



**QORTI TA' L-APPELL
ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tas-26 ta' Marzu, 2014
Appell Civili Numru. 63/2013

Euchar **Vella**

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Euchar Vella tal-4 ta' Novembru 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-15 ta' Ottubru 2013 li rifjutat l-applikazzjoni PA 1884/11 ghal fini t' dar wahda b'zewg sulari u pool u twaqqiegh ta' kmamar ezistenti fi sqaq fi Triq San Blas, Nadur Ghawdex;

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

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

A. Il-Kummissjoni ghall-Kontroll tal-Ambjent u l-Ippjanar, fil-25 t' April 2012, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 1884/11 – Site at Triq San Blas, Nadur: To demolish existing rooms and construct a two (2) storey house with pool.

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

“1. The proposed development has its only access from a private lane and therefore would result in an internal development in UCA and therefore runs counter to Policy 3.8B of DC 2007.”

B. In-nota tal-Perit Saviour Micallef ghall-Appellant, ipprezentata fid-29 ta' Mejju 2012, senjatament il-punti segwenti:

“The proposed development was recommended by the MEPA directorate.

It was however overturned and refused by the EPC since it was decided that proposal has its access on a private access and hence results in an internal development in UCA counter to policy 3.8 of DC 2007.

It is a fact that the access already exists and is moreover committed on the opposite side with another 3 dwellings having their access on it [...].

Had the alley been schemed in the local plan, the proposal would have been approved.

It is however a fact that in Gozo there are many similar small alleys that were not schemed in the local plan.

In fact during consultation, the Local Plan Unit confirmed that if there are two or more dwellings having their sole access on an un-schemed alley, then the alley should be considered as committed. In fact after being requested to amplify by the EPC LPU stated that the argument is based on ‘... past decisions by PAPB, DCC/MEPA where two or more dwellings having a frontage on the alley were considered to commit the alley’. They continued ‘... during the formulation of the local plans, there was insufficient information to determine whether alleys constituted public or private accesses. Hence the adopted policy ...’

Recent examples approved by DCC include PA 3546/09 and PA 651/06 approved along a similar alley in the same village of Nadur [...].

Policy 3.8 of DC 2007 argues that ‘Within UCA’s, internal development is likely to be out of keeping with the streetscape and with the morphology of these historic areas. It would have an adverse impact of the character of UCA’s. This is the reasoning why internal development within UCA is not permitted in DC 2007.’

Internal developments as contemplated in DC 2007 involve the creation of an internal access which affects the morphology and streetscape of the UCA.

In our cases however the access already exists and is further committed with two dwellings having their sole access on it. Our proposal will not result in an

extension of the access. It will hence not affect the street morphology. In fact it will enhance the streetscape as it will consolidate the existing access/development, without creating any blank party walls that will be left exposed. Proposal aims at making efficient use of land within the development zone as in fact contemplated in policy 3.8 of DC 2007 and in Structure Plan policies. It is not contrary to the scope of Policy 3.8 of DC 2007 and thereby acceptable as confirmed by LPU and in many precious MEPA decisions as quoted above.”

C. In-nota risponsiva ta' Darren Fava għall-Awtorita', ipprezentata fit-13 ta' Gunja 2012, inter alia l-punti segwenti:

“5.2.2 Principle of Proposed Development

The case in concern requested the demolition of two structures and replacement by a two storey residential unit. The access into the site is solely through a private un-schemed alley. The Planning Control Unit (Doc 13 in PA File) identified that a previous permit was issued by MEPA for residential purposes in the same alley (PA 7068/04); and hence the Planning Directorate recommended the proposed development favourably on the notion that the consultation with Local Planning Unit had resolved this concern since there are now to be two residential units accessed from this un-schemed alley.

Notwithstanding this, the EPC [...] correctly noted that this quoted permit (PA 7068/04) was originally refused by MEPA since it was also deemed to run counter to policy 3.8B in that internal development was not permitted in UCAs. The proposal was later overturned by reconsideration after it was determined that the proposal sought alterations to an already existing residential use.

This is clearly not the case for the proposal under appeal; since the proposal description states demolition of rooms and construction of two storey house with pool. [In keeping with ...] the position taken by the Authority in PA 7068/04, the proposed development must also be considered as internal development; and since the proposal is creating a new dwelling unit the arguments raised in overturning the request for permit in PA 7068/04 does not apply.

5.2.3 Claim of Cerimus Paribus

The appellant is commenting that the proposal in concern is similar to the development approved by MEPA in PA 651/06 and PA 3546/09 (in Nadur Gozo), and PA 2779/09 and PA 2112/07 (in Għarb Gozo); and is aiming [sic.] this justification as an expectation to be treated accordingly. In the report below the Authority will examine the applications mentioned in more detail to determine whether the cases quoted merits such distinction:

PA 651/06 and PA 3546/09 – these two applications are situated on same site (approx. 800m from site under appeal) and regard construction of a two storey dwelling with pool.

PA 2112/07 and 2779/09 – these two applications are also situated on the same site (approx. 7.5km from site under appeal). The first of these two quoted applications was withdrawn; whereas the second case was approved for construction of dwelling with pools – case now under third party appeal against permit.

5.2.3. Comments by Authority

In view of the merits in PA 1884/11 as explained above, it is clear that there is no relation whatsoever between the quoted permit and the case in concern since the following obvious differences are present:

PA 1884/11 regards development which is fronted onto an un-schemed private alley whereas the quoted cases are fronted onto a schemed public alley. PA 1884/11 was objected by the Planning Control Section since the proposal does not front a schemed road. No objections were made by Planning Control in the quoted cases.

Therefore, in spite of the appellant's claims of *cerimus paribus*, the Authority has clearly examined that the quoted permit applications do not justify the request since the relation of these cases is not similar to that at hand. Furthermore, the Authority wishes to underline the fact that arguments raised are frivolous and misleading; and therefore will not be divulged into further."

D. In-nota ta' sottomissjonijiet tal-Avukat Dott. Jean Paul Grech ghall-Appellant, ipprezentata fil-21 t' Awissu 2012, precizament il-punti segwenti:

"Il-fatti li taw lok ghal dan l-appell huma s-segwenti:

Is-sit tal-esponenti jinsab fi sqaq fi Triq San Blas, Nadur. Accessibbli minn dan l-isqaq hemm ukoll dar antika li fuqha ma saru ebda modifiki mindu dahal fis- sehh il-Kap. 356; u zewgt idjar ohra li dwarhom inhargu permessi ghal zvilupp mill-Awtorita' intimata. Wiehed minn dawn is-siti, dak suggett tal-PA 7068/04 huwa ferm ikbar minn dak tal-esponenti, u ghandu l-pool tieghu testendi iktar' il gewwa ghal go s-sqaq minn dak tal-esponenti. Is-sit l-iehor, suggett tal-permes PA 2130/10 huwa kantuniera mat-triq izda ghandu diversi aperturi u accessi minn fuq l-istess sqaq.

Wara li l-esponenti intavola l-applikazzjoni tieghu, l-Awtorita innifisha kienet ippreparat id-DPAR report minn fejn jirrizulta li s-sit tal-esponenti huwa konformi mal-policies kollha applikabbli, u fid-dawl ta' dan kien qieghed jigi rrakkommandat li l-applikazzjoni tal-esponenti tigi approvata. Il-kwistjoni ta' jekk ghandhiex tigi approvata applikazzjoni fuq sit accessibbli minn sqaq giet espressament diskussa f' dak l-istadju [...]. Peress li f'dan il-kaz, is-sqaq kien diga gie committed b'zewg binjiet ohra, id-Direttorat kien ikkummenta li 'the proposed additional unit is acceptable.' [...]. Kien biss waqt is-smiegh tal-applikazzjoni quddiem l-EPC li tqajmet oggezzjoni dwar din l-applikazzjoni sakemm finalment l-applikazzjoni giet michuda [...].

L-esponenti jissottometti bir-rispett illi din id-decizjoni tmur diametralment kontra d-decizjonij iet precedenti kollha tal-Awtorita appellata meta jkun

hemm involut zvilupp propost li jaccedi minn sqaqien, privati jew pubblici; b'hekk tikkostitwixxi diskriminazzjoni ngustifikata u illegali diretta kontra tieghu; u ghandha tigi skartata u revokata.

Decizjonijiet ohra tal-Awtorita' appellata dwar sqaqien:

Kif muri hawn fuq, id-Direttorat innifsu kien irrikonoxxa li d-decizjonijiet kollha precedenti meta jkun hemm involuta proposta ta' zvilupp li taghti ghal fuq sqaq kienu fis-sens li meta jkun hemm zewg binjiet jew iktar li ghandhom l-access taghhom minn fuq sqaq, kemm jekk dan ikun privat kemm jekk pubbliku, dak l-isqaq jitqies li huwa committed u ghalhekk huwa bhala principju permessibbli li tizdied binja ohra, l-esponenti sejjer hawnhekk jaghmel riferiment ghal numru zghir fost il-hafna decizjonijiet f' dan is-sens:

Fl-istess Triq San Bias Nadur inghata perness PA 4627/01 ta' zewgt idjar fuq sqaq privat u li qatt ma kellu djar ezistenti fuqu.

Hekk ukoll gara fi PA 2815/01 fi Triq Wied Simar Qala fejn inghata perness ta' dar fi sqaq jew ahjar passagg tar-rigel ta' mhux aktar minn 1.2 metri u li qatt ma kien schemed u qatt ma kellu bini iehor fih. L-istess dar giet maqsuma fi tnejn permezz ta' PA 1614/05.

F' PA 6633/05, il-PCU kien irrakkommanda li l-applikazzjoni tigi rifjutata ghaliex is-sqaq li fuqu kien ser isehh l-izvilupp, sqaq fi Triq Frangisk Portelli, Gharb, ma kienx schemed. Minkejja dan, l-Awtorita korrettement approvat l-applikazzjoni.

Hekk ukoll kien gara fil-PA 5839/01, fejn id-DCC kien originarjarnent cahad l-applikazzjoni, izda imbaghad fi stadju ta' reconsideration, hareg il-permess mitlub. Dan il-permess inghata peress li kien hemm djar ohra ezistenti bhal fil-kaz taghna u minkejja li l-PC unit qallu li s-sqaq mhuwiex schemed imma privat.

Il-wisa ta' dan is-sqaq huwa ta' 2 metri.

[...] Tajjeb jigi rilevat hawnhekk li dawn il-kazijiet msemija gew maghzula fost hafna ohrajn msemija bhal ezempji ghax huma kollha kazijiet forsi b'ragunijiet aktar fondati, li jimmilitjaw kontra l-applikazzjonijiet rispettivi: Filkazijiet kollha l-wisa tas-sqaqien huma kollha ferm anqas mill-kaz taghna li fih wisa ta' tlett metri. Aktar minn hekk f'uhud minnhom ma kien hemm l-ebda djar ezistenti bhala commitment imma kien sqaq jew passagg privat vergni.

Fir-rikors ta' appell tieghu, il-Perit Micallef ghamel riferiment ghal [...] PA3546109; u PA651106 [...] u PA 2779/09 u PA 2112/07 [...]. Imbaghad, naturalment, hemm ukoll PA 7068/04, li ghandha l-access taghha mill-istess sqaq li minnu ghandu l-access l-izvilupp propost mill-esponenti. Dak is-sit huwa sahansitra ferm ikbar mis-sit tal-esponenti u jestendi lura iktar milli jestendi s-sit tal-esponenti.

Diskriminazzjoni kontra l-Appellanti:

F'cirkustanzi bhal dawn l-esponenti jissottometti li l-principju ta' ceribus parimus ghandu jigi applikat favur tieghu u ghalhekk l-applikazzjoni tieghu ghandha tigi approvata. Ma kien hemm l-ebda tibdil fil-ligi jew fir-regolamenti mahruga taht dik il-ligi li b' xi mod jiggustifika li l-Awtorita tinjora u titraskura l-linja ta' decizjonijiet kollha precedenti taghha u minflok tichad l-applikazzjoni abbazi ta' kriterji li kienu diga gew ikkunsidrati fl-applikazzjonijiet precedenti u dwarhom ittiehdu decizjonijiet dejjem fis-sens li l-applikazzjoni tigi approvata.

Is-sqaq li rmnu ghandu l-access l-esponenti jinsab f' zona li hija kkulurita kannella fuq il-Local Plan, u dan minnu nnifsu jindika li z-zona hija wahda intiza ghal zvilupp. Is-sqaq jippermetti access facli ghaliex fih wisa' ta' tlett metri, fejn uhud mill-applikazzjonijiet senjalati hawn fuq kellhom faccata fuq sqaqien idjaq, l-idjaq wiehed ikun biss zewg metri wiesgha. U dan is-sqaq huwa diga committed b'xejn inqas minn tlett idjar li jkollhom faccata ghal fuqu.

Hija giurisprudenza ormai assodata li f' tema ta' zvilupp u ippjanar, l-Awtorita hija tenuta li tittratta kazijiet li jipprezentaw fattispecje simili ghal xulxin b'mod konsistenti, u li n-nuqqas ta' konsistenza fih innifsu jikkostitwixxi ngustizzja. Hekk per eżernju insibu jinghad li:

'Applikazzjonijiet simili jirrikjedu trattament identiku. Id- decizjonijiet f'dan ir-rigward, u l-konsiderazzjonijiet li jwasslu ghal dawn id-decizjonijiet neessarjament jehtieg li jkunu konsistenti. l-inkonsistenza ghandha bhala konsegwenza l-kontestazzjoni gustifikata, id-diskriminazzjoni, l-inegwaltanza, u mill-aspett soggettiv tal-applikant, l-ingustizzja', (Qorti tal-Appell Inferjuri fil-kawza 'Vella et vs DCC' deciza fl-10 ta' Dicembru 2008. F' dan l-istess sens hemm is-sentenzi kollha 'Gatt vs DCC' tad-19 ta' Novembru 2001; 'D'Amato vs DCC' tal-24 ta' Mejju 2004; 'Santinu Gauci vss DCC' tal-istess data; 'Mangion vs DCC' tas-27 ta' Ottubru 2003; 'Formosa Gauci vs DCC' tas-26 ta' Marzu 2009; u 'Marco Farrugia vs DCC' tal-10 ta' Dicembru 2008).

Huwa minnu li dawn is-sentenzi kienu, fil-maggor parti taghhorn, jittrattaw il-kwistjoni ta' height limitation imma l-principji ta' natura legali hemm enunzjati ghandhorn applikazzjoni ferm iktar estensiva u generali b'mod u manjiera li japplikaw ghall-kazijiet kollha ta' ippjanar. Fil-fatt insibu sensiela iktar ricenti ta' giurisprudenza fdan is-sens li tghid li una volta ikun applikat principju f'xi applikazzjoni, dan l-istess principju ghandu jkun applikat fil-kump lament ta' Malta u Ghawdex, u mhux limitament fl-akkwati fejn ikun hareg gia permess, u dan peress li una volta jkun applikat principju, dan jikkostitwixxi 'commitment'.

Hawnhekk issir riferenza ghad-decizjoni tal-Qorti tal-Appell fl-ismijiet 'Leisure and Theme Park Limited vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar" (Appell Civili Numru. 2/2007) fejn dik il-Qorti qalet dan li gej :

'Illi l-appell odjern huwa bbazat fuq l-aggravju li l-Bord ma applikax ilprincipju ta' ceribus paribus u ta' commitment ghall-kaz in ezami u dan peress li minkejja li l-appellant kien irrefera ghal diversi permessi li nhargu ghal numru

ta' tined f'Malta dawn ma gewx trattati mill-Bord tal- Appell dwar l-Ippjanar. ...'

Dan il-principju gie applikat mill-Bord tal-Appell dwar l-Ippjanar fis-sentenza tieghu tat-30 ta' Gunju 2011, fl-ismijiet 'Joseph Difesa vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar' (PAB 65/99 ISB, PA 6914/97) fejn il-Bord ikkonkluda li billi inghataw diversi permessi ghal 'wedding halls' f' zoni residenzjali, kellha tintlaqa l-applikazzjoni quddiemu.

L-istess gie kkonfermat fid-decizjoni tal-Bord tal-Appell fl-ismijiet 'Salvu Mallia vs Kummissjoni ghall-Kontroll tal-Izvilupp' (PAB 221/97, PA 4213/96): 'Ir-regola ta' ceribus paribus maghdud mal-commitment rnassicc 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 binjiet.'

Ukoll f' 'Dione Bartolo kontra l-Kummissjoni ghall-Kontroll tal-Izvilupp' (PAB 633/98, PA 0131/98):

'Dak li thalla jsir fil-kaz ta' wiehed ghandu jithalla jsir fil-kaz ta' kulhadd' L-esponenti jirreferi wkoll ghas-segwenti sentenzi ta' din l-Onorabbli Qorti 'Ignatius Attard vs Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp' (26 ta' Mejjun 2004); 'Jimmy Vella vs Il-Kummissjoni ghall-Kontroll tal-Izvilupp' (2 ta' Marzu 2003); 'Marie Louise Farrugia vs Il-Kummissjoni ghall-Kontroll tal-Izvilupp' (24/02/03); 'Michael Gatt vs l-Awtorita' ta' l-Ippjanar' (19 ta' Novembru 2001) u 'Alex Montanaro noe vs Il- Kummissjoni ghall-Kontroll tal-Izvilupp' (9 ta' Frar 2001); 'Max Zerafa vs Kummissjoni ghall-Kontroll ta' l- Izvilupp' (12 ta' lannar 2004); 'Santinu Gauci vs Kummissjoni ghall-Kontroll ta' l-Izvilupp' (24 ta' Marzu 2003). Dawn is-sentenzi gew ikkonfermati fis-sentenza ferm ricenti tal-Qorti tal-Appell tal-31 ta' Mejjun, 2012 fl-ismijiet 'John Saliba vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar' li wara li rreferiet ghas-sentenza 'Dr. Graham Busuttil vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar' (Frar 2008), iddikjarat li:- 'mela allura ... il-kuncett ta' commitment huwa illum ben stabbilit fil-gurisprudenza dwar regolamentazzjoni ta' ppjanar.'"

E. In-nota second statement ta' Darren Fava ghall-Awtorita', ipprezentata waqt is-Seduta numru 67 mizmuma fil-11 t' Ottubru 2012, inter alia l-punti segwenti:

"1.2.1 Permits vis-à-vis private un-schemed alley

[...] The appellant is again quoting PA 7068/04 and another permit PA 2130/10 who [recte and] claims that one has a larger footprint than case under appeal which has an entrance from lane and the other which is a corner site have apertures on the same access.

As regards to the cited two permits in the appeal submitted, the Authority has reviewed both permits and states that:

PA 7068/04: Alterations to existing dwelling and construction of swimming pool at Triq San Blas, Nadur. Permit issued on 11/9/06.

The Authority reiterates that this permit was originally refused by the MEPA since it was also considered against policy 3.8 since internal development was not permitted in UCAs. However the EPC Board overturned the reconsideration after it was determined that the proposal sought alterations to an already existing residential use. Case under appeal is to demolish of rooms and construction of 2 storey house and pool. Hence cited PA 7068/04 does not apply since proposal under appeal is creating a new dwelling unit in an internal development in a UCA.

PA 2130/10: To demolish existing building and construct a two storey house with underlying garage. Recommended by the Directorate and Permit issued on 14/7/11

The Authority does not dispute that permit was issued with apertures on this access however it is not correct that the entrance to the building is from this access (alley). Hence PA 2130/10 does not apply as the entrance to the building is fronting Triq San Blas.

1.2.3 Permits vis-à-vis internal development

The architect submitted various PA permits numbers in which it is claimed that they were similar as approved by the MEPA:

PA 4627/01: To demolish existing building and construction of two houses with two swimming pools at, Triq San Blas, Nadur. Permit issued 19/6/02. TPS no. 14 (Gozo) designates the site partly as partly within and partly outside the limits to development. The height limitation for the area is two floors since the site is located on a ridge. Not designated in a UCA according to DPAR.

PA 5839/01: Construction of dwelling house with swimming pool at, Triq Il-Knisja, Sqaq Nru 2, Gharb. DCC approved on 17/10/02. TPS no. 3 (Gozo) designates the site as partly within and partly outside the limits to development, with a height limitation of two floors. Not designated in a UCA according to DPAR

PA 2815/01: Erection of a dwelling house at, Triq Wied Simar, Qala'. Recommended by Directorate and DCC approved 18/2/02. Outline permission was granted in PA4661/99 on 12 January 2001. Not designated in a UCA according to DPAR.

The above mentioned permits are not comparable to the case being considered in this appeal. These permits were granted under a different planning regime. These files were assessed by the Temporary Provision Scheme and prior to Local Plan and PDG 2007 (April 2007). [...]

PA 1614/05: Alterations to plan and facade. Extension of basement, redesign of shop front and new signage at 1/2 Triq Ross, San Giljan. Not applicable [...] since application is for alterations only to a site at the location of San Julians.

PA 6633/05: To erect house at, Alley in, Triq Frangisk Portelli, Gharb. DCC approved 2/10/07. Not designated in a UCA according to DPAR.

Reference is made to the meeting of EPC minutes and which clearly state the main concerns which led the Board members to grant this request for development. [...]

PA 651/06: To construct house with pool at, Alley in, Triq ir-Ramla, Nadur. DCC approved . DCC approved 24/7/06. The Planning Control Section indicated – see blue 14 – that the proposed works are not affected by street widening. (DPAR in file) Site is designated within UCA.

PA 2112/07: To construct dwelling with pool at, Alley in, Triq It-Trux, Gharb. DCC approved on 20/1/09. The proposal lies within a public road in view that a name has been given (this was even confirmed by objector) (Board minute). Not designated within a UCA.

PA 3546/09: To construct house at, Alley in, Triq ir-Ramla, Nadur. DCC approved 27/7/10. The Authority reiterates that this case is fronting onto a schemed public alley. Site is designated within a UCA.

Hence regarding the above cited cases, the sites are all fronting onto a schemed public alley and thus they are not similar to case under appeal. Moreover PA 6633/05 and PA 2112/07 are not designated within a UCA as per DPAR.

1.2.4 Ceribus paribus vis-à-vis commitments

The architect submitted PA permits numbers in which it is claimed that extract of Appeal justify that commitments tied with ceribus paribus.

PA 4213/96: To erect second floor offices overlying existing first floor at Triq Gharram, Zebbug (Malta). Appeal upheld on 2/8/99.

PA 6914/97: Change of use to a hall for receptions and public functions and additional parking at Triq San Gwann, Bahar ic-Caghaq. Appeal upheld on 1/6/11.

PA 131/98: To erect receding floor plan overlying existing second floor at Triq Il-Marfa, Mellieha. Appeal upheld on 31/5/00 .

The above cited permits are not located in same location, and nature of permits issued is subject to different policies than proposal (a dwelling and pool in an un-schemed access). This clearly shows that the actual site considerations differed from the site under appeal. Furthermore, the Authority makes reference to several Planning Board's decisions in which the Board constantly emphasis that decisions taken in the past and which were decided through different planning policies are not to be considered as being relevant for requests which breach present policies and such applications should only be assessed through present plans and policies according to law.”

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda proposta sabiex f' font li jinsab gewwa l-urban conservation area (UCA) tan-Nadur, konsistenti minn kmamar mitluqa, jitwaqqghu dawn il-kmamar u jinbnew zewgt idjar b' pixxina.

Ir-raguni ghar-rifjut hi bbazata fuq il-fatt li peress li l-font de quo ghandu l-unika access minn sqaq privat (cjoe', mhux skemat), il-proposta ser tirrizulta f' internal development. Dan hu in kontravvenzjoni tal-policy 2.8B tad-Development Control Policy and Design Guidance (DC 2007) li ghandha bhala ghan il-preservazzjoni tal-morfologija.

L-aggravji tal-Appellant jistrieħu fuq il-premessa li l-access għall-isqaq gja' jezisti u huwa ben stabbilit - ghax fil-kantunieri u mad-dahla tieghu, kienu nhargu permessi għall-tlett residenzi (PA 7068/04 u PA 2130/10). Fil-fatt, fil-kaz in ezami, għalkemm kien hemm rakkomandazzjoni posittiva minghand id-Direttorat, madankollu il-Kummissjoni iddecidiet li tinjoraha u tohrog ir-rifjut.

Jigi rilevat li l-oggezzjoni għal-proposta tirrigwarda l-argument li l-isqaq mhux skemat. Madankollu, skond l-Appellant, hemm diversi sqaqien bħal dawn f' Ghawdex – li mħumiex skemati bil-Pjan Lokali – izda fejn l-Awtorita' kienet approvat permess. Fil-fatt, jigi osservat li l-Local Planning Unit (LPU) fi hdan l-istess Awtorita' kienet iddikjarat li normalment, kemm il-darba ikun hemm mill-inqas zewg residenzi li għandhom access minn sqaq simili, allura dan jista' jitqies bħala committed – bil-konsegwenza li jista' jinhareg permess. L-Appellant għalhekk issokta sabiex jagħti kazistika ta' permessi allegatament simili għal dan odjern, kif gej:

- PA 6914/97 Villa Difesa, Triq San Gwann, Bahar ic-Cagħaq; Change of use to a hall for receptions and public functions and additional parking.
- PA 131/98 Site at Triq Il-Marfa, Triq Il-Marfa, Mellieħa; To erect receding floor plan overlying existing second floor.
- PA 1614/05 1/2 Triq Ross, San Giljan; Alterations to plan and facade. Extension of basement, redesign of shop front and new signage.

Dawn it-tlett permessi jirrigwardaw propjeta' li tinsab f' Malta, b' karatteristici li xejn ma jirrispekkjaw it-talba in ezami. Terga tghid il-permessi nhargu taht regime tal-ippjanar differenti u għalhekk, ma jistax isir paragun bejnhom u t-talba odjerna.

- PA 4213/96 Site at Triq ir-Ramla, Nadur Gozo; To erect wall to enclose the applicant's site.
- PA 4627/01 Site at Triq San Blas, Nadur; To demolish existing building and construction of two houses with two swimming pools.

- PA 2815/01 Site at Triq Wied Simar, Qala; Erection of a dwelling house.
- PA 5839/01 Site at Triq Il-Knisja, Sqaq Nru 2, Gharb; Construction of dwelling house with swimming pool.
- PA 7068/04 Site at Sqaq f' Triq San Blas, Nadur; Alterations to existing dwelling and construction of swimming pool.

Ghalkemm dawn il-permessi nhargu f' Ghawdex madankollu huma regolati b' regime tal-ippjanar differenti minn dak in vigore. Terga tghid, l-ebda wahda mit-tlett residenzi in kwistjoni ma nbnew fuq siti li jinsabu barra l-UCA - bhalma hu l-kaz in ezami - u di konsegwenza, lanqas hawnhekk ma jista' jsir paragon bejn dawn l-applikazzjonijiet u dik in kwistjoni.

- PA 6633/05 Site at Alley in Triq Frangisk Portelli, Gharb; To erect house.

Dan il-permess hu wiehed tat-tip outline u l-font ma jinsabx fil-UCA. Ghalhekk, ma jistax jinghad li jirrizulta simili ghal dan de quo.

- PA 651/06 Site at Alley in, Triq ir-Ramla, Nadur; To construct house with pool.
- PA 3546/09 Site at Alley in Triq ir-Ramla, Nadur, To construct house.

Dawn iz-zewg permessi jirrigwardaw l-istess sit li wkoll jinsab fil-UCA. L-ewwel permess kien inhareg precizement qabel ma dahal fis-sehh il-Pjan Lokali bil-premessa li l-proposta ma kienitx ser tippregjudika it-twessiegh tat-triq. Dan ifisser li anke f'dan il-kaz, ma hemm xejn li jista' jitqies simili ghal-kaz in kwistjoni.

- PA 2112/07 Site at Alley in Triq It-Trux, Gharb; To construct dwelling with pool.
- PA 2779/09 Site at Alley 2 in Triq It-Trux, Gharb; To construct dwelling with pool. (appell 247/10)

Bl-istess mod, dawn iz-zewg permessi ukoll jirrigwardaw l-istess sit. L-ewwel permess kien wiehed tat-tip outline segwit minn full development permit. F' dan il-kaz, is-sit jinsab gewwa sqaq indikat mill-Kunsill lokali bhala Sqaq numru 2. Xi terzi kienu intavolaw appelli (107/09 u 247/10 rispettivament) sabiex jattakaw iz-zewg permessi, propju fuq l-argument li s-sqaq kien privat – mhux pubbliku. Madankollu jigi rilevat li z-zewg appelli kienu gew irtirati. Ghalhekk, anke hawnhekk, peress li l-isqaq mhux wiehed privat, l-izvilupp fuq dan il-font ma jistax jitqies bhala precedent.

L-Awtorita' zammet ferm l-oggezzjoni taghha ghal-proposta. Ghar-rgward taz-zewg permessi citati supra mill-Appellant, li nhargu f' is-sqaq in kwistjoni, u li allegatament jikkostitwixxu r-rekwizit ghal-zewg residenzi f' sqaq privat li skond il-principju addottat mill-LPU, jrenduh committed, spjegat dan li gej:

- Il-permess PA 7068/04 għall-font li jinsab faccata ta' dan in ezami kien originarjament gie rifjutat. Madankollu il-Kummissjoni qalbet id-decizjoni fil-fazi ta' rikonsiderazzjoni peress li kien irrizulta li gja' kien hemm uzu residenzjali fuq il-post. Fil-kaz in ezami, ma giex ippruvat li hemm tali uzu. Dan jirrifletti anke fid-deskrizzjoni tal-proposta.

- Il-font kopert bil-permess PA 2130/10 qieghed fuq kantuniera, fid-dahla tal-isqaq privat in kwistjoni. Għalhekk, għalkemm għandu faccata (b' aperturi) li thares fuq l-isqaq, l-access (entartura jew bieb principali) jinsab fuq Triq San Blas; triq skemata.

Minn dan jirrizulta li prezentement hemm biss residenza wahda b' access minn dan l-isqaq privat (fejn l-uzu residenzjali kien gie ppruvat) u għalhekk ma japplikax il-principju ta' zewg residenzi li kien gie addottat mill-LPU f' kazijiet simili. Dan l-argument hu sufficjenti sabiex it-talba in ezami tigi rifjutata.

Għalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, u fuq kollox sabiex ikun konformi mal-policies tal-ippjanar vigenti, dan il-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma ir-rifjut għall-PA 1884/11 kif mahrug mill-Kummissjoni għall-Kontroll tal-Ambjent u l-ippjanar fil-25 t' April 2012.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Id decizjoni tat-Tribunal kienet extra petita u għalhekk nulla, peress illi t-Tribunal ikkonsidra din l-applikazzjoni bhala wahda ta' bini ta' zewgt idjar mhux wahda;
2. It-Tribunal applika hazin l-policy addottata mill-Local Planning Unit fejn jidhol zvilupp fi sqaqien mhux skemati, peress illi qal li l-faccata trid bil-fors tkun fl-isqaq u ma qies illi l-policy ma tiskludix li l-faccata tal-isqaq trid tkun l-unika faccata tal-binja li qeghda fi sqaq. Il-policy trid li biex jigi kunsidrat li sqaq hu kommess bhala wiehed pubbliku irid ikun hemm tnejn jew aktar binjiet b'faccata fuq l-isqaq. It-Tribunal ma qies il-fond fil-kantuniera tal-isqaq b'faccata fuq triq. It-Tribunal għalhekk agixxa ultra vires ghax applika hazin il-ligi;
3. It-Tribunal naqas li jaghti raguni cara u dettaljata għaliex dar ezistenti fil-block plan annessa mal-ittra tal-appellant tas-26 ta' Mejju 2012 giet injorata bhala fond iehor b'access għall-isqaq u b'hekk jigi stabbilit il-commitment skond il-policy rilevanti;
4. It-Tribunal qies hazin li dan l-izvilupp jitqies bhala internal development ghax ma hux jaffaccia triq skemata. Il-Policy and Design Guidance 2007 ma titkellimx fuq triq skemata izda triq pubblika li għandha tifsira aktar wiesa skond id-definizzjoni ta' triq

fil-Kap. 504. Irid jittiehed kont f'termini ta' ppjanar mhux jekk l-art li fuqha ghaddejja t-triq hix pubblika jew privata izda jekk l-access ghall-isqaq hux wiehed pubbliku. F'dan il-kaz gie ppruvat li l-access hu pubbliku u kwindi l-policies rigwardanti internal development mhux applikabbli.

L-ewwel aggravju

Hu minnu illi t-Tribunal fl-introduzzjoni ghal konsiderazzjonijet ulterjuri li ghamel ighid illi l-applikazzjoni hi ghal bini ta' zewg residenzi, mentri hi ghal residenza wahda, pero hu car dan hu biss lapsus calami peress illi fil-bidu tal-konsiderazzjonijet li ghamel it-Tribunal jirreferi korrettament ghall-izvilupp bhala dak ta' binja wahda. In oltre l-Qorti hi perswaza minn ezami tal-konsiderazzjonijet fattwali u teknici tat-Tribunal illi fil-fatt it-Tribunal ikkonsidra l-izvilupp fit-termini proposta u illi d-decizjoni tieghu kienet qed tirriferi ghall-izvilupp kif propost u bl-ebda mod ma jista' jiftiehem illi t-Tribunal wasal ghad-decizjoni tieghu billi bbaza ruhu fuq zvilupp ta' zewg fondi u mhux wahda.

L-appellant kien ikun korrett fis-sottomissjoni tieghu li kieku d-decizjoni b'xi mod taccenna ghal xi raguni ta' rifjut bbazat fuq proposta ta' bini ta' zewg fondi izda dan mhux il-kaz u d-decizjoni kienet motivata biss fuq il-parametri tal-appell kif maghmul tenut kont tal-izvilupp propost relattiv ghall-isqaq fejn gie propost. Tant hu hekk li lanqas l-appellant ma jissostanzja kif il-lapsus tat-Tribunal kien rifless b'mod hazin fid-decizjoni.

Ghalhekk ma kien hemm ebda decizjoni extra petita u dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju kif impostat ma jirrigwardax applikazzjoni ta' policy jew prassi ta' planning izda interpretazzjoni u kwindi lanqas hu sindakabbli sakemm it-Tribunal ma jkunx iddecieda kontra l-kliem car tal-policy jew il-prassi ta' planning li solitament tigi applikata.

Jidher li l-prassi tal-Awtorita hi li fejn ma hemmx triq skemata izda si tratta ta' sqaq, jitqies li hemm commitment biex jithalla jsir zvilupp kemm-il darba jezistu gia zewg binjiet b'access fuq dan l-isqaq. Ma' dan jaqbel l-appellant li jikkonferma din il-prassi fin-nota ta' sottomissjonijiet tieghu tal-21 ta' Awwissu 2012. It-Tribunal ikkonstata illi dan ifisser li mhux biss il-binjiet irid ikollhom parti mill-binja li thares u ghandha aperturi fuq l-isqaq izda li l-access cioe l-frontage taghhom iridu ikun fl-isqaq. Dan jidher li jaqbel mal-istess nota tal-perit tal-appellant ipprezentat fid-29 ta' Mejju 2012 fejn jirreferi ghal konsultazzjoni mal-Local Plan Unit li qalu li 'when two or more dwellings having a frontage on the alley were considered to commit the alley'.

Dak li qed jipprova jaghmel l-appellant hu li jinduci lil Qorti taghti interpretazzjoni tal-kelma 'frontage', liema interpretazzjoni hi fdata fid-diskrezzjoni tat-Tribunal mhux tal-Qorti. Sakemm l-interpretazzjoni moghtija mhix kontra l-kelma espressa ta' xi policy jew dokument rilevanti mahrug mill-Awtorita bhala gwida, jew hi interpretazzjoni assurda, din il-Qorti mhix ser tissindaka tali interpretazzjoni ghax mhux fil-poter taghha li taghmlu. Harsa lejn it-tifsira ta' frontage juri illi din tfisser 'the front part of a piece of property or facade of a building'. Kwindi l-interpretazzjoni moghtija ma tistax titqies assurda.

Kuntrarjament ghal dak li qal l-appellant it-Tribunal qies li binja wahda biss ghandha access dirett ghal fuq l-isqaq, filwaqt li l-binja l-ohra ghandha l-access principali taghha mit-triq ghalkemm il-binja qeghda fil-kantuniera tal-isqaq b'parti mill-binja mibnija fl-isqaq. Fil-fehma tat-Tribunal din il-binja ma kinitx tikkwalifika bhala t-tieni binja b'faccata fuq l-isqaq li tista' taghti lok ghal commitment biex jigi approvat l-izvilupp in kwistjoni.

Ghalhekk dan l-aggravju qed jigi michud.

It-tielet aggravju

Dan l-aggravju sar specifikament fl-appell quddiem it-Tribunal. Gie rilevat illi kien hemm gia access ghal tlett binjiet fuq l-isqaq, cioe dak li fuqu ma jidhirx li hemm disputa li jgib PA 7068/04 u dik li inqala' dizgwid rigward il-faccata li fil-fehma tat-Tribunal ma kienx jikkostitwixxi binja b'faccata fuq l-isqaq peress li l-access principali

kien minn Triq San Blas. L-appellant pero isemmi binja ohra antika li qatt ma saru zviluppi fuqha u li gie allegat kellha access dirett ghall-isqaq. Hu esebixxa wkoll block plan tal-binjiet rilevanti.

Dan l-aggravju bl-ebda mod ma gie kunsidrat jew trattat mit-Tribunal, liema aggravju seta' kellu importanza vitali fil-kwistjoni jekk jinstab li jikkostitwixxi t-tieni binja b'access dirett ghall-isqaq peress li f'dak il-kaz, l-appell seta' kellu ezitu differenti jekk wiehed japplika l-gwida tal-Local Plan Unit dwar zviluppi f'internal development meta jirrizulta commitment ghax hemm zewg binjiet b'faccata fuq l-isqaq. Billi l-kwistjoni ma gietx trattata t-Tribunal abdika mill-obbligu tieghu li jaghmel gustizzja mal-partijiet billi jqis u jiddeciedi l-kwistjonijiet kollha rilevanti mqeghda quddiemu mill-partijiet ghar-revoka jew konferma ta' decizjoni tal-Awtorita.

Ghalhekk dan l-aggravju li l-Qorti tqis bhala rilevanti fl-isfond tal-fatti u d-decizjoni finali tat-Tribunal, jimmerita li jigi milqugh.

Ir-raba aggravju

Dan l-aggravju qed isir ghall-ewwel darba quddiem din il-Qorti u qatt ma kien jiffirma parti mill-kontroversja posta quddiem l-Awtorita jew it-Tribunal ghad-decizjoni tieghu. Billi l-partijiet qatt ma trattaw il-kwistjoni ta' nuqqas ta' applikabilita tal-izvilupp mill-lenti ta' internal development fl-isqaq, din il-Qorti tqis illi tali aggravju ma jisthoqqlux li jitqajjem f'dan l-istadju. L-appellant dejjem ikkontenda li l-proposta kien jikkwalifika ghall-izvilupp qua internal development ghax kien gia jezisti zewg binjiet ohra b'faccata fuq l-isqaq li jaghti lok ghal commitment tal-isqaq ghal aktar binjiet. Il-kwistjoni qatt ma tressqet mod differenti tant li d-dibattitu quddiem it-Tribunal irrisolva ruhu fuq premessi ohra li fil-fehma tal-appellant kien jikkostitwixxi kaz fejn ghandu jkun hemm trattament ugwali. Billi tali aggravju mhux wiehed ta' ordni pubbliku izda biss punt ta' appell li messu tqajjem quddiem it-Tribunal, din il-Qorti ma ghandhiex titqies bhala sostituta tat-Tribunal biex dak li ma tqajjimx quddiem it-Tribunal bhala aggravju ta' appell jinstema quddiem din il-Qorti aktar u aktar meta appelli quddiem din il-Qorti isir fuq punti ta' ligi biss.

Ghalhekk l-aggravju qed jigi michud.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' it-tielet aggravju tal-appellant, u in linea ma' dak deciz, tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-15 ta' Ottubru 2013, u tirrinviija l-atti quddiem it-Tribunal biex jerga' jiddeciedi mill-gdid l-appell fit-terminu ta' dak deciz minn din il-Qorti. Bl-ispejjez kontra l-Awtorita.

< Sentenza Finali >

-----TMIEM-----