



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tad-9 ta' Ottubru, 2013

Appell Civili Numru. 129/2012

**Mark Knight Adams, Maria Xiberras Grech,
Andrew Xiberras, Maria Grech, Peter Berwitz,
Chris Berwitz, Marija Sutton, Marco Busuttil,
Catherine Busuttil, Simon Camilleri,
Carmen Camilleri, Anna Sultana,
Victor Vella, Carmen Vella u
William Spiteri li fis-seduta tat-3 ta' Marzu 2011
iddikjara li m'ghandux aktar interess f'dan l-appell**

VS

**L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u
Carmelo Portelli**

Il-Qorti,

Rat ir-rikors tal-appell ta' Mark Knight Adams, Maria Xiberras Grech u Andrew Xiberras tal-14 ta' Awwissu 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u

Kopja Informali ta' Sentenza

I-lppjanar tal-31 ta' Lulju 2012 li konfermat il-hrug tal-permess PA 2798/05;

Rat ir-risposti tal-appellati Carmelo Portelli u l-Awtorita;

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

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

B'applikazzjoni prezentata fid-29 ta' Marzu 2004 – Full Development Permission, PA 1830/04, l-applikant Carmel Portelli f'sit fi Sqaq fi Triq il-Gajdoru, Xaghra, Ghawdex ippropona zvilupp residenzjali.

L-applikazzjoni giet milqugha bil-permess tad-29 ta' Ottubru 2004 li nghata bil-kundizzjonijiet segwenti:-

“1. The development shall be carried out strictly in accordance with the official street alignment. The street in front of the site shall be formed prior to the commencement of works.

2 a) This development permission is valid for a period of FIVE YEARS from the date of this notice but will cease to be valid if the development is not completed by the end of this five year period.

b) It should be noted that a third party may have the right of appeal against this permission. Any development which is carried out when such an appeal has been made, or until the time limit for the submission of such an appeal has expired, is undertaken at the risk that this permission may be revoked by the Planning Appeals Board or quashed by the Court of Appeal.

c) This development permission does not remove or replace the need to obtain the consent of the land/building owner to this development before it is carried out. Furthermore, it does not imply that consent will necessarily be forthcoming nor does it bind the land/building owner to agree to this development. Where

the land/building is owned or administered by the Government of Malta a specific clearance and agreement must be obtained for this development from the Land and/or Estate Management Departments.

d) All works shall be carried out strictly in accordance with the approved plans and the conditions of this permission. Where a matter is not specified on the plans then the conditions of this permission and of Development Control Policy and Design Guidance shall take precedence and modify the plans accordingly.

e) All building works shall be erected in accordance with the official alignment and proposed/existing finished road levels as set out on site by the Malta Environment & Planning Authority's Land Surveyor. The Setting Out Request Notice must be returned to the Land Survey Unit of the Malta Environment & Planning Authority when the setting out of the alignment and levels is required.

f) Before any part of the development hereby permitted commences, the enclosed green copy of the Development Permit shall be displayed on the site. This must be mounted on a notice board, suitably protected from the weather and located not more than 2 metres above ground level at a point on the site boundary where it is clearly visible and can be easily read from the street. The copy of the permit must be maintained in a good condition and it shall remain displayed on the site until the works are complete.

g) The enclosed Commencement Notice shall be returned to the Malta Environment & Planning Authority so that it is received at least five days prior to the commencement of the development hereby permitted.

h) Copies of all approved plans and elevations shall be available for inspection on site by Malta Environment & Planning Authority staff at all reasonable times.

i) Where the street bordering the site is unopened, it shall be opened up prior to the commencement of the building operations hereby permitted.

j) Work shall not commence on the construction (including excavation), alteration or demolition of the building until a covered way or a fence, boarding or barricade has been constructed as follows

A Where the construction or demolition activity is located less than 2 metres from a public way used by pedestrians a covered way shall be provided (unless the work is carried out within a solid enclosure; site work conditions are more than 2 metres from a public way used by pedestrians, or the work duration does not exceed 5 days). This covered way shall

- (i) have a clear height of not less than 2.5 metres;
- (ii) have a clear width of not less than 1.5 metres or the width of the public way whichever is the lesser;
- (iii) be designed and constructed to safely support all loads that may be reasonably be expected to be applied to it;
- (iv) have a weather tight roof sloped towards the site or if flat be equipped with a splash board not less than 300mm high on the road side;
- (v) be totally enclosed on the site side with an enclosure having a reasonably smooth surface facing the public way;
- (vi) have a railing 1 metre high on the road side where the covered way is supported by posts on the road side, and
- (vii) be adequately lighted between sunset and sunrise.

B Where the construction or demolition activity is located 2 metres or more from a public way used by pedestrians, a strongly constructed hoarding, boarding or barricade shall be erected between the site and the public way or open sides of a construction site, and the hoarding, boarding or barricade shall

- (i) be not less than 1.8 metres high;
- (ii) have a reasonably smooth surface facing the public way;
- (ii) be without openings, except those required for access.

Access openings shall be equipped with solid gates which shall be kept closed and locked when the site is unattended and shall be maintained in place until completion of the construction or demolition activity.

Authorisation for these arrangements must be obtained from the Local Council.

k) No building material, waste material, machinery or plant shall obstruct the pavement or the smooth flow of traffic on the road in the vicinity of the site. The deposit of materials or the placing of equipment in the street must be authorised by the Police.

l) Any soil on the site shall not be built over but shall be collected for reuse. A permit from the Director of Agriculture is required to remove the soil from the site. All soil shall be deposited at the place indicated by the Director of Agriculture.

m) Rock spoil, boulders and other waste materials resulting from excavations or from demolition on this site shall be deposited at an official waste disposal site or used as fill material. If waste materials from the development are not to be reused, they shall not be disposed of other than at an official waste disposal site. A permit from the Environmental Protection Directorate is required to this effect.

n) The height of the building shall not exceed the permitted number of two floors.

o) A water cistern with a volume in cubic metres of 30% of the total roof area (in square metres) of the building(s) shall be constructed to store rainwater run-off from the built-up area of the development. This cistern shall be completed and available for use prior to the development hereby permitted being first brought into use.

p) The development hereby permitted shall not be brought into use until the Final Compliance (Completion) Certificate, certifying that the development has been

carried out in full accordance with the plans approved by this permission and with the other conditions imposed in this permission, has been issued by the Malta Environment & Planning Authority.

3. The development shall be constructed with an extra skin to the exposed part of the third party wall. This shall be constructed in the same manner and materials and with the same detailing as the front elevation of the building.

4. All external apertures shall be constructed in timber and all other metalwork shall be in wrought iron.

5. Windows and doors should not open outwards onto the public street.

6. The door opening at ground floor level, overlooking the public street, shall be fitted with a solid aperture at street level, along the street alignment. This aperture shall be finished to match the other apertures of the elevation. This aperture shall be fitted prior to the issue of any Compliance Certificate (partial or full) on the whole or any part of the development hereby approved. No gates are permitted on this opening.

7. No steps, ramps or street furniture are to be constructed on or encroached onto the public pavement or road/alley.

8. The façade of the building shall be constructed in local stone. The stone shall remain unrendered and unpainted and it shall be allowed to weather naturally.

9. There shall be no service pipes, cables or wires visible on the front elevation or on any other elevations of the building which are visible from the street.

10. Air conditioning units shall not be located on the facades of the building which are visible from a public space. Any such units located at roof level shall be set back from the facade by at least 1 metre.

11. There shall be no permanent means of access to the roof of the first floor.

12. All services located on the roof of the building shall be screened by a wall 1.4 metres (5 courses) high constructed in franka stone. The services shall not exceed the height of this wall.

13. Any uprooting of trees requires prior clearance from the Environment Protection Directorate and the Department of Agriculture. The development hereby being approved shall not commence until the applicant has obtained written clearance from the Environment Protection Directorate and the Department of Agriculture.

14. Adequate measures shall be taken to ensure that the vehicles leaving the site/engaged in the construction works do not deposit mud or other materials on the public highway."

Dan il-permess kien segwit b'permess iehor PA 2798/05 – amended plans as per approved alignment; deciz wara reconsideration fit-3 ta' Novembru 2008;

L-appellanti li huma third parties appellaw minn dan il-permess, b'appell ipprezentat fis-27 ta' Novembru 2008 ghar-ragunijiet segwenti:-

1. Is-sit ma jikkwalifikax biex jinbena billi l-izvilupp propost jinsab fi sqaq li hu weisa' 1.5 mtrs. Applikazzjonijiet simili gew michuda fosthom PA 2798/05, 6652/05 u 4722/06 li kienu gew michuda skond il-Policies 3.8 u 4.1 tal-Policy and Design Guidance 2005; billi l-anqas wiesgha accettabbli bhala access hu ta' 2.4mtrs.
2. L-isqaq in kwistjoni ma jistax jigi kkunsidrat bhala triq skond id-Development Design Guidance policies.
3. L-izvilupp lanqas jista' jigi approvat jekk jigi kkunsidrat bhal internal development.

Fir-risposta taghha l-Avukat Dr. Joanne Vella Cuschieri ghall-applikant Carmel Portelli ssottomettiet is-segwenti:-

1. L-appell sar 'fuori termine' u mhux konformi mal-ligi billi sar minn meta ittiehdet d-decizjoni u mhux fi zmien 30 gurnata minn meta l-permess gie kkomunikat lill-applikant.
2. Mhux l-appellanti kollha huma registered objectors.
3. Il-permess kontestat jirreferi ghall-alignment u mhux dwelling off Gajdoru Street.

L-izvilupp kien gie approvat bil-permess PA 1830/04 suggett ghall-alignment, ghalhekk saret l-applikazzjoni sussegwenti.

L-appellanti fl-appell taghhom insistew li fuq dan is-sit ma kellux jinghata permess ghall-izvilupp residenzjali pero' dan hu l-mertu tal-permess PA 1830/04 u mhux PA 2798/05 li minnu qed isir dan l-appell.

Din l-applikazzjoni tirreferi biss ghall-alignment u l-appellanti ma ddeducew l-ebda aggravju dwar l-alignment.

4. Saret referenza ghas-sottomissjonijiet tal-applikant li saru fl-appell PAB 334/04 li hu l-appell dwar il-permess PA 1830/04.

Annessi man-nota prezentata fis-16 ta' April 2010, hemm diversi ritratti b'konferma li l-izvilupp tal-applikant hu 'receded' biex jirrispetta l-alignment ufficjali.

L-Awtorita' fir-rapport taghha prezentat fit-2 ta' Marzu 2012 kkumentat kif gej:-

"1. The appellant submitted a further note on the 6th December 2012 to conclude his arguments in reply to the Authority's position. The appellant is maintaining that:

the site in question is not zoned for development in the local plan, and the approved development runs counter to policies 3.8 and 4.1 of the DC2005 since at its narrowest the alley is 1.67m,

The Authority does not agree with the appellants for the following reasons:

2.1 The Authority cannot understand why the appellants continue to state that the site is not zoned for development according to the local plan. Map14.12A of the Gozo and Comino Local Plan indicate without any hint of doubt that the site is located within an area designated as a residential area and with a height limitation as set in Policy GZ-EDGE-2 of the local plan.

2.2 The Authority also notes that Policy 3.8 of the DC2007 (the policy document which superceded DC2005) has no relevance to the application. This policy regulates internal development, i.e. development that has no frontage on a schemed road. In this case the approved development has a frontage on a schemed road that has been projected since 1988 as per official alignment B4187/88 AL (various copies in PA file).

2.3 Contrary to what the appellants have stated, Policy 4.1 of the DC2007 does not regulate the width of streets providing access to residential developments. This policy regulates the vehicular access of a residential development within the site and at the point of contact with the street; i.e. it regulates the accessibility of vehicles entering and leaving the site and how this will not impact negatively on existing and projected roads.

The appellants are incorrect to state that this policy requires a minimum street width of 4.1m. Apart from the fact that this policy is referring to the point of contact of the access between the site and the street (and thus not the street itself), criterion (f) of this policy makes it amply clear that the minimum is 2.4m and not 4.1m.”

Ikkunsidra ulterjorament :-

L-applikant ecepixxa li l-appell gie prezentat ‘fuori termine’. Mill-provi rrizulta li d-decizjoni tad-DCC, wara reconsideration, li laqghet l-applikazzjoni ittiehdet fil-laqgha tat-3 ta’ Novembru 2008;

L-appellanti ddikjaraw li qed jappellaw propju minn dik id-decizjoni li ittiedet f'dik d-data u ghalhekk l-appell gie prezentat qabel it-terminu ta' 30 gurnata cioe' fis-27 ta' Novembru 2008.

Irrizulta li d-decizjoni giet impostata lill-applikant fl-10 ta' Dicembru 2008 Dok CP1.

Skond l-Artiklu 1 tat-Tielet skeda, dwar l-Artiklu 15 tal-Kap. 356, kull persuna li thossha aggravata minn decizjoni tal-Awtorita', tista' tappella quddiem il-Bord tal-Appell tal-Ippjanar fi zmien tletin gurnata minn meta d-decizjoni tkun ikkomunikata lil persuna li applikat.

Jekk l-appellant rceva din il-komunikazzjoni, l-ghada li giet impustata cioe' fil-11 ta' Dicembru 2008; it-terminu ta' 30 gurnata ghall-appell kien jiskadi fl-10 ta' Jannar 2009.

L-appell kien ikun 'fuori termine' li kieku gie prezentat wara l-imsemmija data tal-10 ta' Jannar 2009. Fil-fatt, l-appell gie prezentat ferm qabel, fis-27 ta' Novembru 2008; addirittura qabel ma l-istess applikant gie nfurmat bl-ezitu tal-applikazzjoni; billi l-appell sar wara li ttiedet id-decizjoni mid-DCC wara t-talba ta' reconsideration tal-applikant, fit-3 ta' Novembru 2008.

Ma rrizultax ghalhekk li l-appell gie prezentat 'fuori termine', jirrizulta invece li ma gietx strettament segwita l-procedura ndikata fil-ligi – izda l-fatt li appell jigi prezentat qabel, ma jgibx n-nullita' kif hu l-kas, jekk l-appell jigi prezentat wara li jkun skada t-terminu impost mill-ligi.

Din l-eccezzjoni ghalhekk ma tirrizultax fondata u qed tigi michuda.

It-tieni eccezzjoni tal-appellant hi fis-sens li mhux l-appellanti kollha kienu 'registered objectors'. In fatti mill-verifika li saret fil-file tal-applikazzjoni PA 2798/05 irrizulta li ghalkemm uhud minnhom oggezzjonaw bil-miktub, ghar-ragunijiet ta' ippjanar, fit-termini imposti mill-ligi, mhux l-appellanti kollha effettivament huma 'registered objectors'.

Minn ezami tal-file PA 2798/05 jirrizultaw l-objections segwenti:-

1. Red 12 – objection ta' Bill Wood li waslet ghand l-Awtorita' fl-14 ta' Lulju 2005 – li fil-fatt ma tirreferix ghall-proposta mertu ta' dan l-appell.
2. Red 13 – objection tal-Perit Edward Bencini registrata fit-13 ta' Lulju 2005 ghan-nom ta' Maria Xiberras Grech, Andrew Xiberras, Maria Grech, Victor Grech, Victoria Grech, Joseph Cremona, Maria Hili, E. Cremona, Victoria Sultana, Rose Cremona, B. Zammit, Mark Knight Adams, Peter u Chris Berwitz, Marija Sultana, Kevin Alamango, Philippe Parker, Lara Parker, Anton Galea, Anna Marie Galea, Paul, Victor Xerri u Joseph Vassallo.

Ma jirrizultax ghalhekk li huma valid third party objectors, l-appellanti Marco Busuttil, Catherine Busuttil, Simon Camilleri, Carmen Camilleri, Anna Sultana, Victor Vella, Carmen Vella u William Spiteri.

Fil-mertu l-eccezzjoni tal-applikant, Carmel Portelli hi fis-sens li l-appellanti qed jilmentaw mill-permess li awtorizza l-izvilupp cioe' PA 1830/04 – Appell Numru 334/04; u mhux mill-permess li jitratta l-alignment PA 2798/05 li hu l-permess li qed jigi kontestat f'dan l-appell.

Dwar dan jidher li hu korrett l-applikant, billi l-appellanti ma trattaw l-ebda mod l-alignment ufficjali tal-isqaq li sar fl-1989 – b'mod li l-ewwel parti nzammet dejqa skond l-alignment antik u aktar 'l gewwa fl-isqaq li alignment tressaq lura biex minn dik il-parti 'l quddiem, l-isqaq jitwessa'.

Kif tajjeb ikkumentat l-Awtorita', il-Policy 3.8 tal-Policy and Design Guidance 2007 li ssuperat dak precedenti tal-2005, citat mill-appellanti mhix rilevanti ghal kas billi l-istess policy tirregola 'internal development'. Dan il-kas mhux internal development billi ghandu faccata taghti ghall-isqaq li sar schemed road wara l-bdil fl-alignment ufficjali u sar fl-1988 – B 4187/88AL.

In oltre l-Policy 4.1 tal-Policy and Design Guidance 2007 ma tirregolax l-wisa' ta' triqat li jipprovdu access ghal zvilupp residenzjali; izda tirregola l-access tal-vetturi mis-sit tal-izvilupp sa fejn tmiss mat-triq.

Fi kwalunkwe kas, billi bl-alignment kif modifaikat fl-1988, il-maggior parti tal-isqaq twessa' din id-diffikulta' tista' tigi eliminata, kemm-il darba jsir access mill-parti l-wiesa tal-isqaq.

L-oggezzjoni ghall-izvilupp 'per se' l-anqas ma tirrizulta gustifikata billi l-lokalita' skond il-Gozo and Comino Local Plan tal-Lulju 2006 li ndikata bhala area residenzjali – Map 14.12 A u C b'height limitation kif indikat fil-Policy GZ-EDGE-2 tal-Pjan Lokali.

Ezaminati fid-dettal l-ilmenti tal-appellanti fil-kuntest tal-policies ta' ippjanar rilevanti, l-appell ma jimmeritax kunsiderazzjoni favorevoli.

It-Tribunal ghalhekk qed jiddisponi minn dan l-appell, billi jichad l-istess u jikkonferma l-permess moghti lill-applikant Carmel Portelli bl-applikazzjoni PA 2798/05.

Ikkunsidrat

L-aggravji tal-appellanti huma s-segwenti:

1. Billi hi kondizzjoni tal-permess ta' zvilupp ta' Carmelo Portelli f'permess 1830/04 li t-triq quddiem is-sit kellu jkun formata qabel jibda x-xoghol, l-Awtorita ma setghetx tohrog il-permess 1830/04 qabel ma jigi determinat kienx hemm triq. In oltre l-applikazzjoni PA 2798/05 ma fihix process ta' konsultazzjoni bejn l-Awtorita tat-Trasport u l-Awtorita li kien hemm bzonn qabel tigi mfassla triq. Ma saret ebda konsultazzjoni pubblika jew traffic impact assessment;
2. It-Tribunal iddecieda hazin li dan mhux internal development billi l-isqaq mhux schemed road;
3. It-Tribunal ma kkunsidrax sew il-policy 4.1 tad-DC 2007 u 4.5 tal-DC Policy and Design Guidance 2000 fejn il-wisa' tat-triq ma tippermettix vehicular access.

Strettament din il-Qorti tqis illi l-aggravji f'dan l-appell ma jikkoncernawx aggravji mill-permess li hu wiehed għall-approvazzjoni ta' road alignment għal iżvilupp li kien għa nħareġ permezz ta' permess PA 1830/04 u l-aggravji aktar huma dwar l-iżvilupp milli l-allenjament. Dawn l-aggravji fil-fatt gew trattati fl-appell mill-permess PA 1830/04 deciz illum ukoll u li għalih din il-Qorti tagħmel piena referenza. Madankollu l-Qorti ser tikkonsidra l-aggravji safejn jistgħu jkunu applikabli għal permess PA 2798/05 mertu ta' dan l-appell.

L-ewwel aggravju

L-ewwel parti tal-aggravju hu bazat fuq fatt erronju. Il-kundizzjoni dwar il-formazzjoni tat-triq quddiem is-sit tfigħer biss il-parti li trid tigi furmata quddiem il-proprjeta u ma tirreferix għal kumplement tat-triq. Del resto mhux qed jigi attakkat fl-appell li din il-parti ma saritx, u illi l-applikant zamm mal-alignment mogħti lil mill-Awtorita.

In kwantu għal konsultazzjoni li messha saret, dan qatt ma kien aggravju li tpogga quddiem it-Tribunal jew gie diskuss quddiemu u għalhekk il-Qorti mhix ser tiehu konjizzjoni tiegħu billi din hi Qorti ta' revizzjoni minn punti ta' ligi mqajma quddiem it-Tribunal.

Għalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Kif intqal fl-appell 128/12 il-kwistjoni dwar jekk is-sit għandux jigi kunsidrat bħala internal development hi kwistjoni ta' planning u interpretazzjoni ta' policies. It-Tribunal ha konjizzjoni tal-fatti kollha tal-kaz u wasal għal konkluzzjoni li dan mhux internal development billi t-twessigh tal-isqaq bl-allenjament għdid u l-futh taz-zona l-gewwa mill-isqaq għal zvilupp residenzjali elimina hafna mill-problemi ta' access. Dan hu apprezzament li ma jaqax fl-iskrutinju tal-Qorti apparti li kif ingħad dan l-aggravju ma jattakkax l-alignment li sar fl-1988 u li l-applikant zamm miegħu.

Ghalhekk dan l-aggravju qed jigi michud.

It-tielet aggravju

Dan l-aggravju wkoll ma ghandu x'jaqsam xejn ma alignment pero in ogni kaz it-Tribunal qies li l-policies imsemmija mill-appellant lanqas huma rilevanti ghall-izvilupp billi jitrattaw in parti internal development li mhux il-kaz, u in parti dwar access ta vetturi mis-sit ta' zvilupp ghal fejn tmiss ma' triq u kif jimpatta fuq toroq ezistenti u progettati. Dan hu zvilupp residenzjali permess mill-pjan lokali, u l-allenjament ta' parti sostanzjali mill-isqaq ghamel dan l-isqaq schemed road apparti li hemm schemed road ohra ppjanata mill-parti ta' gewwa tal-isqaq. In ogni kaz dan l-aggravju ma jikkontestax bl-ebda mod l-ghoti tal-permess qua approvazzjoni tal-allenjament tas-sit. Kwistjonijiet ta' esproprijazzjoni u titolu fuq l-isqaq mhux ta' kompetenza tat-Tribunal u ghamel sew ma jidholx fihom.

Ghalhekk dan l-aggravju wkoll qed jigi michud.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell tal-appellanti u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-lppjanar tal-31 ta' Lulju 2012. Bl-ispejjez kontra l-appellanti.

< Sentenza Finali >

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