



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tad-9 ta' Ottubru, 2013

Appell Civili Numru. 127/2012

Joseph Refalo

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Joseph Refalo tal-14 ta' Awwissu 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Lulju 2012 ghal ' to sanction differences from approved permit and to erect an extension at roof level to the existing residence and to install a lift' PA 4697/07;

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

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

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

B'applikazzjoni tat-23 ta' Lulju 2007 – Full Development Permission – PA/04697/07 fejn l-appellant, f' 13, Triq San Rokku, Kalkara talab:

“To sanction differences from the approved permit, and to erect an extension at roof level to the existing residence, and to install a lift.”

Illi permezz ta' rifjut hekk kif kkonfermat mill-Kummissjoni Għall-Kontroll tal-Izvilupp, it-talba għall-hrug tal-permess relattiv giet michuda għar-ragunijiet segwenti:

“1 The proposal runs counter to the adopted policy Development Control Guidance Developments Outside Built up Areas, and in particular to Section 8.2 paragraph (iii) which states that extensions to existing buildings must not create a total floorspace which exceeds 150 sq metres. The proposed sanctioning would lead to urbanisation outside those areas specifically designated for urban uses in the Structure Plan - i.e. : existing and committed built up areas and primary development areas, and so also runs counter to the Structure Plan strategy to channel development into existing and committed urban areas to constrain further inroads into undeveloped land.

2 The garage door has a height of 3.2 metres and is exceeding the permitted height of 2.8 metres as specified in Policy 6.8: Garage Door Openings of the Policy and Design Guidance 2007.”

Illi l-Perit Mannie Galea ressaq l-aggravji tal-appellant inter alia kif gej:

“This appeal is being submitted obo Mr. Joe Refalo of 13, Triq San Rokku, Kalkara. Mr. Refalo is the owner / appellant of the property in question. For ease of reference kindly find attached the following literature as following:

Appendix 1 Appeal Levy Fee.
Appendix 2 DCC Refusal Decision
Appendix 3 Photos of streetscape
Appendix 4 Site plan locating site
Appendix 5 Copy of proposed plans
Appendix 6 Copy of site permit PA2953/93
Appendix 7 Copy of Santu Rokku Hamlet Map
Appendix 8 Copy of MEPA reconsideration Report
Appendix 9 Copy of MEPA letter dated 15th December 2009 to submit fresh plans
Appendix 10 Undersigned letter of the 10th December 2009 relating to submission of fresh plans
Appendix 11 MEPA letter dated 21st April 2010 relating to request for fresh plans to keep total floor space as permitted
Appendix 12 Undersigned letter of the 26th April 2010 relating to submission of fresh plans

Appendices 10 and 12 are within themselves a reply to the refusal arguments. The only reason of discussion is the approved area over the original permit PA2953/93 whereas proposed development should not exceed this area. Undersigned relation is detailed enough to justify the appeal evaluated areas. The above shall be further during the Appeals Board meeting.”

Illi permezz ta' rapport l-Awtorita' ressqet il-kummenti taghha inter alia kif gej:

“5.0 COMMENTS ON APPELLANT'S ARGUMENTS

5.1 The Authority has noted the arguments as brought forward in appellant's request for appeal and shall address these issues hereunder:

5.1.1 In this request for appeal, appellant is stating that this request for development is justified in view that the proposed development satisfies all the requisites of the relevant policy.

5.1.2 However, after noting all of appellant's arguments as presented in this request for appeal the Authority disagrees with these justifications and states that the development as proposed breach the relevant policies as will be discussed below.

5.1.3 This application seeks to sanction minor amendments to existing dwelling unit which is covered by PA 2953/93. The minor amendments proposed for sanctioning include:

1. Extension at ground and first floor level;
2. Change in the configuration of a stairwell leading to first floor;
3. The proposal includes also the installation of lift and construction of a utility room at roof level.

The site is located outside development zone where as stipulated in PLP 20, Section 8.2, paragraph (iii), extensions to existing buildings must not create a total floorspace which exceeds 150 sq metres. Therefore the proposal is running counter to Section 8.2 paragraph (iii) of PLP 20. Furthermore the original dwelling unit has already been granted a floorspace of more than 150 sq.m. and hence no additional floorspace can be permitted.

The Authority took note of appellant's argument that latest plan does respect the total floorspace of what had been approved in PA 2953/93 and has recalculated both the approved plan and the latest submitted Red 64A. The measurement used the same methodology in both cases (ie the internal spaces of all rooms + all of the internal walls + the areas of all the stairways) and still resulted that Plan 64A is requesting a development with a massing of 15 sq.m. more than previously submitted. Hence considering that area is not within a scheme boundary and PLP 20 restricts such units to 150 sq.m. and the existing building is already much larger than 250 sq.m., any further extensions over and above that already permitted cannot be approved.

As regards to the Garage Door Opening - Submitted drawing Red 1 E indicates the garage door having a height of 3.2 metres from ground level. Hence the garage door height is running counter to Policy 6.8: Garage Door Openings of the Policy and Design Guidance 2007 which states that the garage door should not exceed an overall height of 2.8 metres. Subsequent Plan 50C (elevation) had shown that the garage door has been reduced to 2.7m as per policy. However considering that the original permit which should have been followed had granted a garage door opening with a height of 2.6m, the existing large garage door is illegal. In view of this illegality on site, PA Circular 2/96 states that unless an illegality is specifically requested to sanction, no further permits can be issued on same site.

In this case, on site the garage door has a larger height than approved and than what can be permitted, as well as the latest plan requesting a further alteration to its present height. Hence in such circumstances, this part of the illegalities on site (others are being requested to be sanctioned) has first to be physically altered on site to render it as per original permit. However, no evidence had been submitted by appellant to show that the garage door has actually been lowered on site and hence, reason for refusal No.2 is still valid in view of the existing illegality on site. Additionally, appellant cannot argue that if and when a permit was issued, then, at that stage, he would have conducted the necessary alterations to lower the garage height. This is not practical since although one could be granted a permit to conduct additions and alterations, one could still choose not to execute all of the approved additions (eg. if a change of use is requested, applicant could still choose not to physically make that approved change of use. or ego if a number of new floors are approved, the uppermost floor could still not be constructed for various reasons). Further clarifications on this notion will be discussed in the forthcoming appeal sittings.

5.1.4 Conclusively, the Authority states that whilst taking note of appellant's arguments in this request for appeal,

the Authority notes that there are no sound planning justifications which could justify a breach to the above cited policies. Hence, reference is made to the reports as presented by the Directorate and to the DCC's decision which dismissed this request for development since the DCC Board had based their decision on the valid relevant policies applicable to this area. Reference is also made to the detailed reports as included in the file and to the submissions (verbal and written) which will be presented during the appeals sittings.

5.2 MEPA therefore reiterates that it acknowledges and confirms that the reasons for refusal can be Justified on sound planning considerations which took into consideration all the relevant facts, planning policies, legislation and submissions as required by article 33/1 of Chapter 356 of the Laws of Malta, and thus, respectfully requests the Planning Appeals Board to confirm the decision of the Development Control Commission and to refuse this appeal. The Authority reserves the right to forward further submissions during the appeals process as necessary.”

Illi fl-access tat-28 t'Ottubru 2011 gie rilevat l-appellant qed jipproponi li jaghmel estenzjonijiet, u li minn naha tal-Awtorita' l-appellant ikun qieghed jeccedi l-parametri tal-policy vigenti. Il-perit Mannie Galea spjega li kien hemm permess precedenti u li qeghda ssir talba biex jigu sanzjonati wkoll xoghljiet li ma sarux fil-parametri tal-ewwel permess.

Illi fl-udjenza tal-25 ta' Jannar 2012 gew prezentati PA 4697/07 u PA 2953/93.

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba ghas-sanzjonar ta' differenzi mill-permess originali, u l-izvilupp ta' estensjoni fil-pjan tal-bejt fir-residenza ezistenti, u sabiex jigi installat lift.

Is-sit mertu ta' dan l-appell jinsab f' area imsejha Ta' Tewma li tiffirma parti mir-rural hamlet ta' Santu Rokku u li qiegħed gewwa Rural Conservation Area fl-indirizz ta' 13, Triq San Rokku, Kalkara.

Din l-applikazzjoni giet rifjutata peress li l-izvilupp konċepit imur kontra l-policy Development Control Guidance Developments Outside Built up Areas, u li l-garage huwa għoli 3.2 metri u li jeccedi dak permess mill-Policy 6.8: Garage Door Openings of the Policy and Design Guidance 2007.

Skond l-Awtorita' il-hamlet ta' Santu Rokku huwa wieħed mill-ftit 'unspoiled rural communities' li baqa' f' din il-parti ta' Malta (Policy GK 04, Grand Harbour Local Plan).

L-argumenti li tqajmu mill-partijiet fil-kors tas-smiegh ta' dan l-appell jistghu jigu migburin fil-qosor kif ġej:

L-appellant jissottometti li l-bazi għall-appell minnħu mressaq huwa msejjes fuq l-ittri pprezentati minnħu fil-21 t'April 2010 b'talba sabiex il-floorspace kif permess jigi mizmum u l-ittra tas-26 t'April 2010 dwar is-sottomissjoni ta' pjanti godda.

L-Awtorita' tissottometti li:

- Il-proposta tmur kontra l-artikolu 8.2 paragrafu (iii) tal-policy PLP 20, u dan peress li waqt li l-permess originali diga kien ikkonceda li l-bini kif approvat kien ta' madwar 288 metru kwadru jigifieri izjed mill-150 metru kwadru konċessi mill-policy PLP 20, issa l-appellant qed jitlob li jissanzjona bini li huwa 15 il-metru kwadru akbar;
- Il-bieb tal-garage imur kontra Policy 6.8: Garage Door Openings of the Policy and Design Guidance 2007 u dan peress li huwa 3.2 metri għoli meta l-għoli permess huwa ta' 2.8 metri; u
- Il-proposta tikser il-PA Circular 2/96 peress li l-appellant ma' inkludix talba biex jissanzjona l-għoli tal-garage fl-applikazzjoni in ezami u ma' irrangax l-għoli tal-garage qabel ma' applika.

Fl-opinjoni kunsidrata ta' dan it-Tribunal dan l-appell qatt ma' kien imissu sar ghaliex kien jaghmel hafna izjed sens li kieku l-appellant lahaq ftiehem car ma' l-Awtorita' dwar x'tibdil kellu jkun accettabbli ghall-Awtorita' biex din il-binja tigi sanzjonabbli. Wara kollox l-appellant diga kien inghata koncessjoni kbira meta inghata il-permess originali. Mhux accettabbli li l-appellant wara li kellu koncessjoni li kwazi tirdoppja l-area li hija permessa skond il-PLP 20 issa jipprova jerga japprofitta ruhu biex jiehu ftit iehor u di piu minghajr ma jaghmel commitment car li l-bieb tal-garage kien sejjer verament ibaxxih ghall-gholi li huwa rikjest mill-policies.

L-appellant ma gabx ragunijiet tajbin bizzzejjed f' termini ta' ipplanar biex jiggustifika t-talba tieghu.

Ghalhekk, fil-fehma kunsidrata ta' dan it-Tribunal, il-pozizzjoni tal-Awtorita' f' dan il-kas hija wahda soda u li hija pjenement sostnuta mill-policies vigenti. Ikun perikoluz hafna li wiehed jipprova igebbed izjed dawn il-policies ghaliex b' hekk ikun qed jinfetah il-bieb ghal numru kbir ta' talbiet simili. Dwar il-kaz li jsemmi l-appellant, jidher car li f' dan il-kaz ic-cirkostanzi kienu differenti ghal kas in ezami. Jista wkoll jinghad li anke kieku kien jirrizulta li inghata permess li kellu cirkostanzi li jigbhu daww tal-kas in ezami, jistghu zgur jissemmew numru kbir ta' applikazzjonijiet fejn talbiet simili gew michuda sahansitra anki minn dan it-Tribunal.

In konkluzjoni, kif jirrizulta mill-fatti li hargu fil-kors ta' smiegh ta' dan l-appell, billi jirrizulta li l-proposta in ezami tikser l-artikolu 8.2 paragrafu (iii) tal-policy PLP 20, il-policy 6.8 tal-Policy & Design Guidance 2007, u anke ghaliex f'dan il-kaz japplika l-Artikolu 14 tal-LN 514, dan l-appell ma jirrizultax fondant u ma jimmeritax konsiderazzjoni favorevoli.

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma r-rifjut mahrug mill-Awtorita' ta' l-applikazzjoni, - PA 4697/07, "To sanction differences from the approved permit, and to erect an extension at roof level to the existing residence, and to install a lift"

Ikkunsidrat

L-aggravji tal-appellant hu s-segweni:

1. It-Tribunal dahal f'argumenti mhux mertu tal-appell u ma indirizzax is-sottomissjonijiet tal-appellant u ghamel zbalji ta' fatt. Hu jsemmi li t-Tribunal ikkunsidra aktar il-premess originali PA 2953/93 u ma dahalx fil-fatt li fil-mori l-appellant irrinunzja ghal diversi talbiet biex ikun konformi mal-permess. Il-permess kellu floorspace li ma setghetx tigi injorata mit-Tribunal biex tigi applikata l-policy PLP 20 dwar il-permitted floorspace meta din mhix relevanti la hemm permess ezistenti. Di piu l-appellant ipprezenta pjanti godda fil-mori tal-appell biex ikun konformi u dan skond indikazzjonijiet li kienu nghataw u dawn gew injorati mit-Tribunal.

Il-Qorti tqis li dan l-appell mhux gustifikat. Jibda biex inghad illi t-Tribunal ma injorax il-permess ezistenti fuq is-sit u lanqas il-pjanti riveduti sottomessi mill-appellant fil-mori tal-proceduri tal-applikazzjoni, tant li fil-konsiderazzjonijiet tieghu hu kien fi qbil mal-argumenti tal-Awtorita illi anki bit-talbiet proposti l-izvilupp kien ser jeccedi bi 15-il metru kwardu dak il-floorspace gia approvat bil-permess moghti lilu. Il-kuntest tal-policy PLP 20 sar biex jigi enfasizzat illi binjiet li saru wara d-dhul fis-sehh tal-policy ma setghux ikollhom floorspace ta' aktar minn 150 metru kwadru, mentri fil-kaz in kwistjoni l-permess ezistenti kien jissupera bil-kbir dan il-floorspace u l-appellant qed jipprova jzid fuq dak approvat b'mod li mhux konformi mal-permess. Il-kwistjoni dwar il-floorspace qua valutazzjoni ta kemm fil-fatt hu l-floorspace propost hi wahda ta' fatt tekniku li taqa' fil-mansjoni tat-Tribunal.

In kwantu ghall-gholi tal-bieb tal-garage, it-Tribunal ukoll irrileva illi nonostante li l-appellant fil-mori tal-proceduri indika li kien lest li jbaxxi l-gholi tal-bieb tal-garage ghal 2.8 metru skond il-Policy and Design Guidance tal-2007 minflok l-attwali 3.2 metru biex jigi konformi mal-policy, skond l-Awtorita l-bieb kellu jkun ta' 2.6 metru skond il-permess u ghalhekk anki f'dan ir-rigward kien hemm

illegalita fuq is-sit li skond ic-cirkolari 2/96 kellu jew jitlob sanzjoni fl-applikazzjoni jew jirranga l-illegalita qabel japplika. Madankollu t-Tribunal dwar dan il-punt jaghmel zewg osservazzjonijiet. Fl-ewwel lok jikkonsidra illi l-appellant ma ghamel ebda commitment car li kien bi hsiebu jbaxxi l-bieb biex ikun konformi mal-policy u fil-parti decisiva jikkwota l-Avviz Legali 514 tal-2010 artikolu 14 li applikazzjoni ma tintlaqax jekk ma jkun hemm talba ghal sanzjoni tal-illegalita jew titneha l-illegalita qabel issir l-applikazzjoni ta' zvilupp fejn ma jkunx qed jintalab sanzjoni tal-illegalita. Ghalkemm il-Qorti tqis li f'dan il-kaz dan l-Avviz Legali mhux applikabbli billi l-applikazzjoni saret qabel ma dahal fis-sehh dan l-artikolu ta' natura procedurali, pero dan l-Avviz Legali ma hu xejn hlief rifless ta-cirkolari 2/96 li kien fis-sehh meta saret l-applikazzjoni. Il-Qorti filwaqt li ma taqbilx mar-ragunament tat-Tribunal rigward il-kwistjoni tal-gholi tal-bieb pero sostanzjalment fuq bazi legali hi gustament applikat ic-cirkolari 2/96, u ghalhekk ma tqis illi d-decizjoni ghal din ir-raguni ghandha tigi revokata speċjalment meta xorta d-decizjoni kienet tkun legalment fondata a bazi tal-floorspace li kien qed jintalab li jsir zvilupp jew jigi sanzjonat skond il-permess ezistenti PA 2953/93.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Joseph Refalo u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Lulju 2012. Spejjez ghall-appellant.

< Sentenza Finali >

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