



## **QORTI TA' L-APPELL**

**ONOR. IMHALLEF  
MARK CHETCUTI**

Seduta ta' l-4 ta' Dicembru, 2013

Appell Civili Numru. 193/2012

**Frans Mamo**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell ta' Frans Mamo tas-27 ta' Dicembru 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-11 ta' Dicembru 2012 rigward applikazzjoni PA 3011/09 'to demolish existing garages and disused Lime Kiln factory. The application also includes the construction of garages, 1 shop and apartments', fejn it-Tribunal laqa' in parte l-appell ta' Frans Mamo kontra d-decizjoni ta' rifjut tal-Awtorita;

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

Kopja Informali ta' Sentenza

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

A. Il-Bord tal-Awtorita' tal-Ambjent u l-Ippjanar, fil-21 ta' Gunju 2011, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 3011/09 - 19, Padre Pio, Triq Haz-Zabbar, Triq il-Karmelitani, riq il-Liedna, Fgura: To demolish existing garages and disused Lime Kiln factory. The application also includes the construction of garages, 1 shop and apartments.

L-unika raguni ghar-rifjut kienet is-segwenti:

“1. The proposal constitutes over-development of the site and the semi-basement apartments looking over the internal open spaces offer low quality of life.”

B. In-nota tal-Perit Philip Mifsud ghall-Appellant, ipprezentata fit-18 ta' Lulju 2011, senjatament il-punti segwenti:

“• The proposal is in full conformity with all MEPA policies. In fact this application was assessed by the Directorate against all relevant, and currently in force, MEPA policies, found to be in full conformity, and recommended for approval. (Refer to DPA Report in MEPA file dated 13<sup>th</sup> May 2011 (copy attached, Doc 4). In spite of the positive recommendation by the Directorate, MEPA has refused this proposal (split vote of 7-4). The decision notice (Doc 3) communicated to us only gives one short reason for this refusal. However we feel obliged to immediately point out that in its reason for refusal MEPA is not stating that this proposal goes against any of all existing MEPA plans, policies and/or regulations. The communicated decision is just an opinion of some of the MEPA Board members, and same opinion is not based on MEPA plans, policies and/or regulations. In fact, in its decision, MEPA has not indicated that the proposed development infringes on any of MEPA's plans, policies and/or regulations the above

and consequently the refusal taken by MEPA is without sound consideration. As a result we respectfully request the EPRT to cancel MEPA's decision and request same to issue permit accordingly.

Without prejudice to the above, we submit that the only reason for this refusal hints that the proposal constitutes an 'over-development' and 'low quality of life' for some of the proposed semi-basement apartments. Regarding this two issues we submit that:-

- As stated above, the proposed development is in line with all MEPA policies, including height limitations, site coverage and all the relevant policies in P&DG 2007. This was confirmed by the Directorate. In stating that the proposed development comprises an overdevelopment MEPA is contradicting itself. In other words, MEPA cannot, and should not, penalise an applicant when he proposes a development which is in full conformity the plans, policies and regulations established and approved by the same Authority.

- With respect to the proposed semi-basement residential units, we stress that, as indicated above, these are in full conformity with the relevant P&DG 2007 policies. As such the above arguments still applies. In addition to the above we state that:-

- The proposed design allows for the opportunity that the semi-basement apartments looking over the internal open spaces are fully exposed. This is in contrast with all other semi-basement residential units approved all over the island and which overlook a public road (as these will have a portion below ground/road level). The semi-basement units proposed in this development and which overlook the internal open space in terms of quality of life can be easily classified as ground floor units. It is really hoped that in its statement, MEPA is not trying to imply that all existing ground floor units approved all over Malta 'offer low quality of life'.

- The chosen type of development, i.e. the inclusion of internal open spaces within the same development offer a unique advantage on other types of development in the sense that the internal open space serves as a semi private/public safe space which can be freely used by the inhabitants of the residential units.

- Finally we state that MEPA has approved several other similar, and almost identical, developments in which same principles have been adopted. In approving these developments MEPA was satisfied that the proposals did not 'constitute over-development' or 'offer low quality of life'.

The list of approved developments adopting the same principles is endless. At this stage we limit ourselves to quote the following: PA 05980/04, PA 06343/04, PA 00907/05, PA 01409/06, PA 01953/06, PA 03277/06, PA 03497/06, PA 03512/06 and PA 00570/09. We are kindly requesting that these files will be attached.”

C. In-nota risponsiva ta' Edward Borg ghall-Awtorita', ipprezentata fl-4 t' Ottubru 2011, inter alia l-punti segwenti:

“5.1.3 [...] Principle of Development:

Following the implementation of the South Malta Local Plan, this site has retained the 'Residential' zoning, previously indicated in the TPS. Therefore, there is no objection in principle to the proposed residential development with underlying car parking provision. Additionally, the Class 4 shop facing onto Triq Hompesch, with the latter falling within a 'Secondary Town Centre', is also acceptable.

Internal Development Concept:

The layout of the proposal includes a corner part facing onto Triq il-Liedna and Triq il-Karmelitani and two common pedestrian fore-courts accessible from the aforementioned streets leading to the internal development concept of this proposal. Soft landscaping is

being proposed within parts of the common pedestrian areas.

Sub-section (e) (ii) of Part A of Policy 3.8 of DC 2007 stipulates a 3 metres separation from such proposals from the back-yards of adjoining buildings. The latter has not been adopted in this proposal. The site plan submitted (and confirmed by MEPA's website) indicates that the buildings adjacent to the site on the parts facing on Triq il-Liedna are deep enough to cover almost all the third party wall.

The remaining exposed part of this third party wall, which consists of the innermost apartment in the common pedestrian area accessible from Triq il-Karmelitani, is bounding a back-yard/open space of a building which faces on Triq Hompesch. The latter is only a few metres up from the Class 4 shop proposed in this application. In this regard, the 3 metres separation has not been requested as the plot depth by the existing building has not been taken in full. Therefore, by the potential deeper development or re-development of the existing building facing on Triq Hompesch, the exposed party wall by this proposal would be covered.

#### Height:

The height limitation of the area is three (3) floors plus underlying semi-basement. As indicated in Policy 2.1 of DC 2007, the maximum allowable height in meters with semi-basement (garages) is fourteen (14) metres. The latter has not been exceeded in the elevations facing on both Triq il-Liedna and Triq il-Karmelitani. [...] Diagram 2.3c of Policy 2.3 of DC 2007 refers to such cases whereby the exposure of the semi-basement is 'transferred' to the adjoining corner street up to a maximum distance of 25 metres in cases that the exposure is exceeded. The 2.6 metres exposure has not been exceeded in any part of the facade on Triq il-Karmelitani and therefore compliance with this policy has been attained.

#### Residential use of Basements:

Policy 5.1 of DC 2007 indicates that normally semi-basement and basements should not be used as separate dwellings to ensure that substandard dwellings with a poor quality internal environment are not created.

The architect is proposing 16 residential units in this level, with 4 of them being directly accessible from Triq il-Liedna and Triq il-Karmelitani, whereas the remaining 12 will be accessible from the respective common pedestrian forecourts.

Section B of this Policy 5.1 stipulates four criteria where such development would be acceptable, namely (a) clear height of 2.75 metres, (b) a 3 metre back-yard, (c) an open 3 metre front open space and (d) compliance with the sanitary regulations. In order to accept such development, strict compliance to criteria (a) and (d) is required, and additionally there is an optional compliance with either criteria (b) or (c).

**Privacy:**

Policy 12.3 of DC 2007 stipulates a minimum distance of 6 metres between habitable rooms of separate residential units in order to ensure adequate privacy. Where such compliance is impossible to be attained, acceptable design measures to eliminate overlooking to and from separate residential units is normally introduced.

Particular attention to privacy is normally taken in consideration due to the fact that parts of this proposal consist of internal development. The width of the internal pedestrian fore-courts, accessible from Triq il-Karmelitani and Triq il-Liedna is 6 metres and 7.6 metres respectively. The latter then narrows down to 6.6 metres.

Therefore, the layout and design of the proposed development complies with the abovementioned policy.

**Minimum Dwelling Size:**

In view of the areas of the proposed residential units, in relation to their number of bedrooms, Policy 3.7 of DC 2007 is being complied with. The number of one bed

roomed residential units does not exceed the 20% threshold of the whole project. [...]

5.1.5 Reference is made to the meeting of the MEPA Board minutes (Red 77) and which clearly state the main concerns which led the Board members to refuse this request for development. The main ones being;

In this meeting the chairman requested further information on the 16 semi-basement apartments which have a prospect on the internal development. The Board noted that the existing complex of internal garages is alleviating the on street parking. Once this development takes place, the parking provided on site will cater for the development while the removal of the existing garages will create on street parking. One of the members remarked that this being an internal development this is too intensive, policies are being stretched to the limit, blank party walls on the side entrance will be created even if treated and questioned on the provision for the refuse collection. This member also stated that the sanitary provisions in some aspects were dubious and that the plans show overdevelopment and the internal facing semi-basements should not be habitable. Another member concurred with these views. The former member added that the amount of open space is the minimum possible and maximised the number of units and this will be made at the expense of quality of life. Another member requested clarification on policy regarding backyards touching third party back yards. The Planning Directorate said that interpretation of policies is always subjective. The former member concluded that this was exacerbating the situation and was contributing to further intensification of the development. The chairman called for a vote on the application and voted 7 against 3 in favour.

5.1.7 The architect submitted various PA permits numbers in which it is claimed that they were similar and identical as approved in which the MEPA was satisfied that proposals did not 'constitute over development or 'offer low quality of life. : -

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PA 5980/04

To demolish existing villa and construct apartments and underlying garages at Birzebbuga.

Permit issued on 19/5/05. Access from one street.

PA 6343/04

To demolish existing building and construct apartments and underlying garages at Mosta.

Permit issued on 2/6/05. Internal development access from one street.

PA 907/05

To construct basement garages and overlying residential units at St Paul's Bay.

Permit issued on 11/11/05. Site is between two streets.

PA 1409/06

To replace a level of garages approved in PA 824105 by residential units. Proposal includes the shifting of garages to a lower level. Application also includes alterations and additions from previous applications at Lija Permit issued on 6/2/08. Access from one street.

PA 1953/06

Demolition of existing three houses & construction of basement garages, & apartments at Allard.

Permit issued on 5/3/08. Site is between two streets.

PA 3277/06

To sanction excavation works (mineral extraction); the Project includes demolition of small rooms and boundary wall and construction of basement garages with overlying residential units at Siggiewi.

Permit issued on 12/12/09.

Part site is a corner and is on two other streets. Adequate internal common access and court yard.

PA 3497/06

To demolish existing premises and construct 49 garages at basement level, 36 apartments at semi-basement,



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ground, 1 st and 2nd floors and overlying 6 penthouses at Balzan Permit issued on 23/4/07.

Site is internal development access from one street.

PA 3512/06

Extension works at level 5 including two additional residential units and alterations works at level 0 and level 4 at Balzan. Permit issue on 617/07.

Site is an internal development access from one street. Dwellings are at ground floor.

PA 570/09

Minor alterations to approve permit PA 1306/05 - to construct basement garages, overlying residential units and penthouses at roof level in lieu of approved washrooms at Allard. Permit issued on 17/9/09. Corner site with internal development. Residential units are at ground floor.

5.1.8 The above cases were cited in this appeal by appellant to justify the proposed development and in particular the use of the semi-basement level for habitation purposes. However the Authority has noted these files [...] and noted that none had identical planning considerations as is the case of this appeal since while semi basements could be utilized for residential use, in such a large project, any deciding body must also take into consideration the overall impact of such a development to both the neighbouring community as well as to the final users of the development itself. [...]

D. In-nota ta' sottomissjonijiet tal-Perit Philip Mifsud u tal-Avukat Dott. Ian Spiteri Bailey ghall-Appellant, ipprezentata fis-6 ta' Dicembru 2011, precizament il-punti segwenti:

“ Overdevelopment

[...] According to the DPA Report prepared by the Directorate, it is evident that the proposed development will not infringe any of the above mentioned policies, and therefore there can be no objection to the said development on the basis of such policies. It was in fact

clearly stated in the said report that, 'there is no objection in principle to the proposed residential development with underlying car parking provision. Additionally, the Class 4 shop facing onto Triq Hompesch, with the latter falling within a Secondary Town Centre is also acceptable'.

#### Policy and Design Guidance 2007

- Policy 2.1 - the height limitation of the area is 3 floors plus underlying semi-basement, with a maximum acceptable height of 14 metres. The latter has not been exceeded.
- Policy 2.3 - this relates to the maximum (2.6 metres) and minimum (2 metres) exposure of the semi-basement level. The 2.6 metres exposure has not been exceeded and therefore compliance with this policy has been attained.
- Policy 3.7 - the number of one-bedroomed residential units does not exceed the 20% threshold of the whole project.
- Policy 3.8 - this policy concerns the 3 metre separation from the back-yards of adjoining buildings. In this regard reference must be made to the Minutes of the meeting which led to the refusal of the proposal. Following a request by Mr. Charles Bonnici, the Planning Authority clarified the policy and the way in which the Directorate had interpreted it. Having obtained the said clarification, Mr. Bonnici then voted in favour of the proposal.
- Policy 5.1 - the proposed development is in full compliance with all of the four criteria listed in this policy, namely (a) a clear height of 2.75 metres; (b) a 3 metre back-yard; (c) an open 3 metre front space; (d) compliance with the sanitary regulations.
- Policy 6.16 - this policy requires the submission of a Fire, Safety & Ventilation Report endorsed by a duly warranted engineer. This was submitted accordingly, along with the relative plans, and approved.

- Policy 10.9 - the design, location and height above roof level of the proposed lift rooms comply with the relative provisions of this policy.
- Policy 12.3 - this stipulates a minimum distance of 6 metres between habitable rooms of separate residential units. The layout and design of the proposed development complies fully with this policy.
- Policy 13.5 - the location and means of screening of the services complies with the criteria listed under Part A of this policy.
- In addition to the above it must be noted that the car parking spaces available in the proposed development will provide adequate car parking provision according to the above-mentioned report.

The DPA Report clearly illustrates the fact that the proposed development is in full compliance with the above-mentioned policies and it must therefore be reiterated that any justification for refusal of the said proposal can in no way be based on such policies.

Having established that the development proposed under application PA03011/09 is in every manner compliant with existing policies, and therefore that the said development does not in any manner infringe upon any of the provisions contained within such existing policy, it is somewhat difficult to comprehend the rationale behind the Authority's refusal of the proposal. The unreasonableness behind the decision taken by the Authority, and the unfairness of the same, are further compounded on consideration of the fact that the DPA Report itself noted full compliance with relevant policy and therefore recommended approval for the project.

Despite such compliance, the Authority claims that 'the plans show overdevelopment and the internal facing semi-basements should not be habitable'. How can the Authority expect to substantiate such allegations, whilst simultaneously admitting that the development in question

complies with all policies relevant to the project and to the site in question? It is an established fact that on presenting an application for a development permission, the burden of ensuring compliance with relevant policy is one which falls upon the shoulders of the applicant. Nevertheless, once the applicant has made all necessary efforts to achieve such compliance, and is successful in his endeavour, the subsequent refusal of development permission is completely unjust and unacceptable.

In this regard reference must be made to the judgement delivered by the Court of Appeal on the 26th May 2003, namely *Claudia Taylor East vs. Il-Kummissjoni ghall-Kontroll tal-Izvilupp* [... as well as ...] *Charles u Margaret Debono vs. Il-Kummissjoni ghall-Kontroll tal-Izvilupp et*, delivered by the Court of Appeal on the 16th December 2003, [... and ...] *Vivian S. Bianchi noe vs. Il-Kummissjoni ghall-Kontroll tal-Izvilupp* delivered on the 15th January 2001 [...].

#### Lack of Reasoning and Motivation behind Refusal

The attention of this Board ought also to be drawn towards the fact that in its submissions the Authority refers both to the 'reasons and justifications' which led to its refusal of the proposal. It must be noted in this respect that the Authority has in fact not tendered a single justifiable reason in order to substantiate its decision to refuse this project.

Reference was also made in the submissions presented by the Authority, to the Minutes of the meeting which led to the refusal of the proposal. The Authority thereby requests the Tribunal to assess such Minutes, in order 'to understand better the rationale which led to the MEPA Board Members not to permit the requested development'. It is presently being submitted that an assessment of the said Minutes serves precisely to reinforce the appellant's arguments to the effect that the development does not infringe any existing policies and therefore ought to be approved. All the issues raised by members of the Board during the meeting were resolved, and the Directorate itself actually confirmed that the

apartments 'are all sanitary compliant' and that 'the dimensions were according to policy'. It must be noted that the development has been approved by the SEO in terms of compliance with sanitary regulations, and that any obstacle raised on such grounds are therefore completely unfounded. [...]

The attention of this Tribunal must be drawn towards the fact that whilst Maltese law defines the term "development", it fails to define "overdevelopment". UK Legislation also fails to define this term. Considering the lack of any definition of the term used by Authority in order to justify its refusal of the proposed development, it ought to follow that such justification must be made on a case by case basis, due consideration being attributed to the particular facts and circumstances surrounding each application. This situation evidently places a grave responsibility upon the Authority, whilst imposing a duty upon the same to provide the applicant with valid reasons for a refusal based upon this particular ground.

Furthermore, it must be reiterated that in this particular case, the report prepared by the Directorate actually recommended approval of the project. Although admittedly no right was thereby acquired by the applicant, it is only legitimate to expect the Authority to follow the pattern adopted in the vast majority of cases, and therefore to proceed to confirm the said report. In any case where the Authority decides to over-turn the abovementioned recommendation, it becomes even more crucial that the Authority clearly enunciate the reasons for such refusal.

According to Article 10 of the first Schedule to Chapter 504 of the Laws of Malta, 'where the authority votes against a recommendation, if any, made by the Director, the Chairman of the Authority shall register in the relevant file the specific environmental and planning reasons adduced by the Authority'. It is undisputable that the legislative intention behind this provision (particularly in light of the fact that the new law aims to increase transparency) is precisely that in cases where a vote is

taken against a recommendation, the applicant is placed in a position where he is able to comprehend the reasons and motivation behind such refusal. There is no doubt that in this particular case, the Authority failed to adhere both to the letter as well as to the spirit of the law.

In addition to the above, it must be noted that Article 69(3) of Chapter 504 specifically states that in cases where the Authority refuses permission, "the Authority shall give specific reasons based on existing plans, policies and regulations or other material considerations for such a refusal .... ",

It is hereby humbly being submitted that in the particular circumstances which surround the present application, the Authority is in clear breach of these provisions of the law.

#### Poor Quality of Life

The Authority further notes in its submissions, that 'the amount of open space is the minimum possible and maximised the number of units and this will be made at the expense of quality of life'. In this regard reference must be made to the Structure Plan goals, also referred to by the Authority, where it is clearly stated that one of the three main goals of the said Plan is 'to use land and buildings efficiently, and consequently to channel urban development activity into existing and planned development ...

Reference must once again be made to the above-mentioned Minutes, whereby it seems that opposition to the proposed development was mainly voiced by Ing. Joe Farrugia who highlighted the fact later echoed by the Authority in its submissions that 'policies are being stretched to the limit'. In this regard it must be reiterated that, in answer to such observations the Directorate confirmed compliance with the relevant policies. It is also important to note that towards the end of the meeting, it would seem that despite his vote against the proposal, the above-mentioned member of the Board had conceded that permission would be granted and in fact suggested the insertion of a condition related to the installation of a

second class water system. This condition was in fact agreed to by Architect Mifsud.

In this regard the attention of this Tribunal must be drawn towards the fact that strict compliance with the minimum and maximum limits established in relevant policy does not negate the fact that the proposal remains within such limits and within the ambit of the above-declared goal, and therefore ought to be accepted. The argument to the effect that such development will prejudice the quality of life, is not only one which the applicant does not concur with, but in any case, given that the proposal fits within all the parameters of all policies applicable, then one ought to say that this argument is fallacious and unsustainable. The applicant has abided by all requirements as imposed by the relevant policies and should not therefore be refused on the ground of any possible failing contained within the said policies themselves.

In this respect it is pertinent to cite the latin maxim *ubi lex voluit, dixit; ubi noluit, tacuit* meaning that when the law wishes to regulate a particular matter it does so, when it does not wish to regulate such matter it remains silent. This dictum is particularly relevant to the issue in question due consideration being accorded to the fact that MEPA policies establish parameters within which development is deemed to be acceptable, and beyond which development is deemed objectionable. It must be reiterated that the proposed development falls squarely within the acceptable parameters as stated by existing policies and therefore by the law itself. There is no valid justification therefore for a refusal of permission in this particular case.

Particular reference must be made to the issues raised by the Authority in relation to the apartments at semi-basement level which will form part of the proposed development. As noted by Architect Mifsud in his appeal submitted on behalf of the appellant, the said apartments which look over internal open spaces are in fact fully exposed. In truth, as illustrated by the above-mentioned Minutes, the aforementioned Architect also pointed out

the fact that the open space in the internal development under consideration is in fact wider than many public roads.

Architect Mifsud also highlights several instances where similar developments were granted approval by the Authority, namely:

- PA5980/04
- PA6343/04
- PA907/05
- PA1409/06
- PA1953/06
- PA3277/06
- PA3497/06
- PA3512/06
- PA570/09

In the submissions made to this Tribunal, the Authority claims that none of the abovementioned applications 'had identical planning considerations'. It is important to point out that it is wholly unreasonable and unrealistic demand that in any appeal related to a planning application, any reference to previously approved developments is superfluous unless the said developments are identical to the proposal under consideration. In actual fact, the above-mentioned applications all relate to similar developments, all adopt the exact same principles and are therefore highly relevant with respect to the present case.

With particular reference to PA3512/06 and PA570/09 it must be noted that the Authority is mistaken in its assertion that the residential units are at ground floor. In truth these particular developments do provide for such ground floor units, however there are also units at semi-basement level. Furthermore, PA3277/06 approved by the Authority actually allows for residential units both at semi-basement level and at the level underlying the semi-basement. With regard to the development currently under consideration, reference to the above-mentioned Minutes clearly illustrates that the Planning Directorate itself declared in relation to the apartments concerned



that, 'while technically a semi-basement these are largely above-ground'. This being the case, due consideration being granted to the above-mentioned permission applications which were approved by the Authority itself, it is evident that refusal of the applicant's proposal in this case constitutes a grave injustice.”

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda proposta sabiex jitwaqqghu sensiela ta' garaxxijiet u kalkara tal-gir li mgħadiex tintuza, u minflokha jinbnew garaxxijiet godda, hanut u appartamenti sovrastanti. Is-sit jinsab fiz-zona edifikabbli tal-Fgura.

Ir-raguni għar-rifjut tistrieħ fuq il-premessa li l-izvilupp propost hu intensivi wisq, bil-konsegwenza li l-appartamenti fil-livell tas-semi basement u li jharsu fuq l-ispazji komuni ta' fuq gewwa, ser joffru standard t'għejxien baxx jew skadenti.

L-aggravji tal-Appellant huma bbażati fuq il-fatt li d-Direttorat kien originarjament propens li jilqa din it-talba, u dan peress li skond hu, hi pjenament konformi mal-policies tal-izvilupp. Għalhekk, dakinhar li l-Bord tal-Awtorita' iddecieda li minflok jichad l-applikazzjoni, ir-rifjut gie motivati b' raguni li allegatament ma tohrogx mill-ebda policy li l-Awtorita' hi obligata thares. Skond hu, il-frazzjiet 'over development' u 'low quality of life' ma japplikawx għall-kaz in ezami, partikolarment in vista tal-fatt li l-Awtorita' kemm il darba approvat appartamenti semi basement bħal dawn odjerni.

Bħala eżempji ta' dan gew citati ben disa' permessi kif gejj: PA 5980/04, PA 6343/04, PA 907/05, PA 1409/06, PA 1953/06, PA 3277/06, PA 3497/06, PA 3512/06 u PA 570/09.

Jigi rilevat li minn dawn, tlieta minnhom (PA 5980/04, PA 6343/04 u PA 907/05) kienu nhargu qabel ma dahal fis-seħh il-Pjan Lokali. Terga tghid, PA 5980/04 kienet biss talba għal outline development permission. Tnejn ohra

(PA 1409/06 u PA 1953/06) gew approvati wara li dahal fis-sehh il-Pjan Lokali izda wara rikonsiderazzjoni. Tnejn ohra kienu jirrigwarda talba ghal-zvilupp li kien jikkonsisti inter alia f' appartamenti fil-pjan terren (PA 3512/06 u PA 570/09) u ghalhekk huma differnti mill-mertu de quo. It-tnejn' li jibqa (PA 3277/06, PA 3497/06), kienu jirrigwardaw zvilupp b' appartamenti fill-livell tas-semi basement; izda anke meta dawn jigu mqabbla mal-izvilupp in ezami, it-talbiet kienu ghal-zvilupp (i.e. in kwantu numru t' appartamenti, garaxxijiet, etc.), li kien ferm izghar minn dak in ezami.

L-Awtorita' tissottometti li fil-laqghat li kellha gew diskussi diversi kwistjonijiet li jwasslu ghad-decizjoni ghal over-development; billi inhass li peress li l-izvilupp huwa internal development il-policies vigenti kienu qeghdin jigu mgebbda. Tirrileva kwistjonijiet ohra bhalma huma l-blank party walls kif wkoll kif kien ser jingabar l-iskart domestiku, u certi aspetti sanitarji ohra allegatament dubjuzi. L-Awtorita' tikkontendi li n-numru ta' units proposti gie massimizzat b'mod li ser jigi ppregdikat il-kwalita' tal-hajja ta' min ikun ser jghammar fihom. Jigi rilevat ukoll li finalment seba' membri tal-Bord kienu vvutaw kontra u tlieta favur.

Ezaminati s-sottomissjonijiet tal-partijiet, jidher car li ghalkemm saru argumenti fit-tul jekk il-proposta fil-fatt kientix konsistenti ma' over development u low quality of life, jew le, iz-zewg partijiet bhal donnhom insistew fuq il-punt taghhom minghajr ma dahlu fil-mertu ta' kif jistghu jigi determinat o meno dawn iz-zewg kwistjonijiet. L-Awtorita' zamment ferm il-punt taghha; cjoe' li l-Bord kien korrett meta ddecieda li jirrifjuta din il-proposta (minghajr ma spjegat kif u ghala, nonostante li ma' d-daqqa t' ghajn il-proposta hi konformi mal-policies u l-ligijeit sanitarji); mentri l-Appellant illimita ruhu sabiex jirrileva li l-proposta tieghu kienet ampjament konformi mal-policies (konferma ta' dan kienu id-diversi rapport favorevoli tal-Awtorita') izda minghajr ma' pprova jiggustifika ghaliex fil-fehma tieghu dawn ir-rapporti kienu verament jirriflettu dak li kien qed jigi propost.

Din kienet opportunita' ohra fejn il-partijiet kellhom ipoggu madwar mejda u identifikaw liema huma l-parametri li jghandhom jirregolaw proposta partikolari bhal din. Mhux spiss li kalkara tal-gir li mghadix tintuza tigi konvertita f' serje t' appartmanti. Veru li f' dan il-kaz, il-proposta tirrispekkja l-policies, izda lanqas mal-policies huma xi checklist li kemm il-darba ir-risposta tkun positiva allura l-ezitu tal-proposta ghandu jkun positiv ukoll.

Irid jinghad li kemm il-darba wiehed jigi affaccjat b' zvilupp li ma' d-daqqa t' ghajn xejn ma jidher sew jew simpatetiku mal-ambjent li jkun inbena fih, izda pero' li jkun pjenament konformi mal-policies. Jidher li f' ic-cirkostanzi dan seta' kien il-kaz.

Ghalhekk kien ikun tajjeb li kieku l-partijiet staqsew ftit mistoqsijiet sabiex jigi identifikat jekk verament hawnhekk si tratta minn over development u/jew low quality of life. (Tajjeb li per eżempju jinghad li wahda ma teskludix lill-ohra u vice-versa. Jista jkun il-kaz, li zvilupp ma jkunx fih over development, izda li l-proposta tkun konducenti ghal low quality of life.)

Ezaminati l-pjanti tal-proposta, wiehed jistaqsi per eżempju: il-ghala gew proposti tant appartmanti fil-livell tas-semi basement? Jew inkella, ghal min huma intenzjonati? Wiehed jippretendi li appartament b' tlett kmamar tas-sodda huwa intenzjonat ghal-familja mdaqqa, izda jaghmel sens li familja bit-tfal tqatta l-maggor parti tal-gurnata, tghix prattikament taht il-livell tat-triq? Mill-banda l-ohra, ma kien ikun aktar xieraq jekk per eżempju, appartamenti li jinsabu fil-livelli l-aktar baxxi jkunu intenzjonati ghal persuni b'mobilita' ristretta, anzjani, etc., u allura li jinbnew izghar, per eżempju mix, b' karma tas-sodda wada jew tnejn?

F' ic-ciorokostanzi dan it-Tribunal hu propens li jilqa t-talba in parte, b' dana li l-proposta tigi riveduta sabiex ma jkunx hemm appartamenti li jirrizultaw taht il-livell tat-triq, cjoe' fis-semi basement. In oltre, il-livell tal-penthouse ghandu jigi rivedut b' dana li appartanti jkun hemm areas iddesinjati apposta ghas-servizzi (cjoe' tankijiet tal-ilma, outdoor

units, pannelli solari u fotovoltaiici, etc.) il-maggor parti tal-bejt jintuza bhala roof garden ghar-residenti tal-appartamenti sottostanti, u dan bhal tpartit (architectural gain) ghal fatt li l-maggor parti ta' dawn ir-residenzi mhux ser ikollhom bitha vera w propja ghax iharsu fuq common area.

Ghalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, dan il-Tribunal qed jiddisponi minn dan l-appell billi jilqa l-istess limitament u jhassar ir-rifjut ghall-PA 3011/09 mahrug mill-Bord tal-Awtorita' dwar L-Ambjent u l-Ippjanar fil-21 ta' Gunju 2011.

In oltre jordna li fi zmien tletin (30) gurnata, l-Appellant ghandu jissottometti pjanti godda li jirrifletti l-punti deciza supra. Wara li l-Awtorita' tkun soddisfatta b' dawn il-bidliet, ghandha tibghat il-pjanti u d-dokumenti kollha rilevanti ghall-approvazzjoni ta' t-Tribunal, sabiex fi zmien tletin (30) gurnata minn meta tircievi l-approvazzjoni, tohrog il-permess kif mitlub mill-Appellant, biz-zieda ta' multa xierqa u bil-kundizzjonijiet li huma normalment imposti f' permessi simili.

### **Ikkunsidrat**

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal applika hazin l-ligi meta wara li ammetta li l-izvilupp jirrispekkja l-policies naqas li japprova l-izvilupp fl-intier tieghu. Dan imur lil hin mill-poteri afdati tat-Tribunal u jikkostitwixxu gudikat irragonevoli u ingust, kif ukoll jilledi l-aspettativa legittima li applikant ikollu meta jressaq applikazzjoni skond il-policies vigenti u jnaqqas ic-certezza legali necessarja fil-gudikat tat-Tribunal;
2. It-Tribunal per konsegwenza mar oltre l-kompetenza lilu attribwita u agixxa b'mod extra petita u illegali meta hu ghamel kondizzjonijiet rigward il-penthouses li qatt ma kien hemm kwistjoni dwarhom quddiem il-Bord tal-Awtorita izda biss dwar l-izvilupp tas-semi basement. La darba ma kienx hemm issue dwar il-penhouses, it-Tribunal ma setghax jesprimi ruhu dwarhom. In fatti ma saru ebda sottomissjonijiet dwar il-penthouses quddiem it-Tribunal.

## **L-ewwel u t-tieni aggravji**

Dawn huma aggravji serji fuq kwistjoni ta' ligi, cioe l-poter tat-Tribunal meta jkun qed jikkonsidra appell. Il-poteri tat-Tribunal johorgu mill-artikoli 41(13) u (14) tal-Kap. 504 u regolament 5 tat-Tieni Skeda tal-istess Kapitolu.

Il-Qorti tirreferi ghal regolament 5 tat-Tieni Skeda tal-Kap. 504 li jghid li "It-Tribunal ghandu jkollu s-segha li jikkonferma, ihassar, jew ibiddel decizjoni li kontra taghha jkun sar appell u jaghti dawk l-ordnijiet li jidhirlu xierqa".

In oltre l-artikolu 41 tal-Kap. 504 li jitkellem dwar il-gurisdizzjoni tat-Tribunal ighid illi "It-Tribunal, jekk jiddeciedi li jaghti permess jew licenzja, jista' jimponi penali, hlas ta' drittijiet jew kontribuzzjonijiet u kondizzjonijiet-ohra, li l-Awtorita tista' timponi meta jaghtu permess jew licenzja; it-Tribunal ghandu jizgura li jkun konformi mad-dispozizzjonijiet tal-artikolu 69 (cioe l-artikolu li jirregola x'ghandu jhares u jqis l-Awtorita fl-ghoti ta' permess u kondizzjonijiet annessi mieghu) meta jirrevedi d-decizjonijiet tal-Awtorita.

In oltre meta t-Tribunal jimmodifika decizjoni tal-Awtorita u jordna l-hrug tal-permess jew licenzja, jew b'kull mod iehor ibiddel decizjoni tal-Awtorita, l-Awtorita ghandha, sakemm ma jkunx sar appell quddiem il-Qorti tal-Appell, tohrog il-permess jew licenzja jew tikkonforma ruhha mad-decizjoni tat-Tribunal fi zmien xahar mid-decizjoni.

Dawn l-artikoli jindikaw b'mod car illi t-Tribunal ghandu l-jedd ibiddel jew jimmodifika decizjoni tal-Awtorita in konformita mal-ligijiet tal-ippjanar.

Dawn l-artikoli jaghtu lit-Tribunal poteri u diskrezzjoni ampja anki fil-kaz bhal dan in kwistjoni fejn il-Qorti qed timmodifika decizjoni tal-Awtorita u fiha jimponi kundizzjonijiet ulterjuri ma' dawk mahruga mill-Awtorita.

Pero din id-diskrezzjoni ampja moghtija mill-ligi trid tingara fl-isfond tal-kompetenza li biha hu moghni t-Tribunal. Dan

hu Tribunal ta' Revizjoni ta' decizjonijiet mehuda mill-Awtorita. Is-setgha tat-Tribunal tinsorgi ghaliex parti diretta jew interessata jinvokaw il-gurisdizzjoni tieghu biex jisma' u jiddeciedi appelli maghmula lilu. F'dan l-isfond il-parametri tat-Tribunal huma cirkoskritti biex jiddeciedi fuq l-aggravji mressqa. It-Tribunal ma ghandux joltrepasa l-limitu li minn Tribunal revizur isir Awtorita li tezamina applikazzjoni mill-gdid minn rajha jekk dak li tezamina u tiddeciedi dwaru ma jkunx ingieb a konjizzjoni u attenzjoni taghha b'aggravju specifiku, kemm jekk ikun kontra rifjut jew approvazzjoni ta' permiss.

Harsa lejn l-atti jirrizultaw certi fatti accertati.

1. Li skond id-Direttorat tal-Awtorita l-izvilupp kien in piena linea mal-ligijiet u policies vigenti u ghalhekk ma kienx hemm oggezzjoni ghall-izvilupp;
2. L-Awtorita dawret din ir-rakkomandazzjoni f'rifjut billi qalet li 'the proposal constitutes overdevelopment of the site and the same basement apartments looking over the internal open spaces offer low quality of life'.

L-appell tal-applikant attakka din id-decizjoni fuq diversi livelli fosthom u l-aktar importanti fil-fehma tal-Qorti:

- a. Jekk l-applikant aderixxa skrupolozament mal-ligijiet ta' ippjanar l-Awtorita ma setghetx tirrifjuta l-applikazzjoni ghax il-partijiet kollha huma marbuta mal-ligijiet u policies;
- b. Id-decizjoni tal-Awtorita ma tohrog minn ebda ligi jew policy kwotata minnha u ma tirrispekkjax il-vot tal-ligi fl-artikolu 10 tal-Ewwel Skeda Kap. 504 u artikolu 69(3) tal-Kap. 504 li meta l-Awtorita tirrifjuta kontra rakkomandazzjoni, ic-Chairman tal-Awtorita irid jirregistra 'the specific environment and planning reasons addressed by the Authority'. F'dan il-kaz ma rrizulta xejn minn dan billi d-decizjoni ma taghtix ragunijiet cari u motivati ghaliex applikazzjoni konformi mal-ligijiet qed tigi rifjutata;
- c. Ma hemm ebda definizzjoni tal-kelma overdevelopment fil-ligi u kwindi la darba konformi mal-ligijiet u policies, applikazzjoni ma tistax titqies li tippekka bhala overdevelopment minghajr ma tigi gustifikata billi l-izvilupp imur kontra ligi jew policy partikolari;
- d. It-tieni raguni ta' rifjut kienet dwar 'il-quality of life' li l-Awtorita sabet mankanti fis-semi basement units fl-

izvilupp. Dan ukoll ma setghax jinghad meta l-izvilupp hu pienament konformi ma' dak li l-istess Awtorita ppromulgat bhala policies applikabbli. F'dan il-kaz id-diskrezzjoni tal-Awtorita hi marbuta bil-pjanijiet u policies u trid taderixxi ruhha magghom.

Dawn kienu kwistjonijiet li t-Tribunal kien obligat jikkunsidra b'mod dettaljat mill-punto di vista legali u ta' ippjanar. Minflok it-Tribunal ha triq kompletament differenti minn dak li kien mitlub jezamina u jiddeciedi dwarha.

Jinghad illi t-Tribunal ammetta li l-izvilupp kien konformi mal-pjanijiet u policies. Stqarrija bhal dik kienet allura tiftah il-kwistjoni specifikament fuq l-aggravji mqajma. Minflok it-Tribunal ghamel osservazzjonijiet dwar kif kellhom jagixxu ma' xulxin il-partijiet biex isibu kompromess, li fil-fehma tal-Qorti mhix il-kompitu tat-Tribunal li jidhol fih. In oltre t-Tribunal mhux biss ha triq differenti minn dak mitlub jezamina izda cahad l-appell dwar il-kwistjoni tas-semi basement b'argument li ma jsib ebda sostenn f'ligi jew policy u aghar minn hekk dahhal kundizzjoni fuq il-penthouses li qatt ma sar aggravju fuqu u lanqas kien jiforma parti mid-decizjoni tal-Awtorita ghar-rifjut.

It-Tribunal hu marbut jezamina l-mertu tal-appell strettament ma' dak mitlub u mhux jiddipartixxi mill-kweziti u jassumi fuqu poteri li ma ghandux senjatament li flok Tribunal Revizjonali jsir Awtorita ohra li qed tezamina mill-gdid applikazzjoni. Dan kollu jinghad minghajr ma jintilef xejn mill-importanza u konsegwenzi serji naxxenti mill-kwezit dwar id-dritt tal-Awtorita li jirrifjuta permess ghal zvilupp konformi mal-pjanijiet u policies minghajr ma jiggustifika r-rifjut fuq pjanijiet u policies ohra izda biss termini generici ta' ippjanar.

Din id-decizjoni ma rrispondiet xejn mill-aggravji mqajma u ghandha tigi totalment irrevokata.

## **Decide**

Kopja Informali ta' Sentenza

Ghalhekk il-Qorti filwaqt li tilqa' l-ewwel aggravju tal-appellant in kwantu l-aggravju tieghu ma giex kunsidrat u deciz kif mitlub fit-termini maghmula, tilqa' t-tieni aggravju billi t-Tribunal agixxa oltre dak mitlub minnu mill-partijiet meta impona kundizzjonijiet dwar il-penthouses li ma fformawx parti mill-mertu tal-appell u kwindi tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-lppjanar tal-11 ta' Dicembru 2012, u tirrimetti l-atti quddiem it-Tribunal ta' Revizjoni tal-Ambjent u l-lppjanar biex jerga' jiddeciedi l-appell in linea ma'dak deciz mill-Qorti. L-ispejjez ghall-Awtorita.

**< Sentenza Finali >**

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