



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-14 ta' Novembru, 2013

Appell Civili Numru. 187/2012

Jerry Ghigo

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Jerry Ghigo tas-27 ta' Novembru 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-8 ta' Novembru 2012 kontra r-rifjut tal-PA 4743/10 'to sanction extension to existing garage and change of use to silencer repairer';

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

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

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

B'applikazzjoni – PA/04743/10 fejn l-appellant, f'Teddy Garage, Triq is-Siggiewi, Mqabba, talab

“To sanction extension to existing garage and change of use to silencer repairer.”

Illi permezz ta' rifjut tas-27 ta' Lulju 2011, l-Awtorita' cahdet it-talba tal-applikant ghar-raguni segwenti:

“1. The proposed development conflicts with Structure Plan Policy SET 11, which does not permit urban development outside existing and committed built-up areas. The development does not fall into a category of non urban development which may be permitted outside existing or committed built-up areas in accordance with Paragraph 7.6 of the Structure Plan. The proposed development also therefore runs counter to policy BEN 5.

2. There is no justification for the development of this site as required by Structure Plan policy SET 12. It is apparent that there are no reasons from a planning point of view why the proposed development cannot be located in an area designated for development or in an existing built up area.

3. South Malta Local Plan is indicating that the relevant site falls within area identified for Protection of Agricultural Land. Within such areas only building, structures and uses essential to the need of arable agriculture will be favourable considered. Thus, the industrial use is not associated with the designated uses set out by the Local Plan. South Malta Local Plan is further showing that the site also falls within a Water Catchment Area, an Aquidfier Protection Zone and a Birds and Wild Rabbits Protection Zone. Thereofre, the proposed sanctioning will compromise the implementation of the policies of South Malta Local Plan set out for such areas.

4. The site falls within a public safety zone and therefore the proposal sanctioning is objectionable since it may cause a hazard to aircraft operations.”

Fl-appell tieghu, l-appellant, permezz tal-Perit Bezzina, jaghti is-segweni ragunijiet ghalix fl-opinjoni tieghu dan l-appell ghandu jigi milqugh:

“1. The proposed development is only an extension to an existing garage and change of use. Therefore, as against to recommendation (1) of the Refusal Decision, the area were the proposed extension and change of use is being proposed is already existing and committed.

2. The area in question is presently committed by other SMEs (PA 2417/09 & PB 4132/91), a tarmac plant & concrete batching plant (PA 3563/97), garages, stores, offices and boat park (PAB 258/10 & PA 4879/02), concrete brick factory (PA 316/03) and various quarries (vide attached plan indicating existing land taken up for industrial operations by third parties).

3. The proposal is not going to take up any further agricultural land. This is so because the application for development permission is a request for change of use and the extension is amounts to only 64m² as against to other areas taken up for various industrial operations which were actually approved or pending decision by MEPA as indicated in (2) above.

4. Although in reason (4) of the Refusal Decision it is being stated that the proposed sanctioning is objectionable since it may cause a hazard to aircraft operations, may I point out that the proposed extension is at the back of and existing garage with building permit 3866/86/2176/86, and therefore it is not going to effect in any way any aircraft operations.”

Fir-risposta tieghu Mario Scicluna, ghall-Awtorita' huwa jghid is-segweni:

"Preliminary Plea

1. The Malta Environment and Planning Authority hereby presents a copy of the latest DPA Report.

2. Since the arguments raised in the appeal submission have already been submitted by the appellant during the processing of this application (refer to doc 23 in the PA File) and the Environment and Planning Commission has already taken cognisance of such, the Malta Environment and Planning Authority has no further comments to add at this stage of this appeal in relation to the merits of this Appeal other than those already mentioned in the DPA report.

3. The Authority thus states that the attached detailed technical report addresses the arguments as submitted by the appellant in his request for appeal.

Enforcement Action on Site

4. It is also important to note that the site under this appeal is subject to an enforcement action as per ECF 787/95, stating:

“Ghandek zvilupp mhux skond il-pjanti approvati tal-permess PB 3866/86/2176/86 datat 9 t'Ottubru 1986 u dan peress li l-garaxx inbena akbar minn kif approvat kif ukoll l-istess garaxx qieghed jintuza ghat-tiswija ta' silencers minghajr permess.”.

Site under Appeal is located within a Scheduled Area

5. The Malta Environment and Planning Authority respectfully asserts that this Tribunal cannot hear and decide on the merits of this appeal in view that the proposed development is to sanction illegal development situated within a scheduled area as per LN 41/03 (Environment Protection – Bird Sanctuary).

Legislation

6. Article 70 (1) and Schedule 6 (2) of Act X of 2010 (Environment and Development Planning Act)

unequivocally state that no development may be regularised in scheduled property.

Conclusions and Reservations

7. Consequently, the appeal as presented should be dismissed as per reasons illustrated in the refusal letter dated 20 July 2011.

8. Without prejudice to the above, the Malta Environment and Planning Authority reserves its right to reply further on the merits of the appeal, if it would become necessary."

Fid-DPA report anness ma' din l-ittra l-Awtorita' taghti r-ragunijiet ghaliex fl-opinjoni taghha dan l-appell ghandu jigi michud. Is-segwenti huma siltiet minn dan ir-rapport li t-Tribunal jhoss ghandhom jigu ssottolineati:

"4.9.1 Overview

The proposal is identical to development previously refused on site in PA 983/07 (file attached). The works were refused by DCC on 7th January, 2009 and again by Reconsideration Board on 7th October, 2009. In accordance with plans submitted (Red 1D - 1F), the proposed development has remained unchanged from that already refused.

4.9.2 Proposed Works

The application is requesting the permission to sanction the change of use of a garage to a silencer repair workshop. The application is also seeking to sanction an extension which was constructed at the rear side of the garage. The extension in accordance with red 1D has an area of 64m². Thus, the existing garage has a footprint of 121m².

4.9.3 Policy Context

The aim of the Structure Plan is to control the spread of industrial developments outside the development zone.

The current use of the existing garage, that is, a silencer repairer workshop constitutes an industrial operation within the countryside. Thus, in accordance with paragraph 7.6 of the Structure Plan such facilities in view of their industrial nature do not qualify as a legitimate use which may be permitted in the rural area. Therefore, the request to sanction the current industrial use of the garage is in conflict with the overall aim of Structure Plan policy SET 11. The acceptance of such use outside the development zone will lead to the further intensification of an industrial development in the country side.

Structure Plan policy IND 6 considers industrial development on sites already identified by the Temporary Provisions Schemes and designated for Micro-enterprise Parks following the approval of a comprehensive topic study or of the relevant Local Plans. SME's (Micro enterprises)-Site Selection Exercise document (MEPA 2004) and South Malta Local Plan are respectively showing that the relevant site was not identified to be developed for industrial purposes.

To the contrary, South Malta Local Plan is indicating that the relevant site fall within area identified for the Protection of Agricultural Land (Map MA 3: Mqabba Environmental Constraints Map). Within such areas only buildings, structures and uses essential to the need of arable agriculture will be favourably considered. Thus, the industrial use is not associated with the designated uses set out by the Local Plan. South Malta Local Plan is further showing that the site also falls within a Water Catchment Area, an Aquifer Protection Zone and a Birds and Wild Rabbits Protection Zone (Map MA 3: Mqabba Environmental Constraints Map).

Therefore, the proposed sanctioning will compromise the implementation of the policies of South Malta Local Plan set out for such area. Thus, there is no apparent justification in terms of Structure Plan policy SET 12 as to why the proposed industrial use of the site cannot be located within an existing or planned industrial zone as it is required by Structure Plan policy IND 6.

The interested site also falls within the Flight Path Protection Zone (document 9). Civil Aviation Department confirmed their objection towards the proposed sanctioning in development planning application PA 1145/00 (red 29 in PA 1145/00, attached). This Department commented that the site lies within the 'Public Safety Zone', in which there is a very high risk of aircraft accidents (red 29 in PA 1145/00 attached). Furthermore, the said department considered the construction of an extension on site as a hazard to aircrafts (black 8 & red 19, PA 2460/92 attached). Thus, in PA 2460/92 confirmed their objection towards the further development of the site (black 8 & red 19, PA 2460/92 attached). Therefore, the request to sanction the constructed extension cannot be considered since it may cause hazard to aircraft operations."

Fl-ewwel nota ta' sottomissjonijiet tal-Avv. Dr Michael Sciriha u l-Avv. Dr Sharon Mizzi ghall-appellant huma jghidu s-segwenti:

"Illi jidher li l-Awtorita' qed tittenta tressaq dawn l-eccezzjonijiet:

1. Enforcement Action

Illi l-Awtorita' qed tallega li (1) l-garage inbena ikbar minn dak li gie approvat fis-sena 1986 (PB 3866/86/2176/86) u (2) li il-garaxx qed jintuza ghat-tiswija ta' silencers minghajr il-permess. A bazi ta' dawn iz-zewgt istantanzi l-Awtorita' harget l-enforcement.

Illi l-appellant jikkontendi li qabel xejn l-Awtorita' trid tressaq prova ta' dan – sa issa jidher li ma ressqet l-ebda wahda u allura ma tistax tipprevali ruhha minn dan l-aggravju kemm il-darba ma ipprovatux.

Illi dwar il-kobor tal-garage jinghad li jekk wiehed jara l-aerial fotos il-kobor tal-garage huwa kif approvat u xejn iktar. Wkoll u minghjar ebda ammissjoni ta' responsabilita', l-appellant jikkontendi li l-enforcement kellu ikun dirett lejn

il-parti li allegatament inbniet zejda u mhux diretta lejn l-binja kollha – ghalhekk f'danir-rigward, l-appellant jikkontendi n-nullita tal-enforcement.

Illi subbordinament u minghajr pregudizzju ghas-suespot hawn si tratta ta' binja li saret qabel is-sena 1992, anzi fis-snin 1984 u ghalhekk l-applikabilita tal-policies hija limitata anke ghal dak li jirrigwardja ic-change of use tal-garage li l-appellant ilu juza fl-istess generu ghal madwar erbghin sena, tant li huwa ghandu l-permessi kollha mill-awtoritajiet koncernati inkluz dawk tal-Vat.

2. Scheduled Area

L-Awtorita qed tghid wkoll li dan il-garage jinsab f'scheduled area - Ln41/03 - bird sanctuary.

Illi l-appellant jikkontesta anke din l-allegazzjoni stante li ma ingabet ebda prova f'dan ir-rigward li hemm xi bird sanctuary fil-vicinanze.

Ghalhekk l-appellant jikkontendi li l-ewwel trid tingib prova ta' dak kollu alleggat u it-tieni li fl-inhawi ghal dawk tal-appellant permessi precedenti gew approvati minghajr ma il-Bord dahal fil-kwisjtoni ta' din il-bird sanctuary o meno.

3. Article 70 (1) u Schedule (2)

L-Awtorita qed tikkontendi wkoll li peress li (skond hi), l-illegalita saret addiritura meta inbena l-garage stante li skond hi inbena ikbar minn dak approvat u ghalhekk din l-applikazzjoni ma tistax tissanzjona dak li sar; l-appellant assolutament ma jaqbilx ma dak li qed jigi allegat ghall-istess ragunijiet li spjega hawn fuq u cioe l-Awtorita naqset li tipprova t-tezi taghha ;

L-appellant ghalhekk jikkontendi li fl-ewwel punt, l-Awtorita ma irnexxiliex tipprova l-allegazzjonijiet kollha taghha u ghalhekk l-argument tal-applikabilita ta' dawn l-artikoli ma ireggiex.

Fir-rigward tal-artiklu 70, l-appellant jikkontendi li anke kienu stess dan ma ghandux japplika b'mod retroattiv. Ubi

lex volut, lex dixit. Jekk wiehed jara l-artikolu 70 skeda 6 issib li l-ligi qed taghmel referenza cara ghall-applikabilita ta' dan l-artikolu minn Mejju 2008, mhux l-istess taghmel f'Scheduled property u ghalhekk mhux applikabbli retroattivament.

Finalment wkoll u minghajr pregudizzju ghas-suespost, l-appellant jirriserva l-posizzjoni tieghu rigward il-legalita' o meno tal-applikazzjoni tal-Artikoli hawn fuq imsemmija stante li l-ordinament guridiku jorbot ghal futur u mhux b'mod retroattiv; dan huwa assodat f'gurisprudenza varja u vasta; L-Awtorita ma ghandhiex tinsa wkoll d-drittijiet akkwisiti u patrimonjali ta' kull persunu u dawk Kostituzjonali.

L-Appell fil-mertu

Il-kwistjoni tal-estensjoni

Illi ma hemmx dubbju li s-sit inkwistjoni huwa kopert b'zewgt permessi regolarment approvati: PB 2737/84 u estensjoni PB 3866/86/2176/86;

Illi l-appellant ma jaqbilx li l-kobor tal-gargae kif originarjament approvata kien ta' 15 1-metru kwadru u li l-estensjoni kabbret 1-area totali ghal 48 metri kwadri; minn jallega irid jipprova u ghalhekk jekk l-Awtorita qed tallega li dank ellu ikun il-kbor tal-garage originarjament, ghandha iggib prova.

Illi l-applikazzjoni pendenti quddiem dan l-Onorabbli Tribunal qed issir sabiex titlob estensjoni ta' dak li l-appellant diga ghandu bil-permess ghalih - effettivament dak li l-appellant qieghed jitlob huwa estensjoni ghal office u facilitajiet sanitarji; irrISPettivament minn jekk dan l-garage jinsabx f'zona barra mill-konfini ta' zvilupp jew le, l-appellant qieghed jitlob estensjoni ma bini debitament kopert bil-permessi u ghal facilitajiet inkluz dawk sanitarji; l-appellant jikkontendi li ma hemmx dubbju li huwa ghandu ikollu id-dritt ta' facilitajiet li huma essenzjali ghal ghixien decenti u dan anke fin-norma ta' ligijiet ta' sanita u direttivi tal-Unjoni Ewropea.

Illi wkoll l-estensjoni hija wahda minima ghal dak li huwa il-kobor generali tal-garage u wkoll l-izvilupp kemm il-darba jigi permess ser isir fuq il-parti ta' wara tal-garage; jigi rilevat wkoll li l-estensjoni ma dak li inghata lil hadd iehor hija negligibbli.

Il-Kwisjtoni ta' change of use u il-Commitment

Illi l-appellant jikkontendi li huwa ghandu jinghata change of use stante li fiz-zona de quo hemm commitment ta' l-istess generu ta' binjiet uta' portata kabar; senjamentament

PA 2417/09 u PB 132/91;

PA 3563/09 - batching plant;

Pab 258/10 u PA 4879/02 - Garages, stores u baot yard;

PA 316/03 - Factory Dok

Illi l-appellant jikkontendi li fejn din z-zona ghalkemm ODZ hija diga committed area b'din it-tip ta' industrija, kif inhi committed per eżempju l-area ta' Xwieki Road, Tal-Balal, San Gwann u fejn permessi simili baqghu jigu approvati anke ricentement u ghalhekk t-Tribunal ghandu jikkonsidra wkoll dan il-fatt li dawn huma permessi antiki fid-deliberazzjonijiet tieghu.

Il-Commitment

Illi referibbilment ghall-kwistjoni ta' l-Commitment u in sostenn ta' dak allegat, l-appellant jaghmel referenza ghall-gurisprudenza varja u jiccita is-segwenti kazistika:

a. Trident Development Limited vs. l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar (4/2008) li ddecidiet kif isegwi:

"Din il-Qorti thoss li jidher car li bhala fatt li hemm commitment fl-istess area ta' diversi zviluppi, koperti bil-permess, ukoll bhal jew simili, u anke to' entita' ikbar minn dak propost mill-istess appellant, u allura a bazi tal-istess il-Bord (tal-Appell dwar l-Ippjanar) hareg l-istess permess ta' zvilupp a bazi ta' commitment. B'hekk il-Bord iddecieda li fid-dawl li l-istess zona hija kommissa, tali permess jista' jinhareg u din hija l-posizzjoni legali korretta."

b. L-istess gie konfermat fid-decizjoni tal-Bord ta' l-Appell fl-ismijiet *Salvu Mallia vs. Kummissjoni għall-Kontroll ta' l-Izvilupp* (PAB 221/97, PA 4213/96):

"Ir-regola ta' *cerimus paribus* maghdud mal-commitment massicc li hemm favur l-applikazzjoni odjerna ma thalli ebda triq lill-Bord hlief li japplika f'dan l-appell dak li gie applikat mill-Kummissjoni stess fid-diversi binijiet".

c. u wkoll fid-decizjoni *Dione Bartolo kontra l-Kummissjoni għall-Kontroll ta' l-Izvilupp* (PAB 633/98, PA 0131/98):

"Dak li thalla jsir fil-kaz ta' wiehed ghandu jithalla jsir fil-kaz ta' kulhadd".

It-trattament ugwali u ir-regola ta' *cerimus paribus*

Illi għalhekk l-appellant jikkontendi li huwa ghandu jinghata trattament b'mod identiku għall-permessi ohra li gew debitament approvati u jissottometti li kemm-il darba dan l-appell jigi rifjutat ser issehh ingustizzja u diskriminazzjoni rnanifesta fil-konfront tieghu.

Din il-posizzjoni giet ikkonfermat mill-Onorabbli Qorti tal-Appell fil-kawza fl-ismijiet *Joseph Muscat vs l-Awtorita' ta' Malta* dwar l-Ambjent u l-Ippjanar deciza fit -18 ta' Mejju 2005, fejn il-Qorti qalet illi:

"Fil-fatt gie retenut gudizzjarjament illi l-applikazzjonijiet simili jirrikjedu trattament identiku. Id-decizjonijiet f'dan ir-rigward, u l-konsiderazzjonijiet li jwasslu għal dawn id-decizjonijiet necessarjament jinhtieg li ikunu konsistenti. L-inkonsistenza għandha bħala konsegwenza, il-kontestazzjoni gustifikata, id-diskriminazzjoni, l-inegwajanza, u mill-aspett soggetti tal-applikant l-ingustizzja."

II-Policies

Illi għal dak li jirrigwardja l-policies ikkwotati, l-appellant jikkontendi li l-Policies għandhom jigu applikati bl-iktar

mod rigoruz meta si tratta zona barra mill-konfini ta' zvilupp, imma wiehed ma jridx jinsa li hawn si tratta ta' garage li diga ghandu permess ta' bini debitament approvat. Dan l-Onorabbli Tribunal ma ghandux jinsa li l-appellant mhux jitlob permess gdid f'zona ODZ imma qieghed jitlob estensjoni ta' bini ghal garage li huwa ghandu permess validu u vigenti. In oltre dan it-tribunal ghandu japprezza wkoll illi l-estensjoni qed tintalab ai fini ta' facilitajiet sanitari u ufficju li fid-dinja tal-lum certament ikkostitwixxu l-essenzjal. Ghalhekk l-appellant jikkontendi li l-Polcies kollha li gew ikkwotati bhal: BEN 1, AHF 5, RCO 2, RC04, SET 11, Set 12, IND 6, IND 7 huma irrilevanti u inapplikabbli ghal kaz odjern stante li jittrattaw proposta ta' bini gdid - certament mhux il-kaz il-kwistjoni stante li dan huwa garage li diga ghandu permess vigenti.

Ghar-rigward tal-Policies l-ohrajn, l-appellant jikkontendi l-istess' stante li dan l-Onorabbli tribunal ma jistghax jikkonsidra din l-applikazzjoni barra mill-kuntest taghha u cioe applikazzjoni ghal estensjoni ta' garage li diga ghandu permess u change of use f'zona li hija committed b'permessi simili u akbar approvati precedentement.

Finalment rigward l-oggezzjoni tal-Civil Aviation Department jinghad li din l-proposta ta' zvilupp hija wahda minima meta komparata ma binjiet ohra fil-vicin li gew approvati u ser isir fuq n-naha ta' wara tal-garage u ghalhekk mhux ser taffettwa it-tragittorja tal-arjuplani."

Fit-tieni risposta tal-Awtorita' l-Awtorita' tghid is-segwenti:

"The Authority has noted all the arguments as presented in the last submissions and states that:

1.1 The first permit on site PB 2737/84 was issued on 24/01/1986 to erect room for agricultural tools, subject to a setback of at least 30 feet from existing road alignment. Another permit PB 2176/86 to carry out extension as per plans submitted was issued on 09/10/1986 on the same site.

A Stop & enforcement notice ECF 787/95 was issued on 14/09/1995 for the following:

“Ghandek zvilupp mhux skond il-pjanti approvati tal-permess PB 3866/86/2176/86 datat 9 t'Ottubru 1986 u dan peress li l-garaxx inbena akbar minn kif approvat kif ukoll l-istess garaxx qieghed jintuza ghat-tiswija ta' silencers minghajr permess.”

Subsequently, the following applications and corresponding appeal were submitted to sanction the enforcement and all were refused;

- PA 2460/92 – to construct an extension to garage.
- PA 6073/94 – to change the use of a garage into a silencer repairer.

An appeal was later submitted but was dismissed as per PAB 455/95 in sentence as delivered on 24.01.2000

- PA 180/98 – to sanction an extension to an existing garage.

An appeal was later submitted but was dismissed as per PAB 584/98 in sentence as delivered on 24.01.2000

- PA 1145/00 - to sanction additions to existing garage & change of use from garage to silencer repairer.

Since the first stop & enforcement notice issued on 14/09/1995 did not include all the illegalities, a new stop and enforcement notice was issued on 15/03/2004 against owner. Both PA 983/07 and PA 4743/10 were refused applications to sanction this enforcement. Hence, although the appellant is claiming that the garage and its change of use occurred prior to 1992 and that he has all the necessary permits, this claim is ill-founded since the appellant has tried through a number of failed attempts to sanction the change of use and extension and no permits were issued.

1.2 Contrary to what is being claimed by appellant the site falls within an area designated by the South Malta Local Plan as a Bird and Rabbit protection Zone.

1.3 The appellant is claiming that the extension to the garage is needed for an office and sanitary facilities in connection with the operation of the garage. The change of use from garage to silence repairs falls under Class 11-Business and Light Industry as per Development Planning (Use Classes) Order, 1994. Hence, the proposal does not fall within a category of non-urban uses which are essential for the needs of agriculture for which the first permit PB 2737/84 was issued and which can be considered as legitimate developments in the countryside.

1.4 The appellant has presented a list of development applications concerning the same type of development of the present appeal which he is contending were approved in the same area.

It is to be noted that none of the following applications was granted development permission and none of the sites are located in the vicinity of the site under appeal.

PA 2417/09: Application to sanction the construction of garages in Mqabba = not yet processed.

PA 3563/09: Granted application for the construction of three storey dwelling in Qormi Scheme.

PA 4879/02: Refused application for the reclamation of disused quarry in Siggiewi. A request for appeal is still pending (PAB 258/10).

PA 316/03: Application to construct a concrete brick factory in Siggiewi. No permit issued.

Additionally, as regards to the issue of *cerimus paribus* the Authority has noted appellant's arguments and states that in these latest submissions no permit number has been cited and which had identical planning considerations to the case under appeal and hence, the Authority cannot forward its comments to the presumed identical permits.

As regards to the last paragraph of appellant, the Authority acknowledges that a permit for agricultural use had been issued but appellant did not cite or provided a copy of any subsequent permit to justify the existing commercial use. Hence, any further land take up of such

ODZ land cannot be justified even if the request is for an extension. If appellant intends to ameliorate, modernize or upgrade his commercial activity, then a more suitable location should be sought in which such uses and massing (in view of the commercial use) would be permissible by the relevant planning policies. The fact remains that this is an ODZ area which is even scheduled through a Legal Notice and hence, only limited development (and related to genuine agricultural activity) could be considered.

In this regard, the Authority reiterates that in line with its previous reports, this request for appeal is not justified by the relevant planning policies and states that the Board's decision was warranted and hence respectfully requests the Tribunal to dismiss this request for appeal."

Fit-tieni nota ta' sottomissjonijiet taghhom, l-Avv. Dr Michael Sciriha u l-Avv. Dr Sharon Mizzi ghall-appellant jghidu s-segwenti:

"Illi referibbilment ghall-ahhar verbal quddiem dan l-Onorabbli Tribunal u anke b'risposta ghas-sottomissjonijiet ta' l-Awtorita' li z-zona in kwistjoni mhix committed b'binjiet li ghandhom attivita' kummercjali, l-esponenti issottometti:

- PA 2417/09 u PB 4132/91 (PB permit issued); Dok AA
- PA 3563/97 – tarmac and batching plant (permess mahrug – ara Dok A anness)
- PAB 258/10 (approvat) u PA 4879/02 pendenti – Garage, stores u boat yard.
- PA 316/03 – concrete brick factory
- PA 4145/10 – site at ta' Kandja approvat Dok B

Illi ghalhekk l-appellant jikkontendi li din z-zona ghalkemm barra miz-zona ta' l-izvilupp ODZ hija diga committed b'din it-tip ta' industrija, if inhi committed per eżempju z-zona ta' Triq ix-Xwieki, tal-Balal, San Gwann u fen permessi simili baqghu jigu approvati anke ricentement u ghalhekk it-Tribunal ghandu jikkonsidra wkoll da nil-fatt fid-deliberazzjonijiet tieghu.

Illi ghalhekk l-appellant jikkontendi li dan l-Onorabbli Tribunal ghandu japprova l-permess kif mitlub u cjoe c-change of use tal-istess garage u l-estensjoni stante li fiz-zona de quo hemm commitment ta' l-istess generu ta' binjiet u ta' portata kabar ara PA 3563/97 batching plant.

Illi a skans ta' repetizzjoni l-esponenti jissottometti li ghandu jinghata trattament ugwali ghal dak li inghata haddiehor u li ghandu jinghata l-permess kif mitlub anke peress li l-estensjoni qed jitlobha bahal ufficju ufacilitajiet sanitarji – certament necessita.

L-esponent jirreferi lit-Tribunal ghan-nota ta' sottomissjonijiet tieghu datata 16 ta' Dicembru 2011 u ghall-argumentazzjonijiet imressqa hemmhekk.”

Ikkunsidra ulterjorment:

Wara li kkonsidra il-premess u minn ezami tal-pjanti, ritratti u dokumenti li hemm fil-files PAB 643/11 u PA 4743/10 , it-Tribunal jikkumenta kif gej:

Il-mertu ta' dan l-Appell jirrigwarda talba ghas-sanzjonar ta' extension ghal garage ezistenti u change of use ghall-silencer repairer.

Is-sit huwa ODZ, u jinsab fil-limiti tal-Imqabba. Il-garage in ezami ghandu footprint ta' 121 metru kwadru u gholi minn barra ta' 15 il-filata waqt li s-sit ghandu area ta' 180 metru kwadru.

Skond l-Awtorita' il-pjan lokali juri li s-sit huwa mmarkat bhala li qieghed gewwa zona li hija indikata ghal Protection of Agricultural Land, Water Catchment Area, Aquifer Protection Zone u Birds and Wild Rabbits protection Zone.

Is-sit ghandu limitazzjonijiet ohra peress li qieghed fil-Flight Path Protection Zone u gewwa il-Bird Sanctuary tal-Ajruport ta' Hal Luqa.

L-Awtorita' tindika wkoll li bejn is-sena 1984 u is-sena 1986 kienu hargu zewg permessi ghal agricultural store fis-sit in ezami li flimkien kienu jkopru kamra b'footprint ta' 48 metru kwadri li kellu jkun 30 pied irrtrirat mit-triq. Minn dak iz-zmien saru diversi applikazzjonijiet biex jigi sanzjonat l-izvilupp kif inhu illum izda dawn dejjem kienu rifjutati. In fatti is-sit bhalissa huwa kopert minn enforcement notice (ECF 787/95) li gie riferut ghad-direct action.

Din il-proposta giet michuda peress li

- L-izvilupp jikser il-policies SET 11 u BEN 5 tal-Pjan ta' Struttura u dan peress li dan huwa zvilupp urbanizanti fl-ODZ;
- L-izvilupp jikser il-policy SET 12 tal-Pjan ta' Struttura u dan peress li m'hemm ebda raguni f' termini ta' ippjanar ghaliex dan l-izvilupp ma' jsirx fiz-zona tal-izvilupp;
- Il-proposta ma' taqax taht wahda mill-kategoriji ta' bini li jista' jsir f' zona li hija indikata ghal Protection of Agricultural Land, Water Catchment Area, Aquifer Protection Zone u Birds and Wild Rabbits protection Zone; u
- Is-sit qieghed f' zona li tinsab fil-Flight Path Protection Zone.

L-argumenti, fil-mertu, li tqajmu fil-kors tas-smieh ta' dan l-appell jistghu jigu elenkati fil-qosor kif gej.

Fl-appell tieghu, l-appellant isostni li:

- Il-permessi PB 2737/84 u PB 2176/86 jkopru l-izvilupp in ezami ghalhekk l-appellant qed jitlob estensjoni ghal bini li huwa kopert bil-permess;
- L-Awtorita' ma' gabitx provi li s-sit in ezami inbena akbar minn dak permess originarjament u li dan illum qed jintuza bhala garage ghat-tiswijja tas-silencers;
- Il-garage huwa kopert b' permessi regolari. L-Awtorita' ma' gabitx provi li l-garage inbena akbar minn dak approvat fil-permessi originali;
- Peress li l-garage u l-attivitá' ilhom li bdew minn qabel is-sena 1992 allura l-izvilupp huwa sanzjonat awtomatikament.

- Ma' ingabitx prova li s-sit in ezami jinsab f' zona li hija bird sanctuary.
- Gew approvati permessi simili f' din iz-zona minghajr ma' ttiehed kont li s-sit jinsab gewwa bird sanctuary.
- L-Artiklu 70 ma' japplikax b' mod retroattiv;
- Fiz-zona in ezami jezistu numru ta' zviluppi li huma ta' tip industrijali u li generalment huma ta' portata akbar mill-izvilupp in ezami. Ghalhekk iz-zona diga hija committed. Il-permessi imsemmija huma PA 2417/09 u PB 4132/91, PA 3563/97, PAB 258/10 u PA 4879/02, PA 316/03, PA 4145/10.
- L-appellant ghandu jinghata trattament identiku skond ir-regola ta' cerimus paribus;
- It-Tribunal ma' jistax jikkonsidra l-applikazzjoni barra mill-kuntest taghha jigifieri applikazzjoni ghal garage li diga ghandu permess u ghalhekk il-policies kollha li qed tikkwota l-awtorita' ma' japplikawx.

Fir-risposta tieghu Mario Scicluna, ghall-Awtorita' jipprezenta covering letter fejn jispjega li peress li l-argumenti imqajma mill-appellant diga gew ittrattati fil-kors tas-smieh tal-appell quddiem l-EPU, huma kienu qed jipprezentaw kopja ta' l-ahhar verzjoni ta' dan id-dokument u jzid li:

- Jezisti enforcement notice fuq is-sit in ezami (ECF 787/95);
- Jiddikjara li skond hu dan it-Tribunal ma' jistax jisma dan l-appell peress li jezisti zvilupp bla permess fuq is-sit li jinsab f' zona skedata; u
- Skond l-Artiklu 70 , Skeda 6 (2) l-ebda zvilupp ma' jista jigi sanzjonat meta dan ikun fuq art skedata.

Fit-tieni nota taghha, l-Awtorita tirribatti l-punti li qajjem l-appellant billi tghid:

- Il-permess PB 2737/84 hareg ghal room for agricultural tools bil-kundizzjoni li jkollu setback ta' 30 pied mit-triq u il-permess PB 2176/86 kien hareg ghal extension fuq din il-kamra skond sett ta' pjanti. Fl-14 ta' Settembru 1995 hareg enforcement fuq dan is-sit ghaliex il-kamra ma' nbietx skond il-permess u ukoll ghaliex kienet qed tintuza ghat-tiswijja tas-silencers;

- Minn dak iz-zmien saru erbgha applikazzjonijiet u zewg appelli biex jigi ittentat is-sanzjonament ta' dan l-izvilupp u l-uzu. Dawn kollha gew rifjutati;
- Fil-15 ta' Marzu 2004 hareg enforcement iehor fuq dak ezistenti biex ikopri illegalitajiet ohrajn. Saru zewg applikazzjonijiet ohra biex jigu sanzjonati dawn l-illegalitajiet izda dawn gew michuda wkoll;
- Dan juri li l-asserzjoni tal-appellant li ghandu permess ghall-izvilupp hija nfondata;
- Skond is-South Malta Local plan, Map 3, is-sit jinsab gewwa Birds and Rabbits Protection Zone;
- L-applikazzjoni PA 2417/07 ghadha ma' gietx determinata;
- Il-permess PA 3563/09 inghata within scheme gewwa Hal-Qormi;
- L-applikazzjoni PA 4879/02 giet rifjutata u l-appell PAB 258/10 ghadu ma' giex deciz;
- L-applikazzjoni PA 316/03 ma' inghatax;
- Ebda wiehed mill-ezempji li semma l-appellant ma' kien vicin tas-sit in ezami u fl-ebda kas ma' kien hemm cirkostanzi tal-ippjanar li kienu identici ghal-kas in ezami. Ghalhekk, skond l-Awtorita' il-principju ta; cerimus paribus ma' japplikax.

Kif jirrizulta bl-izjed mod car mill-premess, il-pozizzjoni tal-Awtorita' f' dan il-kas hija wahda soda u li hija pjenament sostnuta mill-policies tal-ippjanar vigenti u speċjalment dawk li jikkellmu dwar zvilupp ODZ. Ikun perikoluz hafna li wiehed jipprova igebbed izjed din il-policy ghaliex b' hekk ikun qed jinfetah il-bieb ghal numru kbir ta' talbiet simili li jistghu jwasslu ghad-distruzzjoni totali tal-kampanja f'numru ta' zoni li ghandhom sensittivita' speċjali f' dawn il-gzejjer u dan kontra wiehed mill-principji fondmantali tal-iStructure Plan.

Irid jinghad ukoll li l-appellant ma' gab ebda argument f' termini ta' ippjanar biex jirribatti il-pozizzjoni tal-Awtorita' fuq dan il-kas. Ghalkemm l-argumenti li gab l-appellant ma' kienux f' termini ta' ippjanar xorta wahda l-Awtorita' irribattiet l-argumenti kolla li gab l-appellant b' mod li ma' jista jhalli ebda dubju li l-appellant m' ghandux ragun f' termini ta' ippjanar.

Fil-fehma kunsidrata ta' dan it-Tribunal, l-appellant qiegħed biss jipprova jipposponi l-inevitabbli billi jibqa jiffa applikazzjoni wara l-oħra għall-istess żvilupp nonostante li dan jieħu rifjut wara l-ieħor. L-appellant għandu jindirizza l-problema tiegħu b'mod kompletament għdid għaliex inkella qatt m' hu ser jirrisolvja.

Dwar l-eżempji ta' żviluppi fil-vicinanze li skond l-appellant huma simili, l-Awtorita' tat spjegazzjoni konvincenti dwar kull permess li ccita l-appellant bħala li kien simili għat-talba tiegħu u li ingħata fl-istess zona. Fil-fatt jirrizulta li ebda wieħed minnhom ma' kien fl-istess zona, ta' l-istess tip f' termini ta' ippjanar u fuq kollox li fil-maggoranza tagħhom dawn jew ma' gewx approvati jew gew approvati għax kienu fiz-zona tal-iżvilupp.

Fi kwalunkwe kas, dan it-Tribunal huwa tal-fehma li jekk din l-issue ta' x'jikkostitwixxi precedent, f' termini ta' ippjanar, ma' tittehidx fil-perspettiva gusta tagħha jista' jigi żmien meta' l-ebda parti minn dawn il-gzejjer ma' tigi salvata minn żvilupp urbanizzanti ta' kull tip li bil-mod jeqred il-kampanja kollha u dan b' dannu għall-generazzjonijiet kollha li għad iridu jigu u kontra wieħed mill-principji fundamentali li għalih l-iStructure Plan inkiteb u gie addottat bħala l-ligi bazika tal-ippjanar ta' pajjizna.

Hawn taht qed tigi kkwotata decizjoni recenti ta' dan it-Tribunal li turi l-pozizzjoni tat-Tribunal fuq l-issues ta' x' jikkostitwixxi precedent u x' inhu commitment f' termini ta' ippjanar:

“Jekk precedent, f' termini ta' ippjanar, f' dan il-kas jista' jfisser permess ta' bini fl-ODZ li ingħata f'xi żmien qabel, għaliex m' għandux jittiehed bħala precedent ukoll rifjut ta' talba simili li jkun ingħata lil xi hadd ieħor fl-istess zona skond kif jitolbu l-policies tal-iStructure Plan? Certament jezistu hafna u hafna iżjed kazi fejn talbiet għal żvilupp urbanizzanti fl-ODZ gew michuda appuntu skond ma' jgħidu l-policies tal-iStructure Plan u dawn, b' argument identiku, għandhom jittiehdu bħala li gie ikkreat precedent favor li l-status quo f' dawn iż-zoni ma' jinbidilx.

F' termini ta' ippjanar jekk precedent li jigi segwit b' kazijiet simili fl-istess zona, mhux kas singolu izda numru konsiderevoli ta' kazijiet simili, dan eventwalment jista' johloq commitment u cioe il-konsiderazzjoni materjali imsemmija fil-ligi (art. 69(2)(i)) li l-Awtorita' tista' tirritjeni bhala rilevanti fl-ghoti tal-permess. Jidher car mill-premess li f' dan il-kas zgur li ma' tezistix di is-sitwazzjoni.

Fi kwalunkwe kas irid jinghad li l-kuncett ta' commitment f' terminu ta' ippjanar ghandu japplika biss f' kazi eccezzjonali u ghandu jigi uzat b' kawtela kbira u dan ghaliex id-dixxiplina teknika u xjentifika ta' land use planning giet stabbilita f' pajjizi zviluppati u avvanzati appuntu biex permezz ta' pjani strategici fit-tul u management ghaqli jitrazznu u addirittura jigu mmregga lura proliferazzjoni ta' zvilupp u land uses ohrajn li jkunu qed ikollhom effetti mhux desiderabbli fit-territorju li fuqu jkunu japplikaw u li jkunu qed jixxerdu propju bis-sahha tal-argument li zviluppi u uzi simili diga jezistu fil-madwar. Ghalhekk, by definition, land use plans u policies li jkollhom is-sahha ta' ligi ghandhom generalment japplikaw irrispettivament minn kwalunkwe indikazzjoni ta' commitment li jista' jkun hemm u dan sakemm mal-commitment ma' jkunx ta' entita' massicca kif spjegat hawn taht. Jekk ma' jsirx dan, l-ebda sistema ta' land use planning ma' tista' qatt tahdem.

Fil-fehma kunsidrata ta' dan it-Tribunal, biex sistema ta' ippjanar tahdem kif suppost u fl-interess publiku, il-kazi fejn jista' legittimament, f' sens tekniku, jintuza il-principju ta' commitment huwa meta il-maggoranza kbira ta' permessi potenzjali ta' xi tip partikolari li jkunu jistghu jinghataw jkunu fil-fatt inhargu.

Li qed jinghad hawn fuq ma' jnaqqas bl-ebda mod id-dritt li jista' jkollu l-applikant li jipprocedi kontra l-Awtorita' civilment jekk ihoss li hu kien haqqu jiehu permess ghaliex fil-passat kien inghata permess simili ghat-talba tieghu. Id-differenza hi li din il-kawza civili ma' tistax issir bhala parti mill-process tal-ippjanar."

Kif jidher mill-fatti li hargu fil-kors tas-smieh ta' dan l-appell, billi jirrizulta li l-aggravji mressqa mill-appellant mhumie x fondati dan l-appell ma jimmeritax kunsiderazzjoni favorevoli.

Ghalhekk peress li l-proposta ta' l-appellant tikser il-policies SET12, BEN 5 u SET 11 ta' l-iStructure Plan kif ukoll peress li s-sit in ezami jaqa gewwa Birds and Rabbits Protection Zone u gewwa public safety zone dan l-appell ma jirrizultax fondat u ma jimmeritax kunsiderazzjoni favorevoli.

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut tal-applikazzjoni PA/04743/10, "To sanction extension to existing garage and change of use to silencer repairer.", tas-27 ta' Lulju 2011

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal ma kkunsidrax il-kwistjoni dwar il-prova li kellha taghmel l-Awtorita dwar il-kobor tal-garage li kien munit b'permessi PB 2737/84 u PB 2176/86 u l-parti li kien effettivament kolpit bl-enforcement notice peress illi l-appellant kien qed jikkontendi illi parti zghira biss kienet mibnija bla permess liema parti kien qed jintalab sanzjoni ghal uzu ta' ufficju u facilita sanitarja. Minflok it-Tribunal iffoka li l-izvilupp kien f'ODZ u ma kkonsidrax li dawn kienu permessi antiki;
2. Peress li l-Awtorita naqset li tikkonstata l-kbor tal-binja approvat harget enforcement minghajr ma gie ccarat liema parti tal-binja kien qed jintlaqat bl-enforcement u ghalhekk l-enforcement hu null;
3. Ghalkemm l-appellant ressaq diversi permessi simili li jindikaw commitment u l-Awtorita argumentat li ebda applikazzjoni ma giet approvata, dan jirrizulta li mhux minnu pero t-Tribunal ma dahalx f'ezami tal-aggravju mressaq u minflok irrepeta dak li qalet l-Awtorita. Ma hax konjizzjoni tal-fatt li l-appellant mhux jitlob zvilupp gdid izda estensjoni u ghalhekk il-policies ikkwotati minnu jirreferu ghal binja gdida.

L-ewwel aggravju

Dan l-aggravju jipprova jqajjem punt ta' ligi minn punt ta' fatt li mhux permissibbli f'appell quddiem din il-Qorti li jista' jsir fuq punt ta' ligi mqajjem quddiem it-Tribunal. Fi kwalunkwe kaz l-allegazzjoni tal-appellant lanqas hi fattwalemnt korretta peress illi fil-bidu tal-konsiderazzjonijiet ulterjuri tat-Tribunal gie kostatat illi l-garage ghandu footprint ta' 121 metri kwadri. Dawn il-kostatatazzjonijiet fattwali li ma jidhirx li gew negati mill-appellant li kellu l-obbligu li jipprova l-estensjoni ckejna li jallega li ried jissanzjona, inducew lit-Tribunal jikkonsidra d-diversi talbiet tal-appellant biex jissanzjona bla success l-izvilupp u l-bdil ta' uzu u l-hrug tal-enforcement notice li gie riferut ghal direct action. Hu fl-isfond tal-permess li kellu originarjament is-sit u l-kobor li suppost kellu li inducew lit-Tribunal jikkonsidra l-aggravji tal-appellant mill-punto di vista tal-ligijiet ta' ippjanar. Il-fatt li s-sit jinsab f'ODZ kien biss fattur wiehed ghalkemm importanti li minnu insorgew konsiderazzjonijiet ta' ippjanar kif ukoll il-ligijiet ta' ippjanar applikabbli tenut kont li skond il-pjan lokali s-sit skond l-Awtorita hu indikat ghal 'Protection of Agricultural Land, Water Catchment Area, Aquifer Protection Zone' u 'Birds and Wild Rabbits Protection Zone'. Dawn huma fatturi li l-appellant ma ddisputax.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju gia gie kunsidrat mill-Qorti fl-ewwel aggravju u rrizulta illi l-kobor tal-garage mibni kien jissupera bil-bosta dak approvat fil-permessi originali. Kien jispetta lill-appellant ixejjen dawn il-provi u mhux jallega b'mod mhux sostanzjat li ma saritx il-prova tal-estensjoni illegali u dak li effettivament kien approvat. Anki d-distinzjoni li ppruvat issir ma fihix mertu peress illi l-izvilupp cioe l-binja hi wahda u jekk inbena aktar milli approvat allura kien l-izvilupp per se li hu illegali.

Dan l-aggravju qed jigi michud.

It-tielet aggravju

L-appellant qed jattakka d-decizjoni tat-Tribunal ghax ma dahalx fl-aggravju tal-commitment imressaq mill-appellant fejn gew imsemmija permessi ohra simili li ghalihom inhareg permess. Dan mhux minnu peress illi t-Tribunal ikkonsidra l-permessi kwotati mill-appellant u wasal fi qbil mal-Awtorita li fil-maggoranza dawn ma gewx approvati, jew ma kienx fl-istess zona u tal-istess tip f'terminu ta' ippjanar. Dan kien mill-lat fattwali pero l-kwistjoni tal-commitment giet indirizzata bhala kwistjoni legali mit-Tribunal fejn it-Tribunal ta l-fehma tieghu li fil-qosor kienet fis-sens illi l-ligijiet ta' ppjanar qeghdin hemm biex jigu segwiti bhala ligi bazika ta' ppjanar f'pajjizna u ma ghandhomx jiggebdu b'tali mod li jiznaturaw il-pjan ta' struttura li tindirizza l-ippjanar tas-siti partikolari. Dan ifisser li jekk inhargu permessi ohra, ma jfissirx li b'daqshekk kull applikazzjoni ohra ghandha tigi trattata bl-istess mod ghal din ir-raguni biss bla ma jittiehed kont tal-pjanijiet u policies applikabbli li jirregolaw l-izviluppi.

Il-Qorti tqis li t-Tribunal ghamel interpretazzjoni korretta tal-artikolu 69 tal-Kap. 504 u in ogni kaz interpretazzjoni ta' thaddim ta' policies mhux appellabbli quddiem din il-Qorti.

Mhux minnu wkoll dak li jallega l-appellant li l-appellant mhux jitlob zvilupp gdid izda estensjoni ghax l-estensjoni fiha nfisha li qed jintalab sanzjonar hi fil-fatt zvilupp oltre dak gia permess u l-bdil ta' uzu tal-izvilupp kollu huwa zvilupp differenti u kwindi gdid minn dak approvat. Kwindi huma applikabbli ghalih il-policies li kkwota t-Tribunal bhala applikabbli f'dan il-kaz u li l-appellant naqas li jikkombatti hlief b'dan l-argument li ghadu kif gie kunsidrat.

Ghalhekk dan l-aggravju qed jigi michud.

Decide

Kopja Informali ta' Sentenza

Il-Qorti ghalhekk qed tichad l-appell ta' Jerry Ghigo u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-8 ta' Novembru 2012. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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