



**QORTI TA' L-APPELL**

**ONOR. IMHALLEF  
MARK CHETCUTI**

Seduta ta' l-20 ta' Frar, 2013

Appell Civili Numru. 48/2012

**Emanuel G. Cefai**

**vs**

**Awtorita' Maltija dwar l-Ambjent u l-Ippjanar**

**Il-Qorti,**

Rat ir-rikors tal-appell ta' Dottor Emanuel George Cefai tas-17 ta' April 2012 kontra d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Marzu 2012 li rrifjutat l-applikazzjoni PA 6210/08 ghal bini ta' flats u garages u penthouses f'outside development zone;

Rat ir-risposta tal-Awtorita li ssottomettiet li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata ghar-ragunijiet moghtija minnu;

Kopja Informali ta' Sentenza

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

Rat id-decizjoni tat-Tribunal li tghid hekk:  
It-Tribunal ikkunsidra:-

Il-Kummissjoni għall-Kontroll tal-Izvilupp irrifjutat l-applikazzjoni, PA 6210/08 f'sit, Triq il-Kappar, Xlendi, Ghawdex - "To erect flats and garages (touching development scheme), including penthouses" f'Outside Development Zone. Ir-ragunijiet kienu s-segwenti:-

"1. The site is located within a Special Area of Conservation of International Importance. The proposed development is not necessary to the management of the Special Area of Conservation, nor does it seek to improve the Special Area of Conservation. The proposal would adversely affect the integrity of the Special Area of Conservation and therefore conflicts with Article 19.1 of Legal Notice 311 of 2006.

2. Gozo and Comino Local Plan Policy GZ-RLST-5 specifically sets out that "requests for the construction of new rural dwellings in Gozo and Comino will be refused". The proposal lies completely Outside Development Zone and thus cleacly conflicts with this policy.

3. The site lies outside the limits for development defined in Gozo and Comino Local Plan Map 14.6-C1 and so it is located in an area which should remain undeveloped and open. The proposed development runs counter to Gozo and Comino Local Plan Policy GZ-LMDZ-1 and would represent unacceptable urban development in the countryside.

4. The proposed development 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 Paragraph 7.6 of the Structure Plan.

5. There is no justification for the development of this site as required by Structure Plan Policy SET12. It is apparent that there are no reasons from a planning point of view why the proposed development cannot be located in an area designated for development.

6. The site lies in a Rural Conservation Area (as designated by the Structure Plan and indicated on the Key Diagram). The proposal does not comply with Structure Plan Policy RCO2 which clearly states that no form of urban development will be permitted within Rural Conservation Areas.

7. 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.

8. The site is located in an Ecological Buffer zone, where further human intervention, particularly in the form proposed, is not desirable. The proposal would therefore adversely affect the area, hinder its protection, and run counter to the rural conservation and ecological objectives of the Structure Plan and Gozo and Comino Local Plan Policy GZ-RLCN-1.

9. Gozo and Comino Local Plan Policy GZ-RLCN-1 sets out that "apart from the normal restrictions on development in rural areas, there shall be a strong presumption against the creation of new built structures (including cultivation and animal husbandry related structures) in AHLs". The site is located within an Area of High Landscape Sensitivity (AHL) and the proposal, thus, conflicts with this policy.

10. Structure Plan Policy RCO4 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 RCO4.

11. The site is located within a Category A Valley system and the proposed development does not fall into one of those categories of development permitted in this type of location. The proposal therefore runs counter to Structure Plan Policy RCO29 and Gozo and Comino Local Plan Policy GZ-RLCN-2.”;

Fl-appell ipprezentat mill-Perit Johann Farrugia ghan-nom tal-appellant u pprezentat fl-12 ta' Novembru 2010 huwa jesponi s-segwenti:

“1----- The decision should have been taken after an evaluation by the Major Projects Section of MEP A not the Gozo Case Officer. Consequently from the very start of the process, the process was irregular and null. Consequently the decision of refusal emanating from and following the chronological order of this procedure is null void and of no effect 'in toto' .

2----- The decision was given in just one sitting - even at re-consideration stage. This when so many other decisions are given after several sittings. In this case the applicant had several documents, plans, arguments and other evidence to show to the Commission before the Commission decided anything. Instead the Commission rushed into a decision which is fundamentally null and void.

3----- The re-consideration decision was made heard and given by the same members who decided in the first instance [13th October 2009] and consequently infringes the sacred maxim 'nemo iudex in causa propria'. Consequently for this reason the re-consideration decision and the re-consideration proceedings and all relative decisions are null and void.

4----- The decision is based on an incorrect description of the site. A methodology of description was used

describing the site as a sort of an environmental paradise when in fact other sites ODZ in Gozo were recommended for building development, even urban development . Here the applicant was a different one from the present applicant. Consequently all the reasons for refusal are based on incorrect evidence, biased reporting, and discriminatory treatment and therefore for these and other reasons are in proportion null void and of no effect and should be completely disregarded.

5----- Moreover we opine that the policies quoted by the Case Officer in large part do not apply to the case and in any case are over-ruled by commitments and/or precedents both near and/or in other parts of the Maltese Islands.

6----- Moreover a large number of reasons already given by applicant in writing in the 'original' submissions made at Development Control Commission level are also being referred to as reasons to uphold this Appeal.

7----- Moreover third parties were allowed to make developments outside the development zone and even at least in one case on a Special Conservation Area (SAC); and this notwithstanding, instead of issuing to applicant the relative permits - as in the case of others - the Development Control Commission both at first instance and at reconsideration level ignored these facts; and this despite that in the 'original' submissions also the Development Control Commission was duly informed of the case-law on the subject (like the case of Trident Properties Limited) and that the Development Control Commission had to follow this case law.

8----- There is every reason to infringe SET 11 and SET 12 for this site should indeed appear in the schemes of MEPA and form part of the Development Zone. The present situation - in which the site in question is indicated as not in the development zone - is a mistake, which this application is designed to correct - at the expenses of the applicant. In fact the site in question was in the Development Zone as is intended to be proved by the

evidence to be given and shown to this Board during the hearing of the case. Moreover - for the sake of the argument and indeed only so - even if this were not so, other permits for urban dwellings and developments were given without difficulty in other areas ODZ including in Gozo - to other applicants different from the appellant. In these cases SET 11 and SET 12 were infringed and the same should by law and by justice be done in the present case.

9----- Decisions given by the Planning Appeals Board and/or by the Court of Appeal, all point out that permits should be issued on site because of commitment, consistency and equality of treatment, justice, equity, and other reasons. These cases and decisions by the Planning Appeals Board and/or by the Court of Appeal made it reasonably compulsory on the Development Control Commission to grant the permits requested by the applicant.“

Ir-rapport tal-Awtorita prezentat minn Mario Scicluna fil-15 ta' Dicembru 2010, partikolarment il-kummenti dwar l-argumenti tal-appellant fejn issottometta s-segwenti;

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

-- Principle of Development

The proposed residential development is a form of urban development and not one of the categories of development permitted outside the development boundaries. The site lies wholly outside the limits to development as defined in the Local Plan. The Structure Plan strategy comprises a blanket prohibition of any form of urbanization outside areas specifically designated for urban uses in the Plan. Any form of urbanization outside these designated areas is prohibited. Thus this proposal runs counter to Structure Plan Policies SET11, RCO2 and SET12 as there is no justification to depart from the Structure Plan provisions to prohibit residential development ODZ. The proposal also conflicts with Gozo

and Comino Local Plan Policies GZ-LMDZ-1, in this regard. Additionally, Policy GZ-RLST-5 specifically sets out that “requests for the construction of new rural dwellings in Gozo and Comino will be refused”.

-- Special Area of Conservation

The unacceptability of the proposed development is augmented by the site's designation as a Special Area of Conservation, a Level 3 Ecological Buffer Zone and the Gozo and Comino Local Plan's proposed Level 3 scheduling (Ecology). The location of any buildings on the site would conflict with the conservation status of the site and also conflict with Structure Plan Policy RCO12, Gozo and Comino Local Plan Policy GZ-RLCN-1 and L.N. 257 of 2003.

-- Visual Impact

Gozo and Comino Local Plan Policy GZ-RLCN-1 sets out that “apart from the normal restrictions on development in rural areas, there shall be a strong presumption against the creation of new built structures (including cultivation and animal husbandry related structures) in AHLs”. The site is located within an Area of High Landscape Sensitivity (AHLs) and the proposal, thus, conflicts with this policy. Additionally, the Local plan makes special provisions for development located within the development zone in the vicinity to ensure that buildings do not increase in height and that blank party walls are eliminated. The proposed development would create two blank party walls, over four floors high, in this rural conservation area. The proposal thus conflicts with the general thrust of the Local Plan, with the scheduling of the area as an Area of High Landscape Value and with Structure Plan Policies RCO2 and RCO4.

-- Valley Location

The Gozo and Comino Local Plan also designates the site within a Category A Valley. Local Plan Policy GZ-RLCN-2 sets out that in such areas, development shall be fully subject to the provisions of Structure Plan Policy RCO29. The latter specifies that “No new physical development

will normally be allowed on the sides of valleys...". The proposal is clearly in conflict with these policies.

-- Height limitation

The Local Plan designates the height limitation for the development zone opposite the site such that the two floors and setback floor permissible therein are only measured from Triq ix-Xlendi. Therefore, the height on the road where the site gains access is further restricted in terms of building height. The proposal is for a semi basement, four floors and penthouse level (above ground level) and is thus greatly in excess of the permissible height within the nearest development zone, in conflict with Policy GZ-HTLM-1.

1.1.1 As regards to the arguments of the appeal itself, the Authority has noted all of appellant's arguments and will comment on each one hereunder:

Re Point 1: The internal distribution of work within MEPA is the Authority prerogative and appellant cannot dictate which part of the Directorate assesses a particular application. Either way, it was still the same DCC which would have taken the final decision, so whether this application was assessed by Team A, B or C, the final decision would have still be taken by the same DCC Board.

Re Point 2: Any 'evidence' to substantiate appellant's arguments should have been forwarded to the Authority well before the DCC sitting. This would have enabled the Directorate to take note and comment on each argument and hence, the DCC would have seen both applicant's point of view as well as the Directorate's comments accordingly. The DCC is bound to assess all the facts as forwarded to the Directorate and the DCC Board is not there to hear and assess new comments which were not presented by applicant to the Directorate. In this respect, the fact that the decision was taken in one sitting only shows that the DCC is responding to the normal complaint by the general public that decision are always postponed by the Boards and the 'pending' cases list is always



increasing unnecessary. The PAB is also a Board of revision and will assess whether the DCC (with the facts as present to them at the time of the decision) had taken a right decision vis-à-vis the relative plans and policies relative to the particular area. In this regard, it is unjust and against procedure that one does not submit all the relative information / arguments to the Directorate and then expects that such arguments be submitted at the DCC stage or even at appeals stage. It is thus important the all such information is submitted at an early stage so that the necessary verifications and counter arguments are presented by the Directorate and hence, both the DCC and the PAB would have both arguments included in file for their final decision. This notion is now evermore galvanized by the amendments as of next January since the DCC is bound by law to decide applications in their first sitting except in exceptional case were one deferment can be requested.

Re Point 3: The DCC Board is set up according to law and appellant did not quote any part of the law which proves that the Board at reconsideration stage was set up illegally. The Authority strongly disagrees that the DCC Boards are somehow not according to law since if this was the case, then all their decisions would be null.

Re Point 4: While every application has to be considered on its own merit, not every ODZ site in Gozo is protected and scheduled in the same manner. In this respect, if appellant considers that the scheduling applicable to this particular site is not relevant, then such a challenge should be directed to the scheduling itself through a separate appeal against scheduling (according to law and procedures) and not through an appeal against a refusal. Until such time that the scheduling is decided that it is no longer valid to this particular site, the reasons for refusal are fully justified and lawful.

Re Point 5: From the photos as submitted in file, there are no immediate commitments adjacent to the site under appeal. The nearby buildings are not adjacent to the site and are in fact 'within the scheme boundary'.

Re Point 6: Reference is made to earlier replies by appellant but no specific reasons are highlighted.

Re Point 7: No PA numbers were quoted so that the Authority could respond and verify appellant's claim that an identical case was treated in a different manner.

Re Point 8: The inclusion of this site in the 'development scheme' cannot be achieved through an appeal against refusal but entails the submission of such a request to the Authority 'Local Planning Unit' for their consideration and recommendation. The Planning Appeals Board does not have jurisdiction to extend development boundaries as has been declared by the same Board in many decisions relating to similar requests in ODZ.

Re Point 9: The issue of commitment only applies in exceptional cases in which an area is already heavily committed by a specific type of development and a situation exists that, for example, an infill site is still undeveloped and hence, it would make planning sense to develop the remaining site for the sake of "commitment, consistency, equality of treatment, justice and equity". However in this case, there are no adjacent buildings which could in any way render this particular plot of land as committed or prone for development in lieu of the heavy adjacent buildings. On the contrary, the proposed building would create two new blank party walls which would be 5 floors high and 22m in length. This is surely not acceptable in an area which is specifically scheduled as an SAC and an Area of High Landscape Value and one cannot understand that building such an urban development in such a scheduled area would be beneficial to the ODZ status of this site.

1.1.2. The following are just a few of the many instances that the PAB had declared that such ODZ areas should be protected from urban development that should be directed to appropriately designated areas and not in ODZ. Furthermore, the PAB does not have jurisdiction to change the provisions of the Local Plans.

“Il-Pjan Lokali kien specifkament mahsub sabiex jaghti direzzjoni ta' kif zoni differenti ghandhom ikomplu jigu zviluppanti. Kieku wiehed kellu jinjora l-pjan lokali u johrog permessi abbazi biss ta' xi tip ta' commitment 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 5727/05 - RT 04.02.09 - PAB 161/07 - Fenech Victor – Attard – Scheme.

“... gew identifikati ‘settlements’ fejn jista' jsir zvilupp kontrollat biex l-izvilupp ezistenti jista' jigi konsolidat u fl-istess hin konfinat ghax hu car li f'dawn iz-zoni wkoll l-izvilupp ma jistax jithalla jkompli jinfirex ...

... Jidher li ghal xi zmien il-Kummissjoni ghall-Kontroll ta' l-Izvilupp ikkunsidrat l-possibilita' ta' avilupp ridott bhala ‘end of scheme’ ... l-Bord ma jaqbilx ma' dak li jinghad fl-appell, li l-Pjan Lokali ma gab ebda bidla fil-policy ghax kien fil-Pjan Lokali li dahlu l-policies dwar Rural Settlements msemmija aktar ‘l fuq. Fil-fatt, il-Bord hut al-fehma li decizjonijiet fil-passat li kienu bazati fuq il-prezenza ta' bini adjacenti u ‘blank walls’ ma jistghux jitqiesu bhala precedent ghal dan il-kaz minhabba li ttiehdu qabel ma gie fis-sehh il-Pjan Lokali” PA 4037/05 - ISB 6.3.09 – PAB 136/07 - Muscat Anthony – l/o Mgarr - ODZ

“Dan il-Bord ma ghandux gurdizzjoni jew poteri li tippermettli jissindika l-kontenut tal-pjanijiet lokali. Iz-zona inkwistjoni hija stabbilita fil-Pjan Lokali bhala Industrial zone, kif inhuma ukoll iz-zoni fl-inhawi ta' madwar ... Ghaldaqstant dan il-Bord huwa tal-fehma li stante li l-Bord m'ghandux gurdizzjoni u fuq ‘decizjonijiet dwar Kontroll ta' Zvilupp, u dwar xi zvilupp li jkun specifkament awtorizzat fi Pjan ta' zvilupp’. Skond l-Artiklu 15(1)(D)(ii) tal-Att dwar l-Ippjanar ghall-Izvilupp, dan l-appell huwa null.” PA 6039/05 - ISB 24.07.09 – PAB 46/06 - Bondin Malcolm – Mqabba - ODZ

“Li kieku l-Bord kellu jacçetta t-tezi ta' l-appellant li s-sit tiegħu jista' jinbena għaliex jmiss ma ODZ Settlement, allura dan ikun ifisser illi s-siti kollha illi jmissu ma ODZ

Settlements jkunu jistgħu jinbnew. Li kieku l-Bord kellu johloq dan il-precedent, dan ċertament igib fix-xejn l-isforzi kollha li qed isiru sabiex l-iżvilupp ma jibqax jinfirax fil-kampanja”. - PA 2388/05 - RT 29.07.09 – PAB 21/06 - Apap John - Gharb – Gozo – ODZ

“Il-Bord ikkunsidra wkoll illi permessi maħruga taħt policies differenti minn dawk tal-lum ma jistawx awtomatikament iservu ta’ precedent sabiex illum jinħargu permessi li jmorru kontra l-policies in vigore fil-prezent”. - PA 1154/05 - RT 29.07.09 – PAB 205/06 - Agius Bernard – Paola – UCA

“Il-permess PA 0511/05 inhareg qabel ma gie fis-sehh il-Pjan Lokali u ghalhekk ma jistax jitqies bhala precedent; il-permess PA 0056/05 ukoll inhareg qabel ma gie fis-sehh il-Pjan Lokali u ghalhekk ma jistax jitqies bhala precedent”. PA 4290/04 – RT 14.04.10 – PAB 61/06 - Vella Clint – Mosta – UCA

“Il-Bord ikkunsidra l-argumenti kollha mqajjma miz-zewg partijiet u jinnota illi hemm numru ta' decizjonijiet tal-Qorti ta' l-Appell li jstabilixu illi, decizjonijiet fuq applikazzjonijiet ghal permessi tal-bini, ghandhom jittiehdu mhux fuq il-policies fiz-zmien meta tkun saret l-applikazzjoni izda fuq il-policies in vigore meta tkun qed tittiehed id-decizjoni”. PA 1597/05 – RT 14.04.10 – PAB 77/07 – Cassar Mark – Siggiewi – ODZ.

“Jidher car mid-dokumenti pprezentati illi skond il-Pjan Lokali ta’ Ghawdex, parti mis-sit tinsab fiz-zona tal-izvilupp u li ghalhekk ma hemm ebda oggezzjoni li jigi kkunsidrat zvilupp fuq din il-parti. Il-Bord jinsab marbut bil-limiti kif definiti mill l-istess pjan lokali u ma jara ebda raguni valida sabiex jigi permess zvilupp fuq il-parti tas-sit li tinsab il-barra miz-zona ta’ l-izvilupp.” PA 4608/01 – RT 9.1.08 - Charlie Farrugia – Ghajnsielem - Scheme

“Fil-fehma tal-Bord l-aktar fattur importanti hu li din il-proposta hi skond il-height limitation tal-Pjan Lokali. Hu l-Pjan Lokali li jiddetermina lis-streetscape skond iz-zona, u meta jkun hemm bzonn li jigi miz-mum jew protett xi tip ta' streetscape dan ikun specifikat fil-Pjan Lokali.” PA

Kopja Informali ta' Sentenza

6606/06 – ISB 15.05.09 – Sammut Mario – San Gwann – Scheme”

It-Tribunal ikkunsidra:

Wara li kkonsidra il-premess u minn ezami tal-pjanti, ritratti u dokumenti li hemm fil-files PAB 325/10 u PA 6210/08, it-Tribunal jikkumenta kif gej:

Il-mertu ta' dan l-appell jirrigwarda proposta ghal zvilupp li jikkonsisti fil-kostruzzjoni ta' block ta' appartamenti fuq erbgha sulari b'hames appartamenti f'kull sular, penthouses sovrastanti u zewg livelli ta' parking sottostanti li wiehed minnhom huwa fil-livell ta' semi-basement. Din hija outline application.

Is-sit mertu ta' dan l-appell huwa ODZ, fi Triq il-Kappar, Xlendi, u jikkonsisti f' art mhux zviluppata li tiffirma parti minn Special Area of Conservation of International Importance u li ma tmiss maz-zona tal-izvilupp li tinsab fuq in-naha l-oħra tat-triq.

Fuq l-istess sit kienet saret applikazzjoni , PB4002/88, għall-bini ta' flats u garages li kienet giet michuda fiz-17 ta' April, 1989, peress li kienet ODZ.

Fl-appell tieghu, l-appellant jagħmel numru ta' argumenti u dikjarazzjonijiet biex jissostanzja l-kaz tieghu u biex jikkonvinci lit-Tribunal li l-appell tieghu għandu jigi milquh.

Huwa jargumenta li din l-applikazzjoni kien imissa giet evalwata mill-Major Projects Section u mhux mill-Gozo Case Officer u għalhekk id-decizjoni hija nulla. Fuq dan l-Awtorita, bir-ragun, tikkontendi li it-tqassim tax-xogħol huwa il-prerogattiva tagħha u kien liema kien it-team tad-Direttorat li għamel l-evalwazzjoni, id-decizjoni finali dejjem tittiehed mill-istess DCC.

L-appellant ikompli jargumenta li d-decizjoni ittiehdet wara li saret seduta wahda biss u għalhekk l-appellant ma kellux ic-cans jagħmel il-kaz tieghu u għaldaqstant id-decizjoni hija nulla. Hija haga ovsja li l-informazzjoni li

kellu l-appellant biex jissostanzja l-kaz tieghu kellha tingieb waqt l-ipprocessar tal-applikazzjoni jigifieri hafna qabel is-seduta tad-DCC u dan kif isir f'kull kaz iehor. Huwa appuntu dan ir-rwol tad-Direttorat jigifieri li jistudja l-informazzjoni kollha sottomessa mill-applikant mill-punto di vista ta' ippjanar biex ikun jista jipprepara rakkomandazzjoni f'terminu ta' ippjanar lid-DCC.

L-appellant ikompli billi jghid li d-decizjoni f'fazi ta' reconsideration inghatat mill-istess membri tal-kummissjoni li semghu il-kaz originarjament u ghalhekk id-decizjoni hija nulla.

L-Awtorita tinnota li din hija is-sistema li tintuza f'kull kaz iehor u hija skond il-ligi.

Fuq l-argument li jaghmel l-appellant li d-decizjoni ittiehdet fuq deskrizzjoni hazina tas-sit ghaliex is-sit gie impingi bhala li hu xi genna tal-art meta f'siti ohra fl-ODZ inghataw permessi lil applikanti ohra, l-Awtorita korrettement tispjega li kull sit huwa differenti u ghandu kwalitajiet partikolari. L-appellant kien seta joggezzjona mix-scheduling meta dan kien gie propost jekk ma' qabilx mieghu. Certament, l-appellant ma' jistax jaghmel dan permezz ta' dan l-appell.

L-appellant isostni li numru ta' terzi persuni inghatalhom permess biex jibnu fl-ODZ u sahansitra f' certi kazi fi Special Conservation Area mentri fil-kaz tal-appellant l-applikazzjoni giet rifjutata anki fi stadju ta' reconsideration anki wara li gew imsemmijien dawn il-precedenti. Fuq dan ma' gie sottomess ebda kaz partikolari u ghalhekk l-Awtorita tispjega li ma' tistax tiverifika jekk kienx hemm xi kaz identiku ghal dan fejn l-applikant gie moghti permess. It-Tribunal jaqbel mal-pozizzjoni li hadet l-Awtorita fuq dan.

L-appellant jghid li huwa zball li dan is-sit qieghed jigi muri li qieghed fl-ODZ ghaliex is-sit kien fiz-zona tal-izvilupp. L-Awtorita tghid korrettament li l-appellant kien imissu oggezzjona fuq il-linja tal-izvilupp meta din kienet giet proposta jew inkella billi jaghmel PC Application biex ibiddilha jekk ma' jaqbilx maghha. Certament ma jistax

jagħmel dan permezz ta' dan l-appell u dan għaliex dan it-Tribunal m'għandux gurdizzjoni jew poteri li tippermetti li jissindika l-kontenut tal-pjanijiet lokali.

Li kieku it-Tribunal kellu jaċċetta t-teżi ta' l-appellant li s-sit tiegħu jista' jinbena għaliex jmiss mal-ODZ, allura dan ikun iffisser illi s-siti kollha illi jmissu ma ODZ jkunu jistgħu jinbnew

L-appellant isemmi l-issue ta' precedenti u ta' commitments numru ta' drabi fl-appell tiegħu. It-Tribunal jaqbel ma' l-Awtorita li biex tagħmel confront bejn kazi differenti kif għamel l-appellant fil-kors tas-smieh ta' dan l-appell wiehed għandu jikkonsidra:

- Iz-zmien meta tkun saret l-applikazzjoni peress li f'kull zmien dejjem japplika regime ta' plans and policies specifiku għal dak iz-zmien;
- Il-lokalita geografika tas-sit;
- Il-kuntest tas-sit;
- It-talbiet li jkunu saru fl-applikazzjoni; u
- L-istorja f'termini ta' zvilupp tas-sit.

Fuq l-issue ta' x'inhu commitment u kif japplika f'termini ta' ippjanar, l-Awtorita' tispjega li f'kazi eccezzjonali fejn per eżempju area li skond il-pjan lokali tkun zoned mod izda fir-realta tkun mimlija b'bini u zvilupp ta' tip differenti hlief għal xi pocket zghir li fuqu jkun hemm applikazzjoni gdida dan jista' japplika. It-Tribunal jaqbel ma' dan fis-sens li peress li l-iStructure Plan b' policies bħal BEN 1 u BEN 2 jipprevedi li f'sitwazzjonijiet bħal dawn għandu jkun hemm konsistenza, allura dawn il-policies jistgħu jieħdu is-sopravent fuq policies ohra. Normalment, pero, dan jigri fis-sens oppost għal dak li qed jahseb l-appellant fis-sens li it-tendenza hi li fl-ippjanar il-kommitment normalment jintuza biex inaqqas l-impatt ta' xi proposta u dan huwa rifless bit-tibdil li sar fil-ligi l-gdida tal-ippjanar li dahlu fis-sehh fil bidu tas-sena 2011.

Ta' min jinnota li f'dan il-kaz ma jeżistux commitments madwar is-sit in ezami. Kif tghid l-Awtorita fir-rapport tagħha:

“However in this case, there are no adjacent buildings which could in any way render this particular plot of land as committed or prone for development in lieu of the heavy adjacent buildings. On the contrary, the proposed building would create two new blank party walls which would be 5 floors high and 22m in length. This is surely not acceptable in an area which is specifically scheduled as an SAC and an Area of High Landscape Value and one cannot understand that building such an urban development in such a scheduled area would be beneficial to the ODZ status of this site.”

Fl-opinjoni kinsidrata ta' dan it-Tribunal u kif jirrizulta mill-premess, l-appellant naqas milli jittratta b'mod konvincenti imqar wiehed mit-tmien reasons for refusal mill-lat ta' ippjanar biex jikkonvinci li dan l-appell ghandu jigi milqugh. Kif jirrizulta mill-premess, il-punti li jqajjem l-appellant fl-appell tieghu m'humiex ta' natura strettament ta' ippjanar u hafna minnhom huma sahansitra bla bazi.

In konkluzjoni, kif jidher mill-fatti li hargu fil-kors tas-smieh ta' dan l-appell, billi jirrizulta li il-proposta in ezami tikser numru ta' policies tal-Pjan Strutturali, tal-Gozo and Comino Local Plan u tal- Policy and Design Guidance, 2007, dan l-appell ma jirrizultax fondat u ma jimmeritax kunsiderazzjoni favorevoli;

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut mahrug mill- Awtorita ta' l-applikazzjoni, PA 6210/08, “To erect flats and garages (touching development scheme), including penthouses” wara reconsideration.

### **Ikkunsidrat**

L-aggravji tal-appellant huma s-segwenti:

1. Id-decizjoni hi nulla ghax tikser il-principju tal-audi alteram partem;
2. Id-decizjoni tmur kontra l-principju ta' cerimus paribus u tal-'commitment' ezistenti fiz-zona;
3. In-nullita tal-proceduri ghal irregolaritajiet procedurali tal-Awtorita li t-Tribunal skuza.



Dawn huma punt ta' ligi li jithoqqilhom jigu trattati.

### **L-ewwel aggravju**

L-appellant isostni illi talab li jgib provi dwar permessi oħra u dan gie rifjutat lilu f'zewg okkazonijiet. L-iter ta' dan l-ilment hu s-segwenti. Kellha ssir seduta quddiem it-Tribunal fit-8 ta' Frar 2011 li giet differita għal 5 ta' Lulju 2011 billi l-avukat tal-appellant kien okkupat b'xogħol il-Qorti. Jinghad li din kienet l-ewwel seduta utili għal provi tal-appellant quddiem it-Tribunal. Fis-seduta tal-5 ta' Lulju 2011 la deher l-appellant u anqas l-avukat tiegħu u t-Tribunal għalhekk fid-diskrezzjoni akkordata lilu biex jirregola l-proceduri, iddiferixxa l-appell għas-sentenza in difett ta' ostakolu għad-29 ta' Marzu 2012. L-appellant intavola rikors fit-3 ta' Awwissu 2011 fejn talab zmien iressaq il-provi u/jew sottomissjonijiet bla ebda spjegazzjoni cara għalfejn ma attendiex għas-seduta tal-5 ta' Lulju hliet li jinghad fir-rikors illi l-avukat tal-appellant kien maqbud b'impenji oħra. It-Tribunal caħad it-talba wara li ra l-oppozizzjoni tal-Awtorita li l-appellant lanqas biss kien wiegeb għar-risposta tal-Awtorita mill-appell interpost u dan wara tmien xhur mindu sar l-appell u wara zewg seduti fejn l-appellant ma utilizza l-ebda wahda minnhom. L-appellant rega' għamel rikors iehor din id-darba fid-19 ta' Dicembru 2011 fejn rega' għamel l-istess identika talba li giet michuda stante li kien ġia ngħata digriet fuq din il-kwistjoni.

Hu minnu illi hu principju assodat tal-gustizzja illi kull parti għandu jkollha l-opportunita li tinstema' minn min qed jiggudika l-kaz tagħha u tkun f'pozizzjoni li tipprezenta l-provi tagħha in sostenn ta' dak li qed issostni. Pero dan id-dritt fl-ebda hin ma jista' jigi abbuzat billi in nonkuranza jew in-nuqqas ta' osservanza ta' procedura igibuh fil-pozizzjoni li ma utilizzax id-dritt mogħti illi jinstema'. Id-dritt li parti tinstema' hi marbuta mal-obbligu li l-parti tosserva l-proceduri, zminijet u termini impost fuqha purche dawn ikunu ragonevoli u li ma jgibux fix-xejn fid-dritt tal-persuna.

F'dan il-kaz l-appellant inghata zewg okkazzjonijiet fi granet specifici avzati lilu u b'distakk ragonevoli bejn data u ohra fejn inghata l-facilita u l-possibilita lli jtellja' dawg il-provi kollha li jidhirlu idoneji. Fiz-zewg okkazzjonijiet l-appellant naqas li jattendi. It-Tribunal gie infurmat f'okkazzjoni wahda li d-difensur tal-appellant kien impenjat b'xoghol il-Qorti u fit-tieni okkazzjoni ma nghatat ebda forma ta' avviz ghaliex l-appellant jew id-difensur tieghu ma attendewx u kien biss min rikors ipprezentat xahar wara li l-appellant informa lil Qorti li l-avukat ma kienx attenda ghax kellu impenji ohra.

Il-Qorti tqis illi t-Tribunal kien gustifikat li jiehu l-pozizzjoni li ha wara li l-appellant iddeklina li jsegwi l-procedura billi jgib il-provi u jressaq il-kaz tieghu f'zewg dati infila. Hawn ma jistghax jinghad li l-appellant sofra xi lezjoni ta' dritt izda aktar li l-appellant naqas li juzufriuxxi ruhu minn dritt u abdika minnu.

Ghalhekk dan l-aggravju qed jigi michud.

### **It-tieni aggravju**

L-appellant jishaq illi s-sit tal-appellant hi simili ghal siti ohra fix-Xlendi wkoll f'ODZ u nhargilhom permess. Hu jispjega li s-sit jigi faccata ta' zona fl-iskema ta' bini, u illi hi biss triq li taqsam iz-zewg zoni. Ighid illi kien biss bic-caqlieq taz-zoni ta' bini li s-sit tieghu baqa' barra miz-zona ta' bini mentri ohrajn fil-vicin iddahhlu u ghandhom binjiet. Dan kien jikkostitwixxi commitment bil-bini fil-vicin nonostanti z-zoning li sar.

Dan l-aggravju ma fih ebda mertu. Fl-ewwel lok l-appellant, fl-appell quddiem it-Tribunal ma semma' ebda permessi ohra li jissufragaw l-aggravju tieghu ta' trattament ugwali f'sitwazzjoni simili, u ghalhekk ma jistghax jinghad li kien hemm xi lezjoni f'dan l-aspett. Il-Qorti izzid illi l-kuncett ta' cerimus paribus ghandu jintuza biss fil-kazijiet fejn il-fatti u cirkostanzi kollha juru trattament differenti ghal fattispecie identici. Is-similarita mhix bizzzejjed ghax kull kaz jista' jkollu fattur wiehed jew izjed li jirrendi permess mahrug f'zona jew ghal binja

partikolari differenti mill-permess li jkun qed jigi pprocessat.

In kwantu ghal kwistjoni tal-commitment il-Qorti tqis li l-kwistjoni giet trattata mit-Tribunal u bhala principju, la darba t-Tribunal ikun itratta b'mod konkret dan l-aggravju, mhux lecit u ghal Qorti li tissindaka l-fatti li jkun wassal lit-Tribunal jiddeciedi jekk jirrizultax commitment o meno. F'dan il-kaz pero l-kwistjoni tal-commitment lanqas kienet kwistjoni lli fuqha seta' jkun hemm xi argument favur l-appellant billi t-Tribunal mexa fuq il-policies specifici applikabbli ghal kaz cioe li l-izvilupp rikjest kien qed jintalab f'zona barra l-izvilupp formanti parti minn Special Area of Conservation of International Importance u ghalhekk tmur kontra Structure Plan Policy RCO 12 u l-Gozo and Comino Local Plan Policy G2-RCCN-1 u 2 u Avviz Legali 257 tal-2003, u in oltre lanqas kien minnu li biswit is-sit kien hemm binjiet ohra.

Ghalhekk dan l-aggravju qed jigi michud.

### **It-tielet aggravju**

L-appellant qed jallega li l-proceduri irregolari quddiem l-Awtorita li t-Tribunal iggustifika wasslu ghan-nullita tad-decizjoni. Dawn l-irregolaritajiet jikkonsistu skond l-appellant:

- a. L-applikazzjoni messha giet evalwata mill-major projects section mhux il-Gozo Case Officer;
- b. Id-decizjoni ttiehdet wara seduta wahda biss quddiem id-DCC u anki fi stadju ta' reconsideration u l-appellant ma kellux cans iressaq il-kaz tieghu;
- c. Id-decizjoni fil-fazi ta' reconsideration ittiehdet mill-istess membri tal-Kummissjoni;
- d. Id-decizjoni ttiehdet fuq deskrizzjoni skorretta tas-sit.

Jibda biex jinghad li l-appellant ma ssostanzjax ebda wahda minn dawn l-aggravji anki meta pprezenta l-appell tieghu. It-Tribunal seta' ghalhekk lanqas ikkonsidrahom ghax wara kollox kien jispetta lill-appellant lil jissostanzja b'argumenti dawn l-aggravji. Pero nonostante dan it-Tribunal dahal f'kull wiehed mill-allegati anomaliji u ta r-

Kopja Informali ta' Sentenza

ragunijiet tieghu ghalfejn ma sar xejn kontra l-ligi f'kull wahda mill-allegati anomaliji procedurali. Din il-Qorti ma tqis li t-Tribunal applika hazin xi ligi jew ta interpretazzjoni tant skorretta ta' xi punt ta' ligi car lli fuqha bbaza d-decizjoni finali tieghu. Il-konsiderazzjonijiet tat-Tribunal ghaliex wiehed mill-erba' allegati skorrettizi procedurali ma gewx pruvati la fil-fatt u anqas fid-dritt isibu l-adezzjoni ta' din il-Qorti u a skans ta' ripetizzjoni tirreferi ghad-decizjoni tat-Tribunal.

Ghalhekk dan l-aggravju qed jigi michud.

### **Decide**

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Emanuel G. Cefai u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Marzu 2012. Bl-ispejjez kontra l-appellant.

**< Sentenza Finali >**

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