



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-4 ta' Dicembru, 2013

Appell Civili Numru. 37/2013

Jimmy Vella

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Jimmy Vella tal-21 ta' Mejju 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-2 ta' Mejju 2013 li rrifjutat applikazzjoni PA 2235/09 'proposed fixed structure to serve as a sales point for fruits and vegetables instead of current mobile truck';

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:

Kopja Informali ta' Sentenza

Ikkunsidra:

B'applikazzjoni tal-20 ta' Mejju 2009 – Full Development Permission – PA/2235/09 l-appellant, f' site at Xatt il-Pwales, San Pawl il-Bahar, talab:

“proposed fixed structure to serve as a sales point for fruits and vegetables instead of current mobile truck”

Permezz ta' rifjut mahrug fis-27 ta' Mejju 2011 l-Awtorita' dwar l-Ambjent u l-Ippjanar cahdet it-talba ghall-hrug tal-permess relattiv ghar-ragunijiet segwenti:

“1 The proposed structure/kiosk on site is unacceptable since the "Malta: Assessment of Proposals for Kiosks" report considered that only one kiosk in this area at Xemxija is acceptable and this kiosk already exists. Moreover site in caption is located at an approximate distance of 30 metres from the existing kiosk thus it runs counter to paragraph 5.3 of the Policy and Design Guidance on Kiosks which requires that no new kiosks will be permitted within 500 mts of an existing kiosk in order to limit proliferation of kiosks in anyone location.

2 The site lies outside development zone. The proposal does not comply with Structure Plan policy RCO 2 which clearly states that no form of urban development will be permitted outside development zone.

3 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.

4 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.

5 The dimensions of proposed structure (28 sq metres x 3 metres high) exceed the permitted dimensions (20 sq metres x 2.5 metres) specified in paragraph 5.8 of the Policy and Design Guidance on Kiosks. No further assessment on the design of proposed structure was carried out, since this is unacceptable in principle.”

Permezz t'appell il-Perit Philip Mifsud ressaq l-aggravji tal-appellant kif gej:

“In it's Refusal, MEPA is giving five reasons to justify its decision. The first four reasons deal with eligibility/justification issues, the fifth reason deals with the dimensions of the proposed kiosk.

As the first four reasons are related, they will be addressed together in this report, and as such we respectfully submit the following:

1) Studying these reasons for refusal and also referring back to the DPA Report which was prepared by the Directorate for the EPC to consider, it is evident that the MEPA has treated this application as a proposal to create a NEW kiosk/sales point. In fact the DPA Report has quoted Section 5.3 of the Policy and Design Guidance on Kiosks (PDGK) which specifically deals with new kiosks. This is not the case as will be explained below:

a) As can be proved from the documentation attached (Doc A), my client has been selling fruits and vegetables from the site under consideration for more than twenty years. This operation was carried out under the recognition and authorisation of the San Pawl Local Council and different Government administrations. In spite of the above, it has to be stated that during the summer of last year my client encountered some difficulties with the operation, particularly because the distance between my client and another operator was less than 50m. However, following a resolution by the San Pawl Local Council

(copy attached - Doc B), which was endorsed by the Hon Minister of Finance, the Economy and Investment (copy attached - Doc C) the distance for the concerned area was reduced from 50 mtrs to 30 mtrs. Hence the siting was also acceptable to the Police.

b) For clarification purposes it has to be stated that Section 4.6 (iii) of the PDGK acknowledges this type of activity and states that: Quote "Mobile Kiosks and Hawkers - although these may be mobile (i.e. vehicles, such as lorries or vans), some tend to be permanently sited, as at Marsa" Unquote.

2) Having proved that this is not a new proposal and that the operation is recognised to and accepted by to the Local Council, the Central Government and the Police, we would like to revert back to the PDGK and particularly to Section 5.22 of the said document. It is indeed the intention of the applicant to improve the existing situation through this application, particularly by an overall improvement in the visual appearance of the area.

3) This office is also aware of the recent approval of a similar application in the area; PA 00752/07. This permit was studied and the proposal under consideration has been amended so that it will be streamlined with what has already been approved few meters away. In fact, the proposal has been amended so as the proposed kiosk will be of a temporary nature supported on a timber platform and all fixed elements (including the shading devise) included in the original proposal have been removed. We are kindly requesting that PA 00752/07 will be attached.

4) The above, has addressed reasons for refusal Nos. 1 to 4. With reference to reason for refusal No.5, we respectfully submit that the amended drawings submitted to MEPA on the 23rd May 2011 fully address this reason in that the amended drawings are limiting the proposal to 20 sqr mtrs x 2.5 mtrs high and a frontage which is within the 5mtr limit.

Kopja Informali ta' Sentenza

In view of the above, we respectfully request the EPRT to cancel MEPA's decision and request same to issue permit.”

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

“5.0 COMMENTS ON APPELLANT'S ARGUMENTS & REFUSAL NOTICE

5.1 The following grounds are being raised to justify this appeal:

1 MEPA is treating this case as a proposal to create a NEW kiosk/sales point and quoting Section 5.3 of the Policy and Design Guidance on Kiosks. Nonetheless, the appellant has been selling fruit and vegetables from the site for more than 20 years; and this operation was carried out under the recognition of the Local Council and different Government administrations.

2 In spite of this, during the last summer the appellant encountered some difficulties with operation because the distance between him and another operator was less than 50m. Following a resolution by the Local Council this distance has been reduced to 30m.

3 The appellant is quoting Section 4.6 (iii) of the PDGK which states that mobile kiosks and hawkers - although these may be mobile (e.g. vehicles such as lorries or vans), some tend to be permanently site, as at Marsa.

4 Since the use is not new, the appellant wishes to address Section 5.22 of the PDGK. It is indeed the intention of the appellant to improve the existing situation through this application, particularly by an overall improvement in the visual appearance of the area.

5 The appellant is aware of recent approval of a similar application PA 752107 and wishes that the case be attached.

6 Regarding the fifth reason for refusal, amended drawings were submitted to MEPA on 23rd May, 2011 which fully addresses the reason since amendment is limiting the proposal to 20m² and 2.5m high with a frontage within the 5m limit.

5.2 The Directorate has the following comments to make:

5.2.1 Introduction

The appellant is arguing that the Authority is treating this application as if the development is 'new' to the site; in fact the appellant is arguing that he has been selling fruits and vegetables on site from motor vehicles for more than twenty (20) years. Notwithstanding this, there are no planning permits to use this site for such purposes. In fact, the same appellant had applied for a permission to construct a fixed kiosk in PA 3667/95 but such permit was refused and no appeal of this outcome was made. As a result, since the current development is being carried out without the required permits and in view of the previous refusal for a kiosk; there are no other planning justifications as to why this development should not be considered as 'new'.

5.2.2 Policy Guidance for Kiosks

The construction of new kiosks is regulated under Section 5.3 of the Policy and Design Guidance on Kiosks; which states that No new kiosks will normally be permitted within 500m of an existing and permitted kiosk. A mobile timber kiosk has been approved recently (PA 752/07 approved March 2011) to replace a previous aluminium kiosk. This approved kiosk is situated approximately 30m from the site in concern and therefore the proposed development is not in line with Section 5.3 of the PDGK.

Furthermore, Section 5.8 of the PDGK states that kiosks are not to exceed a maximum height of 2.5m from ground level and 20m in width whilst retaining a maximum area of 20m². The proposed development is indicating that the

kiosk is to be 28m² in area and approx. 3m in height. These dimensions clearly exceed the limitations of Section 5.8 and were therefore not accepted in the recommendation by the Authority or in the decision taken by EPC Board.

The appellant is counter-arguing this reason for refusal since he is stating that fresh plans were submitted on the 23rd May, 2011 which reduces the proposed kiosk to within the limitations of Section 5.8. Notwithstanding this, at such a late stage (after DPAR is concluded), only written submissions of additional information are accepted. Furthermore, the submission arrived only two days before the Board was scheduled to make its decision (25th May, 2011). The appellant had sufficient time to address the landscaping issue at earlier stages of the development application but did not take action against the reason for refusal.

5.2.3 Further Issues Raised by Appellant and Counter Arguments

The appellant is stating that the proposal should be assessed in light of Section 4.6 (iii) of the same document which states that some mobile kiosks and hawkers tend to be permanently sited. The appellant is not correctly addressing this guideline however, since earlier in the policy it is clearly indicated that such circumstances relate to kiosks in urban areas.

The appellant is also commenting that in light of Section 5.22 of the PDGK which relates to the Authority's means of addressing replacement of existing kiosks which involve upgrading and visual improvement of the area. Nonetheless, as mentioned in earlier stages of this report (particularly para. 5.2.1), the existing use of the site is not covered by a legal planning permit (PA 3667/95 for such use was refused) and no 'kiosk' is present on site. Hence, the subject matter of this policy is not applicable to the case at hand since the proposal deals with the construction of a new kiosk.

5.2.4 Other Comments - Location of Site ODZ

The site is located within a Special Area of Conservation, Special Protection Area and a Level 1 Area of Ecological Importance. In addition, the site also lies in close proximity to a wooded area that is currently proposed to be managed as a recreational area (PA 3335/08 - currently pending) as an extension to the Simar Nature Reserve. Since the proposed development is not permitted through the Malta: Assessment of Proposals for Kiosks the general policies for ODZ apply.

In accordance with policies SET 11, SET 12 and Para. 7.6 of the Structure Plan, only development essential to agriculture and of ecological and archaeological interest may be permitted ODZ. As the proposal seeks to construct a permanent structure for commercial purposes, the proposal is not in line with SET 11 and SET 12 since such uses should be channeled to appropriate areas.”

Permezz ta' nota l-Avukat Michael Sciriha ressaq is-sottomissjonijiet tieghu ghall-appellant kif gej:

“Illi l-Awtorita permezz ta' decizjoni tas-27 ta' Mejju 2011 cahdet it-talba hekk kif proposta mill-appellant u cioe:

"Proposed fixed structure to serve as a sales point for fruits and vegetables instead of current mobile truck"

Illi l-appellant intavola appell minn dina id-decizjoni stante li hass ruhu aggravat mid-decizjoni tal-Awtorita, liema appell jinsab pendentu quddiem dan l-Onorabbli Tribunal;

Illi l-appellant ser jelenka fid-dettal, r-raguni ghalfejn fil-fehma umli tieghu, l-Awtorita waslet ghal decizjoni billi applikat Policiez hziena ghal kaz odjern;

Id-decide fid-dettal

1. Para 1 tad-Decizjoni - applikabilita hazina ta' para 5.3 tal-Policy (POGK) Illi l-Awtorita tikkwota para 5.3 tal-Policy

Kopja Informali ta' Sentenza

and Design Guidance Kiosks fl-ewwel paragrafu tad-decizjoni taghha. Para 5.3 jghid hekk:

“No new kiosks will normally be permitted within 500 metres of an existing kiosk

A proliferation of kiosks in anyone area will result in an intensification of the problems noted earlier; including obstruction to pedestrians..... it means that kiosks should normally be spaced at least 5 minutes walking distance apart. This does however depend upon the character of the area, the number of existing. kiosks, and the general intensity of use of the area and of the promenade.”

Wkoll jekk wiehed jara:

Para 5.4jghid hekk:

"Kiosks shall be sited so as there is at least 3 meters clear width of promenade or footway/pavement either in front of, or behind, the kiosk, so that the flow of pedestrian is not obstructed."

Ma hemmx dubbju li din il-policy qed tipprovdi ghall-applikazzjonijiet ta' kiosks godda u li ser ikunu sitwati fuq promenade - fil-fatt para 5.5 tirreferi ghal fatt li l- kioks ma jistghux jirristringu :

“The enjoyment of sea views from the promenade ...”

U para 5.2.2 jghid:

“no new kiosks will normally be permitted within 500m of an existing and permitted kiosk.”

Ghalhekk l-appellant jikkontendi li l-paragrafu 5.3 tal-PDGK hekk kif ikkwotat mill-Awtorita ma japplikax fil-kaz in dezamina stante li mhux qed nittrattaw fuq kiosk li qiegħed fuq il-promenade u kwindi l-ewwel raguni għal rifjut hija hazina u ma għandhiex tigi ikkonsidrata minn dan l-Onorabbli Tribunal.

2. Il-kwisjtoni ta' new kiosks

L-appellant jikkontendi li l-proposta tieghu ma taqax taht applikazzjoni ghal new kiosk u ma ghandhiex tigi trattata taht dawk il-provvedimenti tal-PDGK imma taht artikolu 5.22 li jittratta 'replacement of existing kiosk'.

Jigi rilevat illi dan il-kiosk, ghalkemm mobile in nature, ilu sitwat fl-istess sit u huwa jistgha jitqies li huwa permanently sited ghall-perijodu ta' iktar minn hamsa u ghoxrin sena; qed jigi esebit Dok JV1 sa Dok JV4 fejn jindika li l-appellant dejjem jarma f'dan is-sit; issir referenza wkoll ghad-dokumenti li gew ippresentati mal-appelli jindikaw l-istess;

In sostenn tal-fatt li huwa ilu sitwat fdan is-sit u li din il-policy tipprevedi ghal dawn ic-cirkostanzi specjali, l-appellant jikkwota para 4.6 tal-PDGK li jaccetta li hemm dawn it-tip ta' sitwazzjonijiet:

'mobile kiosks and hawkers - although these may be mobile (eg. Vehicles such as lorries or vans), some tend to be permanently sited, as at Marsa.'

Dan huwa proprju dak li qed jikkontendi l-appellanti; mid-dokumenti annessi indikati hawn fuq l-appellant ressaq prova sufficjenti li huwa ilu jopera interrottament fuq dan is-sit ghal mill-inqas hamsa u ghoxrin sena;

Gialadarba, l-appellant ilu fiss f'dan il-post ghall-ahhar hamsa u ghoxrin sena, l-appellant jikkontendi li ic-cirkostanzi specjali tieghu huma inkwadrati u regolati that l-artikolu 4.6 u 5.22 tal-PDGK li jstabilixxi hekk:

'the Planning Authority will normally favourably consider applications for the replacement of existing kiosks which will involve upgrading and which will improve the usual appearance of the area.'

L-appellant jikkontendi li huwa jaqa taht din il-kategorija u dan ghar-ragunijiet segwenti:

- ma hemmx dubbju li huwa permanently sited;

- ma hemmx dubbju li ilu iktar minn 25 sena;
- ma hemmx dubbju li mhuwiex sitwat fuq promenade u ghalhekk in-nuqqas ta' applikabilita ta' para 5.3 tal-Policy and design Guidance on Kiosks;
- ma hemmx dubbju li l-awtoritajiet koncernanti wkoll jikkonsidraw li l-kiosk ma jaqax that il-provvediment tal-5.3 stante li akkorcaw id-distanzi tal-istess kiosk minn ma l-iehor presenti li minn 50 metri ghamluha 30 metri.

L-Awtorita fir-rapport taghha in segwitu ghall-appell tas-26 ta' Awissu 20112, jidher li hija qed tipprowa tikkontendi billi tirribatti li dan il-kiosk huwa wiehed gdid ghax 'there are no planning permits to use this site for such purposes.' Dak li ma ratx l-Awtorita huma li kien hemm diga applikazzjoni PA 3667/95 li giet irrifjutata fis-sena 1996, din hija prova ohra (apparti il-permessi li gew esebiti) li l-appellant ilu jopera minn dan is-sit ghal snin twal.

3. PA 00752/07

Issir refernza ghall-permess mahrug recentement hawn hekk ikkwotat, minn fejn jirrizulta li l-proposta tal-appellant hija simili ghal dak li gie approvat. Fil-fatt l-kiosk ser ikun ta' natura temporanja 'supported on a timber platform and all fixed elements including the shading devise included in the original proposal have been removed.'"

Jidher li rikjesta simili giet approvata b'dan il-permess Dok JV5 mahrug fil-29 ta' Marzu 2011 u fejn l-istruttura ser tkun bhal din proposta mill-appellant u cioe timber kiosk ta' natura mhux permanenti.

L-appellant jikkontendi li jekk dan il-permess inhareg fuq proposta li saret fejn wara li ilu stabbilit l-appellant, l-istess ghandu jinghata huwa li ma hemmx dubbju li ilu sitwat fl-istess sit ghal iktar zmien

4 Il-Kwistioni tar-Rural Conservation Area.

Kopja Informali ta' Sentenza

L-appellant ma jaqbilx mal-kontenzjoni tal-Awtorita li din hija ODZ. Huwa minnu li s-sit jinsab sitwat biswit Wied l-Pwales izda is-sit inkwistjoni ma jinsabx f'din iz-zona imma jinsab fit-triq li tipperifera din iz-zona.

Para 2 tad-decizjoni tghid hekk:

"The site lies outside development zone. The proposal does not comply with structure plan policy RCO 2 which clearly states that no form of urban development will be permitted outside development zone."

L-appellant ma jaqbilx mal-kondkluzjoni li dan is-sit jaqa f'ODZ. Is-sit qiegħed sitwat fil-Coast Road li tati minn San Pawl għat-tela tax-Xemxija, f'arterja principali bejn iz-zewġt bliet hdejn facilta ta' parkegg. Fuq ix-xellug meta wieħed iħares lejn is-sit huwa jara il-kosta ta' San Pawl - illum din iz-zona hija karatterizzata b'appartamenti lusuzi u ta' postijiet ta' villeggjatura Dok JV (5b) u fil-lemin it-tela tax-Xemxija, fejn issib bars, restaurants, lukandi u appartamenti. Jistgħa jingħad li kemm din il-parti ta' San Pawl u kemm it-tela tax-Xemxija hija zona turistika, fejn fl-istess tela wieħed issib tal-inqas 15 ir-restaurant. Huwa biss fuq in-naha ta' wara u maqtuġh il-gewwa li wieħed isib ir-riserva naturali tas-Simar.

Qed tigi annessa Pjanta mill-Key Diagram tal-Istructure Plan Dok JV6 fejn jindika bl-iktar mod car u unekwivoku immarkat bl-isfar fuq il-pjant li l-kosta tikkostitwixxi arterja principali tat-traffiku, mentri biss fuq n-naha ta' wara u il-gewwa hija iz-zona ODZ. Is-sit inkwisjtoni jinsab fil-genb ta' din l-arterja - proprju fil-parkegg li hemm fl-istess.

Wkoll Dok JV7 jindika in-NWLP fejn jindika car immarkat bl-aħmar Triq San Pawl u bil-blu it-tela tax-Xemxija, indikat car wkoll fil-mappa li biss fuq in-naha ta' wara hem mil-Wied u huwa Rural Conservation area.

Dok JV 8 huwa NWLP tax-xemxija li jindika l-arterja principali f'Xatt il-Pwales, indikat bl-isfar li huwa 'traffic control at xemxija hill' u bil-blu 'strategic road network improvement.'

Kopja Informali ta' Sentenza

Ghalhekk, l-appellant jikkontendi li mhiex korretta l-Awtorita meta ttiprova issostni li s-sit jinsab f'Rural Conservation Area, setghet tghid li jinsab biswit u kienet tkun korretta imma mhux li tghid li jinsab 'within'.

Ir-RCA li qed tirreferi ghalih l-Awtorita huwa is-Simar u Wied l-Pwales, indikat wkoll fil-Pjanta annessa u minn fejn jidher car id-delinjament bejn territorju u iehor u cioe bejn il-coast road u ir-Rural Conservation Area.

Structure Plan - RCO 2

Jekk ghal grazzja tal-argument wiehed kellu jaghmel qari akkurat ta' din il-policy issib illi :

"within rural conservation areas no form of urban development will be allowed ... "

Din il-policy tispecifika l-kelma 'within (rural conservation areas)'- certament dan it-Tribunal ser japprezza li s-sit inkwisjtoni mhuwiex 'within' a 'rural conservation area' imma jinsab f'arterja principali li taqqad lil San Pawl il-Bahar mat-Tela tax-Xemxija. biswit RCA.

Jerga jigi ribadid li jekk wiehed jaghmel analizi leggera tal-mapep ippresentati tan-NWLP tal-Coast Road ta' San Pawl u ix-Xemxija isib li dan li qed jikkontendi l- appellant huwa minnu u li huwa ma jaqax that zona (RCA) - l-iktar li l-awtorita setghat tikkontendi li huwa sitwat biswit imma zgur mhux gewwa fiha.

U anke jekk ghal grazzja tal-argument ikollna napplikaw din il-policy (li fil- fehma tal-applikant zgur mhux applikabbli), l-istess Policy wkoll taghmel proviso u tippermetti certu zvilupp:

'however in accordance with policy ben 5, applications for permission to develop structures or facilities essential to agricultural, ecological or scenic interests will be favourably considered as long as the proposed development does not infringe the principles set out in Policy RCO 4.

Policy RCO 4 tillimita l-izvilupp u tghid hekk:

The planning authority will not permit the development of any structure or activity which in the view of the authority would adversely affect scenic value because it would:

1. Break a presently undisturbed skyline;
2. Visually dominate or disrupt its surroundings because of its mass or location;
3. Obstruct a pleasant and particularly a panoramic view;
4. Adversely effect any element of the visual composition - for example, cause the destruction or deterioration of traditional random stone walls;
5. Adversely affect existing trees or shrubs;
6. Introduce alien forms, material, textures, or colours.

Tajjed li jigi rilevat li l-ebda wahda minn dawn il-punti ma qed tigi miksura mill-proposta tal-appellant. Huwa car li din il-policy qed timmilita lejn il-preservazzjoni ta' zoni li huma totalment rurali fejn ftit strutturi biss, jistghu jigu accettatti, certament mhux il-kaz ta' din l-applikazzjoni li mhux qed tittenta tibni kiosk fis-Simar.

L-appellant jikkontendi anke hawn hekk li din il-policy wkoll mhiex applikabbli ghaz inkwistjoni stante li mhux biss is-sit mhuwiex fi RCA, imma jinsab f'arterja principali li taqqad zewg irhula wiehed minnhom ta' certu portata.

5. Para 3 u 4 tad-Decizioni

Anke f'dan ir-rigward l-appellant jikkontendi li l-Awtorita qed terga tikkwota policies li jirregolaw ODZ, li huwa ma jaqax tahtom. Is-SET 11 titkellem dwar 'outside existing and committed built-up areas'. L-appellant jerga jaghmel referenza ghal dak li huwa argumenta hawn fuq fejn gie ampjament ippruvat li l-proposta ta' zvilupp tinsab f'arterja principali li taqqad zewgt irhula u ma taqax f'RCA.

Ghalhekk fl-umli fehma tal-appellanti huwa ghal kollox irrilevanti li jigu ikkwotati policies dwar Rural Conservation Areas meta hawn si tratta ta' triq, anzi arterja principali.

Ir-rapport ta' Awtorita wara l-appell

Kopja Informali ta' Sentenza

Illi anke minn ezami tar-rapport tal-Awtorita tas-26 ta' Awissu 2011 jirrizulta li r-ragunijiet in sostenn tad-decizjoni li qed telenka l-Awtorita huma is-segwenti:

"The site is located outside the development zone at Xatt Il-Pwales, St Paul's Bay. The site currently forms part of a car park and lies in proximity to a wooded area that is currently proposed to be managed as a recreational area (PA 3335/08) "

Hawn hekk, l-Awtorita qed taghmel sensiela ta' klassifikazzjonijiet:

Tibda billi tikkwalifika is-sit bhala ODZ, fl-istess nifs tghid li 'currently forms part of a car park and lies in proximity to a wooded area', mentri iktar l-isfel tikkwota n-North West Local Plan u tghid hekk 'the site is designated as a 'nature reserve' (policy NWC08).

Tkompli tikkwota Policy NWCO 8 li jghid 'no development of any kind will however be permitted within the boundary except for suitable maintenance of existing structures and construction of minor amenities designed to enhance the conservation or educational use of the area:

Fir-rigward tad-deskrizzjoni tas-sit hekk kif jergi mis-suespost jidher li l-Awtorita trid tiddecidi hux qed niddiskutu:

sit li jinsab "f'nature reserve";

"within the boundary" tal-istess reserve;

"at Xatt il-Pwales";

"currently forms part of a car park";

"jew in proximity of a wooded area. "

Fil-fehma umli tal-appellant u mill-Pjanti/Mapep Dok JV 5-6 u 7) jidher li ma hemmx dubbju (da parti tal-appellanti) li

Kopja Informali ta' Sentenza

is-sit jinsab fit-Triq li taqqad San Pawl mat-tela tax-Xemxija u imkien iktar u li ilu hemm ghal iktar minn hamsa u ghoxrin sena.

6. Para 5 tad-decizioni

Issir referenza ghal para 4 tal-Appell fejn jindika car li l-kobor tal-kiosk gie indirizzat u imcekken skond ma titlob il-PDGK, kif wkoll il-materjal li ser jintuza tirrifletti l-esigenza tad-design" u li dan kollu huwa rifless fil-pjanti sottomessi mill-Perit fl-atti tal-Applikazzjoni u l-proceduri pendent.

Ghaldaqstant l-appellant permezz tal-presenti qed jaghmel referenza ghal dak kollu suespost, ghall-provi kollha imressqa quddiem il-Bord/Tribunal precedent, kif wkoll ghall-appell u ghas-sottomissjonijiet tieghu ulterjuri wkoll jitlob li l-appell tieghu jigi milqugh.

L-appellant finalment jikkontendi wkoll anke in vista ta' dak espost hawn fuq li l-awtorita ikkwotat policies li ma japplikawx ghal kaz odjern u ghalhekk hziena fil-kuntest li gew ikkwotati minnha.

L-appellant jiddikjara li tant ghandu x'jissottometti f'dan l-istadju.

B'riserva ghal sottomissjonijiet ulterjuri f'kaz li l-awtorita taghzel li tirispondi ghal din in-nota."

Permezz tat-Tieni Statement taghha l-Awtorita' ressqet il-kummenti taghha inter ali kif gej:

"1.0 COMMENTS ON APPELLANT'S ARGUMENTS

1.1 Following the submission of the initial report by the Authority; the appellant replied in letter received on 14th November. 2011 by stating that following:

1 Policy 5.3 of the PDG Kiosks is not correctly applied. Para. 5.3 states that no new kiosks will be permitted within 500m of an existing kiosk. However. if one also considers para. 5.4 of the PDG Kiosks, it is stated that

kiosks shall be site so as there is at least 3m clear width of promenade or footway/pavement either in front of, or behind, the kiosk, so that the flow of pedestrian is not obstructed. There is no doubt that this policy applies to new development situated on a promenade. Therefore the appellant is contesting that para. 5.3 of the PDG Kiosks as quoted by the Authority does not apply in this case since the development proposed is not 'new' in nature.

2 As quoted in para. 4.6 of the PDG Kiosks, mobile kiosks and hawkers - although these may be mobile (e.g. Vehicles such as lorries or vans), some tend to be permanently sited, as at Marsa. Therefore, since the appellant has been fixed in the said location for the last twenty-five years, his case should fall under the eligibility of special circumstances stated in paras. 4.6 and 5.22 of the PDG Kiosks which establishes that the Authority will normally favourably consider applications for the replacement of existing kiosks which will involve upgrading and which will improve the usual appearance of the area.

3 In the initial report, the Authority argued that there are no planning permits to use the site for such purposes whilst in fact there was an application PA 3667/95 which was refused in 1996. This also proves just how long the same appellant has been using the site in concern.

4 With regards to recently approved adjacent kiosk (PA 752/07) the appellant is commenting that there is no doubt that he has been using the site far longer than the applicant in the adjacent permit approval; and that the adjacent kiosk is not permanent in nature since it is constructed in timber.

5 The appellant does not agree with the Authority that the site in concern is situated outside the development zone since the street in concern is on the periphery of the scheme. On that note, the appellant is illustrating that the development hence cannot run counter to Structure Plan policies RCO 2, RCO 4 or SET 11 since the area in

concern does not form part of the Rural Conservation Area.

1.2 The Authority has the following comments to make:

1.2.1 Policies of the PDG Kiosks

In submission, the appellant is seeking to indicate to the Tribunal that the Authority did not correctly assess the proposed development in view of the PDG Kiosks since it misquoted the contents of para. 5.3. As in the comments provided at initial stages of this Appeal, the appellant is consistently remarking that in light of Section 5.22 of the PDG Kiosks, existing kiosks may be replaced by new ones so long as the project includes a holistic upgrading and visual improvement of the area.

In spite of these comments and as already explained by the Authority in para. 5.2.3 of the initial report, the existing use of the site is not covered by a legal planning permit. The appellant has indicated that he has been using the site for the past twenty-five years and subsequently even submitted an application in PA 3667/95 to regularise the use of the site. However, since the application in concern was refused in 1996 it is clear that the use of the site has continued illegally; and this does not justify that the existing kiosk is now eligible for replacement under para. 5.2.2 of the PDG Kiosks. The development can therefore only be considered as a new construction from a planning point of view.

1.2.2 Site Location

In the comments submitted by at second statement, the appellant is insisting that the street in concern is located on the boundary of the development zone and therefore the reasons for refusal based on policies Rca 2, Rca 4 and SET 11 are incorrectly quoted since they only apply to development located ODZ. Notwithstanding this argument, the North West Local Plan clearly indicates that the site in concern is outside the development zone;

Kopja Informali ta' Sentenza

forming part of the Major Recreational Area (policy NWRE 1) and Nature Reserve (policy NWCO 8).

2.0 CONCLUSION

2.1 For the above-mentioned reasons, the Malta Environment & Planning Authority respectfully requests the Environmental and Planning Review Tribunal to confirm the decision of the EPC and to refuse this appeal for development permission.

2.2 Without prejudice to the above, the Authority reserves its right to reply further on the merits of the appeal, if it would become necessary, after the decision of this Tribunal on the above preliminary point. ”

Permezz ta' nota ta' sottomissjonijiet l-Avukat Michael Sciriha ressaq l-osservazzjonijiet tal-appellant kif gej:

“Existing Kiosk

Illi a skans ta' repitizzjoni u b'referenza ghan-nota ta' sottomissjonijiet minnu precedentement ippresentata, l-esponent jikkontendi li l-kiosk de quo ghandu jigi ikkunsidrat bhala existing kiosts u mhux new kiosk stante li l-appellant ilu fiss fdan il-post ghall-aktar minn hamsa u ghoxrin sena, l-appellant jikkontendi li ic-cirkostanzi specjali tieghu huma inkwadrati u regolati that l-artikolu 4.6 u 5.22 tal-PDGK li jstabilixxi hekk:

'the Planning Authority will normally favourably consider applications for the replacement of existing kiosks which will involve upgrading and which will improve the usual appearance of the area.'

L-appellant jikkontendi li huwa jaqa taht din il-kategorija u dan ghar-ragunijiet segwenti:

- ma hemmx dubbju li huwa permanently sited;
- ma hemmx dubbju li ilu iktar minn 25 sena;

Kopja Informali ta' Sentenza

- ma hemmx dubbju li mhuwiex sitwat fuq promenade u ghalhekk in-nuqqas ta' applikabilita ta' para 5.3 tal-Policy and design Guidance on Kiosks;
- ma hemmx dubbju li l-awtoritajiet koncernanti wkoll jikkonsidraw li l-kiosk ma jaqax that il-provvediment tal-5.3 stante li akkorcaw id-distanzi tal-istess kiosk minn ma l-iehor presenti li minn 50 metri ghamluha 30 metri.

Il-Posizzjoni Geografika tal-Kiosk

Jidher li l-awtorita tkfixxklet meta waslet sabiex tidentifika l-pozizzjoni geografika tal-kiosk effettivament Para 2 tad-decizjoni tghid hekk:

"The site lies outside development zone. The proposal does not comply with structure plan policy RCO 2 which clearly states that no form of urban development will be permitted outside development zone."

Pero imbaghad jekk wiehed jirreferi ghar-rapport ta' Awtorita wara l-appell tas-26 ta' Awissu 2011 jirrizulta li l-Awtorita issa qed tikdentifika il-posizzjoni tal-kiosk f'San Pawl bhala:

"The site is located outside the development zone at Xatt il-Pwales, St Paul's Bay. The site currently forms part of a car park and lies in proximity to a wooded area that is currently proposed to be managed as a recreational area (PA 3335/08)"

L-esponent jaqbel ma dak sottomess fir-rapport ta' Awissu 2011 u jirreferi ghan-nota ta' sottomissjonijiet tieghu fejn huwa issottometta hekk:

- Il-Kiosk qieghed sitwat fil-Coast Road li tati minn San Pawl ghat-tela tax-Xemxija, f'arterja principali bejn iz-zewgt bliet hdejn facilita ta' parkegg. Issir referenza Dok JV (5b). Huwa biss fuq in-naha ta' wara u maqtugh il-gewwa li wiehed isib ir-riserva naturali tas-Simar.
- Issir referenza wkoll ghall-Pjanta mill-Key Diagram tal-Structure Plan Dok JV6 fejn jindika bl-iktar mod car u

Kopja Informali ta' Sentenza

unekwivoku immarkat bl-isfar fuq il-pjanta li l-kosta tikkostitwixxi arterja principali tat-traffiku, mentri biss fuq n-naha ta' wara u il-gewwa hija iz-zona ODZ. Is-sit inkwisjtoni jinsab fil-genb ta' din l-arterja - proprju fil-parkegg li hemm fl-istess.

- Wkoll Dok JV7 jindika in-NWLP fejn juri car immarkat bl-ahmar Triq San Pawl u bil-blu it-tela tax-Xemxija, indikat car wkoll fil-mappa li biss fuq in-naha ta' wara hemm il-Wied u huwa Rural Conservation area.

- Dok JV 8 huwa NWLP tax-Xemxija li jindika l-arterja principali f'Xatt il-Pwales, indikat bl-isfar li huwa 'traffic control at xemxija hill' u bil-blu 'strategic road network improvement:

- Wkoll qed jigi esebit Dok triq arterjali. fejn jindika li anke skond l-TM din iz-zona hija klassfikata bhala triq arterjali

Ghalhekk ma hemmx dubbju li ii-kiosk huwa sitwat l-barra minn rural conservation area u qieghed fi triq arterjali u parkegg.

Trattament ugwali u nuqqas ta' Diskriminazzjoni

Issir referenza ghall-permess mahrug recentement PA 00752/07 – proposta simili ghal dak mitlub mill-esponent liema gie approvat fid-29 ta' Marzu 2011. Ma hemmx dubbju li dan il-Kiosk m'ilhux permanantely sited bhal ma ilu l-esponent u minkejja dan ma kienx hemm ostakolu sabiex jinghata l-permess. L-esponent jikkontendi li huwa ilu permantely sited f'dan is-sit ghal iktar minn hamsa u ghoxrin sena, in sostenn is-segwenti:

DokJV1 ricevuta ta' licenzja ta' hawker bl-uzu ta' trakk datata 14 ta' Frar 1984.

DokJV2 ricevuta ta' licenzja ta' hawker bl-uzu ta' truck datat 5 ta' Jannar 1982.

Kopja Informali ta' Sentenza

DokJV3 ittra ta' rikjesta datat 9 ta' April 1986 fejn l-appellant talab li isir fixed hawker. Din hija prova li huwa kien ilu diga minn dak iz-zmien 'permanently sited'

DokJV4 acknowledgement tal-isess ittra

DokJV5 ittra ta' konferma mill-Kunsill Lokali San Pawl il-Bahar li ilu ghal dan iz-zmien u li ghandu il-facilita ta' dawl u ilma

DokJV6 kopja tal-kont tad-dawl u l-ilma.

DokJV7 vat registration tal-appellant li tindika li ibiegh il-haxix.

DokJV8 memo and articles tas-socjeta tal-appellant indikanti li ibiegh il-haxix.

Illi inoltre issir referenza ghal diversi kiosks/gabanni li hemm sitwati l-Ghadira - fuq il-promenade - fejn ir-riserva ta' naturali tal-Ghadira, wiehed isaqsi ittiehdu l-istess konsiderazzjonijiet fil-proliferazzjoni tal-istess Kiosks? L-istess jistgha jinghad ghal Ghajn Tuffieha fejn wiehed isib zewgt Kiosks - wahda fuq ir-ramel (sand dunes) prottetti anke mill-istruktura plan inniffsu.

Illi wkoll l-esponent jaghmel referenza ghall-diversi sentenzi tal-Onorabbli Qorti ta' l-Appell fejn gie ribadid ad nauseam illi dak li jithalla jaghmel wiehed ghandu jithallas jaghmel iehor that il-principju ta' trattament ugwali u nuqqas ta' diskriminazzjoni. Senjatmaent issir referenza ghad-decizjoni tal-Bord ta' l-Appell fl-ismijiet Salvu Mallia vs. Kummissjoni ghall-Kontroll ta' l-Izvilupp (PAB 221/97, PA 4213/96):

"Ir-reqola ta' ceribus 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".

u wkoll fid-decizjoni Dione Bartolo kontra l-Kummissjoni ghall-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”.

Coastal Zone Management Structure Plan

Illi finalment l-esponent jirreferi ghall-coastal zone management policy (CZM2) fl-istruktura Plan Document innifsu li tghid hekk:

“a subject plan will be prepared for coastal management, to include both conservation of this important resource, and improve facilities for its enjoyment by the public”.

wkoll CZM3 para 15.48 tghid hekk:

“Facilities for enjoyment by the public shall include car parks, toilets, first aid posts, restaurants, shops, temporary boat mooring, watersports, sunbathing areas, showers, picnic areas, refuse disposal, promendades, nature trails”

Illi l-esponent jikkontendi li l-generu ta' attivita ta' negozzju tieghu konsistenti f'bejgh ta' frott u haxix frisk u xi xarba friska tikkwalifika bhala sit li joffri facilita sabiex il-pubbliku jgawdi ix-xatt tax-Xemxija li hemmx dubju li hija Kosta fejn anke isir l-ghawm u li ghalhekk anke fl-isfond ta' din il-policy il-permess kif miltub mill-esponent ghandu jinhareg.”

Permezz tat-Tielet Statement tagha l-Awtorita' irrilevat:

“1.0 COMMENTS ON APPELLANT'S ARGUMENTS

1.1 Following the submission of the initial report by the Authority; the appellant replied in letter received on 21st March, 2012 by stating the following:

1 The appellant is arguing that the development should be considered as to an "existing kiosk" and that in accordance with para. 4.6 & 5.22 of the Development Control for Kiosks, the appellant is eligible for the proposal.

2 There has been conflict of opinion on the geographic location of the kiosk since this case refers to the development as ODZ whereas in PA 3335/08 the area was identified as ODZ forming part of a car park and in proximity to a wooded area. To the appellant, there is no doubt that the kiosk is situated outside the rural conservation area and is on parking spaces provided to the arterial road.

3 With regards to the recently approved kiosk in PA 752/07 (issued in March 2011) there is no doubt that the kiosk permitted has been permanently situated on site far less than that being requested in this appeal. On this argument, the appellant is providing copies of police licensing dating back to 1982 to show that the use of the site was permitted for the sale of fruits/vegetables by the appellant.

4 The appellant is claiming the arguments of Cerimus Paribus in view of the permit issued in PA 752/0Z, and is quoting previous appeal decisions of Salvu Mallia (PAB 221/97) and Dione Bartolo (PA 633/98) vs MEPA.

1.2 The Authority has the following comments to make:

1.2.1 Repeat of Earlier Comments

At third statement the appellant is once again stating that the Authority must regard the kiosk as 'existing' and therefore the appellant is eligible for the development in line with policy 4.6 and 5.22 of DCG Kiosks. In spite of these comments, the Authority retains the arguments made in para. 5.2.3 of the initial report and 1.2.1 of the second statement where the Authority explained that the existing use of the site is not covered by a legal planning permit and therefore the proposal can only be considered as a new construction from a planning point of view.

1.2.2 Geographic Location of Site

Although the appellant is making comparison between this application and that in PA 3335/08 (extension to Simar

Nature Reserve), it remains a fact that both cases referred this areas as Outside Development Zone; albeit adding that the use of the area is also that of a public car park. In spite of this comment, it is agreed that the site is situated on an arterial road and that the NWLP identifies the area as a Major Recreational Area.

As explained in para. 5.2.2 of the initial report, the kiosk is proposed to be situated in close proximity (approx. 30m) from another approved kiosk (PA 752/07) and therefore the proposal is not in line with policy 5.3 of the PDG Kiosks. On this note, the Authority wishes to also address the fact that the height and area of the proposed kiosk are also excessive to the limitations of the PDG Kiosks (as also explained in more detail previously in para. 5.2.2 of the initial report).

1.2.3 Principle of Development as Cerimus Paribus vis-a-vis Commitment

In arguments submitted, the appellant is also stating that in the case of the proposed development, the site is situated in an area where other similar developments are present; hence is requesting that permit be approved in view of Cerimus Paribus. In this respect, MEPA highlights the importance of respecting the zoning designations in the Local Plan and other Policy Documents in order to ensure comprehensive planning. This position finds comfort in a recent decision given by the Planning Appeals Board (PA 5727/05; PAB 161/07) which stated that: *Il-Pjan Lokali kien specificament mahsub sabiex jaghti direzzjoni ta' kif z-zoni differenti ghandhom jkomplu jigu zviluppati. Kieku wiehed kellu jinjora l-pjan lokali u johrog permessi abbazi bissta' xi tip ta' kommittment dan jkun jfisser illi l-ghannijiet tal-Pjan Lokali ma jkunu jistghu qatt jintlahqu u l-ezercizzju kollu tal-pjanijiet lokali jkun sar ghall-xejn. Therefore it is clear that whilst existing (legal) commitment must be taken into account by the Authority when assessing and deciding a proposed development, respecting the zoning designations is essential.* ”

Kopja Informali ta' Sentenza

Permezz ta' nota u ghan-nom tar-Ramblers Association Alex Vella ressaq is-sottomissjonijiet tieghu kif gej:

“Stante li l-appellant ilu jahdem min dan il post ghall-aktar min hamsa u ghoxrin sena r-RAM tikkontendi li:

- Dejjem kien mobbli permezz ta' truck u perjodikament imcaqlaq ghal ragunijiet varji, u dan il-fatt ma jikkwalifikahx bhala kiosk kif stability mill-ligi;

- Ghaldaqstant ic-cirkustanzi tieghu ma humiex inkwadrati lanqas regolati taht l- artikolu 4.6 u 5.22 tal-PDGK kif dikjarat;

- Art 4.6 u 5.22 jistabilixxi li "the Planning Authority will normally favourably consider applications for the replacement of existing kiosks which will involve upgrading and which will improve the usual appearance of the area." Konsekwentament l-Awtorita' ta' l-Ippjanar ma tistax tikkonsidra favorevolment din it-talba stante li ma hemm ebda existing kiosk permanently sited;

- Billi ma jinsabx fuq in-naha tal-bahar ma hemmx dubbju li is-sit jiffirma parti mill-promenade. Fil-fatt il-kiosk l-iehor prezenti jittratta bejh ta' refreshments u gelati li normalment issib fuq promenades, hemm bankijiet pubblici li jiffaccjaw ix-xena tal-bajja, hemm restaurants u snack-bars li jpoggu mwejjed barra fuq l- istess naha tat-triq kif ukoll souvenir shops. Ma jistghax jinghad li dawn kolla ma humiex relatati mal-promenade u li ma jiffurmawx parti minna. Anke l-Awtorita' stess, fir-rapport taghha wara l-appell tas-26 ta Awissu 2011, iddentifikat is-sit bhala "a recreational area"

- Ghaldaqstant huwa kontestat li para 5.3 tal-Policy and Design Guidance on Kiosks ma japplikax.

Il-Posizzjoni Geografika

Ir-RAM tafferma il-kunsiderazzjoni tal-Awtorita li is-sit jaqa barra iz-zona ta zvilupp. Ghalkemm prossimattiv mal-konfini taz-zona ta'zvilupp huwa car li Triq il-Pwales tifred

Kopja Informali ta' Sentenza

iz-zewg zoni, us-sit in kwistjoni jaqa fuq in-naha tal-ODZ. L-argument li sitwat f'arterja principali tat-traffiku u go car park ma jregix ghar-raguni li triq li tghaddi minn ODZ ma tiehux drittijiet ta' zona ta'zvilupp. Ghalkemm it-triq taqsam ir-ramla mir-riserva natura li tas-Simar xorta taghmel parti integrali mis-sistema ekologika, u kull zvilupp fuqa ma jistax hliet jaghmel aktar hsara lis-sistema ekologika. Il-parking area flimkien mal-wooded area biswit attwalment iservu ta' buffer zone ghar-riserva naturali tas-Simar.

Trattament ugwali u nuqqas ta' diskriminazzjoni

Ir-RAM tikkontendi li:

- Dan l-argument ma ghandux jinghata kunsiderazzjoni ghax huwa fil-kompetenza tat-tribunal li jitratta kazi fejn jista jkun hemm misapplikazzjoni ta' policies u regolamenti. Rimedji ghall-allegat diskriminazzjoni ghandom jigu mfittxa ghand l-qrati jew tribunali kompetenti relattivi;
- Permess qatt ma nghata lil-appellant biex isir "fixed hawker" minkejja l-ittra tieghu ta' rikjesta ta April 1986. Semplici acknowledgement mhux permess.
- Dokumenti ohra prezentati li jirrigwardaw ii-VAT, Memo & Articles tas-socjeta, kontijiet tad-dawl u ilma, konferma mill-Kunsill Lokali huma kolla irrelevantanti ghall-kas;
- Dokument iehor iffirmit mis-sur George Gatt, li kien MP, u jgib id-data tas-16 ta' Gtlnju 1986, juru fic-car kemm ic-cirkustanzi inbiddu ghax illum l-applikant huwa f'sahthu ghall-grazzja ta' Alla u dan ix-xoghol ma huwiex aktar "l-uniku xoghol li ghandu," kif jikkonfermaw ukoll-M&A tas-socjeta tieghu;
- Ma kellomx jissemmew diversi precedenti biex dan il-kas jigi determinat fuq pretest ta' precedent, waqt li policies u regolamenti rilevanti jigu traskurati;
- Diskriminazzjoni jekk tezisti kienet u ghada favur l-appellant li thalla illegalment jipparkja it-truck tieghu post

Kopja Informali ta' Sentenza

wiehed kulljum meta l-permess tieghu huwa ta' hawker, li normalment tinvolvi mobilita kontinwa. Saret u qed issir attwalment discriminazzjoni kontra dawk ir-residenti, li anke huma oggezzjonaw, u li ghal 25 sena ittolleraw il-vettura ingombranti tal-applikant li tostakula il-veduta ta' darom; qed issir diskriminazzjoni ukoll kontra dawk li ma jsibux post fejn jistghu jipparkjaw;

Coastal Zone Management u Structure Plan

Finalment ir-RAM tafferma li din l-applikazzjoni tmur kontra iz-zewg dokumenti riferiti mill-appellant. Fil-kaz tal-Coastal Zone Management policy (CZM2) ma huwiex tenibbli li kostruzzjoni permanenti kif qed jitlob l-appellant tikkonserva ir-rizorz naturali importanti tas-Simar jew ittejjeb il-facilitajiet ghall-godiment tal-publiku. Jekk xejn ser izzid il-light pollution ghar-riserva natura li, tkun ta' ingombro akbar ghat-traffiku, anke f'kaz ta'emergenza ghax ma tistax titnehha, tostakola d-djar tal-girien ta' wara, biex ma nsemmux id-dannu fl-infrastruttura.

Fir-rigward ta' CZM3 para 15.48, ukoll kwotat mill-appellant, l-istruttura li qed tintalab ma taqa taht ebda klassifika hlief forsi "shops" li essenzjalment fuq promenade ma hux normali li jinkludu hwienet tal-merca jew tal-haxix.

Ghal dawn ir-ragunijiet li jikkonformaw mal-ispirtu tal-policies rilevanti fid-dokument tal-Pjan ta' Struttura, dan l-appell ghandu jigi rifjutat. ”

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda t-talba segwenti: “ proposed fixed structure to serve as a sales point for fruits and vegetables instead of current mobile truck.”

Is-sit mertu ta' dan l-appell jinsab f'Xatt il-Pwales, San Pawl il-Bahar.

Din l-applikazzjoni giet rifjutata peress li l-izvilupp propost mhuwiex accettabbli peress li ma hemmx htiega ghal kiosk iehor fiz-zona, li s-sit jinsab barra l-limiti permessi

mill-paragrafu 5.3 tal-Policy and Design Guidance on Kiosks, li l-proposta tmur kontra l-policy RCO 2 tal-pjan ta' struttura, l-proposta tmur kontra l-policy SET 11 tal-pjan ta' struttura peress li jikkonsisti f'zvilupp urban barra zona kommissa ghall-izvilupp, imur kontra l-paragrafu 7.6 tal-pjan ta' struttura u l-policy BEN 5, li l-izvilupp mhuwiex gustifikat in linea mal-policy SET 12 tal-pjan ta' struttura u li d-dimensjonijiet tal-istruttura jeccedu dawk permessi skond il-paragrafu 5.8 tal-Policy and Design Guidance on Kiosks.

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 l-Awtorita' qeghda tikkonsidra l-applikazzjoni odjerna bhala wahda ghal kiosk gdid li mhuwiex il-kaz peress li l-applikant ilu jopera mill-istess sit ghal izjed minn 20 sena bil-kunsens tal-Kunsill Lokali ta' San Pawl il-Bahar u entitatijiet governattivi ohrajn, li skond l-artikolu 4.6 (iii) tal-PDGK l-attivita' relattiva hija accettata billi "Mobile Kiosks and Hawkers - although these may be mobile (i.e. vehicles, such as lorries or vans), some tend to be permanently sited, as at Marsa", li l-appellant jixtieq jimmeljora s-sitwazzjoni prezenti permezz ta' miljoramenti generali fl-apparenza vizwali taz-zona, li inhareg permess simili fiz-zona u cioe' PA 00752/07, li r-ragunijiet 1-4 tar-rifjut gew indirizzati u li l-hames raguni hija sorvolata peress li fit-23 ta' mejju 2011 gew prezentati qisien godda sabiex id-daqs ikun in linea mal-policies vigenti.

L-Awtorita' tissottometti li s-sit mhuwiex kopert b'permess li jkopri l-operat ezercitat minnhu, li l-appellant kien applika ghal kiosk fiss permezz ta' PA 3667/95 u li t-talba giet michuda u li ma giex intavolat appell sabiex id-decizjoni tigi kkontestata, li l-Policy Guidance for Kiosks ma tippermettix li tintlaqa t-talba tal-appellant peress li mhuwiex permess kiosk f'500m vicin ta' iehor, li l-kiosk kopert b'PA 752/07 awtorizza 'mobile timber kiosk' minnflok wiehed maghmul mill-aluminium, u li dan tal-ahhar jinsab 30m l-boghod minn dak propost, li l-qisien u dimensjonijiet proposti mhuwiex in linea mal-istess policy u li dawn gew michuda mill-Bord tal-EPC, li l-qisien li gew

proposti bil-ghan li jkunu in linea mal-policy gew sottomessi tard, li s-sit jinsab f'special area of conservation, special protection area u level 1 area of ecological importance, jinsab vicin ta' 'wooded area' li huwa propost li jigi zviluppat bhala estensjoni ghas-Simar Nature Reserve, u li l-proposta tmur kontra l-policies SET 11 u SET 12.

Mill-file tal-applikazzjoni jirrizulta li oggezzjonaw ghall-proposta, u gew registrati bhala registered objectors s-segwenti:

1. Francis Agius, 2, Flat 1, Triq l-Awwista, Xemxija.
2. Romano Cassar, 34, Triq l-Emigranti, Naxxar
3. Alex Vella ghar-Ramblers Association of Malta, POBox 108, Sliema.
4. Maria Agius, 324, Pwales Road, Xemxija, St. Paul's Bay.
5. Jill Kupezac, 11, Nag Flats, St. George's Street, St. Paul's Bay.
6. Joseph Agius, 12, Flat 1, Pwales Road, St. Paul's Bay

Is-sit jinsab barra z-zona tal-izvilupp f'Xatt il-Pwales, San Pawl il-Bahar; jifforma parti minn Car Park u jinsab vicin area bis-sigar li bl-applikazzjoni PA 3335/08 qed tigi proposta bhala area ta' rikreazzjoni, u estenzjoni tar-rizerva Naturali Simar. Fil-prezent is-sit hu okkupat minn truck, li minnu l-appellant jbiegh l-frott u l-haxix.

Skond in-North West Local Plan is-sit hu disinjat bhala "Nature Reserve" Policy NWCO8, u Major Recreational Area Policy NWRE 1.

L-art hi triq pubblika propjeta tal-Gvern. Fuq l-istess sit kienet saret applikazzjoni minn Tony Borg, PA 3667/95 "to erect a fixed Kiosk selling take away foods and drinks". L-applikazzjoni giet michuda mid-DCC Board fis-6 ta' Dicembru 1996.

L-appellant jikkontendi li l-fatt li ilu snin twal armat bit-truck, ibiegh l-frott u l-haxix, ifisser li l-applikazzjoni m'ghandhiex tigi trattata bhala wahda ta' attivita' gdida, u ghalhekk skond is-Section 5.22 tal-Policy and Design

Guidance on Kiosk jikkwalifika biex jaghmel miljorament partikolarment fl-aspett vizwali.

Dan l-argument pero' hu validu biss jekk l-kiosk originali jkun kopert bil-permess tal-izvilupp. Dan ma jirrizultax fil-kaz in ezami billi l-attivitá' tal-bejgh tal-frott u l-haxix isir minn truck – cjoe vettura mobbli u mhux stabbiliment fiss u immobbli.

Naturalment iz-zewg sitwazzjonijiet m'humieq regolati bl-istess mod; fruit and vegetable mobile hawker hu regolat b'certi kondizzjonijiet, mentri l-istess attivita ta' bejgh minn struttura fissa, tirrikjedi permess ghall-izvilupp.

Il-fatt li applikazzjoni simili fuq l-istess sit, PA 3667/05 giet michuda jikkostitwixxi konferma ulterjuri, li l-bejgh minn truck fuq is-sit, m'ghandux implikazzjonijiet rilevanti fil-kontest ta' ippjanar.

Il-proposta hi wkoll in kontravvenzjoni ta' diversi regolamenti tal-Policy and Design Guidance on Kiosks, billi jinhtieg li tinzamm certa distanza specifika bejn kiosk u iehor, u ghandhom ikunu ta' certi qisien. Fil-kaz in ezami jirrizulta li l-qisien tal-izvilupp propost kien in excess ta' dak konsentit bl-istess regolamenti; u l-modifiki li saru dwar dan mill-appellant, saru fi stadju avanzat tal-process, meta m'humieq permissibbli.

L-appellant jikkontesta wkoll id-disinjazzjoni tas-sit, semplicement ghar-raguni li dan jinsab vicin triq arterjali. Dan mhux kriterju korrett billi d-disinjazzjoni taz-zona hi kif indikata fil-Pjan Lokali, cjoe' barra z-zona tal-izvilupp, f'area ta' Rizerva Naturali, u Area Rikreazzjonali. L-izvilupp propost ghalhekk ma jistax jigi approvat billi d-disinjazzjoni tas-sit, skond in-North West Local Plan, ma tippermettix tali zvilupp. Zvilupp barra iz-zona tal-izvilupp mhux permissibbli billi in kontravvenzjoni ta' diversi Policies tal-Pjan ta' Struttura , kif dettaljatament indikat fir-rapporti tal-Awtorita'.

Eccezzjonalment jigu permessi certi zviluppi relatati ma' htigijiet agrikoli genwini. Dan ma japplikax ghal kazin

ezami billi effettivament l-appellant qed jipproponi zvilupp ta' hanut fuq art pubblika indikata bhala area ta' rikrejazzjoni.

Ezaminata fid-dettal l-applikazzjoni tal-applikazzjoni tal-appellant, l-motivazzjonijiet tar-rifjut u l-aggravji tal-appell fil-kuntest tal-Policies tal-Ippjanar rileanti, l-appell ma jimmeritax konsiderazzjoni favorevoli.

It-Tribunal ghalhekk qed jiddisponi minn dan l-Appell billi jichad l-istess u jikkonferma r-rifjut tas-27 ta' Mejju 2011 ghall-applikazzjoni PA 2235/09.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal injora d-dispost tal-artikolu 4.6(III) tal-Policy and design Guidance on Kiosks cioe fejn jirrigwarda mobile kiosks and hawkers li ghalih japplika l-kaz in kwistjoni u bbaza d-decizjoni tieghu fuq l-artikolu 5.3 li jirrigwarda 'new kiosks'. It-Tribunal injora l-fatti li dan il-mobile kiosk ilu jintuza fl-istess sit ghal 25 sena u ghalhekk japplika l-artikolu 5.22 fejn l-Awtorita thares favorevolment lejn talba ghal sostituzzjoni tal-istess kiosk ma' wiehed li jabbellixxi aktar l-ambjent. L-appellant jikkontendi li ghandu dritt kwezit u jistrieħ fuq il-fatti dwar l-uzu u permessi ta' awtoritajiet li ilu jopera mis-sit in kwistjoni bi kiosk;
2. L-elementi li qies it-Tribunal dwar distanzi bejn kiosk u iehor u kobor kienu zbaljat billi dawn huma kirterji li japplikaw ghal kiosk fuq il-promendate li mhux il-kaz;
3. It-Tribunal ikkunsidra hazin li s-sit hu zona ta' riserva naturali billi bhala fatt jirrizulta li jinsab f'arterja principali. In oltre ikkunsidra hazin li jinsab f'rural conservation area u rabat ir-rifjut ma' dan il-fatt;
4. It-Tribunal injora l-argumenti ta' commitment rigward divrsi premissi ta' kiosks approvati f'siti naturali u ta' konservazzjoni bhal Ghadira u Ghajn Tuffieha.

L-ewwel tlett aggravji

Dawn l-aggravji mhumiex appelli fuq punti ta' ligi izda talba ghal rikonsiderazzjoni ta' kwistjonijiet teknici u ta' ppjanar ikkunsidrati mit-Tribunal.

L-appellant jipprova jerga' jiftah id-dibattitu jekk dan hux talba ghal kiosk gdid jew upgrading. It-Tribunal ha konjizzjoni ta' dan l-aggravju b'riferenza ghal policy in kwistjoni u kien tal-fehma illi l-appellant ma kellu ebda premess ta' zvilupp fuq is-sit in kwistjoni tant li kien gia applika ghal permess fl-2005 u gie rifjutat. Kwindi din l-applikazzjoni wahedha kienet gia ammissjoni implicita li l-appellant ma kellu ebda permess ta' zvilupp ghal kiosk fuq is-sit in kwistjoni. Konsegwenza ta' dan ebda applikazzjoni ghal upgrading ma tista' tigi kunsidrata jekk lanqas hemm permess ghal kiosk fl-ewwel lok. Dan hu l-iter li wassal lit-Tribunal biex jasal ghal konkluzjoni dwar it-tip ta' zvilupp rikjest. Dawn kienu apprezzament ta' fatti u interpretazzjoni tal-ligi tal-ippjanar specifika ghal dawn il-fatti. Il-Qorti ma tissindakax l-interpretazzjoni legittima li ghandu dritt jaghmel it-Tribunal tal-policies ta' ppjanar li hu munit b'esperti fil-materja biex jassistieh. Din il-Qorti ma tindahalx sakemm l-interpretazzjoni ma ssirx kontra dak li tghid il-policy espressment jew l-interpretazzjoni li fuqha hi bbazata d-decizjoni tirrizulta minn affermazzjoni ta' fatt li jirrizulta zbaljat jew hi manifestament ingusta u ma tirriflettix il-policy u l-ispirtu taghha. F'dan il-kaz il-Qorti tqis li t-Tribunal irrikonoxxa l-fatti u interpeta l-policy b'tali mod li din il-Qorti ma tqis li hi sindakabbli billi t-Tribunal ghamel distinzjoni netta bejn zvilupp kopert b'permess li jrid modifika u wiehed li ma ghandux permess li fuqu qed jistrieu biex jitlob modifika. Din hi kwistjoni ta' planning fid-diskrezzjoni tat-Tribunal u l-Qorti tqis li ma hemm xejn f'din il-parti tad-decizjoni li hi kontradetta b'mod car mill-policy kwotata.

Il-fatti ma gewx elenkati mit-Tribunal b'mod arbitrarju u erroneju u a bazi ta' dan wasal ghal konkluzjonijiet sussegwenti rigwardanti l-ghoti ta' permess ghal kiosk gdid. It-Tribunal ikkunsidra li s-sit hu barra z-zona ta' zvilupp f'art tal-Gvern, tiffirma parti minn car park u vicin zona bis-sigar li qed tigi proposta bhala area ta' rikreazzjoni u estensjoni ta' riserva naturali f'applikazzjoni

separata. F'dawn ic-cirkostanzi t-Tribunal ikkonsidra li d-desinjazzjoni tas-sit skond in-North West Local Plan ma tippermettix tali zvilupp u hi in kontravvenzjoni ta' diversi policies u pjan ta' struttura skond kif elenkat l-Awtorita. Zied li lanqas japplikaw kriterji ta' eccezzjoni ghal zvilupp simili fuq art pubblika indikata bhala area ta' rikrejazzjoni. Kontrarjament ghal dak sottomess mill-appellant it-Tribunal ma dahalx fil-kwistjoni tal-promenade u kundizzjonijiet applikabbli ghal strutturi fuq promenade u lanqas ma qal li s-sit jiffirma parti minn riserva naturali. Qal pero illi tinsab f'ODZ li ghaliha japplikaw certi regoli fosthom regolazzjoni ristrettissima ta' zvilupp li anki jekk wiehed kellu jissoferma ruhu fuq il-policy dwar kiosks, din il-proposta kienet in kontravvenzjoni ta' distanza bejn kiosk u iehor ezistenti u anki l-qisien tal-kiosk kienu in excess ta' dak permess u l-emendi tal-qisien mill-appellant kienu saru fi stadju inoltrat wisq tal-process.

Dawn il-kwistjonijiet kollha bbazati fuq policies ta' planning kienu r-ragunijiet li waslu lit-Tribunal ghad-decizjoni tieghu wara l-argumenti ventilati mill-partijiet li regghu gew riprodotti f'dan l-appell. Il-fatt li wiehed ma jaqbilx mad-decisjoni ma jfissirx li jista' jerga' jiftah il-fatti quddiem din il-Qorti biex terga' taghmel riapprezzament tal-fatt u tiddeciedi hi kif tapplika l-policies rilevanti. Il-policies rilevanti gew applikati u fil-fehma tal-Qorti, dawn kienu sfavorevoli ghall-applikant. Hu dan li l-appellant qed jipprova jwaqqa' f'dan l-appell cioe l-apprezzament tat-Tribunal mhux l-izball ta' applikazzjoni ta' policy partikolari.

Ghalhekk dawn l-aggravji qed jigu michuda.

Ir-raba aggravju

Hu minnu illi l-appellant fit-trattazzjoni tal-appell invoka argumenti ta' cerimus paribus b'referenza partikolari ghal kiosk iehor li hemm fl-istess zona u li nghata permess recenti. L-Awtorita rribatiet illi l-permess kien ghal tibdil fil-materjal minn wiehed tal-aluminium ghal wiehed tal-injam. It-Tribunal hu sieket fuq din il-kwistjoni u f'cirkostanzi ohra l-Qorti kienet tirrimetti l-atti biex jigi trattat dan il-punt. Pero f'dan il-kaz il-Qorti tqis illi d-decizjoni tat-Tribunal kienet

ibbazata fuq policy cara cioe il-PDGK tenut kont in oltre taz-zoning tas-sit. B'dawn il-konsiderazzjonijiet, din il-Qorti gia esprimiet ruhha b'mod car illi fejn il-policies u pjan ta' zvilupp jew pjan lokali huma cari, iridu jigu applikati u dan minghajr ma t-Tribunal jinkorri fl-izball li jinjora l-ligi li ghandu l-obbligu jsegwi skond l-artikolu 69 tal-Kap. 504. Hu minnu li t-Tribunal seta' rrikonoxxa l-aggravju tal-appellant u wasal ghal konkluzjoni implicita fl-istess decizjoni li l-obbligu tieghu kien principalment lejn l-osservanza tal-pjanijiet u policies li dan il-kaz ma jirrispettax. Pero l-Qorti tqis illi l-argument tal-permess tal-kiosk l-iehor ma kienx wiehed primarju jew li jaghti lok serju ghal dibattitu meta l-istess argument tal-Awtorita dwar in-natura tal-permess tal-kiosk l-iehor ma giex michud mill-appellant u l-aggravji kienu essenzjalment fuq in-natura tal-izvilupp cioe jekk hux talba ghal kiosk gdid jew sostituzzjoni ta' wiehed ezistenti u d-desinjazzjoni taz-zona fejn qed jintalab l-izvilupp. Dawn kienu l-pern tal-kontestazzjoni u l-argumenti tal-izvilupp l-iehor fl-istess zona kien biss, fil-fehma tal-Qorti, wiehed periferali li ma jirriedix fuq is-sustanza ta' dan l-appell.

Ghalhekk fic-cirkostanzi ta' dan il-kaz dan l-aggravju mhux misthoqq u ma jimmeritax li d-decizjoni ghandha tigi revokata u l-appell jigi milqugh fuq din ir-raguni.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Jimmy Vella u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-2 ta' Mejju 2013. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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