



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-4 ta' Dicembru, 2013

Appell Civili Numru. 12/2013

George Mifsud

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' George Mifsud tal-1 ta' April 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-15 ta' Marzu 2013 li cahdet applikazzjoni PA 1093/09;

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

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

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

B'applikazzjoni tat-18 ta' Marzu 2009 – Outline Development Permission – PA/1093/09 l-appellant, f' Fair Mark, Triq Wied Ghomor, San Giljan, talab:

“proposed penthouse over existing residential block ”

Permezz ta' rifjut mahrug fl-1 ta' Frar 2011 l-Kummissjoni dwar l-Ambjent u l-Ippjanar cahdet it-talba għall-hrug tal-permess relattiv għar-ragunijiet segwenti:

“1 The site lies outside development zone and so it is located in an area which should remain undeveloped and open. The proposed development would run counter to the scheme and would represent unacceptable urban development outside the development zone.

2 The proposed development conflicts with Structure Plan Policy SET 11, which does not permit urban development outside existing and committed built-up areas. 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 of the Structure Plan. The proposed development also therefore runs counter to BEN 5.

3 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 can not be located in an area designated for development or in an existing built up area.”

Fl-appell tieghu l-Perit Samuel Formosa ressaq l-aggravji tal-appellant kif gej:

“Further to the EPC Board decision, my client and myself would like to lodge an appeal against this refusal in view of the following submission and information which shall be presented to the Appeals Tribunal to consider during the process of this appeal :

1. Surrounding HEIGHT:

The site is surrounded with buildings which are four floors high and include an overlying penthouse. Thus the proposed development is just another request to construct an additional recessed floor over a block of approved residential block which is just three floors high, that is one floor less than the surrounding built environment. Not only are most of the adjacent buildings four storeys high with overlying penthouses, but that the local plan has zoned the area to be four floors and overlying penthouses - thus committing and confirming that the area should be four floors (and overlying penthouse) high.

2. Outside Development Zone:

Although the building is actually zoned as Outside Development Zone, the site is committed as an approved residential block and cannot be considered as a site which is located outside the limits of development or as a rural environment as argued in the DPA Report. The proposal concerns an additional recessed floor and thus its approval shall not increase the visual impact upon the surrounding built environment and existing streetscape. Moreover, the proposed development has been recessed accordingly (from the sides) such that its visual impact upon the existing streetscape can be considered as negligible.

My client would also like the Environment & Planning Review Tribunal Board and Planning Directorate to inspect the site to verify matters.

In view of these considerations, my client sincerely hopes that the Appeals Tribunal shall look upon this application favourably.”

Fir-rapport taghha l-Awtorita' ressqet il-kummenti taghha inter alia kif gej:

“5.0 COMMENTS ON APPELLANT'S ARGUMENTS & REFUSAL NOTICE

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 policies.

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 Reference is made to the assessment carried out in the DPAR. This included the following:

Principle of development

This planning application is seeking development permission to construct a penthouse at the top floor of an existing block of residential units. Thus the proposed development consists of the construction of a new residential unit. The site in question lies outside the development zone boundary of St Julian's as indicated in the North Harbours Local Plan and thus Structure Plan policies SET 11, SET 12 and BEN 5 apply. Policies SET 11 and BEN 5 state that development allowed in outside development zones has to be essential to agriculture, ecological or scenic interests. The proposed development does not fall within one of the categories of development allowed in outside development zones. Furthermore there is no valid justification for the proposed urban development to be located within the site in question and not in an area designated for development or in an existing built up area. Thus the proposal is also running counter to Structure Plan policy SET 12. The proposed development is therefore objectionable in principle. Allowing the construction of the proposed residential unit within the site in question would lead to intensification of buildings within the respective rural area/valley.

Other considerations

The site in caption is located outside development zone and is not situated within a Category Rural Settlement; hence development should be restricted to conserve the rural environment and limit intensification of buildings.

5.1.4 As regards to the arguments of the appeal itself, the Authority disagrees with appellant's statement on various accounts and will be explained below.

The architect argued that most of the adjacent buildings are four storeys high with overlying penthouse; furthermore the architect states that the local plan zones this area to be four floors and overlying penthouse, thus committing the building height limitation of the area. Therefore, the issue of commitment in relation to the building height is not relevant due to Section 69 (2) (i) proviso of the Environment and Planning Development Act 2010, since the site under appeal lies within the Outside Development Zone; hence dismissal of the appeal is being requested on this ground.

5.1.6 Map CV2 of the North Harbour Local Plan designates the area within which the proposed site lies, as a Site of Scientific Importance with a Level of Protection 4. The construction of a NEW dwelling within such an area would cause further urbanization and would increase the habitable density of the site. Vertical urban sprawl would also be generated thus creating a negative visual impact. The architect argues that "in view of the fact that the proposed development is recessed by a few metres from all sides, then, its visual impact upon the existing streetscape can be considered as negligible. This, however, is only PARTLY correct. The recessing of the proposed penthouse would only cause minor visual impacts to the streetscape due to the relatively narrow width of the street; however the penthouse level as seen from various view points from around the valley would cause major visual impacts since it is an added Level to the overall massing of the building structure. The building envelope thus increases in its overall mass/volume. This is unacceptable since the structure under appeal lies

within the Outside Development Zone and within a Site of Scientific Importance. The construction of the structure under appeal would encourage further development and urban intensification in the Outside Development Zone of Wied Ghomor. The penthouse is not a structure essential to agriculture; hence such a structure is not justified in principle in an ODZ area. SET 11 states that:

No form of urban development will be permitted outside existing and committed built-up areas, and primary development areas as designated in the Structure Plan even where roads and public utilities are available. Permitted forms of non-urban development outside such areas are restricted to the categories referred to in Paragraph 7.6.

The penthouse under appeal is not a listed use in Paragraph 7.6. Paragraph 7.6 states that the provision of illegitimate structure must be controlled in order to preserve and enhance the environmental quality of the countryside. Penthouse under appeal runs counter to Policies SET 11, SET 12 and BEN 5.

[...]

5.2 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 EPC's decision which dismissed this request for development since the EPC 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.

5.3 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 and thus, respectfully

requests that the Environment & Planning Review Tribunal to confirm the decision as issued with the refusal notice and to refuse this appeal. The Authority reserves the right to forward further submissions during the appeals process as necessary. ”

Fl-access mizmum fis-27 t'April 2012 it-Tribunal innota li l-izvilupp huwa fuq tlett sulari, li l-proposta hija biex isir additional floor receded, li l-oggezzjoni tal-Awtorita' hi fis-sens li l-area hija ODZ pero hu accettat li l-bini li hemm inbena bil-permess, u li l-appellant indika diversi zviluppi fuq il-faccata li huma mibnijin f'gholi ferm izjed minn dak minnu propost.

Il-Perit Samuel Formosa ghall-appellant ressaq il-kummenti tieghu kif gej:

“1. Re : Site Inspection:

It is clear that after a site inspection one can verify that the street is totally committed with buildings built on four floors and an overlying penthouse. Consequently, the existing situation and streetscape cannot be simply ignored, with the Planning Directorate arguing instead that since the site lies Outside Development Zone, than an additional penthouse cannot be in fact permitted. Policy 10.7 of the Design Guidelines allows penthouses to be constructed on top of three floors and does not specify whether the site should be within scheme or Outside the Development Zone.

2. Existing Streetscape :

The site itself is actually committed with a building covered with several MEPA permits, the last permit issued is PA 1078/03. Moreover, as explained above the site is located within a streetscape which is manifestly committed with four storey buildings on one side (with overlying penthouses) and several residential units on the other side (which lie further down the site in question). In view of these, one can easily argue that the site should not be considered as an area Outside Development Zone but one whereby the locality and streetscape is manifestly committed with buildings and thus can be considered as a

built-up area. Moreover, the approval of the proposed penthouse shall not increase the urban spread and is recessed for all sides and thus can hardly be visualised due to the narrow width of the street as in fact confirmed in the Planning Appeal's report.

In view of these considerations, my client sincerely hopes that the Appeals Tribunal shall look upon this application favourably. ”

Fis-seduta tal-4 t'Ottubru 2012 l-Awtorita' irrilevat li l-proposta hija ghal additional floor fil-PA 6045/04 mentri l-applikazzjoni ghal receded floor hija ghal PA 1093/09, li b'riferenza ghan-nota tal-Perit Formosa – fejn gie rilevati li huwa committed bi zvilupp ta' 4 sulari fuq in-naha l-oħra tat-triq – l-izvilupp jinsab fl-area tal-izvilupp u mhux ODZ kif inhu is-sit mertu ta' dan l-appell u fejn fl-istess nota jissema committed iktar l-isfel, anke dan l-izvilupp jinsab f'zona tal-izvilupp.

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba għall-izvilupp ta' penthouse fuq block t'appartamenti ezistenti.

Is-sit mertu ta' dan l-appell jinsab fl-indirizz Fair Mark, Triq Wied Ghomor, San Giljan.

Din l-applikazzjoni giet rifjutata peress li s-sit jinsab barra miz-zona ta' zvilupp, l-proposta tmur kontra l-iskema u tirrappreżenta zvilupp urban inaccettabbli, l-proposta tmur kontra l-policy SET 11 tal-pjan ta' struttura u l-policy BEN 5, u li l-izvilupp mhuwiex gustifikat ai termini tal-policy SET 12.

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

L-appellant jissottometti li t-talba hija għal sular addizzjonali fuq tlett sulari ezistenti fejn il-bini fl-akkwati huwa ta' erba sulari, li l-pjan lokali jiffissa zoning għal erba sulari fiz-zona, li għalkemm il-bini huwa zoned bħala ODZ is-sit huwa kommess għal blokk residenzjali approvat u li l-hrug

ta' permess ma jikkreax impatt vizwali fuq il-bini fl-akkwata jew l-istreetscape.

L-Awtorita' tissottometti li l-izvilupp propost ma jaqax f'kategorija ta' zvilupp permessa f'zoni ODZ, li l-proposta tmur kontra l-policy SET 12 tal-pjan ta' struttura, li l-proposta twassal ghall-intensifikazzjoni ta' zvilupp fil-wied/zona rurali, li s-sit ma jinsabx f'Category Rural Settlement u li l-izvilupp ghandhu jkun ristrett ghall-konservazzjoni t'ambjent rurali u li ghandhu jigi llimitat l-intensifikazzjoni ta' bini, li l-kwistjoni ta' commitment in vista tal-gholi tal-bini mhijiex rilevanti in linea mal-artikolu 69(2) (i) tal-Att dwar l-Ambjent u l-Ippjanar 2010 peress li s-sit de quo jinsab f'zona ODZ, u li l-izvilupp tas-sit kif propost iwassal ghal intensifikazzjoni urbana f'zona ODZ ta' Wied Ghomor.

Il-ligi tistabilixxi x'inhuma l-kriterji li l-Awtorita' ghandha tikkunsidra fl-ghoti ta' permessi ghall-izvilupp.

L-Artikolu 69 ta' l-Att X ta' l-2010, Kap. 54, precedentement l-Artikolu 33, tal-Kap. 356, jistabilixxi li l-permessi jinghataw skond l-plans u policies approvati; l-Awtorita' ghandha tikkunsidra wkoll aspetti materjali, fosthom dawk ambjentali estetici u sanitarji li jidhrilha li jistghu jkunu rilevanti.

Dwar dan l-ahhar element, l-Artikolu 69(2)(i) proviso tal-Kap. 504 jaghmilha cara li l-commitment ta' bini iehor fil-vicinanze ma jisax jigi interpretat jew utilizzat biex tghola l-height limitation indikata fil-pjan.

L-Artikoli hawn fuq citati ma jhallu l-beda dubbju li l-konsiderazzjoni principali, fl-ghoti tal-permessi hi d-disinjazzjoni taz-zona fjen jinsab is-sit tal-izvilupp propost kif indikata fil-pjan.

L-Awtorita' fir-rapport taghha, rriproduciet parti mill-Mappa WHSJ10, li minnha jirrizulta li s-sit mertu ta' dan l-appell jinsab barra z-zona ta' l-izvilupp, f'lokalita partikoalri, Wied Ghomor, li hu sit ta' Importanza Xjentifika, b'livell ta' Protezzjoni 4.

Skond l-Policies citati mill-Awtorita', l-izvilupp propost f'zona disinjata barra z-zona tal-izvilupp (ODZ) mhux permessibbli.

Il-perit tal-appellant issottometta li in vista tal-izvilupp ezistenti fuq is-sit – iz-zona ma tistax tigi kkunsidrata bhala wahda barra z-zona tal-izvilupp – izda ghandha tigi kkunsidrata bhala 'built-up area'. Ghalkemm fattwalment dan l-argument hu korrett; jibqa' fatt mhux kontestat li skond l-Local Plan z-zona hi disinjata bhala 'barra z-zona tal-izvilupp'.

F'dan il-kuntest ghandu jinghad, li qabel ma gie approvat l-Pjan Lokali f'Lulju 2006, hareg ghall-konsultazzjoni publika, fejn kull minn deherlu li kellu jikkummenta dwar d-'draft proposal' dan seta' jaghmlu f'zmienijiet specifici qabel mal-istess Pjani Lokali gie formalment approvat.

Ma irrizultax fil-kors ta' smiegh ta' dan l-appell, li l-appellant ilmenta miz-zoning tal-area kif kien propost u approvat ghal Pjan Lokali.

Fic-cirkostanzi prezenti, sakemm ma jkunx emendat jew modifikat l-Pjan Lokali, rigward disinjazzjoni ta' din iz-zona partikolari, l-proposta prezenti ma tistax tigi milqugha.

It-Tribunal ghalhekk qed jiddisponi minn dan l-Appell billi jichad l-istess u jikkonferma r-rifjut tal-1 ta' Frar 2011 ghall-applikazzjoni PA 1093/09.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal injora li jikkunsidra l-aggravju dwar 'kwistjonijiet ohra ta' sustanza' cioe li avolja s-sit jinsab f'ODZ pero hu committed b'bini iehor cirkostanti b'gholi li jissupera dak mitlub prezentement;
2. It-Tribunal ntrabat biss mal-kwistjoni li s-sit hu ODZ u ghalkemm ammetta li s-sit hu committed bi zvilupp gia ezistenti ta' tlett sulari ma kkunsidrax din il-kwistjoni sew fl-isfond taghha;

3. L-gholi tal-izvilupp ma taqax fid-divjet tal-artikolu 69(2) billi dan l-gholi għa jżisti u hu pmiss mill-policy 10.7 liema policy it-Tribunal injora għalkemm għe mitlub jikkunsidraha. In oltre l-kummenti dwar konsultazzjoni pubblika fir-rigward ta' zoning hi irrelevanti f'dan il-kuntest.

L-ewwel u t-tieni aggravi

Dawn l-aggravi mhux fondati. It-Tribunal ma injorax il-fatt li fil-madwar iz-zona hi żviluppata b'bini aktar għoli minn dak għa eżistenti fis-sit murtu ta' din l-applikazzjoni. It-Tribunal fil-fatt ikkonceda li bħala fatt iz-zona hi mibnija pmo skond il-pjan lokali s-sit fejn qed jintalab żvilupp ulterjuri oltre dak għa approvat jinsab f'żona li l-pjan lokali jiddikjarah bħala outside development zone fejn żvilupp mhux pmiss. It-Tribunal qies illi l-artikolu 69 ma jhallix dubbju illi l-kunsiderazzjoni pncipali fl-ghoti tal-pmiss hi d-desinjazzjoni taz-zona skond il-pjan lokali, u f'dan il-kaz is-sit jinsab f'Wied Ghomor cioe ta' importanza xjentifika b'livell ta' protezzjoni 4.

Dawn kienu l-kunsiderazzjonijiet li waslu lit-Tribunal jakkolji r-ragunijiet ta' rifjut mogħtija mill-Awtorita cioe li tali żvilupp imur kontra Structure Plan Policy SET 11 u BEN 5 billi żvilupp barra zona ta' żvilupp jista' jsir biss jekk esenzjali għall-agrikoltura, ekologija u interess ambjentali li mhux il-kaz, jew eccezzjoni pmissa skond artikolu 7.6 u illi żvilupp ulterjuri ser jintensifika żvilupp f'żona rurali. Għalhekk ma hemm ebda għustificazzjoni għal żvilupp f'dan il-kaz li ma jistax isir band'ohra kif irid il-policy SET 12.

It-Tribunal għalhekk ikkonsidra li ladarba l-pjan lokali hu car, cioe li l-izvilupp li qed jintalab li jsir qieghed f'ODZ, hu l-pjan li għandu jigi applikat u t-Tribunal ma għandux diskrezzjoni jmur kontrih meta l-pjan u policies relevanti huma cari. Ma jistax jingħad kif qed jigi suggerit mill-appellant li t-Tribunal ma kkonsidrax l-ilment tal-izvilupp fil-madwar. Dan għe kunsidrat mit-Tribunal pmo sostna li din il-kwistjoni ma setghet qatt tinfluixxi fuq jew tagħleb id-desinjazzjoni tas-sit fejn żvilupp ulterjuri oltre dak għa

approvat ma jistax jigi approvat skond il-pjanijiet u policies kwotati mill-istess Tribunal.

Ghalhekk dawn l-aggravji qed jigu michuda.

It-tielet aggravju

Dan l-aggravju hu wiehed akkademiku peress illi l-kummenti tat-Tribunal rigwardanti l-artikolu 69(2)(i) u dak dwar il-konsultazzjoni pubblika qabel hareg il-pjan lokali fl-2006 fejn iz-zona li jinsab fiha is-sit gie dikjarat ODZ, gustifikati jew le ghal fattispecie tal-kaz, ma kienu bl-ebda mod dak li wassal lit-Tribunal ghad-decizjoni tieghu. Dak li fil-fatt ried juri t-Tribunal hu illi f'kaz bhal dan fejn il-pjan lokali hu car ma hemm ebda diskrezzjoni fdata lit-Tribunal. Il-fatt innifsu li s-sit hu ODZ ma jippermettix zvilupp oltre dak permess mill-policies rigwardanti specifikament zviluppi f'ODZ. F'dan il-kuntest it-Tribunal ma dahalx fil-kwistjoni ta' Policy 10.7 li hi biss 'Design Guidelines' u kif ammess mill-perit tal-appellant ma tispecifikax jekk il-kwistjoni ta' penthouses fuq it-tielet sular tapplikax ghal siti fi skema jew barra skema ta' zvilupp. Pero l-pjanijiet u policies kwotati mit-Tribunal huma in effett relatati specifikament ma zvilupp f'ODZ. Il-Qorti kienet tkun aktar sodisfatta li kieku t-Tribunal elabora aktar fid-decizjoni fuq il-punti mqajma pero billi fis-sustanza l-argumenti tat-Tribunal kienu cari u jolqtu l-lanjanzi tal-appellant, dan l-aggravju wkoll qed jigi michu.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' George Mifsud u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-lppjanar tal-15 ta' Marzu 2013. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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