MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF
MARK CHETCUTI

Seduta tad-9 ta' Ottubru, 2013

Appell Civili Numru. 69/2011

Amalia Cefai ghan-nom u
in rapprezentanza ta' Gozo Caterers Limited

vs

Awtorita' Maltija dwar l-Ambjent u l-Ippjanar

Il-Qorti,

Rat ir-rikors tal-appell ta' Gozo Caterers Limited tal-15 ta' Dicembru 2011 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Novembru 2011 wara r-rifjut tal-outline application ghal kostruzzjoni ta' flats fit-tieni sular ta' binja ezistenti;

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

Rat l-atti kollha, in-noti ta’ sottomissjonijet u semghet id-difensuri tal-partijiet;

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

Dan huwa appell minn rifjut ta’ l-Awtorita ta’ l-applikazzjoni PA 0597/02 ‘Construction of flats at second floor’, b’ decizjoni tat-28 ta’ Gunju, 2004 wara reconsideration.

Ir-ragunijiet li ghalihom l-Awtorita’ irrifjutat l-applikazzjoni PA 0597/02 kienu s-segwenti:

"1.The height of the proposed building exceeds the maximum height limitation for this area of Ghasri. It is therefore incompatible with the characteristics of the area and with the Temporary Provisions Scheme for the area, which seeks to limit height in order to safeguard the general amenity of the area. The proposed development runs counter to Structure Plan Policy SET 8, which requires that the layouts and other provisions of the Schemes will only be reviewed as part of the Local Plans to be prepared for the areas in which the schemes are located.

2. The proposal runs counter to Structure Plan policy TRA 4 and the car parking standards set out in Table A2.5 in the Structure Plan Explanatory Memorandum in that it fails to provide the required car parking spaces. It will give rise to unacceptable additional on-street car parking which would not be in the interests of the amenity of the area and which would exacerbate existing problems of congestion, potential highway danger and vehicular and pedestrian conflict.

3. Development of this site would compromise the Malta Environment & Planning Authority's ability to review the layout and other provisions of the Temporary Provisions Scheme through the Local Plan process as proposed in Structure Plan policies SET8 and BEN4. The proposal is therefore premature and counter to Structure Plan policies SET8 and BEN4.

4. The proposal runs counter to Circular PA 2/96 which states that "when existing building development on a site is wholly or partly illegal the DCC will not consider a development permit application relating to new development on that site, unless the development is regularised". The illegal development includes the construction of the existing building not according to permission."

Fl-appell tieghu ppresentat fil-5 ta’ Awwissu, 2004, l-appellanta, permezz tal-Perit Grech, taghti r-ragunijiet taghha ghal dan l-appell billi tghid:

“The first reason put forward in the refusal provides that the application runs counter to Structure Plan policy SET 8, and is incompatible with the Temporary Provision Scheme due to the height limitatioin. This reason is unfounded for the following grounds.

i) The maximum height limitation for this area, through the height relaxation policy is of three floors and not of only two. In fact the present outline application PA 597/02 relates to a site situated in the same street, a few metres away, in respect of which an application was submitted in 1995, re: PA 2210/95. Reference is being made to this granted application, since this applicatioin (PA 2210/95) relates to the erection of an extra second floor. Notwithstanding the fact that the Temporary Provisions Scheme, 1998, no 4 (Gozo), in force then as it is now, provides for two floors, the application was approved by the DCC for the erection of the extra floor. Reference, in this respect, ought to be made to DCC decision report PA 2210/95, condition clause 2, “height of the building should not exceed three (3) floors”. Therefore, since the statues to date have remained unchanged, it is only justifiable that the application be approved on the same grounds as the previous application.

ii) Furthermore, the refusal contends that the erection of three floors would prejudice the Local Plan. It is submitted that the area in question is already

compromised by an already existing three-floor building. Mention must be made to a three-floor building on the same side of the road, a few metres away from the site in question. Therefore, the contention that the visual integrity of the area would not be maintained, is inconsistent since the site in question in question is already adulterated.

The second reason put forward in the refusal provides that the application runs counter to Structure Plan policy TRA 4. This unfounded reason, which has only sprouted at the reconsideration stage was not even mentioned in the initial refusal is also unfounded.

iii) In fact my client owns four (4) garages at the back of this site covered with permit PA 4806/90 [Proposed garages and washrooms at Ghammar Street], which are more than adequate to provide the parking requirements of the three (3) apartments to be constructed.

The third reason put forward in the refusal provides that the application runs counter to Structure Plan policy SET 8 and BEN 4 and would compromise the MEPA ability to review the TPS through the Local Plan. This reason is unfounded for the following grounds:

iv) The Draft Gozo and Comino Local Plan mentioned in the refusal are not yet in vigore. So much so that the reason only says that these draft policies merely ‘recommend’ the height limitation of two floors. A recommendation is not legally binding unless it is put into effect as an obligatory rule. To this extent therefore, the premise that the application submitted runs counter to the Structure Plan is groundless, since the premise is premature given the fact that the drafts, as yet, are merely recommendations.

v) In fact other granted applications such as PA 330/01 and PA 5531/02, were not treated with this same reasoning, and although counter to polcies set out in the Draft Gozo and Comino Local Plan were given the green light, even though the Draft Gozo and Comino Local Plan was already issued.

vi) It is also important to note that the Draft Gozo and Comino Local Plan was not even issued when this application was submitted and it is unjust to judge application with policies which are issued six months after a proposal has been submitted. This application was submitted on January 2002, whilst the Draft Gozo and Comino Local Plan was issued in June 2002. The Case Officer took ages to complete the DPAR, and only completed it in July after the Draft Gozo and Comino Local Plan was issued.”.

Fir-risposta tieghu tal-20 ta’ Settembru, 2004, David Cassar ghall-Awtorita’ jaghti r-ragunijiet ghaliex fl-opinjoni ta’ l-Awtorita dan l-appell ghandu jigi michud. Is-segwenti huma siltiet minn dan ir-rapport li t-Tribunal jhoss ghandhom jigu ssottolineati:

"DIRECTORATE'S COMMENTS ON GROUNDS FOR APPEAL

The Temporary Provisions Schemes (1988) indicate the height limitation of the site as two floors. The Height Limitation Guidance (1998) states that the height limitation is two floors. This height limitation was modified by policy “Interim Review of Building Heights Pending Local Plan Completion” (1993). This policy states that where the height limitation is two floors, three floors may be permitted, until the local plan for the area is prepared.

In the current application, the Gozo and Comino Local Plan (Public Consultation) indicates the height limitation of the site to be two floors. This is in accordance with the Temporary Provisions Schemes and the Height Limitation Guidance. The policy “Interim Review of Building Heights Pending Local Plan Completion” is no longer applicable after the preparation of the local plan. Therefore the height limitation for the site is two floors.

The proposal is for three floors and a stairwell at roof level. Thus the development runs counter to the height limitation for the area. The proposal would also

compromise MEPA's ability to review the layout and other provisions of the TPSs through the local plan process. This runs counter to Structure Plan Policies SET8 and BEN4.

In addition the proposal lacks suitable car parking provision and therefore it runs counter to Structure Plan Policy TRA4.

Finally The existing building is built not according to permission whilst the current application does not seek to sanction this illegality and therefore the provisions of Circular PA2/96 apply.

The Planning Appeals Board may wish to note that PA0330/01 and PA5531/02, referred to by architect, do not relate to the construction of additional floors, nor do they relate to the village of Ghasri."

Fin-nota tieghu tas-7 ta' Frar, 2005, l-appellant, permezz tal-Perit Grech, jissottometti, inter alia li:

"Ghandu jigi rilevat mill-ewwel illi f'xenarju fejn il-Local Plan ghal Ghawdex u Kemmuna ma jkunx ikkunsidrat bhala li japplika ghal dan is-sit, dan is-sit jikkwalifika ghal tlett sulari in virtue tal-height limitation tieghu kif stabbilita u msahha bil-Building Heights Relaxation Policy.

Fil-fatt meta kienet saret applikazzjoni fuq sit fl-istess triq propju ftit metri l-boghod mis-sit in kwistjoni u fejn fuq bini ezistenti ta' zewg sulari nhareg il-permess PA 2210/95.

F'dan ix-xenarju li hu totalment identiku ghal dak tal-applikazzjoni prezenti jidher car illi t-talba tar-rikorrenti missha li ntlaqghet mill-Kummissjoni ghall-Kontroll ta' l-Izvilupp ghall-istess ragunijiet u taht l-istess cirkostanzi. Barra min hekk il-File PA 597/02 kellu jidher fis-seduti tla-Bord tal-Kummissjoni ghall-Kontroll ta' l-Izvilupp li ghandu x'jaqsam ma siti fl-iskema u mhux dak li jitratta siti fl-UCA.

Hekk ir-rikorrent mhu jippretendi xejn hlief dak li nghata diga' fis-sit adjacenti mill-istess Planning Authority (illum Malta Environment and Planning Authority).

Il-Local Plan ghal Ghawdex u Kemmuna hija applikabbli ghall-kaz in kwistjoni?

Ghandu jinghad mill-ewwel illi l-Kummissjoni ghall-Kontroll ta' l-Izvilupp ibbazat id-decizjoni taghha fuq il-fatt illi l-Local Plan ghal Ghawdex u Kemmuna hija applikabbli ghal kaz in kwistjoni.

Il-Kummissjoni ghall-Kontroll ta' l-izvilupp stess tammetti fit-thaddim taghha u fid-decizjonijiet taghha – illi d-Draft Local Plan ghal Ghawdex u Kemmuna ma japplikax. Hekk ghamlet per ezempju f'dawn il-kazi:

Fl-applikazzjoni numru PA 330/01 il-Case Officer ghamel rakkomandazzjoni biex il-permess ikun rifjut u dan ghaliex id-Draft Gozo and Comino Local Plan kien applikabbli.

Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp injorat dan kollu (li fid-Draft Gozo and Comino Local Plan dan is-sit huwa Edge of Scheme u ghalhekk ma setax jkollu kaxxa tat-tarag u wisq anqas washrooms) u harget il-permess relattiv fit-28 ta' April 2003.

Fl-applikazzjoni numru PA 5531/02 il-Case Officer ghamel rakkomandazzjoni biex il-permess ikun rifjutat u dan ghaliex id-Draft Gozo and Comino Local Plan kien applikabbli. Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp injorat dan kollu u wkoll harget il-permess relattiv.

Hemm hafna kazijiet ohra fejn gara l-istes bhal ma gara hawn fuq per ezempju dak ta' PA 3316/04. Dawn l-istanzi lkoll juru li kemm fis-stadju tad-decizjoni proprja ta' rifjut kif ukoll f'dak ta' 'reconsideration' relattiva ghall-istess l-Kummissjoni ghall-Kontroll ta' l-Izvilupp imxiet mar-rikorrent b'mod diskriminatorju u differenti minn haddiehor; oltre dan mxiet b'mod differenti minn kif hi stess iddecidiet fl-ahhar applikazzjoni numru PA 597/02 fuq appena riferit.

Fil-fatt ir-ragionamenti (jekk tista ssejhilhom hekk) tal-istess Kummissjoni huma lkoll impenjati in gran parte fuq it-triq li qabdet l-istess Kummissjoni fil-konfront tar-rikorrenta u cjoe' li kuntrarjament kif ghamlet ma haddiehor – tikkunsidra illi d-Draft Gozo and Comino Local Plan hu vigenti.

Ma' dan wiehed jrid jzid ukoll il-kunsiderazzjoni li anki kieku ghall grazzja tal-argument id-Draft Gozo and Comino Local Plan illum hu applikabbli (li ghad mhux) xorta ma kienx applikabbli la fid-data tad-decizjoni tar-reconsideration, la fid-data tar-rifjut originali u wisq anqas fid-data tal-induzzjoni tal-applikazzjoni kmieni fit-2002 u cjoe' kwazi tlett (3) snin ilu."

" L-allegazzjoni ossija "raguni ta' rifjut" mressaq mill-KKI – kemm fir-rifjut originali kif ukoll fi stadju tar-reconsideration – dwar 'parking' hi kompletament bla bazi.

Fil-fatt kif jidher anki minn mera harsa kursorja mill-pjanti annessi mal-applikazzjoni numru PA 597/02 moghtija fil-permess PA 4806/90 u PA 2376/93 illi hemm numru ta' garages li nghataw il-permess tal-MEPA u li huma iktar minn bizzejjed biex iservu il-bini tat-tlett appartamenti.

Dawn il-garages huma illum lkoll mibnijin ezistenti (kif jidher mir-ritratti fil-file tal-applikazzjoni.

Issir ukoll riferenza ghal kaz ta' 'Degiorgio' PAB 531/96 SMS taht riferit fejn il-permess tal-bini tar-raba (4) sular gie akkordat minn dan il-Bord minghajr l-ebda riferenza ghal xi parking jew garage requirements."

" In kwantu ghall allegazzjonijiet dwar 'illegal building'

In kwantu ghal allegazzjoni dwar 'illegal building' mill-KKI ghandu jigi ipprecizat illi l-bini diga' ezistenti huma mibnijin skond il-permessi Numri 4806/90 mahrugin mill-ex-Planning Appeals Board bl-ezatt: tant li inghataw is-servizzi tad-dawl u tal-ilma liema servizzi, ma kienux jinghataw li kieku kien hemm irregolaritajiet. Jidher pero' illi xi bini fuq l-istess arja in kwistjoni jista' jkun m'huwiex

ezattament skond permessi li nhargu ghall-washrooms liema 'infrazzjonijiet' huma tant minimi li jista' biss ikollhom xi multa zghira barra u illi bl-ghoti tal-permess tat-tielet sular – liema permess wara kollox ghandu johrog skond il-ligi – tali diskrepanzi minimi li jista' jkun hemm jkunu totalment u permanentmenet eliminate.

Jigi rilevat illi fil-kaz 'Degiorgio' PAB 531/96 SMS taht riferit minkejja illi s-sular rikjest kien inbena bla permess qabel id-decizjoni tal-appell xorta wahda dan il-Bord akkorda l-permess relattiv minghajr ma impona l-ebda multa jew sanzjoni ohra.

Ghandu jinghad wkoll illi danb il-Bord dejjem qata' u ddecieda b'mod illi l-applikant tal-inqas jiehu l-istess u jitpogga fl-istess pozizzjoni daqs haddiehor.

Kaz li huwa 'in point' hu il-kaz 'Degiorgio versus il-Kummissjoni ghall-Kontroll ta' l-Izvilupp' appell Numru 531/96 deciz fid-29 ta' Lulju 1998."

"F'dan il kaz PA 5858/89 sar appell minn rifjut tal-KKI ghaliex din irrifjutat il-bini tar-raba (4) sular f'post fi Triq Ghar Qawqla, Marsalforn, Ghawdex.

Ghandu jinghad mill-ewwel illi fid-data tal-applikazzjoni kif ukoll tad-decizjoni tal-appell ma kien hemm l-ebda 'policy' jew skema li tippermetti li jinghata l-permess ghar-raba (4) sular in kwistjoni.

Anzi l-policy maghrufa w ufficcjali kienet l-oppost w l-'ischemes' kienu jindikaw bhala 'building height limitation' l-gholi ta' tlett sulari biss.

Kien hemm pero xi ezempji sporadici l-boghod ma' Marsalforn kollu (mhux fl-istess triq ta' l-appellanti u wisq anqas adjacenti jew metri biss qrib is-sit in kwistjoni) fejn kien fil-fatt inbena ir-raba (4) sular. Ma gew prodotti l-ebda permessi li jawtorizzaw dan – bhal fil-kaz in kwistjoni fejn madwar metri 'l boghod il-MEPA nnifisha fil-PA 2210/95, fl-1997 akkordat sular (tielet sular) u qasma ma

qasma mal-bini tal-appellanti odjerna hemm it-tielet sular ta’ terzi mibni diga’.

Ghalkemm ma kien hemm l-ebda policy illi tawtorizza r-raba sular anzi l-policy kienet l-oppost u l-building height limitation keinet ta’ tlett sular biss u kien hemm biss ftit ezempji ta’ raba sular – li ghalihom ma gie riprodott l-ebda permess – il-Bord tal-Appell – minkejja illi irrikonoxxa illi ma setghax ibiddel l-iskema tal-building height limitation (ta’ tlett sulari) xorta hareg il-peermess ghar-raba’ sular bis-segwenti motivazzjoni:

“Il-Bord jaqbel mad-decizjonijiet ikkwotati mill-Awtorita’ fis-sottomissjonijiet relattivi li l-poteri tal-Bord huma limitati ghal dak li hemm fil-Pjan ta’ Struttura u li ‘schemes’ relattivi. L-unika sitwazzjoni li thalli xi forma ta’ diskrezzjoni ghal Bord huwa jekk il-Bord huwa tal-fehma li hemm ‘commitment’ car li jikkreja sitwazzjoni fattwali li l-Bord bilfors jaderixxi mieghu – ghax hekk hu bhala stat ta’ fatt.

Waqt l-access mizmum fid-29 ta’ Lulju 1998 il-Bord ikkostata:

“… fl-istess triq kif taqbez il-pjazza u tibda t-triq lejn ix-Xaghra hemm, fuq iz-zewg nahhat tat-triq, diversi bini b’erba sulari..”

Naturalment dan ifisser li hemm ‘commitment’ qawwi favor l-applikazzjoni odjerna li ghalhekk ma tistax ma tigix accettata

Hu ovvju illi l-kaz odjern tal-appellanti huwa ferm superjuri ghal kaz ta’ Degiorgio appena riferit ‘inter alia’ ghaliex – (i) il-bini li jaghmel il-‘commitment’ hu ferm eqreb fil-kaz odjern milli mill-kaz ta’ Degiorgio; u (ii) il-bini li jikkommetti hu bil-permess u skond il-policies a differenza ta’ dak tal-kaz ta’ Degiorgio li ghalih ma gew invokati l-ebda permessi; u (iii) il-bini tal-appell odjern hu kopert bil-Building Height Relaxation Policy u bil-policies u ligijiet applikabbli – haga li wiehed ma jistax jghida fil-kaz ta’ Degiorgio.”

“Fil-fatt l-istess Draft Gozo and Comino Local Plan jghid car u tond illi fil-kaz ta’ fejn hemm ‘building height limitation’ ta’ zewg sulari jinghat l-permess ghal sular addizzjonali u cjoe t-tielet sular basta b’irtirar ta’ 4.25 metri min quddiem, fil-fatt gew sottomessi pjanti fl-ahhar seduta b’irtrirar ta’ 4.25 metri minn quddiem. UCA Quality Area ma tfissirx li ma ghandux jinghata permess ghat-tielet sular jekk adjacenti hemm tlett sulari.”

Fir-risposta ta’ David Cassar ghall-Awtorita’ ippresentata fl-4 ta’ Marzu, 2005, jissottometti li gej:

"Permission relative to PA2210/95 was issued in March 1997, prior to the publishing of the Gozo and Comino Local Plan - Public Consultation document, and therefore this case may not be used to justify the current proposal. Moreover, it is important to note that the proposal is not being refused as it conflicts with a draft document. Indeed the proposal is being refused, as it conflicts with Structure Plan Policy BEN4 (which seeks to restrict development that would compromise such an emerging plan). In addition, the proposal also infringes Structure Plan Policy SET8, which endorses the Temporary Provisions Schemes, which set out a height limitation for the area of two floors.

Furthermore, as opposed to what is being stated by Architect, the Gozo and Comino Local Plan (Public Consultation document)specifically restricts the height for the area to two floors, as shown on MAP14.4-C – “Height Limitation and Main Development Boundaries”. MAP14.4-D – “Safeguarded Areas Urban Context”, used by Architect to identify the site as a UCA Quality Area, simply specifies the design that the building is to follow, but does not specify its height.

Additionally, permission PA4806/90 – see red 57A in PA0597/02 – only allowed the construction of four garages. With the additional three flats, to the existing six dwelling units, the parking requirements for the site would add up to nine on-site parking spaces. The proposal,

therefore has a shortfall of five parking spaces, in conflict with Structure Plan Policy TRA4. Indeed, the parking concession made by the Planning Appeals Board in PAB531/96/SMS (quoted by Architect) referred only to the requirement of one unit.

Finally, the DCC has stressed that – see minute 62 in PA0597/02 – the building is not constructed according to the original permission, and therefore the provisions of Circular PA2/96 apply. Indeed, Architect agrees that discrepancies from approved plans exist however no attempt to regularise these illegalities has been made during first decision stage or during reconsideration stage."

Fin-nota tieghu tal-24 ta' Gunju, 2005, il-Perit Robert Grech ghan-nom tal-appellanta, Amalia Cefai, jesponi li:

"Id-draft Local Plan ta' Ghawdex gie injorat fil-permessi li semmejna fl-ewwel sottomissjonijiet – PA 330/01, PA 5531/02 u hafna ohrajn. Id-direttorat ghogbu ma jaghmilx referenza ghal dawn il-files fit-tieni nota li pprovda. Dawn il-files imsemmija hawn fuq ghandhom jigu annessi ma dan il-kaz.

Il-garaxxijiet li hemm wara s-sit m'humiex abbinati bl-ebda mod mal-appartamenti ga mibnija, u ma hemm l-ebda referenza ghalihom jew kundizzjoni. Il-file PA 480/90 ghandu jigi anness.

Ma hemm ebda karatteristici urbani fis-sit in kwistjoni. Vide ritratti fil-file PA 597/02. Fil-fatt l-iskemi kien u ghadhom juru li z-zona hija 'in sheme' u mhux UCA, barra li hemm commitment qawwi fiz-zona vide PA 2210/95 u ohrajn.

F'siti ohra simili l-MEPA sal-21 ta' Gunju ta' din is-sena mxiet differenti ma kazi li jaqghu taht UCA fuq il-kotba imma huma areas godda. Vide PA 7470/03.

In kwantu l-allegati irregularitajiet, ma hemm l-ebda irregularitajiet sostanzjali hlief xi affarijiet zghar, li meta

saru ma kienux jitqiesu bhala irregularitajiet sinjifikanti. Issir referenza wkoll ghal fatt illi l-Bord ta’ l-Appell laqgha appelli u nhargu permessi relattivi fuq siti li fuqhom sahansitra kien hemm enforcement.”

Fin-nota tal-Avukat Dr Leslie Cuschieri, ghall-appellanta ppresentata fit-18 ta’ April, 2007, huwa jghid li gej:

“Illi fl-ewwel lok, u minghajr l-ebda pregudizzju ghad-drittijiet jew pozizzjoni tal-appellanti – jigi sottomesss illi din is-sottomissjoni m’hijiex ezatta ghaliex il-Local Plan ghal Ghawdex u Kemmuna jippreskrivi car u tond illi fejn height limitation hi ta’ two floors jista’ jinghata wkoll receded floor fuq dan il-livell.

Illi fit-tieni lok ir-rikorrenta thoss ruhha sorpriza bl-atteggjament ta’ l-istess MEPA fil-konfront tal-appellanta meta l-esponenti intavolat nota fl-atti ta’ dan il-process li turi b’mod ezawrijenti kif lil terzi, li sahansitra applikaw wara li applikat l-appellanta, nhargulhom permessi bhal dak mitlub mill-appellant jew simili jew ekwivalenti ghall-istess. Illi ghalhekk ukoll il-kaz prezenti hu kaz ta’ ‘commitment’.

Illi fit-tielet lok l-appellant tirrileva illi m’huwiex minnu illi r-regoli tal-ippjanar jippreskrivu zewg sulari biss bini ghas-sit in kwistjoni kif allegat mill-kontro-parti tant illi:

a) Fil-Policy and Design Guidance 2007 hu espressament provdut (Part 17) illi ghalkemm fejn dahlu il-Local Plans il-‘Height Relaxation Policy’ tnehhiet, madankollu ghal applikazzjonijiet li dahlu qabel it-3 ta’ Awissu 2006 (kif inhu fil-kaz prezenti) il-‘Height Relaxation Policy’ xorta wahda ghadha applikabbli fejn:
i) ‘there are commitments in the immediate vicinity and within the same street which have been permitted as three floors on the basis of that policy’ (kif inhu il-kaz prezenti fejn l-applikazzjoni numru PA 2210/95 proprju giet approvata biss ftit metri ‘l boghod u inbena it-tielet sular u ii) ‘the resultant development is compatible with its immediate surroundings and that the additional floor will

result in an improved streetscape.' (kif inhu il-kaz odjerd kif jirrizulta ahjar mill-pjanti relattivi) u

b) fl-istess Policy and Design Guidance 2007 hu espressament provdut illi anki sahansitra ghal applikazzjonijiet wara t-3 t'Awwissu 2006 'receded floor' huwa permess anki fil-kaz odjern – ara Part 10 tal-istess Policy and Design Guidance 2007.

c) Dan minbarra bini li hu permess skond policies f'Part 10 tal-istess Policy and Design Gudiance 2007."

Fir-risposta ta' Lorinda Vella ghall-Awtorita' ippresentata fl-20 ta' April, 2007, hija tikkummenta li:

"1. Kif wiehed jista' jikkonstata mill-Map 14.4-C tal-pjan lokali, l-istess sit ma taqax fil-parti GZ-EDGE-1, w'ghaldaqstant ma japplikax ir-receded floor.

2. Illi waqt li llum veru dahlu l-policy and design guidance 2007 fil-mori ta' l-appell, meta l-istess kienet diga' marret ghas-sentenza, l-istess sit ma tikkwalifikax taht il-parti 17 stante li PA 2210/95 mhix fl-'immediate vicinity', izda biss 'within the same street'. Oltre zvilupp wiehed biss fit-triq ma johloqx commitment u ghalhekk l-istess rekwizit jghid 'commitments'. Oltre dan dan hu imsahhah bil-fatt li t-tieni rekwizit hu li 'the resultant development is compatible with its additional surroundings and that the additional floor will result in an improved streetscape – dan l-izvilupp ser ikun l-uniku wiehed ma' dak imsemmi mill-appellant li ser anzi jikser l-omogenita', integrita' w armonija ta' l-istreetscape billi ser jistona mas-surroundings – dan hu evidenti mill-istess access li kien sar f'Ottubru 2005 li jghid li l-izvilupp in kwistjoni jinsab f'shell form ta' garage fil-first floor u access ghat-tromba tat-tarag li hi fit-tielet sular. Fuq il-garage inbena apartment u qed jigi propost sular addizzjonali u dan meta il-Bord innota li l-propjeta' fil-vicinanzi hi mibnija fuq zewg sulari."

Fid-decizjoni moghtija mill-Bord ta' l-Appell ippresjedut mill-Avukat Dr Ian Spiteri Bailey li jgib id-data tal-4 ta' Mejju, 2007, il Bord jikkonkludi kif gej:

"Permission relative to PA2210/95 was issued in March 1997, prior to the publishing of the Gozo and Comino Local Plan - Public Consultation document, and therefore this case may not be used to justify the current proposal. Moreover, it is important to note that the proposal is not being refused as it conflicts with a draft document. Indeed the proposal is being refused, as it conflicts with Structure Plan Policy BEN4 (which seeks to restrict development that would compromise such an emerging plan). In addition, the proposal also infringes Structure Plan Policy SET8, which endorses the Temporary Provisions Schemes, which set out a height limitation for the area of two floors.

Furthermore, as opposed to what is being stated by Architect, the Gozo and Comino Local Plan (Public Consultation document)specifically restricts the height for the area to two floors, as shown on MAP14.4-C – "Height Limitation and Main Development Boundaries". MAP14.4-D – "Safeguarded Areas Urban Context", used by Architect to identify the site as a UCA Quality Area, simply specifies the design that the building is to follow, but does not specify its height.

Additionally, permission PA4806/90 – see red 57A in PA0597/02 – only allowed the construction of four garages. With the additional three flats, to the existing six dwelling units, the parking requirements for the site would add up to nine on-site parking spaces. The proposal, therefore has a shortfall of five parking spaces, in conflict with Structure Plan Policy TRA4. Indeed, the parking concession made by the Planning Appeals Board in PAB531/96/SMS (quoted by Architect) referred only to the requirement of one unit.

Finally, the DCC has stressed that – see minute 62 in PA0597/02 – the building is not constructed according to the original permission, and therefore the provisions of Circular PA2/96 apply. Indeed, Architect agrees that discrepancies from approved plans exist however no attempt to regularise these illegalities has been made

during first decision stage or during reconsideration stage."

Fis-sentenza moghtija fid-29 ta’ Jannar, 2009, l-Imhallef l-Onor. Raymond Pace jispjega r-raguna li ghalija kien qieghed jilqa l-appell:

“Illi f’dan il-kaz hemm qbil bejn il-partijiet li l-imsemmi perit kien membru tal-Bord ta’ l-Appell dwar l-Ippjanar li ta d-decizjoni tieghu mertu ta’ dan l-appell u wkoll membru tal-Kummissjoni ghall-Kontroll ta’ l-Izvilupp li ta d-decizjoni tieghu dwar l-istess applikazzjoni premessa, b’dan ghalhekk li membru tal-istess Bord iddecieda l-kaz fl-istadju ta’ appell meta kien allura ga ta’ d-decizjoni tieghu fuq l-istess kaz u applikazzjoni bhala membru tal-Kummissjoni imsemmija.

Illi b’hekk din il-Qorti thoss li ma hemmx dubbju li d-dispozizzjonijiet tal-artikolu 734(d)(ii) tla-Kap. 12 japplika ghal kaz in ezami u dawn iwasslu sabiex tali decizjoni tal-Bord tigi dikjarata nulla u bla effett u dan peress li effettivament minhabba dawn il-fattispecie tal-kaz l-istess socjeta appellanti quddiem il-Bord giet negate mid-dritt taghha li l-kaz jigi trattat minn Bord compost minn persuni differenit minn dawk li kienu ga trattaw il-kaz meta dan kien quddiem il-Kummissjoni, u b’hekk effettivament l-istess socjeta appellanti giet ukoll negate mid-dritt li jkollha aditu ghad-doppio esame, li huwa principju konness ma dak indikat fl-imsemmi artikolu, li jghin sabiex jistabbilixxi li l-membri tal-istess Bord ikunu imparzjali u indipendenti (L-E.T. Rev. ma Monsinjur Arcisqof Giuseppe Mercieca proprio et nomine vs. l-Onorevoli Prim Ministru noe et’ – Q.K – 22 ta’ Ottubru 1984).

Illi ovvjament ma hemmx dubbju li dan il-principju jittratta meta jkun hemm l-istess kawza involuta (Licari Estates Limited vs Kishinchand Mohnani – PA (GV) – 19 ta’ Frar 2001); ‘Gauci vs. Gatt’ – A. C. – 6 ta’ Novembru 2007).

Illi dan il-principju huwa tant importanti li huwa wiehed mill-elementi sabiex jassikura l-imparzjalita’ ta’ gudikant jew minn ghandu jiddeciedi fil-kuntest ta’ smiegh xieraq

anke fil-kuntest tad-drittijiet fundamental ital-bniedem, u f'kazi bhal dak odjern huwa wiehed mill-elementi bazilari sabiex jinghad li l-gustizzja mhux biss issir izda tidher ukoll li qeghda ssir ('Arcidiciano Limited vs. Avukat Generali et' – Q.K. 29 ta' Ottubru 2004) u ghalhekk f'dan il-kaz partikolari, u minhabba l-importanza tal-principju ta' imparzjalita' li japplika wkoll ghall-membri tal-istess Bord, thoss lid an il-punt wahdu huwa punt ta' dritt li jaghti lok ghall-appell quddiem din il-Qorti,u wkoll huwa tant serju, li ghandu jwassal minhabba l-fattispecie tal-kaz kif fuq spjegati sabiex tigi annullata d-decizjoni tal-istess Bord tal-4 ta' Mejju 2007.

Il-punti li jitqajmu fin-nota tal-Avukat Dr Leslie Cuschieri, ghall-appellanta ppresentata fl-1 ta' Settembru, 2010, li tittratta zewg appelli jigfieri PAB 224/04 u PAB 279/07, huma migburin fil-qosor izjed l-isfel.

Ir-risposti ghall-dawn il-punti fin-nota addizzjonali ta' Mario Scicluna ghall-Awtorita' ippresentata fis-26 ta' Ottubru, 2010, li tittratta zewg appelli jigfieri PAB 224/04 u PAB 279/07, huma migburin fil-qosor izjed l-isfel.

Ikkunsidra:

Il-mertu ta' dan l-appell jirrigwarda proposta ghal zvillupp li jikkonsisti fil-kostruzzjoni ta' tlett appartamenti fil-livell ta' second floor. Il-proposta tinkludi ukoll il-bini ta' turgien sa fuq il-bejt. Din hija outline application. Is-sit mertu ta' dan l-appell huwa fiz-zona tal-bini ta' Ghasri u jinsab quddiem il-UCA ta' dan ir-rahal. Il-bini ezistenti huwa fuq zewg sulari.

L-argumenti, fil-mertu, li tqajmu fid-diversi stadji ta' dan l-appell jistghu jigu elenkati fil-qosor kif gej:

Fl-appell tieghu, l-appellant isostni li:
• Bl-applikazjoni tal-height relaxation policy, il-height limitation ghaz-zona li fija jinsab is-sit in ezami hija ta' tlett sulari;
• Gew approvati applikazzjonijiet ohra bi tlett sulari u specifikatament wiehed vicin hafna tas-sit in ezami;

• Il-proposta ma’ taffettwax il-visual integrity ta’ l-area;
• Il-Local Plan kien ghadu ma’ dahalx fis-sehh u ghalhekk ma’ jistax jintuza biex tigi rifjutata l-applikazzjoni; u
• Zewg applikazzjonijiet, PA 330/01 u PA 5531/02 gew approvati wara li hareg id-Draft Local Plan.

L-Awtorita irrespondiet li:
• It-Temporary Provisions Scheme (TPS) u l-Height Limitation Guidance juru li l-height limitation ghas-sit in-ezami huwa ta’ zewg sulari;
• Il-policy Interim Review of Building Heights Pending Local Plan Completion tas-sena 1993 kienet tippermetti li f’ certi kazi jinghataw tlett sulari minflok tnejn. Din il-policy ma’ baqghtex tapplika hekk kif gie ppreparat il-Gozo and Comino Local Plan;
• Jekk tigi approvata din l-applikazzjoni jkunu qed jigu miksura il-policies tal pjan strutturali SET8 u BEN4 ;
• Il-proposta ma’ tipprovdiex spazju adegwat ghall-parking u ghalhekk tikser il-policy TRA 4 tal-pjan strutturali;
• Hemm illegalitajiet fuq is-sit li mhux koperti b’din l-applikazzjoni; u
• Il-permessi imsemmija ma sarux biex jizdiedu s-sulari u ma’ jirriferux ghal siti fl-Ghasri.

Fin-nota tieghu tas-7 ta’ Frar, 2005, l-appellant, permezz tal-Perit Grech:
• Inhareg il-permess PA 2210/95 vicin is-sit in ezami ghal sular addizzjonali fuq iz-zewg sulari ezistenti;
• Il-file PA 597/02 kellu jidher fid-DCC li ghandu x’jaqsam mas-siti fl-iskema u mhux dak li jitratta l-UCA;
• Id-DCC ibbazat id-decizjoni taghha fuq il fatt li d-Draft Gozo and Comino Local Plan huwa applikabbli ghal kas in ezami meta d-DCC stess ammettiet li d-Draft Gozo and Comino Local Plan ma’ kiex applikabbli f’numru ta’ applikazzjonijiet ohra imma mhux fil-kas in ezami (PA 330/01, PA 5531/02, PA 3316/04);
• Anki jekk id-draft local plan huwa applikkabbli llum ma’ kiex applikabbli fid-data tar-rifjut tar-reconsideration u tar-rifjut originali;
• L-ipprocessar ta’ l-applikazzjoni damet iz-zejjed fl-istadji kollha;

• Ir-reason for refusal dwar in-nuqqas ta’ parking huwa bla bazi; u
• Hemm commitment qawwi fiz-zona peress li hemm bini ta’ tliet sulari li hu bil-permess vicin tas-sit in ezami u peress li l-appell odjern hu kopert bil-Building Height Relaxation Policy u bil policies u ligijiet applikabbli;

Fir-risposta ta’ David Cassar ghall-Awtorita’ ippresentata fl-4 ta’ Marzu, 2005:
• PA 2210/95 hareg qabel ma’ gie publikat il-Public Consultation Document tal-Gozo and Comino Local Plan u ghalhekk dan il-kas mhux relevanti ghall-kas in ezami;
• Il-proposta in ezami qed tigi rifjutata specikifament ghax tmur kontra l-policies BEN4 u SET 8 ta’ l-iStructure Plan;
• Fil-mappa MAP14.4-C, il-Public Consultation Document tal-pjan lokali jillimita l-izvilupp fis-sit in ezami ghal zewg sulari;
• Il-proposta ghandha parking short fall ta’ hames parking spaces u ghalhekk tmur kontra l-policy TRA 4 tal-pjan strutturali; u
• Il-bini mhux mibni skond il-permess originali u ghalhekk il-provedimenti tas-Circular 2/96 japplikaw ghal dan il-kas.

Fir-risposta tal-Perit Robert Grech ippresentata fl-24 ta’ Gunju, 2005:
• Il-Pjan Lokali gie injorat fil-permessi PA 330/01, PA 5531/02 u f’ohrajn;
• Il-garaxxijiet li hemm wara s-sit mhux abbinati mal-units li nbnew originarjament;
• Ma hemm ebda karatteristici urbani importanti fiz-zona in ezami;
• Ma hemm ebda irregolaritajiet sostanzjali.

Fin-nota tal-Avukat Dr Leslie Cuschieri, ppresentata fit-18 ta’ April, 2007:
• Il-policy GZ-EDGE-1 tal-pjan lokali tghid li fejn il-height limitation hija ta’ zewg sulari jista jinghata receeded floor;
• Il-kas presenti hu wkoll kas ta’ commitment;
• Ghal applikazzjonijiet li dahlu qabel it-3 ta’ Awwissu, 2006, il-Height Relaxation Policy ghada applikabbli (PDG, 2007 – Part 17);

• Jista jithallas ammont ta’ flus fejn ma’ jkunx hemm parking spaces bizzejjed;

Fit-tielet risposta ta’ Lorinda Vella ghall-Awtorita’ ippresentata fl-20 ta’ April, 2007:
• Is-sit ma jaqax fil-parti GZ-EDGE-1 u ghalhekk ma’ japplikax ir-receeded floor;
• Is-sit ma jikkwalifikax taht parti 17 tal-PDG, 2007, peress li PA 2210/95 mhix fl-immediate ‘vicinity izda’ izda ‘within the same street’ u anke ghaliex l-izvilupp propost mhux ‘compatible with its immediate surroundings’ u il-sular addizzjonali ma jirrizultax f’ ‘improved streetscape’.

Fid-decizjoni moghtija mill-Bord Ta’ l-Appell ippresjedut mill-Avukat Dr Ian Spiteri Bailey li jgib id-data tal-4 ta’ Mejju, 2007:
• Il proprjeta fil-vicinanzi tas-sit in esami hija ta’ zewg sulari;
• Il-pjan lokali, kif approvat, jikkonferma ‘two floors’ ghas-sit in ezami mentri l-applikazzjoni hija ghal ‘three floors’ (Map M14.4-C).
• M’hemmx commitments ta’ bini ta’ aktar minn zewg sulari fil-vicinazi tas-sit in ezami l jistghu jiggustifikaw bini ta’ aktar minn zewg sulari;

Fin-nota tal-Avukat Dr Leslie Cuschieri ta’ l-1 ta’ Settembru, 2010, li tittratta zewg appelli jigfieri PAB 224/04 u PAB 279/07:
• Bil-permess PA 2376/93 hemm vested right fuq dan is-sit. Dan anke ghaliex meta l-PAB hareg il-permess dan ghamlu wara li ghamel site visit fis-sit in ezami;
• Jekk l-applikazzjoni PA 597/02 tigi approvata fl-istadju tal-appell din l-applikazzjoni awtomatikament tissanzjona l-illegalitajiet li hemm fuq is-sit;
• L-illegalitajiet li hemm fuq is-sit huma ‘minimi’;
• L-Awtorita m’ghandiex gurisdizzjoni fuq l-illegalitajiet peress li dawn saru qabel is-sena 1992;
• Inghataw numru ta’ permessi b’mertu simili ghal dan il-kas;
• Il-punt krucjali f’dan il-kas huwa li l-appellant huwa intitolat ghat-tielet sular in vista tal-fatt li l-Height Relaxation Policy ghada tapplika;

• Is-sit relattiv ghall-permess PA 2210/95 jinsab ftit metri boghod mis-sit in ezami u jikkostitwixxi commitment car;
• Fuq l-issue tal-commitments, is-sentenzi tal-Qorti ta' l-Appell jemfasizzaw l-importanza li dawn ghandhom jittihdu in konsiderazzjoni minkejja kull konsiderazzjoni kuntrarja ohra;
• Il-kas in ezami jikkonsisti f'renewal ta' permess diga mahrug b'differenzi zghar mill-permess originali;

Fin-nota addizzjonali ta' Mario Scicluna tas-26 ta' Ottubru, 2010, li tittratta zewg appelli jigfieri PAB 224/04 u PAB 279/07:
• M'hemmx vested right fuq dan is-sit li jirrizulta mill-permess PA 2376/93 kif qed jikkontendi l-appellant. Dan ghaliex il-PAB hareg dan il-permess skond it-talba ta' l-appellant kif kienet tirrizulta mill-files relattivi u mhux skond dak li ra meta ghamel is-site visit;
• Peress li l-applikazzjoni PA 597/02 hija outline application, anki kieku kellha tigi approvata fl-istadju tal-appell din l-applikazzjoni, xorta ma' tissanzjonax l-illegalitajiet li hemm fuq is-sit u dan peress li f' outline permit ma jigux approvati pjanti dettaljati. Fi kwalinque kas l-applikazzjoni PA 597/02 ma' tinkludiex talba ghas-sanzjonar ta' l-illegalitajiet li jezistu fuq is-sit;
• Is-siti li jikkorrispondu ghall-PA 1863/05 u PA 597/02 ma' jinkludux talba ghas-s-sanzjonar ta' l-illegalitajiet li saru.
• L-illegalitajiet m'humiex 'minimi';
• L-ezempji ta' permessi li gab l-appellant ma' japplikawx ghal dan il-kas;
• Fuq l-issue tal-commitments, is-sentenzi tal-Qorti ta' l-Appell jemfasizzaw l-importanza li f'kull kas, ic-cirkostanzi partikolari kollha tal-kas ghandhom jigu ikkonsidrati meta tkun qed issir id-decizjoni. Ma' jghidux li l-pjan lokali jew xi pjan jew policy ohra ghandu jigi injorat;
• L-ebda wahda miz-zewg applikazzjonijiet, PA 1863/05 u PA 597/02, ma' hija ghal renewal;
• L-Awtorita harget ECF 500/08 fuq l-illegalitajiet, liema enforcement ma' giex appellata mill-appellant li juri li l-appellant jaqbel li l-Awtorita' ghandha gurisdizzjoni fuq illegalitajiet li saru qabel is-sena 1992;

Fis-seduta tal-24 ta' Mejju, 2011, l-Avukat Dr Anthony DeGaetano, ivverbalizza li:
• Skond l-Artiklu 69, sub-artiklu 2(i) proviso, commitments ta gholi li jkun oghla dak fil-pjan lokali ma' jisrax jigi kunsidrat bhala material consideration li l-Awtorita jew it-Tribunal jikkonsidra fid-decizjoni taghhom.

Ikkonsidra ulterjorment:

Wara li kkonsidra il-premess u minn ezami tal-pjanti, ritratti u dokumenti li hemm fil-files PAB 224/04 u PA 0597/02, it-Tribunal jikkumenta kif gej:

Hemm qbil bejn iz-zewg partijiet li t-Temporary Provisions Scheme (TPS) u l-Height Limitation Guidance kienu japplikaw meta sar dan l-appell u li dawn jispecifikaw li, ghas-sit in ezami, il-height limitation huwa ta' zewg sulari.

L-Awtorita targumenta li peress li xi zmien qabel kien gie ippublikat id-Draft Gozo and Comino Local Plan, il-policy Interim Review of Building Heights Pending Local Plan Completion tas-sena 1993, ma' baqghatx tapplika u dan biex jigu ssalvagwardjati l-intenzjonijiet tal-policies SET8 u BEN4 ta' l-iStructure Plan. Dan ghalhekk kien necessarju biex ma' jigux compromessi l-proposti li kienu qed isiru fl-abbozz tal-pjan lokali.

It-Tribunal jaqbel li din kienet l-unika triq possibbli biex ma' jigux miksura l-policies SET8 u BEN4 ta' l-iStructure Plan li hija l-ligi li minnha johorgu l-pjanijiet u l-policies l-ohra kollha ta' pajjizna.

Illum il-Gozo and Comino Local Plan (Map M14.4-C) jikkonferma 'two floors' ghas-sit in ezami. L-gholi propost ta' tlett sulari hu ghalhekk in kontravenzjoni tal-height limitation approvata ghal din il-lokalita', u tal-Gozo and Comino Local Plan, Policy HTML-1.

Dwar il-Part 17 tal-Policy and Design Guidance, 2007, it-Tribunal jaqbel ma' l-Awtorita' li dan is-sit ma' jikkwalifikax peress li PA 2210/95 mhix fl-'immediate vicinity' izda 'within the same street' u anke ghaliex l-izvilupp propost

mhux ‘compatible with its immediate surroundings’ u is-sular addizzjonali ma’ jirrizultax f’ ‘improved streetscape’. Illum dahal fis-sehh l-proviso tal-Artiklu 69 (2) (i) tal-Kap. 504, li jghid li l-commitment tal-gholi tal-bini fil-vicinanzi ma jistax jigi interpretat li jgholli l-height limitation indikat fil-Plan.

L-applikant naqas milli jittratta b’mod konvincenti il-problema li qajmet l-Awtorita’ dwar l-illegalitajiet fuq is-sit in ezami (bi ksur tas-Circular PA 2/96) kif ukoll dwar il-fatt li l-proposta ma’ tipprovdiex spazju adegwat ghall-parking u li l-proposta ghalhekk tikser il-policy TRA 4 tal-pjan strutturali.

It-Tribunal jaqbel ma’ l-Awtorita li f’kull wiehed mill-kazi kkwotati mill-appellant fil-kors tas-smieh ta’ dan l-appell issib differenzi mill-kaz in ezami bhal:
• Iz-zmien meta tkun saret l-applikazzjoni peress li f’kull zmien dejjem japplika regime ta’ plans and policies specifiku ghal 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.

F’wahda mis-sottomissjonijiet tieghu l-appellant issottometta li l-applikazzjoni tieghu ghandha tigi deciza skond il-ligijiet, plans u policies vigenti meta saret l-applikazzjoni.

Il-kwistjoni dwar liema ligi hi applikabbli giet deciza mill-Onorabbli Qrati tal-Appell fil-kawza fl-ismijiet ‘Angelo Farrugia vs Awtorita’ tal-Ippjanar’ deciza fl-24 ta’ April 1996; kif ukoll fil-kas fl-ismijiet ‘Emanuel Mifsud vs Kummissjoni ghal Kontroll tal-Izvilupp’ deciza mill-istess Qorti fil-31 ta’ Mejju 1996.

Dawn id-decizjonijiet stabillew l-principju li l-applikazzjonijiet jigu decizi skond il-pjanijiet u l-policies in vigore fiz-zmien li tittiehed id-decizjoni u mhux dawk in vigore meta saret l-applikazzjoni.

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 0597/02 'Construction of flats at second floor', b' decizjoni tat-28 ta' Gunju, 2004 wara reconsideration.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:
1. It-Tribunal illeda d-dritt tal-audi alteram partem billi ma tax l-istess piz lill-argumenti tal-appellant kif ghamel mal-Awtorita;
2. It-Tribunal naqas li jaghti l-istess trattament lill-appellant u applika b'mod retroattiv ligi fis-sens illi commitemnt dwar building height ma japplikax, u ghandu jibqa' japplika l-principju tal-commitemnt kif kien meta l-kaz kien differit ghad-decizjoni;
3. Id-decizjoni tat-Tribunal mhix korretta jew gusta ghax:
a. L-applikazzjoni kienet ghal estensjoni ta' permess u xogholijiet addizjonali minuri u ghalhekk it-Tribunal ma setghax jirrevoka l-permess mahrug validatament;
b. Kieku applika l-policies kif mitlub mill-appellant f'dak iz-zmien ma kienx ikun hemm bzonn ta' sanzjonar;
c. Il-kwistjoni ta' sanzjonar ta' irregolaritajiet qatt ma giet spjegata sew fid-dawl tal-policies vigenti u cahhad lill-esponenti milli jirribatti l-akkuza. Anki kieku ezistew irregolaritajiet dawn kienu de minimis;
d. Jekk tezisti irregolarita qatt ma gie pruvat lil min jappartjenu l-irregolaritajiet meta tqis li fl-istess blokk hemm terza persuna li applikat u inhargilha permess;
e. Fil-kaz tat-terz ma tqajmitx il-kwistjoni ta' irregolarita;
f. L-irregolaritajiet cioe grada u liftwell setghu ingiebu ghall-attenzjoni tal-applikant fir-reconsideration u mhux ingiebu bhala skuza ghal rifjut;

g. In ogni kaz il-grada u liftwell saru fis-snin tmenin u ghalhekk ma kienux jaqghu fil-gurisdizzjoni tal-MEPA Circular 2/96 ma tapplikax ghalihom u messha intlaqghet l-applikazzjoni bhal ma ntlaqghet tat-terz;
4. Id-decizjoni tat-Tribunal ma osservatx il-principju tad-dritt vestit;
5. It-talba tal-appellant hi koperta bil-policies senjatament DC 2007 kuntrarja ghal dak li ddecieda t-Tribunal.

L-ewwel aggravju

Dan l-aggravju ma fihx mertu. Qari tal-atti u decizjoni tat-Tribunal juri illi l-partijiet inghataw kull opportunita li jressqu l-argumenti taghhom b'mod liberu u miftuh u l-istess verbali quddiem it-Tribunal juru illi l-appellant ripetutament f'diversi seduti talab u inghata l-fakolta li jezamina applikazzjonijiet ohra biex jissostanzja l-pretensjoni tieghu fl-appell u dan minghajr ebda xkiel u b'ghoti ta' terminu ragonevoli biex jivverifika dak li ried.

Id-decizjoni fiha sintesi dettaljata tal-argumentazzjoni kollha tal-partijiet, u t-Tribunal wizen dawn l-argumenti. Il-fatt wahdu li t-Tribunal attribwixxa aktar sahha lill-certi argumenti tal-Awtorita minn dawk tal-appellant ma jfissirx li nkiser xi dritt kif qed jippretendi l-appellant fit-termini ta' dan l-aggravju cioe l-lezjoni tal-principju tal-audi alteram partem.

Kwindi dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju fih kwistjoni legali interessanti u cioe jekk ghandux l-artikolu 69(2) li gie introdott fl-2011 ghandux japplika bi pregudizzju ghall-appellant billi sa dakinhar, l-gholi tal-binjiet fiz-zona kienet argument li seta' jitqajjem minn applikant bhala kwistjoni ta' sustanza li t-Tribunal kellu obbligu li jqis. Bl-introduzzjoni tal-proviso ghall-artikolu 69(2) dan l-argument li seta' jintuza a favur applikant fl-argumentazzjoni tieghu ghal ezitu favorevoli ghall-applikazzjoni tieghu gie eskluz specifikament bil-ligi.

Il-Qorti kienet tkun propensa li tidhol fil-mertu ta’ dan l-aggravju kieku d-decizjoni tat-Tribunal giet abbuzata biss jew principalment fuq il-kwistjoni tal-‘commitment’ b’referenza ghal height limitations bhala r-raguni li ghalih gie michud l-appell. Pero dan mhux il-kaz.

Hu minnu illi t-Tribunal ikkonsidrah bhala wiehed mill-elementi li jmur kontra l-argumentazzjoni tal-appellant, pero xorta wahda dahal fil-kwistjoni dwar il-permessi mressqa mill-appellant u ta’ aditu ghall-argumenti tal-Awtorita mhux tal-appellant. Aktar minn hekk pero, it-Tribunal fil-parti decisiva tieghu ghamilha cara li oltre l-policies u pjan lokali li l-izvilupp kien qed jivvjola, l-applikazzjoni infisha ma kienitx tinkludi talba ghal sanzjonar skond ic-crkulari 2/96, ezistenti meta saret l-applikazzjoni u ghalhekk fi kwalunkwe kaz it-talba ghall-izvilupp ma setghet qatt tigi approvata. Dan kien il-punt kardinali li wassal ghad-decizjoni tat-Tribunal u ghalhekk il-kwistjoni legali tar-retroattivita tal-ligi, ghalkemm interessanti mill-punto di vista legali, hi akkademika ghall-fattispecie ta’ dan l-appell u kwindi dan l-aggravju ghandu jigi michud.

It-tielet aggravju

L-appellant isostni illi d-decizjoni mhix gusta fil-konfront tieghu. Strettament dan l-aggravju lanqas jikkostitwixxi punt ta’ ligi determinat mit-Tribunal. Madankollu harsa lejn il-punti msemmija mill-appellant f’dan l-aggravju jirrizulta dan li gej.

L-appellant qed jassumi illi fic-cahda ghal hrug tal-permess it-Tribunal kien qed jirrevoka permess mahrug fuq l-istess sit. Dan ma hu minnu xejn. Kull ma ddecieda t-Tribunal hu illi l-applikazzjoni mertu ta’ dan l-appell kienet qed tigi michuda ghax irrizultaw nuqqasijiet lejn dak li kellu jigi zviluppat bil-permess PA 2376/93 u dak ezistenti fattwalment meta ntalab li jsiru emendi ghall-istess permess u alterazzjonijiet. Il-permess PA 2376/93 ma kienx minsus b’din id-decizjoni.

It-tieni u t-tielet lanjanza hi wahda fis-sens li kieku gew applikati l-policies fi zmien l-applikazzjoni u mhux dawk fiz-zmien tad-decizjoni, l-appellant ma kienx ikollu bzonn jissanzjona xejn. Dan mhux minnu ghax kif gia intqal f'din is-sentenza t-Tribnunal ibbaza primarjament id-decizjoni tieghu fuq in-nuqqas li jigu sanzjonati jew jintalbu li jigu sanzjonati illegalitajiet ezistenti mill-permess 2376/93 qabel saret jew flimkien mal-prezentata ta' din l-applikazzjoni. It-Tribunal in oltre applika cirkolari 2/96 ezistenti fiz-zmien tal-applikazzjni u kienet kwistjoni li giet imqajma mhux mit-Tribunal fid-decizjoni tieghu izda mill-bidu nett fid-decizjoni tal-Awtorita. Il-kwistjoni jekk dawn l-irregolitajiet kienux de minimis hi kwistjoni ta' fatt u mhix sindakabbli mill-Qorti. Ma hemmx bzonn li t-Tribunal jispjega l-kontenut tac-cirkolari biex ikun car ghax il-fatt stess li din il-kwistjoni kienet qamet ab initio, il-partijiet kienu ben konxji tal-portata ta' tali cirkolari.

Ir-raba, hames u sitt ilmenti huma kwistjonijiet ta' fatt li din il-Qorti ma tistax tissindaka u del resto t-Tribunal fid-decizjoni tieghu jidher car li kien fi qbil mal-Awtorita illi fil-fatt kien hemm illegalitajiet li skond il-ligi kellhom jigu sanzjonati qabel issir applikazzjoni ohra. L-istess Awtorita fis-sottomissjonijiet taghha tirreferi ghal enforcement notice li hareg fuq l-irregolaritajiet ECF 500/08 kontra l-appellant u li l-appellant ma agixxiex kontra din in-notice. Din tindika li kontra dak li qed jissottometti l-appellant f'dan l-istadju, ma taqment ebda kwistjoni ta' nuqqas ta' gurisdizzjoni fiz-zmien appozitu u fis-seda idonea ghal tali oggezzjoni.

In kwantu ghal lanjanza illi l-appellant ma nghatax l-istess trattament bhall-applikanti ohra t-Tribunal qabel mal-argumenti tal-Awtorita kontra dan l-argument u sostanzjah. Kien ikun hemm dritt ta' appell kieku l-appellant gie injorat pero t-Tribunal ha konjizzjoni tal-argument tal-partijiet kif riportati fl-istess decizjoni u ghal ragunijiet msemmija minnu kkonkluda li dan il-kaz kien fih differenzi li ma jimmeritawx l-istess trattament. Darba li l-kwistjoni tkun giet trattata u motivata din il-Qorti ma ghandhiex tassumi rwol ta' appell mill-gdid fuq il-fatti.

Ghalhekk dan l-aggravju ma jistax jigi milqugh.

Ir-raba aggravju

L-appellant jikkontendi li t-Tribunal ma osservax il-principju li ghandu dritt vestit. Dan l-aggravju ma tantx jiftiehem. Il-permess mahrug lill-appellant PA 2376/93 kien jikkostitwixxi dritt vestit fl-appellant li jizviluppa l-binja tieghu skond il-permess. Dan l-appell ma mess xejn minn dak il-permess. Dan pero ma jfissirx illi jekk il-binja mhix konformi mal-permess, allura qed jigi minsus xi dritt li l-applikant qatt ma jista’ jivvanta li ghandu. In oltre kull zvilupp sussegwenti irid isir fil-parametri ta’ dak permess originarjament u qabel jigi sanat dak kontravvenzjonali ebda zvilupp sussegwenti ma jista’ jigi permess. Ghalhekk il-Qorti ma tifhimx liema dritt vestit gie vjolat lill-appellant.

Jekk l-appellant qed jalludi ghal xi dritt li jinghata permess jizviluppa skond policies ezistenti fiz-zmien tal-applikazzjoni, il-Qorti tirrileva illi applikazzjoni tikkostitwixxi talba jew xewqa u l-applikazzjoni per se ma jikkostitwixxi ebda dritt fl-applikant. Id-dritt vestit jinsorgi meta tittiehed id-decizjoni a bazi tal-ligi, pjanijiet u policies kif ikunu fis-sehh fiz-zmien tad-decizjoni, u hu l-permess li jikkostitwixxi d-dritt.

Ghalhekk dan l-aggravju qed jigi michud.

Il-hames aggravju

Dan l-aggravju gie specifikatament trattat mit-Tribunal, kunsidrat u moghti interpretazzjoni li jirrizulta mill-qari tal-istess policy. Hu appellabbli aggravju materjali u sostanzjali li t-Tribunal jinjora jew ma jaghtihx id-debitu konsiderazzjoni ghalih. F’dan il-kaz it-Tribunal kkunsidra specifikatament dan l-aggravju u mill-fatti li kellu quddiemu wasal ghal konkluzjoni li din il-policy mhix applikabbli ghal kaz ghar-ragunijiet moghtija mill-istess Tribunal. L-interpretazzjoni ta’ policy hi fdata f’idejn it-Tribunal u din il-Qorti ma ghandhiex jedd tintrometti ruhha sakemm dak li t-Tribunal iqis interpretazzjoni tkun applikazzjoni hazina ta’ ligi jew policy. Pero dan mhux il-

kaz f’din l-istanza u ghalhekk dan l-aggravju ghandu jigi michud.

Decide

Il-Qorti ghalhekk tichad l-appell ta’ Gozo Caterers Limited u tikkonferma d-decizjoni tat-Tribunal ta’ Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta’ Novembru 2011. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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