



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-1 ta' Awwissu, 2013

Appell Civili Numru. 76/2012

Michael Farrugia

vs

**L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u
l-kjamat in kawza Antonio Ganado**

Il-Qorti,

Rat ir-rikors tal-appell ta' Michael Farrugia tat-18 ta' April 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Marzu 2012 dwar il-hrug ta' permess numru PA 749/03 ghal outline development permission ta' groundfloor garages and overlying dwellings fi Triq Annetto Caruana, Mqabba;

Rat ir-risposta tal-Awtorita u ta' Charles Camilleri bhala kjamat fil-kawza li fil-mertu ssottomettew li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata;

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

B'applikazzjoni pprezentata fil-5 ta' Frar 2003, outline development permission PA 0749/03, l-applikant Antonio Ganado fuq il-Plots 30 sa 34 fi Triq Annetto Caruana, Mqabba, ippropona zvilupp ta' "ground floor garages and overlying dwellings".

L-applikazzjoni giet milqugha bil-permess tas-16 ta' Frar 2005 – Red 60 fil-file PA 0749/03 bil-kundizzjonijiet segwenti:

"1. No work shall commence on site until full development permission has been granted for the development. The following reserved matters still require approval by the Malta Environment & Planning Authority as part of a full development permit application:

the design,
layout, and
the external appearance of the proposed building.

Details of these reserved matters should be submitted for the approval of the Malta Environment & Planning Authority within five years of the date of this permission.

2. Car parking details must be submitted with the full Development Permit Application. The use of the garages shall be strictly limited to parking of private vehicles and not for any commercial or industrial use.

3. The height of the building shall not exceed both the permitted number of 3 floors (plus the underlying basement of not more than 3 courses above finished road level) and the maximum allowable height of 12 meters measured from the highest street level.

4. The full development application shall be consistent in content with drawings PA 754/03/20A/20B (in file) as submitted by the architect together with covering letter dated 30th December 2003.

5. The full development application is to comply with sanitary regulations and DC 2000 provisions."

Fl-appell tieghu l-Avukat Dottor Peter Fenech għall-appellant Michael Farrugia issototmetta s-segwenti:

1. L-applikazzjoni ma tikkonformax mar-rekwiżiti tal-ligi mill-lat ta' ippjanar u ma setghet qatt tigi kkunsidrata;
2. Il-konsiderazzjonijiet tad-Dipartiment tal-Agrikoltura ma inghatawx l-importanza dovuta.
3. Li l-izvilupp in kwistjoni hu parti minn zvilupp akbar – u l-Awtorita' kellha tikkunsidra l-impatt tal-progett fl-intier tieghu.
4. Li dan l-izvilupp kellu jkun soggett għall-EIA.
5. Il-Bord naqas li jikkonsidra l-fatt li l-progett jirrikjedi toroq godda fuq raba saqwi.

L-Avukat Dottor Peter Fenech ikkonferma li l-appellant għandu razzett f'din il-lokalita' fejn irabbi l-annimali u jahdem r-raba' – cirka 14-il tomna. L-appellant ilu jahdem dan ir-raba għall-dan l-aħhar 45 sena, u għal diversi generazzjonijiet mill-familja tieghu; li l-pjanti pprezentati ma jurux numru ta' strutturi li jinsabu fuq is-sit; li l-Awtorita' naqqset li tagħti l-importanza dovuta għall-kummenti tad-Dipartiment ta' l-Agrikoltura; li r-raba hu saqwi u għandu jigi protett; li r-razzett hu fonti importanti għall-ghajxien tal-appellant, oħtu u huh.

Fir-risposta tieghu l-Avukat Dottor John Refalo għall-applikant Antonio Ganado ssottometta li:

1. l-appell hu null billi ma sarux l-oggezzjonijiet mill-appellant fit-termini stabbiliti tassattivament mill-ligi.
2. L-applikazzjoni hi konformi mal-ligi.

L-Awtorita fir-rapport tagħha 'inter alia' kkummentat kif gej:

"1.1 This is a Third Party Appeal against the approval of development permission issued for the construction of residential development and ancillary garages. The appeal refers to permission issued on 8 separate sites, however which are located adjacent and within close vicinity to each other. Permission issued for these applications all consist of outline development consent, with the exception of PA 0758/03 for which full development permission has been issued.

1.2 The attached site plan illustrates the relationship between the sites subject to appeal, and also reveals that the area was subject to four other similar applications (Sites E, H, K, L) for which an appeal was not registered.

1.3 The sites subject to appeal are located within the development zone boundary of Mqabba, with access from Triq l-Ahwa Ghigo. In accordance with Temporary Provision Scheme 68, the sites are zoned for terraced house development. The sites presently consist of cultivated agricultural land, while part of the area is also occupied by an animal husbandry farm.

2.0 Comments on Appellant's Arguments

2.1 The applications subject to this appeal have been issued development consent as the sites for development are located within the Temporary Provision Scheme boundary identified for Mqabba, and the nature of the proposed developments comply with the zoning designations for these sites, i.e. terraced house development. Notwithstanding this, an objector to the issuance of permission has filed an appeal for these applications, with the main grounds for appeal consisting of the following:

- a) The sites are used for agricultural purposes, which include irrigated agricultural land and an animal farm;
- b) A total of 12 separate applications have been submitted, and this has not enabled a comprehensive assessment of the developments and their impact on the surrounding streetscape;

c) The development of these sites should have been subject to an EIA.

2.2 Present Use of the Site for Agricultural Purposes

The area of land applied for development through these applications include the appellant's animal husbandry farm, and agricultural land cultivated by the appellant for several years. Notwithstanding this, this area of land has been schemed for terraced house development since 1988 in accordance with TPS 68, while the South Local Plan issued for public consultation retains this area with such zoning conditions. In view of this, the issuing of development permission for the construction of residential development is justified as the developments comply with the zoning conditions for each site, and as permitted by the provisions of Structure Plan policy SET 8.

Furthermore, although the Department of Agriculture have indicated that the area of land is intensively used for agricultural purposes and the land is registered as irrigated, this same Department has also indicated that the land has been recently registered as irrigated land with the use of an unregistered borehole. Moreover, the retention of an animal husbandry farm on this land is not justified, as Structure Plan policy AHF 9 encourages the relocation of livestock units from existing and committed urban areas to more suitable sites where the impacts generated by such activities may be minimised. In fact, paragraph 1.9.1(c) requires that animal husbandry farms are distant by at least 200m from urban areas.

2.3 Comprehensive Assessment of Applications

The appellant is also stating that MEPA has not adequately assessed the proposed development in terms of the impact that may be created on the streetscape of the area. The appellant further states that these applications should have been assessed in a holistic and comprehensive manner, rather than each of the 12 applications being assessed on its own merits. Notwithstanding this, the appellant has only appealed

against 8 of the submitted applications, whereas a total of 12 development permission applications were submitted in the area. This does not offer a comprehensive assessment of the developments proposed in the area for the Planning Appeals Board.

However, it is also to be pointed out that when a decision was issued for these applications, the DCC was aware that several development permission applications were submitted in the area, as highlighted by the Planning Directorate in the DPA Report. Hence, a comprehensive assessment was enabled, notwithstanding the fact that 12 separate applications were submitted instead of a single application. Furthermore, the consequence of these 12 separate applications would result in the same impact on the streetscape if the land was sold to third parties, parcelled into plots, and each individual plot owner applied for their own development permission. Such practices are common forms of development in the Maltese Islands, and there appears to be no form of evidence that indicate that the development of parcels of land has resulted in negative visual impacts on a particular streetscape.

2.4 Requirement of an EIA

The appellant is also claiming that an EIA should have been requested for these applications prior to issuing an approval. L.N. 204 of 2001 'Environment Impact Assessment Regulations, 2001' list the procedures and categories of development that require the preparation of an Environment Impact Statement (EIS) or an Environment Planning Statement (EPS). According to Schedule 1, Section 3 – Land Use & Built Development Projects, none of the applications subject to this appeal qualify for the preparation of either an EIS or and EPS. Even if all the 12 applications submitted in the area were considered as a single development, an EIS or an EPS would not be required according to the provisions of Schedule 1, Section 3. Therefore, the appellant's argument that and EIA should have been requested is unfounded."

L-Avukat Dottor John Refalo għall-applikant fin-nota tat-28 ta' Novembru 2007 għamel referenza għall-applikazzjoni PA 6593/04 fejn l-appellant Michael Farrugia ippropona alterazzjonijiet u ziediet fil-farm – u l-permess inghata fit-23 ta' Settembru 2008, limitatament għall-kostruzzjoni ta' 'manure clamp'. L-applikazzjoni ma gietx michuda kif gie dikjarat fl-imsemmija nota, pero' l-fatt li l-approvazzjoni kienet limitata għall-manure clamp – iffisser li l-Awtorita' ma tapprovax estensjonijiet ta' din l-attivitá billi l-area hi zoned għall-bini, u għalhekk l-permess inghata biss għall-manure clamp biex tigi assicurata aktar indafa.

Ikkunsidra ulterjorment:

L-Eccezzjoni Preliminari

Il-konsulent legali tal-applikanti eccepixxa n-nullita' ta' l-appell billi ma sarux l-oggezzjonijiet mill-appellant fit-termini tassatttivamente stabbiliti mill-ligi.

L-Artikolu 15(1)(d)(i) u (iv) tal-Kap. 356, jghati lit-terz interessat d-dritt tal-appell kemm il-darba jkun oggezzjona bil-miktub fuq ragunijiet ta' ippjanar fit-termini tal-Artikolu 32(5) tal-Kap 356; l-istess artikolu jstabilixxi terminu ta' 15-il gurnata mill-pubblikazzjoni tal-proposta tal-izvilupp fil-gazzetta lokali.

Skond is-subincis (4) tal-imsemmi Artikolu 32 – barra l-Pubblikazzjoni tal-applikazzjoni, l-Awtorita' twahhal site notice fuq is-sit de quo.

Id-dikjarazzjoni tal-interess hi illum regolata bl-Artikolu 7 tal-Avviz Legali 514 ta' l-2010.

Is-site notice tinsab f'Red 5 tal-file PA 0749/03; iggib id-data 13 ta' Frar 2003, u tistieden lil kull min jagħmel rappreżentazzjonijiet jikteb mhux aktar tard mid-9 ta' Marzu 2003;

L-oggezzjoni bil-miktub tal-Avukat Dottor Peter Fenech għall-appellant bbazata fuq ragunijiet ta' ippjanar waslet

ghand l-Awtorita' fis-6 ta' Marzu 2003 – Red 11 cjoe qabel id-9 ta' Marzu 2003 – d-data ndikata fis-site notice.

Fic-cirkostanzi ghalhekk din l-eccezzjoni ma tirrizultax fondata, u qed tigi michuda billi l-oggezzjoni tal-appellant saret konformi mat-termini imposti mill-ligi.

Il-mertu

L-appellant qed jopponi ghall-izvilupp urbanistiku propost billi fl-istess sit ghandu razzett fejn irrabbi l-annimali u jahdem cirka 14-il tomna raba – xoghol li ilu jaghmel ghal cirka 50 sena, u qablu generazzjonijiet shah minn antenati tieghu fil-familja. Raguni li certament tiggustifika l-oppozizzjoni tieghu ghall-izvilupp propost.

Applikazzjonijiet ghall-izvilupp jigu kkonsidrati pero' mhux tant fuq ezigenzi personali, izda skond id-dispozizzjonijiet tal-ligi. L-artikolu 69 tal-Att X ta' 2010 Kap. 504, precedentement l-Artikolu 33 tal-Kap. 356 jelenka l-kriterji li fuqhom jigu determinati applikazzjonijiet ghall-izvilupp cjoe' l-pjanti, l-policies, l-Pjan ta' Struttura, kunsiderazzjonijeit materjali fosthom dawk ambjentali, estetici, u sanitarji.

L-Artikolu 33(1)(a)(i) tal-Kap. 356 jsemmi wkoll t-Temporary Provisions Schemes. Fil-kaz in ezami irrizulta li sa minn 1988, t-Temporary Provision Scheme 68, l-lokalita in kwistjoni giet indikata bhala zona ta' terraced house development. L-istess zoning conditions gew indikati mis-South Local Plan li gie ppubblikat f'Lulju 2006. In oltre skond lis-Structure Plan Policy AHF 9 dawk l-irziezet ghandhom jigu traslokati ghal siti aktar addattati ghal dan l-uzu, tant li skond l-paragrafu 1.9.1(c), farms ghat-trobbija tal-annimali ghandhom ikunu distanti almenu 200 metri minn areas urbanizzati u residenzjali.

L-appellant seta' joggezzjona ghaz-zoning tal-area meta saru t-Temporary Provisions Schemes fin-1988, u wara meta gie ppubblikat d-draft ta' South Malta Local Plan ghall-konsultazzjoni pubblika qabel il-2006 meta gie ffinalizzat.

Appell minn terz, kontra permess mghoti skond zoning ufficjali ma jistax iservi, u mhux l-istrument adegwat biex jinbidel iz-zoning stabbilit.

It-Tribunal ghalhekk qed jiddisponi minn dan l-Appell billi jichad l-istess u jikkonferma l-permess PA 0749/03 moghti favur Antonio Ganado fis-16 ta' Frar 2005; salvi u impregudikati d-drittijiet civili tal-appellant.

Ikkunsidrat

L-aggravji tal-appellant fil-mertu huma s-segwenti:

1. Id-decizjoni tat-Tribunal mhix soddisfacentement motivata billi illimita ruhu ghaz-zoning taz-zona in kwistjoni u ma qies l-aggravji tal-appellant;
2. It-Tribunal naqas li japplika l-policies rilevanti ghal kaz, liema policies gew indikati mill-istess appellant;
3. L-applikazzjoni kellha tigi michuda ghax intavola diversi applikazzjonijiet fuq l-istess art biex jiskapula obbligazzjonijiet li kienu jkunu inkombenti fuqu ta' Environment Impact Assessemnt skond Avviz Legali 114/2007 li kieku tressqet applikazzjoni wahda dwar l-izvilupp shih.

Qabel xejn il-Qorti tirreleva illi l-atti tal-appelli kollha tal-appellant Michael Farrugia fuq l-art mertu ta' dawn l-appelli huma applikabbli mutatis mutandis.

L-ewwel aggravju

Dan l-aggravju jimmerita konsiderazzjoni peress illi t-Tribunal ghandu mhux biss jiddeciedi l-vertenza pero irid jaghti ragunijiet ghaliex qed jiddeciedi bil-mod kif issostni u wkoll billi jezmna u jevalwa l-ilmenti tal-appellant fil-kuntest ta' dak deciz. Tajjeb kemm hu tajjeb ir-ragunament tat-Tribunal irid jaghti aditu ghal lanjanzi sostantivi tal-appellant u jaghti ragunijiet ghalfejn dawn ma jisthoqqilhomx jigu milqugha fid-dawl ta' dak deciz. Mhux necessarju li t-Tribunal jinvestiga kull sottomissjoni li ssir min appellant izda aggravji, li jekk fondati, jistghu

ibiddlu d-direzzjoni ta' vertenza, iridu jigi konsidrati u tinghata raguni ghaliex qed jigu skartati.

Hu lampanti minn ezami ta' din id-decizjoni illi t-Tribunal strah esklussivament fuq iz-zoning tas-sit mertu tal-applikazzjoni. Bla dubbju t-Tribunal kien legalment korrett illi z-zona kienet intiza ghal bini skond l-outline application li saret pero dan ma kienx l-ispirtu tal-appell tal-appellant. Hu ma hux jikkontesta z-zoning, haga li difficilment jaghmel meta dan hu l-istat fattwali u legali pertinenti tas-sit in kwistjoni. Pero l-appellant talab lil Bord li jqis jekk l-ghoti tal-permess hux gustifikat jew gustifikabbli in vista ta' policies ohra, fl-opinjoni tieghu, daqstant rilevanti ghal protezzjoni tal-appellant fuq art li fiha ilu jrabbi l-annimali, cioe art agrikola, ghal ghexiren ta' snin u l-impatt u konsegwenzi li jistghu jinsorgu mill-hrug tal-permess minghajr ma jigu konsidrati jekk l-aggravji tal-appellant ghandhomx fundament fil-ligi li jistghu irazznu l-hrug tal-permess tal-bini. Dak li l-appellant kien qed itlob effettivament hu li t-Tribunal jaghmel ezami komparattiv ta' policies applikabbli u jiddeciedi x'japplika ghal kaz jew x'ghandu jipprevali fic-cirkostanzi.

B'dankollu irid jirrizulta illi l-appellant kien irrefera ghal policies li dehrli li kienu applikabbli ghal kaz u mhux jistenna lit-Tribunal li jiddezumihom hu jew li aggravju maghmul b'mod generiku dwar policies applikabbli jigu imlahhma mit-Tribunal.

F'dan il-kaz l-appell innifsu kien wiehed generiku u l-aggravju kien fis-sen li l-applikazzjoni ma tikkonformax ruhha mal-ligi u li l-kundiserazzjonijiet tad-Dipartiment tal-Agrikoltura ma nghatawx debita importanza; u wkoll illi ma ttiehidx kont tal-effett tal-izvilupp fuq l-istreetscape, u l-kreazzjoni ta' toroq fuq art agrikola saqwi u rilokazzjoni ta' razzett minhabba t-toroq krejati.

Pero harsa lejn in-noti ta' sottomissjonijiet tal-appellant senjatament dik prezentata fis-16 ta' Ottubru 2006 juri illi l-appellant semma diversi policies u argumenti relatati senjatament policy BEN 1 u BEN 2, RLO 1 u l-konformita mal-policy AHF 9 dwar ir-rilokazzjoni ta' rziezet gia

ezistenti fejn art issir zviluppabbli u hi anqas minn mitejn metru mill-irziezet u r-Rural Strategy Topic Paper – Policy 7.6.1. rigward art ta' valur agrikolu.

L-appellanti talbu li t-Tribunal jikkonsidra dawn il-policies ghal fatti quddiemu, fost affarijiet ohra u kien il-kompitu tat-Tribunal li rinfaccjat b'dawn il-kwistjonijiet li jaqghu pjanament fil-kompitu tieghu kien obligat taht l-artikolu 69(1) u 69(2) tal-Kap. 504 li jikkunsidrahom u b'mod dettaljat u studjat jilqa' jew jiskarta argument minn iehor u jispjega ghalix policy ghandha tipprevali fuq ohra jew wahda tigi skartata favur ohra.

Dan mhux kaz fejn policy hi kjament inapplikabbli jew bla ebda relevanza avolja anki hawn, la darba tigi mressqa mill-appellant bhala sottomissjoni favur it-tezi tieghu, it-Tribunal obligat jaghti sodisfazzjon ghalix mhix applikabbli.

F'dan il-kaz taqra kemm taqra d-decizjoni tat-Tribunal ma nghatat ebda gustifikazzjoni sodisfacenti fil-ligi ghalix s-sottomissjonijiet tal-appellant ibbazati fuq policies specifici kienu qed jigu rigettati a favur tal-argument uniku tat-Tribunal li z-zoning tal-art jippermetti l-permess tal-bini minghajr ma kkonsidra ebda kwistjoni ohra mqajma. Il-fatt li semmihom, u mbaghad u jiddeciedi minghajr ma kkummenta dwar il-validita o meno taghhom fil-kuntest tal-applikazzjoni ma jekwivalix ghal gustifikazzjoni ragonevoli ghad-decizjoni. Id-diskrezzjoni tat-Tribunal hi ampja pero mhix arbitrarja u trid tissodisfa l-elementi bazilari ta-certezza legali tal-gudikat ghal partijiet.

Ghalhekk dan l-aggravju qed jigi milqugh.

It-tieni aggravju

Dan l-aggravju hu subordinat ghall-ewwel aggravju pero ma fihx mertu per se billi kieku t-Tribunal ikkonsidra l-policies li rrefera ghalhom l-appellant u skartahom ghar-ragunijiet konsidrati tieghu, ma kienx ikun hemm lok ta' appell billi hawn si tratta ta' evalwazzjoni u apprezzament ta' fatti, u l-applikazzjoni tal-policies li fil-fehma tat-Tribunal

kellhom jipprovdu tenut kont tal-fattispecie tal-kaz. Dan hu kompitu li jaqa' fid-diskrezzjoni tat-Tribunal munit bl-esperjenza teknika li jevalwa u jiddeciedi dawn il-kwistjonijiet ta' planning u li dwarhom din il-Qorti ma ghandhiex tinterferixxi. Fi kliem iehor dan l-aggravju mehud fl-isfond ta' dak li qed jinghad lanqas kien jikkwalifika bhala punt ta' ligi appellabbli. Kif intqal f-ewwel aggravju l-Qorti taqbel mal-appellant li t-Tribunal naqas li jikkonsidra l-policies msemija mill-appellant u jasal ghal konkluzzjonijiet tiehu pero l-Qorti ma tistax taqbel mal-appellant la darba konsidrati kienu bil-fors iwasslu ghal-konkluzjoni li t-Tribunal naqas li japplikahom. Jekk humiex applikabbli jew le jaqa' fil-mansjoni tat-Tribunal li din il-Qorti ma tistax tissostitwixxi ruhha floku f'dak li hu applikabbli o meno qua policies.

Ghalhekk kif impostat dan l-aggravju ma jistax jigi milqugh peress li t-Tribunal naqas li jikkonsidrahom u wara dan l-ezami jara hux applikabbli o meno.

It-tielet aggravju

Dan l-aggravju msemmi fl-appell tal-appellanti, u dibattut mill-partijiet hu punt legali li kellu jigi investigat mit-Tribunal u jekk jikkunsidrah bla mertu, jichdu. Izda ma kellux id-dritt li jinjorah ghax jekk l-appellant kellu raguni legalment fondata fuq din il-kwistjoni, cioe li ma kellhomx isiru diversi applikazzjonijiet fuq l-istess mertu ta' zvilupp izda wahda holistika u kwindi per necessita kien ikun obligatorju Environment Impact Assessment, allura l-fondament tad-decizjoni tal-Bord kienet tkun zbaljata u t-Tribunal kien ikun obligat jannula d-decizjoni ta' approvazzjoni ghax nieqsa minn rekwizit essenzjali ghal valutazzjoni kompleta tal-applikazzjoni ta' zvilupp. Dan pero gie totalment injorat mit-Tribunal u ghalhekk tonqos ic-certezza tal-gudizzju necessarja fil-konfront tal-partijiet. It-Tribunal lanqas jaccenna ghal dan l-aggravju u jonjorah kompletament li essendo aggravju sostanzjalment rilevanti ghall-ezitu tal-kaz kollu kellu jigi trattat u jekk jinsab mhux floku, jigi michud izda mhux skartat bla ebda raguni.

Kopja Informali ta' Sentenza

Ghalhekk dan l-aggravju qed jigi milqugh.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-appell ta' Michael Farrugia, u tirrevoka decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Marzu 2012 u tirrinviija l-atti lura lit-Tribunal biex jerga' jisma' l-kaz skond il-ligi. Bl-ispejjez kontra l-appellati.

< Sentenza Finali >

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