost and exit of old compost would be distinct, thus greatly improving farm

cleanliness which is of utmost importance. The proposed mushroom farm would have a mushroom supply of approximately 50 tonnes of fresh mushroom per year.

In fact adjacent to my client's site one finds another farm, which up to a couple of years ago used to accommodate pigs. Furthermore, the surrounding area also accommodates Qammieh sewage treatment plant and a number of greenhouses structures. Current structures on site, apart from being in danger of collapsing are also too small to serve us mushroom growing rooms as per today's standards. Thus the area where the development is being proposed has already its commitments and therefore reasons for refusals 1 to 4 do not stand in this case.

2. With regards to the agricultural fields referred to by EPD, one should state that an on site visit would reveal that the depth of the soil is not more than 20 cm and thus the land in question cannot be classified as good and productive agricultural land.

3. As indicated in the submitted drawings, the external height of the proposed structures shall be 3.2m and not as assumed in the report (4m). To my knowledge the report presented to the Development Control Commission should be based on the submitted drawings and not on presumptions.

4. With regards to reason for refusal 5, the lack of non asked for information and/or clearances should be categorically never be used as a reason for refusal. Furthermore, I would like to draw to your attention to the fact that this is an outline development permission, and as per section 8 of the application form, clearance for siting, design, means of access, landscaping and external appearance are being sought."

Illi l-Awtorita ressqet il-kummenti taghha inter alia kif gej:

"5.1 The proposed farm is objectionable by MEPA mainly on the grounds that the applicant failed to present a

justification on sound planning grounds for the proposed development, while the proposed development shall have a significant environmental impact on the site and its surroundings. With regards to the latter, the proposed development shall have irreparable damage on the present terraced landscape which shall effectively be removed, and would hence have a significant visual impact on this area which is characterized an open and unobstructed terraced fields. Moreover, the extent of proposed constructions and hard surfacing required for the mushroom farm would also result in the significant loss of good quality agricultural land, which is the predominant characteristic of the site and its immediate surroundings.

5.2 In this appeal, the appellant seeks to present a justification for the proposed mushroom farm by indicating that the applicant's present mushroom operations are located within an urban area, and this relocation is required to facilitate the expansion of his enterprise as well as to remove the nuisances created by mushroom growing with the present urban area (in particular the generation of smells). The appellant also claims that the relocation into an industrial area would not be appropriate with other industrial uses, and that the site proposed for development is to be considered committed due to the presence of greenhouses, a disused pig farm, and the Qammieh sewage treatment plant within vicinity.

5.3 While the Authority recognizes that mushroom farming units may be located outside the development zone boundary, this does not entail that such an activity can be located on any such site. It would need to be proved that the proposed farm can be adequately absorbed on the particular site and within its surrounding context. As outlined earlier in this report, the visual impact of the proposed farm and the negative environment impacts that would be created cannot be accepted. Unlike that claimed by the appellant, the photographs submitted with this application at red 1B illustrate that the site's immediate surroundings are open and undeveloped, and the

Kopja Informali ta' Sentenza

proposed farm would have a substantial visual impact on the surrounding landscape.

5.4 Moreover, due to the negative impact that the proposal would have on the scenic value of this area, and would also result in the removal of good quality agricultural soil, the proposed development is considered to go against rural conservation policies, which only allow development with such areas where there would be no impact on the scenic, agricultural, and ecological interests of such areas. The proposed development would have irreparable damage on the environmental qualities of this site and its surroundings.

5.5 Other issues raised in the refusal notice include the lack of provision of information as required by Policy 2.3A(6), and that the height of the proposed structures exceed 3.2 metres in height in conflict with Policy 2.4A(9)."

Illi l-Avv. Vella Cuschieri resqet il-kummenti responsivi taghha kif gej:

"1. Illi fl-ewwel lok issir referenza ghad-deskrizzjoni tas-sit moghtija mill-istess Awtorita appellata fid-DPA report fejn jinghad kif isegwi:

'The site is located within the North West Malta Local Plan but no particular designations apply. The site consists of good agricultural land and a number of small structures; open reservoir and two rooms, which are visible in the 1967 aerial photo). The site is located adjacent to the Treatment Plant.'

Illi minn dak suespost johorgu l-punti segwenti:

(i) Illi ghall-kuntrarju ta' dak espost fir-ragunijiet ta' rifjut iz-zona m'hijiex indikata bhala zona ta' xi valur xeniku partikolari.

(ii) Anzi l-istess deskrizzjoni tikkonferma li fiz-zona in kwistjoni hemm bosta zviluppi ta' tip urban fosthom l-impjant ta' Trattament tad-Drenagg.

(iii) Mill-istess deskrizzjoni j irrizulta li fuq is-sit stess gia hemm 'commitment' ta' binjiet antiki li saru qabel is-sena 1967 u ghalhekk is-sit huwa kommess ghall-bini, Apparti minn hekk anki jekk wiehed jaghti daqqa t'ghajn lejn is-'site plan' esebita ma' l-appell jirrizulta li anki fis-siti adjacenti hemm bosta strutturi, uhud tista' tghid ta' l-istess entita jekk mhux akbar ghal dak propost mill-appellant u dawn huma kollha legali. L-istess Awtorita fid-DPA report taghha tirrikonoxxi li 'The applications were revisited as concern was expressed by EPD that refusal on visual impact is not strong enough. A site selection exercise may also not be justified as other larger structures have been permitted ODZ without a site selection exercise.' Nonostante dan kollu l-Awtorita' procediet sabiex tirrifjuta jista jkun gwidata mill-izball illi l-gholi ta' l-izvilupp minghalija li kien erba' (4) metri meta fil-fatt huwa ta' tlieta punt tnejn (3.2) metri fattur li jaghmel differenza kbira ghal dak li huwa impatt vizwali;

Illi izda l-appellant ma jaqbilx ma' dik il-parti fejn jinghad li s-sit jikkonsisti f'art agrikola tajba stante li l-hamrija fuq is-sit hija fonda mhux aktar minn 20 centimetru u ghalhekk certament ma tistax tigi kkunsidrata bhala tajba ghall-agrikoltura. Dan appartu l-vicinanzi taghha ghall-impjant tad-drenagg. Ukoll id-Dipartiment ta' l-Agrikoltura ma sab l-ebda objezzjoni ghal din l-applikazzjoni principalment ghar-ragunij iet segwenti:

Illi l-appellant kienu ilu jkabbar il-'mushrooms' ghal mill-anqas sentejn;

Illi d-Dipartiment huwa favur li tigi rilokata l-attivita miz-zona urbana ghal zona ohra aktar idonea;

2. Illi b'referenza ghar-ragunijiet ta' rifjut u l-kummenti da parti tal-Awtorita li l-appellant ma prrovi ex xi dokumentazzjoni jigi emfasizzat li din hija 'outline development permit' u ghaldaqstant certu dettalji huma

mistennija li jintalbu fil-'full development permit' u mhux fl-atti ta' din l-applikazzjoni kif qed taghti x'tifhem l-Awtorita. L-iskop ta' 'outline development permit' huwa li jigi deciz jekk di principio hiex accettabbli, l-kwistjoni jekk l-appellant jikwalifikax o meno jew provdiex id-dettalji kollha neccessarji huwa mistenni li wiehed jidhol fiha fil- 'full development permit'.

Izda minghajr pregudizzj u ghas-suespost, fuq dan il-punt jigi sottomess is-segwenti:

i) Illi l-applikant provda provi dokumentarji ta' l-attivitá tieghu anki permezz ta' ircevuti li juru l-produzzjoni tal-'mushrooms' u l-ammonti li s'issa l-istess applikant jiproduci;

ii) lili l-appellant isostni li mhux minnu li d-Dipartiment ta' l-Agricoltura ma jafux li huwa ser ikabbar l-attivitá. Bizejjed jinghad li dan huwa evidenti mill-entita ta' l-applikazzjoni li tiprovi spazju sabiex l-attivitá tiproduci mill-anqas ghaxar darbiet aktar minn dik prezenti. Fuq kollox tali konferma tista tintalab lid-Dipartiment fil-mument li tkun qed tigi kkunsidrata l-'full-development application'. Ukoll, li kieku l-applikant gie nformat li l-Awtorita ma kinitx sodisfatta bir-risposta tad-Dipartiment ta' l-Agricoltura kien jitlob lill-istess Dipartiment sabiex jikjarifika l-posizzjoni tieghu izda l-appellant ma nghatax din l-opportunitá.

3. Illi wahda mir-ragunijiet ta' rifjut (it-tielet) issemmi li ma jezistux ragunijiet ghalfejn din l-attivitá ma tistax tigi rilokata f'zona industrijali. L-appellant ma jaqbilx ma' din is-sottomissjoni stante li tkabbir tal-'mushrooms' huwa process delikat hafna u certu rwejjah u kimici li jemanu minn strutturi industrijali jikkostitwixxu hsara u periklu ghal din l-attivitá. Apparti minn hekk wiehed irid jikkunsidra wkoll il-fatt li l-istess attivitá tikkaguna hi stess certu rwejjah stante li, per ezempju, jintuza demel tat-tigieg u certu kimiki li mhux idoneu li jkunu f'zona urbana.

4. Illi l-appellant isostni li in vista tac-cirkustanzi kollha tal-kaz in vista wkoll ta' 'policy' specifika li tapplika ghal dawn it-tip ta' 'farms', is-sit propost huwa wiehed idoneu ghal

dak li qed jigi propost u dan ghaliex kif spjegat mhux ser ikun l-ewwel zvilupp fiz-zona, ser iservi sabiex l-attivitá tigi rilokata minn zona urbana fejn mhux fpostha, ser iservi sabiex tikber il-produzzjoni ta' dan il-prodott partikolari li huwa pjuttost rari fil-Gzejjer Maltin filwaqt li dan it-tip ta' zvilupp mhux f'postu lanqas f'zona industrijali.

5. Illi finalment l-appellant jaghmel referenza ghad-decizjoni tal-Onorabbli Qorti tal-Appell fejn gie emfasizzat kif isegwi:

"Fil-fatt gie ritenut gudizzjarjament li applikazzjonijiet simili jirrikjedu trattament identiku. Id-decizjonijiet f'dan ir-rigward, u l-konsiderazzjonijiet li jwasslu gahl dawn id-decizjonijiet necessarjament jinhtieg li jkunu konsistenti. L-inkonsistenza ghandha bhala konsegwenza, l-kontestazzjoni gustifikata, d-diskriminazzjoni, l-inegwáljanza, u mill-aspett soggettiv ta' l-applikant l-ingustizzja." (Joseph Gauci vs. Awtorita' ta' Malta dwar l-Ambjent u l-lppjanar deciza mill-Onorevoli Mhallel Dr. Raymond Pace nhar il-25 ta' Frar, 2010, pagna 22 tad-decizjoni);

Ghalhekk in linja wkoll ma l-insenjamenti tal-Qorti, l-appellant qed jitlob biss li t-Tribunal jimxi b'mod konsistenti bhal ma l-Awtorita mxiet ma' siti ohra fil-vicinanzi u jinghata l-permess ta' zvilupp mitlub."

Illi l-Awtorita ressqet kummenti ulterjuri permezz ta' Second Statement kif gej:

"2.1 Site Designation and Visual impact

Contrary to what the appellant is claiming, the site is designated as a Special Area of Conservation of International Importance (Habitats Directive - 92/43/EEC).

The proposal is changing the context of the site in question through the removal of soil and rubble walls and construction of the mushroom farm units and hard paving which take up a considerable area of the site. Hence the proposal is contrary to the provisions of Policy 2.11:

Buildings for other forms of Agriculture which aims at ensuring that building used for other forms of agriculture have minimal environmental and other impacts.

The appellant has selectively quoted from the DPAR part of a statement by the Planning Directorate's PDAT This statement as reported out of context seems to imply that the Authority deems the visual impact of the proposal as not significant.

This could not be further from the truth. The PDAT was reassessing the application because the Environment Protection Directorate considered the initial objection based on visual grounds is not enough given that the proposal generates other unacceptable impacts. The following is the full minute from the PDA T, to ensure no out-of-context interpretations:

"The applications were revisited as concern was expressed by EPD that refusal on visual impact is not strong enough. A site selection exercise may also not be justified as other larger structures have been permitted ODZ without a site selection exercise.

Due to the impacts associated with this development type (mushroom farming) especially the take up of agricultural land for uses which are not related to the intrinsic value of agricultural land (i. e. the growing of crops), the principle of this development ODZ, the projected growth of the activity, the specific requirements and potential impacts have to be discussed with the Department of Agriculture prior to it being accepted as a legitimate use ODZ Applications should not be processed until this issue is resolved. " (document 24 in PA file).

The proposed development shall have a significant environmental impact on the site and its surroundings. It will also cause irreparable damage on the present terraced landscape which shall effectively be removed and would therefore have a significant visual impact on this area which is characterized an open and unobstructed terraced fields.

2.2 Height of proposed development

The mushroom cultivation units are envisaged to have a height of 4 metres. At certain points (see section drawings) this will reach a height of almost 5m. Therefore the proposal runs counter to Policy 2.4A(9) of the Policy and Design Guidance: Agriculture, Farm Diversification and Stables which does not permit farm buildings higher than 3.2m except in exceptional cases, when it is essential to store agricultural machinery necessitating such height, the height of the building may not exceed 3.75m.

2.3 Agricultural quality of the surrounding fields

At present, the site in question consists of good agricultural land as shown in photos nos. 2, 3 and 4 taken during a site visit (refer to Document 20 in PA file). It should be noted that the proposal entails the removal of agricultural soil and rubble walls resulting in the loss of good agricultural land whilst drastically alerting the site rural features.

2.4 Requested Clearances

Policy 2.3A(1 c), Policy 2.4A(1 e) and Policy 2.11 of the Policy and Design Guidance: Agriculture, Farm Diversification and Stables requires an official statement from the Food and Veterinary Regulation Division and Department of Agriculture stating that the proposed development is essential for the effective operation of the farm unit. No reference to the proposed development within the site in question as a means of improving the mushroom farming activity was made by the Department of Agriculture. Hence as demonstrated by the Department of Agriculture, the main reason for the construction of this mushroom farm within the site in caption is related to relocation purposes only.

The appellant is claiming that such clearances are required at full development application stage and not at an outline as is this current application. The appellant also

continues to argue that it is the principle which requires to be established at this stage.

It is needless to say that the justification of having a mushroom farm on this site is of primary importance. If such a justification is not forthcoming how can ever the Authority accept in principle of permitting a mushroom in this sensitive location.

Thus, there is no valid justification for the construction of a new mushroom farm within the site in caption especially when considering that the applicant already owns a structure for growing mushrooms. The Authority is of the opinion that such a use (mushroom cultivation) is to be located in an already committed area that does not result in the removal of good quality agricultural land and have other negative impacts. The proposal is considered not acceptable in principle since the take up of agricultural land for uses which are not related to the intrinsic agricultural value of the area are not acceptable.

While the Authority recognizes that mushroom farming units may be located outside the development zone boundary, this does not entail that such an activity can be located on any such site. It would need to be proved that the proposed farm can be adequately absorbed on the particular site and within its surrounding context.

2.5 Other alleged commitments on site and in the area

The appellant is claiming that since the site is already committed by two structures which are pre 1967 than the site is committed for development. The Authority finds this argument quite dangerous in this case. The two pre-1967 rooms have a collective area of less than 60sq.m, whilst the proposal is for a farm of over 430sq.m (apart from the previously mentioned 60sq.m) and a paved area of circa 700sq.m in the ODZ. How can two such rooms constitute commitment for a development of such a scale?

The appellant also argued that there are other commitments in the area. However the various

photographs submitted with this application at red 1B illustrate that the site's immediate surroundings as open and undeveloped. This situation was also noticed during the site inspections.

2.6 Reference to the Court of Appeals decisions

The appellant made reference to a Court of Appeals decision which stresses the need that similar applications are similarly assessed; i.e. it is a reference to the concept of *cerimus paribus*. However the appellant did not quote any particular permit that may constitute a comparable commitment."

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda proposta tat-tip outline ghall-bini ta' mushroom farm. Din il-proposta tghid li i-farm propost ser jikkonsisti f zewg binjiet differenti b' footprint ta' 220 metri kwadri il-wahda, agricultural store ta' 26 metru kwadru u pump room ta' 30 metru kwadru.

Skond l-Awtorita, it-terracing tas-sit ser jinbidel user isir ammont konsiderevoli ta' hard paving partikolarment madwar iz-zewg binjiet il-kbar.

Is-sit mertu ta' dan l-appell huwa ODZ fzona maghrufa bhala il-Mejjieli, fil-Mellieha, li hija mmarkata bhala Rural Conservation Area, Special Area of Conservation (International Importance), Level 3 Area of Ecological Importance, Special protection Area, u tiffirma parti mill-Ghadira Nature Reserve protection zone.

Skond l-Awtorita, is-sit u l-areas tal-madwar jikkonsisti f'ghelieqi imtargin (terraced) ghall-uzu tal-agrikoltura.

Din il-proposta giet michuda peress li

- Il-proposta tikser il-Policij 2.11 tal-Policy and Design Guidance on Agriculture, Farm Diversification and Stables (December 2007) li tittratta is-suggett tal-mushroom farms;

Kopja Informali ta' Sentenza

- Il-policy RCO 4 tal-Pjan ta' Struttura peress li s-sit jinsab f'zona ta' scenic value;
- Il-policy AHF 1, AHF 10, AHF 4 u RCO 8 tal-Pjan ta' Struttura peress li l-operat propost mhux idoneu mas-sit in ezami; u
- Il-proposta ma' taqax taht wahda mill-kategoriji ta' bini li jista jsir f'Rural Conservation Areas jew f Area of Ecological Value.

L-argumenti, fil-mertu, li tqajmu fil-kors tas-smigh ta' dan l-appell jistghu jigu elenkati fil-qosor kif gej.

Fl-appell tieghu, l-appellant isostni li:

- L-appellant bhalissa ghandu mushroom farm fl-abitat. Jekk jigi approvat dan il-progett dan jigi imnehhi mill-abitat;
- Ma tistax tpoggi mushroom farm f'zona industriali peress li certi irwejjah mill-industrija ma jaghmlux tajjeb ghal dan it-tip ta' farm waqt li fl-istess hin mushroom farm jaghmel certi irwejjah;
- Is-sit in ezami huwa committed peress li fuq is-sit jezistu greenhouses waqt li fis-sit adjacenti jezisti farm u s-sewage treatment plant hija vicin;
- M'hemmx hamrija fonda fuq is-sit;
- L-gholi tal-bini propost huwa ta' 3.2 metri u mhux 4 metri; u
- Din hija outline application u ghalhekk l-informazzjoni kollha rikjesta m'hemmx ghalfejn tinghata f'dan l-istadju.

Fl-nota taghha, l-Awtorita waqt li terga' tirrepeti ir-ragunijiet moghtija fir-rifjut telabora izjed bis-segwent:

- L-izvilupp huwa oggezzjonabbli peress li l-appellant ma iggustifikax il-proposta, li ghandha impatt ambjentali sinifikanti fuq is-sit in ezami, f'termini ta' ippjanar;
- Il-proposta ser taghmel hsara inkalkolabbli fil-landscape ezistenti u kif ukoll ser ikollha visual impact negattiv;
- Il-proposta tinkludi bini li huwa relattivament goff waqt li l-ammont kbir ta' paving li ser ikun hemm bzonn ser jghatti art agrikola li hi propju l-karatteristika ta' dan is-sit;
- Waqt li l-Awtorita tirrikonoxxi li mushroom farm jista jsib post fl-ODZ dan ma jfissirx li dan jista' jsir f'kull sit ODZ.

Kopja Informali ta' Sentenza

F'dan il-kaz il-proposta ser ikolla impatt visiv negativ user taghmel hsara ambjentali;

- L-gholi tal-bitha u l-gholi tal-bini propost huwa ta' izjed minn 3.2 metri; u
- Problema ohra b' din l-applikazzjoni hija in-nuqqas ta' informazzjoni relattiva,

Fir-risposta taghha ghal dan ir-rapport, l-Avv. Vella Cuschieri tghid inter alia li:

- Kontra ghal dak li qed tghid l-Awtorita s-sit in ezami mhux xi wiehed li ghandu high landscape value u dan johrog mid-DPA report stess;
- Is-sit huwa diga committed;
- Il-bini li qed jigi propost mhux ser jaqbez gholi ta' 3.2 metri;
- L-art agrikola tas-sit u z-zona tal-madwar mhux ta' kwalita' tajba;
- Il-clearances li qed issemmi l-Awtorita jistghu jingiebu fi stadju ta' full development application;
- Il-proposta hija konformi mal-policies; u
- Il-Qorti tal-Appell qalet f'diversi okkazonijiet li applikazzjonijiet li huma simili ghandhom jigu assessjati bl-istess mod.

L-Awtorita irrispondiet inter alia b'li gej:

- Kontra ghal dak li qal l-appellant s-sit huwa mmarkat bhala Special Area of Conservation of International Importance (Haditats Directive - 93/43/EEC) u in fatti s-silta li jikkwota l-appellant mid-DPA report hija mehuda out of context;
- Mill-pjanti tal-applikazzjoni jidher car li l-bini ser ikun iktar minn 3.2 metri gholi u f' xi punti il-bini jigi vicin il-5 metri;
- Id-Department tal-Agrikultura imkien ma jghid li dan l-izvilupp huwa essenzjali ghall-operat tal-mushroom farm li ghandu l-appellant attwalment. Minghajr din il-gustifikazzjoni l-Awtorita mhix f'pozizzjoni li taccetta fil-principju li jitqieghed mushroom farm f'dan is-sit daqshekk sensitiv; u
- L-istrutturi li l-appellant qed jghid li ilhom minn qabel is-sena 1967 u ghalhekk li jikkommetti is-sit fil-fatt jokkupaw footprint ta' madwar 60 metri kwadri biss waqt li l-proposta in ezami ser tkun tokkupa 430 metri kwadri izjed u di piu

ser ikun hemm madwar 700 metri kwadri oħra ta' paved areas.

Mill-premess jirrizulta li f'dan il-kaz it-Tribunal irid jiddeciedi fuq tliet issues li qamu fil-kors tas-smigh ta' dan l-appell:

- L-Awtorita tghid li dan is-sit huwa wiehed sensitiv hafna waqt li l-appellant isostni li l-area madwar madwar s-sit mhix art agrikola tajba u li mid-DPA report jirrizulta li s-sit mhux area of high landscape value;
- L-Awtorita issostni li biex taccetta din il-proposta fil-principju hemm bzonn li jigi ppruvat li l-proposta hija essenzjali għall-operat tal-mushroom farm attwali li għandu l-appellant. L-appellant qed jghid li waqt il-process tal-outline application dan mhux necessarju u li dan jista jagħmlu waqt il-process tal-full development application; u
- L-appellant qed jghid li s-sit huwa diga committed bi zvilupp iehor u għalhekk l-izvilupp in ezami jista jsir.

Fuq l-ewwel punt m'hemmx dubju li s-sit huwa wiehed ta' sensitivita specjali u dan johrog car mill-pjan lokali li jikkwalifika lill-dan is-sit f'numru ta' kategoriji ta' konservazzjoni kif johrog car mill-premess. Meta it-Tribunal għamel access fuq is-sit innota l-istrutturi fuq is-sit, il-farm adjacenti u is-sewage treatment plant fil-vicin. Fl-istess hin it-Tribunal ma setax ma jinnottax il-kuntest sensitiv li fih jinsab is-sit u li fil-fatt huwa imdawwar b'art agrikola. Għalhekk it-Tribunal jaqbel ma l-Awtorita li dan is-sit huwa ambjentalment wiehed sensitiv.

Fl-opinjoni kunsidrata ta' dan it-Tribunal, by definition, l-għan li wiehed jagħmel outline application huwa precizament biex jigu stabbiliti il-principji basici kollha biex wiehed ikun jista jagħmel gudizju f' termini ta' ippjanar jekk jagħmilx sens li l-progett għandux isir jew le fis-sit in ezami. Kien precizament f'dan l-istadju li l-appellant kellu jagħmel il-kaz tieghu dwar kemm huwa importanti għall-operat tal-mushroom farm attwali li jsir il-progett f'dan is-sit. L-appellant ma hax din l-opportunita anke meta kellu hafna zmien biex jagħmel dan u in fatti fil-kors tas-smigh ta' dan l-appell l-appellant naqas milli jgib dawn ir-ragunijiet.

Dwar it-tielet punt u kif ghamel f'numru ta' decizjonijiet simili, dan it-Tribunal ihoss li ghandu jirrileva dan li gej fuq l-issues ta' meta jinholoq precedent u x-inhu commitment f'termini ta' ippjanar.

"Dan it-Tribunal huwa tal-fehma li jekk din l-issue ta' x'jikkostitwixxi precedent, f'termini ta' ippjanar, ma tittehidx fil-perspettiva gusta taghha jista' jigi zmien meta l-ebda parti minn dawn il-gzejjer ma' tigi salvata minn zvilupp urbanizzanti ta' kull tip li bil-mod jeqred il-kampanja kollha u dan b'dannu ghall-generazzjonijiet kollha li ghad iridu jigu u kontra wiehed mill-principji fundamentali li ghalih l-iStructure Plan inkiteb u gie addottat bhala l-ligi bazika tal-ippjanar ta' pajjizna. Jekk precedent, f'termini ta' ippjanar, jista' jfisser permess ta' bini fl-ODZ li inghata f'xi zmien qabel, ghaliex m'ghandux jittiehed bhala precedent ukoll rifjut ta' talba simili li jkun inghata lil xi hadd iehor fl-istess zona skond kif jitolbu i-policies tal-iStructure Plan? Certament jezistu hafna u hafna izjed kazi fejn talbiet ghal zvilupp urbanizzanti fl-ODZ gew michuda appuntu skond ma jghidu l-policies tal-iStructure Plan u dawn, b' argument identiku, ghandhom jittiehdu bhala li gie ikkreat precedent li l-status quo f'dawn iz-zoni ma jinbidilx.

F'termini ta' ippjanar jekk precedent li jigi segwit b' kazijiet simili, mhux kas singolu izda numru konsiderevoli ta' kazijiet simili, dan eventwalment jista' johloq commitment u cioe il-konsiderazzjoni materjali imsemmija fil-ligi (art. 69 (2)(i)) li l-Awtorita tista' tirritjeni bhala rilevanti fl-ghota tal-permess.

Fi kwalunkwe kas irid jinghad li l-kuncett ta' commitment f'terminu ta' ippjanar ghandu japplika biss f'kazi eccezzjonali u ghandu jigi uzat b' kawtela kbira u dan ghaliex id-dixxiplina teknika u xjentifika ta' land use planning giet stabbilita f'pajjizi zviluppanti u avvanzati appuntu biex permezz ta' pjani strategici fit-tul u management ghaqli jitraxxu u addirittura jigu mmregga lura proliferazzjoni ta' zvilupp u land uses ohrajn li jkunu qed ikollhom effetti mhux desiderabbli fit-territorju li fuqu jkunu japplikaw u li jkunu qed jixxerdu propju bis-sahha

tal-argument li zviluppi u uzi simili diga jezistu fil-madwar. Ghalhekk, by definition, land use plans u policies li jkollhom is-sahha ta' ligi ghandhom generalment japplikaw irrispettivament minn kwalunkwe indikazzjoni ta' commitment li jista jkun hemm u dan sakemm mal-commitment ma jkunx ta' entita massicca kif spjegat hawn taht. Jekk ma jsirx dan, l-ebda sistema ta' land use planning ma tista qatt tahdem.

Fil-fehma kunsidrata ta' dan it-Tribunal, biex sistema ta' ippjanar tahdem kif suppost u fl-interess publiku, il-kazi fejn jista legittimament, f'sens tekniku, jintuza il-principju ta' commitment huwa meta il-maggoranza kbira ta' permessi potenzjali ta' xi tip partikolari li jkunu jistghu jinghataw jkunu fil-fatt inhargu.

Li qed jinghad hawn fuq ma jnaqqas bl-ebda mod id-dritt li jista' jkollu l-applikant li jipprocedi kontra l-Awtorita civilment jekk ihoss li hu kien haqqu jiehu permess ghaliex fil-passat kien inghata permess simili ghat-talba tieghu. Id-differenza hi li din il-kawza civili ma tistax issir bhala parti mill-process tal-ippjanar."

Mill-premess jirrizulta, li l-pozizzjoni tal-Awtorita f'dan il-kas hija wahda soda u li hija pjenement sostnuta mill-plans u policies tal-ippjanar vigenti.

Ghalhekk, kif jidher mill-fatti li hargu fil-kors tas-smigh ta' dan l-appell, billi jirrizulta li l-aggravji mressqa mill-appellant m'humiex fondati dan l-appell ma jimmeritax kunsiderazzjoni favorevoli.

Ghalhekk peress li l-proposta ta' l-appellant tikser il-policies AHF 1, AHF 10, AHF 4 u RCO 8 u RCO 4 ta' l-iStructure Plan kif ukoll il-policy 2.11 tal-Policy and Design Guidelines on Agriculture, Farm Diversification and Stables, dan l-appell ma jirrizultax fondat u ma jimmeritax kunsiderazzjoni favorevoli.

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut tal-applikazzjoni PA/04138/08,

"Proposed erection of partly underground mushroom farm.", tat-22 ta' April 2010.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal ta' definizzjoni skorretta ta' x'jinvolvi outline application billi sostna li kellhom jigu stabiliti l-principji bazici kollha f'termini ta' ppjanar biex it-Tribunal ikun jista' jaghmel gudizzju jekk il-progett ghandux isir fis-sit jew le;
2. It-Tribunal ma mmotivax id-decizjoni tieghu ghax naqas li jidhol fil-mertu tal-aggravji kollha tal-appellant, senjatament l-ewwel u t-tielet aggravji tal-appellant li kienu r-ragunijiet mressqa mill-appellant ghaliex l-izvilupp propost kien permissibbli fuq is-sit partikolari u l-izball dwar l-gholi li ghamlet l-Awtorita u li t-Tribunal injora;
3. It-Tribunal ta' definizzjoni skorretta ta' 'commitment' billi ghalkemm ammetta li hemm zviluppi ohra simili flok applika l-principju tal-commitment idderiega lil applikant ifittex rimedji civili ghal allegat ingustizzji. In oltre sostna li biex 'precedent' jigi kunsidrat bhala 'commitment' ghandu jkun hemm aktar permessi ta' zvilupp simili fiz-zona milli rifjut.

L-ewwel aggravju

L-appellant jikkontendi li t-Tribunal zbalja meta ta' definizzjoni skorretta ta' dak li jikkostitwixxi 'outline perit'. Il-Qorti ma taqbilx illi hawnhekk si tratta ta' applikazzjoni hazina tal-ligi u kwindi punt ta' ligi appellabbli. It-Tribunal ta' l-interpretazzjoni tieghu dwar x'ghandu jikkompreni 'outline development application' li fl-Avviz Legali 6 tal-1993 jiddefinixxi bhala "an application submitted for outline development permission and in which one or more matters are reserved for submission and approval". Fil-fehma tat-Tribunal outline application trid tikkontjeni l-principji bazici kollha biex wiehed jaghmel gudizzju f'termini ta' ippjanar jekk is-sit propost kienx idoneu ghal progett. Altriment hi l-fehma tal-Qorti illi trattat mod iehor jingieb fix-xejn l-iskop tieghu. Fuq bazi fattwali t-Tribunal ikkonkluda li l-applikant ma ressaqx l-argumenti konvincenti li kellu l-opportunita iressaq biex jiggustifika l-

importanza li l-mushroom farm attwali jigi attwat f'dak is-sit partikolari liema sit gie identifikat mill-istess Tribunal bhala sit ta' sensitivita specjali kif hareg mill-pjan lokali li jikkwalifikah f'numru ta' kategoriji ta' konservazzjoni. Il-Qorti tqis illi l-aggravju jinkalja ruhu minn zewg aspetti cioe interpretazzjoni ta' 'outline permit' liema interpretazzjoni taqa' fl-ambitu tad-diskrezzjoni tat-Tribunal sakemm ma jigix pruvat li applika definizzjoni zbaljata li tohrog minn xi ligi, li l-appellant naqas li jipprova. Tinkalja wkoll ghax il-konluzzjoni fuq din il-kwistjoni kienet dipendenti minn evalwazzjoni tal-fatti mressqa, wkoll mhux punt ta' ligi appellabbli.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Il-Qorti ma tqis li dan l-aggravju tal-appellant iwassal ghan-nullita tad-decizjoni meta tqis l-assiem tal-konsiderazzjonijiet tat-Tribunal. L-appellant jishaq illi t-Tribunal naqas li jikkonsidra r-ragunijiet tal-applikant ghalfejn il-progett kien permissibbli fuq is-sit in kwistjoni u illi zbalja dwar l-gholi propost tal-izvilupp. Hu minnu illi dawn iz-zewg aspetti ma gewx trattati specifkament ghal rashom pero ttiehed kont taghhom tant li l-istess Tribunal b'mod metikoluz wara li semma' s-sottomissjonijeit kollha tal-partijiet, imbaghad ghamel riassunt tal-punti saljenti li semmew il-partijiet fejn jissemew kemm il-kwistjoni tal-gholi li fuqu kien hemm nuqqas ta qbil bejn il-partijiet u rigward ir-ragunijiet ghaliex skond l-appellant, is-sit kien idoneju mentri ghall-Awtorita ma kienx. It-Tribunal pero ma dahalx f'kull kwistjoni ta' fatt b'mod specifiku meta wasal beix jiddelibera fuq il-mertu tal-outline permit izda bbaza ruhu fuq il-principji f'materja ta' planning policies kemm dan il-progett seta' kien idoneju ghas-sit propost u wasal ghal konkluzjoni, u dan mehud kont tat-istampa wiesa' tal-progett mas-sit li fih kien propost li jsir, illi tali policies u structure plan kif imsemmija mill-istess Tribunal ma kienx jiggustifikaw li l-mushroom farm jsir fis-sit propost.

Ghalkemm hu desiderabbli illi l-aggravji ta' applikant jigu indirizzati kollha pero b'daqshekk ma jfissirx li t-Tribunal hu marbut li jindividwa kull aggravju ghal rasu u jimplifika fuqu meta d-decizjoni tieghu tkun ikkunsidrat il-kwistjoni b'mod sostanzjali u iggustifika bl-istess mod ir-rifjut u li tali rifjut ikun innewtralizza l-aggravji minhabba l-portata tar-ragunijiet minnu moghtija ghar-rifjut. F'dan il-kaz, ir-ragunijiet imsemmija mill-applikant biex ipoggi l-mushroom farm fis-sit propost u l-kwistjoni dwar l-gholi ta' strutturi proposti kienu newtralizzati bir-ragunijiet ibbazati fuq policies u structure plan applikabbli ghalfejn is-sit ma setax ikun idoneju ghal tali progett.

Ghalhekk dan l-aggravju qed jigi michud.

It-tielet aggravju

Dan l-aggravju ma jistax isib gustifikazzjoni ghax l-appellant qed jipprova jiftah kwistjoni li t-Tribunal ikkonsidra fid-dettall u ddecieda dwaru, billi jattakka d-decizjoni tat-Tribunal fuq l-aggravji ta' commitment u cerimus paribus billi jallega li t-Tribunal ta definizzjoni hazina taghom. It-Tribunal li ghamel hu illi interpreta l-kwistjoni ta' permessi simili li jistghu jikkostitwixxu precedent u dak li jikkostitwixxi committment u dan b'mod generali u mhux specifikament ghal kaz u mbaghad wasal ghal konkluzjoni, li fl-opinjoni tal-Qorti hi dik gusta, li ebda forma ta' commitment ma ghandha tipprevali fuq pjanijiet u policies li ghandhom sahha ta' ligi u li ghandhom jigu applikati irrispettivament minn kull forma ta' commitment dwar permessi anterjuri salv u impregudikati d-drittijiet civili ta' min ihoss li sehhet ingustizzja mieghu. Bhala punt krucjali pero t-Tribunal sostna illi l-Awtorita mxiet mal-pjanijiet u policies specifici u dawn kellhom jigu applikati f'dan il-kaz. Kwindi t-Tribunal applika l-pjanijiet u policies li kienu dawk applikabbli ghal kaz in ezami u kwistjonijiet ta' precedent u commitment ma kellhomx ikollhom prevalenza anki kieku kienu jezistu.

Kwindi dan l-aggravju ma fih ebda mertu fil-ligi u qed jigi skartat.

Kopja Informali ta' Sentenza

Decide

Ghal dawn ir-ragunijiet, il-Qorti qed taqta' u tiddeciedi billi tichad l-appell ta' Daniel Borg u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Lulju 2012. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

-----TMIEM-----