



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

Seduta tas-26 ta' Marzu, 2014
Appell Civili Numru. 55/2013

Ray **Bugeja**

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Ray Bugeja tad-19 ta' Awwissu 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-30 ta' Lulju 2013 li cahad PA 4994/09 'to sanction the construction of swimming pool and room at back garden of existing house';

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, fit-28 ta' Marzu 2011, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 4994/09 – Farmhouse 1, Triq it-Torri, Marsaxlokk: To sanction the construction of swimming pool and room at back garden of existing house.

Iz-zewg ragunijiet ghar-rifjut kienu s-segwenti:

"1. The proposal runs counter to the adopted policy Development Control Guidance - Developments Outside Built up Areas, and in particular to Paragraph 8 Section 2. iii which limits development ODZ to a maximum floorspace of 150m².

2. The swimming pool as proposed is not in line with the criteria listed in Circular PA 1/00; this in terms of hard landscaping."

B. In-nota tal-Perit Edric Micallef ghall-Appellant, ipprezentata fis-27 t' April 2011, senjatament il-punti segwenti:

"1. The application was refused on the basis of the policy development control guidance for developments outside built up areas which limits development at ODZ to a maximum floorspace of 150m². According to the DPA Report, with this application, the floorspace would be increased from 244m² to 270m². However, this calculation is taking into account what is being described as an internal yard but which in actual fact is a side yard in conjunction with the backyard. Thus, the existing floor area measures actually 203m² (including the two floors). The proposed extension is of 27m² at the ground floor only and that would give a total floor area of 230m². The proposed footprint area including the extension is of 126.6m². ...

2. It is understood that the proposed total floor area is still greater than 150m² as stipulated in the development control guidance. However, it should also be understood that the guidances are there for what their names implies i.e. as a guidance. [sic.] One should also understand the spirit behind such guidance and then assess the particular circumstances accordingly. The undersigned believe that such assessment and judgement was not carried out neither by the MEPA Directorate nor by the Board. No indication in the DPA Report nor in the decision notice of the MEPA Board make any reference to any assessment that has been made other than mathematical additions of areas. Our reasons for the particular situation come in the next point.

3. Although the area is an ODZ area, it has developed into a small hamlet and the location of the proposed extension is totally encompassed by the other development. The spirit of the mentioned guidance is to limit the building sprawl in ODZ areas. The proposed extension may thus fall outside the scope of the guidance limiting the development. A site visit may help one understand better the situation. It was noted that n site visit was made by the Directorate in order to assess properly this situation.

4. Despite the available floor area, the layout provides limited living space since a substantial part of the ground floor is taken by the garage and the staircase and thick old walls.

5. The walls of the extension are made of glass panes and so the extension does not impose heavily on the backyard.

6. With regards, to the second reason for refusal, i.e. regarding the percentage of hard landscaping, this can be complied to by a fresh proposal of the landscaping which however needs to be determined following the decision upon the extension of the building. No object is found to comply with this requirement."

C. In-nota responsiva ta' Darren Fava ghall-Awtorita', ipprezentata fis-7 ta' Lulju 2011, inter alia l-punti segwenti:

"The Authority is hereby presenting a copy of the DPA Reconsideration Report since it has no further comments to add at this stage in relation to the merits of this Appeal other than those mentioned in the said report.

Nevertheless, the Authority wishes to clarify an argument raised in request for Appeal. The appellant is commenting that the Authority mentioned that the development is an increase from 244m² to 270m²; whilst the appellant is arguing that the increase is in fact from 203m² to 230m². Notwithstanding this, it is clear that the appellant is agreeing to what is illustrated by the Authority; that the development is already exceeds the maximum 150m² permissible for residential use outside the development zone.

Hence, any extensions would only further increase urban development and run counter to the development guidance of the Authority, and therefore the proposed development is be permissible."

D. In-nota ta' sottomissjonijiet tal-Perit Edric Micallef ghall-Appellant, ipprezentata fis-27 ta' Settembru 2011, inter alia l-punti segwenti:

"Comment no.1.

[...]This is being contested since the mentioned policy explicitly indicates that this area refers to the ground floor area of the existing building plus the extension. [...] As stated in my original submission, it is to be noted that the proposed footprint area including the extension is of 126.6m². This is less than 150m² and thus within the limits set by the Development Control Guidance – Developments Outside Built up Areas. Therefore the proposed development should have been accepted.

In its calculations, MEPA has been counting not only the ground floor as stated in the quoted Guidance but also the first floor level area and the side yard. This is not in accordance to what is indicated in the same quoted clause itself.

Comment no. 2:

It is to be noted that MEPA has not replied to the claim being made by the undersigned that it has not carried out an appropriate assessment of the

particular site in order to come to a correct judgement. It has been argued in the original request for this Appeal that this proposed extension is totally encompassed within other development and thus falls outside the scope of the planning guidance that limits the developments in ODZ to a maximum of 150 sq.m. in order to restrain further building sprawl. This argument was not replied to in MEPA's reply."

E. In-nota second statement ta' Jonathan Borg għall-Awtorità, ipprezentata fit-22 ta' Frar 2012, inter alia l-punti segwenti:

"2. The Authority does not agree with the appellant for the following reasons:

The Authority has recalculated the measurements of the proposed development. The existing dwelling has a floorspace of circa 202sq.m (excluding washroom and excluding the internal yard). The proposal is to sanction an extension in the backyard at ground floor of circa 25sq.m, a 22sq.m swimming pool, related facilities (2sq.m) and the paving of all the back garden. The proposed development would increase the total floorspace to about 230sq.m (again excluding washroom and excluding the internal yard). According to Policy PLP 20, extensions to existing buildings must not create a total floorspace which exceeds 150sq.m. Given that the legally constructed dwelling already exceeded this threshold further extensions are obviously not permitted.

The appellant is making the mistake of interchanging the terms floorspace with footprint; however there is a clear distinction between the two. Policy 8.2 of the PLP 20 refers to a maximum of 150sq.m floorspace not footprint. The 126sq.m referred to by the appellant regards the footprint of the property. It is also important to note that the appellant is excluding the internal yard from the footprint.

The Authority does not agree with the appellant that only the ground floor area plus extension is to be considered in its calculation since policy 8.2(iii) of the PLP20 states that extension to existing buildings must not create a total floorspace which exceeds 150sq.m. It is true that in brackets there is written ground floor of existing building plus extension but this must be taken in the context that typical dwellings in the ODZ are usually limited to ground floor.

The Authority is correct in its interpretation of the policy because otherwise it would lead to a situation where several piecemeal applications are filed on the same site to extend a dwelling ODZ; with each application being proposed in a way that it does not exceed the parameters of the policy as interpreted by the appellant (i.e. ground floor [only] plus extension) and yet end up creating a building much larger than it should be in the ODZ.

The appellant is also arguing in favour of the extension by stating that the site is located within a hamlet and that the extension is enclosed and screened by existing buildings. The Authority however notes that the local plan has not recognised this area as a rural settlement. Moreover even if this

area is indeed a rural settlement, this should not be construed as a carte blanche to develop any open space in between buildings in ODZ as this tantamount to urbanization and overdevelopment of an area that should and is typically characterised by open areas, fields and punctures between buildings.

The proposed development also includes the construction of a swimming pool, within the curtilage of the existing dwelling unit. Section 5.1 (3) of Circular PA 1/00 (the policy which regulates swimming pools in ODZ) requires the extent of paving of hard surface around the swimming pool to be limited to not more than 50% of the pool area and an appropriate mix of hard and soft landscaping within the garden area/open space is to be encouraged. In this case the total area of hard landscaping is circa 50sq.m which greatly exceeds the 50% of the pool area as required by PA Circular 1/00."

F. Il-verbal tal-access fuq il-post tas-Seduta numru 81, mizmuma fit-30 ta' Novembru 2012, precizament il-punti segwenti:

"It-Tribunal acceda fuq is-sit in kwistjoni u gie muri mill-appellant is-swimming pool li qiegħed fuq in-naha ta' wara tad-dar li tidher li hija uzata għall-abitazzjoni. Apparti mis-sanctioning tas-swimming pool, hemm kamra adjacents għall-istess swimming pool li ukoll giet mizjuda u l-appellant qed jitlob sanctioning tagħha.

Jonathan Borg għall-Awtorita' ikkummenta dwar il-fatt illi sar hard landscaping eccessiv u l-oggezzjoni għall-izvilupp propost hija illi l-maximum floor space huwa in eccess ta' 140 square metres li huwa dak li hu accettabli f'areas ODZ.

Il-perit Edric Micallef iddikjara, li l-policy titkellem biss fuq il-ground floor and extensions u għalhekk, fl-opinjoni tiegħu il-kalkolu li għamlet l-Awtorita' mhux korrett billi f'dan il-kalkolu ma kellux jigi nkluz il-floor space tal-ewwel sular."

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda proposta sabiex f' font konsistenti minn residenza li tinsab barra z-zona tal-izvilupp (ODZ) f' Marsaxlokk, jigu ssanati il-bini ta' pixxina u kamra fuq wara fil-bitha ta' l-istess propjeta'

Precedentement kienu gja' gew intavolati xi applikazzjonijiet għall-izvilupp. Dawk sinifikanti għal-kaz in ezami huma: PA 3694/07 sabiex jigi estiz il-pjan terran u tinbena pixxina fil-bitha ta' wara – din kienet giet rifjutata; u PA 4627/09 sabiex tigi skavata pixxina, li pero' giet irtirata.

Bhal issa s-sit hu milqut b' avviz biex tieqaf u ta' twettieq ECF 68/10 minhabba l-fatt li xoghlijiet konsistenti propju fil-bini ta' pixxina u kamra, xorta wahda saru minghajr permess. Dan jaqra' kif gej:

“Ghandek zvilupp minghajr permess fis-sular terran (ground floor) li jikkonsisti fis-skavar u u bini ta swimming pool kif ukoll estensjoni ta' kamra ma' binja ezistenti.”

Ir-raguni ghar-rifjut odjern huma bbazat fuq il-fatt li l-izvilupp komplessivament jeccedi l-limitu massimu ta' 150 metri kwadri kif indikati permezz tal-paragrafu 8, section 2(iii) tad-Development Control Guidance – Developments Outside Built-Up Areas (PLP 20). In oltre, peress li l-landscaping madwar il-pixxina huwa karenti, it-talba hi in kontravvenzjoni ta- Cirkolari PA 1/00.

L-aggravji ta'-Appellant jistrieħu fuq il-premessa li d-dokument development control guidance hu ntiz bhala linja gwida u ghalhekk m' ghandux jigi kkunsidrat ad letteram. Fil-kaz in ezami, jekk ma tittiehiedx kunsiderazzjoni tal-btiehi (cjoe' tal-bitha interna li tinfed mal-bitha fuq wara fejn hemm il-pixxina), il-footprint tal-izvilupp inkluz l-estensjoni li qed jigi ttentat is-sanar taghha hi ta' kwazi 127 metri kwadri.

Tajjeb li qabel xejn jigi osservat li l-paragrafu 8.2 tal-policy paper PLP 20 kif citat fir-raguni tar-rifjut, jaqra' kif gej:

“Site Area

(iii.) Extensions to existing buildings must not create a total floorspace which exceeds 150 sq. m. (ground floor area of existing building plus extension).”

Jirrizulta ghalhekk li skond il-policy paper, l-ispazju utili tal-izvilupp ma jridx jaqbez il-150 metri kwadri. Tenut kont tal-fatt li binjiet fl-ODZ normalment huma ta' sular wiehed, il-policy paper tispecifika (fil-parentesi) li l-150 metri kwadri jirreferu komplessivament ghal parti originali (cjoe' ground floor) inkluz kwalsiasi estensjonijiet li jkunu qed jigu proposti.

Dan qed jinghad in vista tal-fatt li l-Appellant qed jinterpreta l-policy paper diversament. Jargumenta (erronjament) li ghalkemm il-floor area tammonta ghal 230 metri kwadri fuq zewg sulari (cjoe' 203 metri kwadri tal-bini originali u 27 metri kwadri tal-estensjoni li qed jigi ttentat is-sanar taghha), il-footprint hi biss ta' 127 metri kwadri - kif gja' rilevat supra. Skond l-Appellant allura, reductio ad absurdum, sakemm il-parti li tmiss ma l-art tkun inqas minn 150 metri kwadri, is-sulari sovrastanti jistghu jinbnew b' spazju ad infinitum.

F' ic-cirkostanzi ikun inutili li jigi rilevat li skond l-Appellant:

- Il-parti l-kbira tal-ground floor tikkonsisti fil-garaxx u tarag ampju, ghax dawn ilkoll jiffurmaw parti mill-floorspace,
- L-estensjoni ghandha hafna hgieg u allura tidher lightweight, u
- Li l-hard landscaping eccessiv tal-pixxina jista' jigi ridisinjat b' proposta gdida (fresh proposal).

Fl-ahharnett, tajjeb li jigi osservat li l-Appellant jargumenta li l-Awtorita' qatt ma kkunsidrat il-fatt li din iz-zona illum hi zviluppata qisha bhal hamlet u allura kien imissha libset komma wiesgha u hargitlu permess.

Tajjeb li jigi osservat li skond il-Pjan Lokali, din iz-zona hi indikata esplicitament bhala ODZ - u mhux rahal zghir - u allura ma tistax tinghata l-ebda konsiderazzjoni li din iz-zona ghajr kif indikat fl-istess Pjan Lokali. Forsi l-Pjan Lokali huwa wkoll intiz bhala linja gwida?

Meta l-Awtorita' tiddeciedi applikazzjoni, taghmel dan abbazi tal-pjanijiet u l-policies in vigore; skond ma jipprovdi l-Artikolu 69 tal-Att X tal-2010 (Kap. 504). Il-parti ta' dan l-artikolu rilevanti ghal-kaz in ezami hi kif gej:

“(1) Meta l-Awtorita' tiddeciedi dwar applikazzjoni li ssirilha: [...] (b) fir-rigward ta' kull applikazzjoni [...] japplikaw [...] il-pjanijiet, policies u regolamenti mahruga taht dan l-Att kif jista' jitqiesu rilevanti u xierqa.

Jsegwi li jkun ferm frivolu li kieku l-Awtorita' kellha tiddipartixxi mill-pjanijiet u l-policies u kapriccozament tiddeciedi arbitrarjament jew addirittura kuntrarju ghalihom.

Ghalhekk, 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 ghall-PA 4994/09 kif mahrug mill-Kummissjoni ghall-Kontroll ta' l-Izvilupp tal-Ambjent u l-Ippjanar, fit-28 ta' Marzu 2011.

Ikkunsidrat

L-aggravju tal-appellant huwa s-segwenti:

1. It-Tribunal applika hazin l-artikolu 8(2)(iii) tal-policy guidance PLP 20 meta interpreta tali policy b'mod li tmur kontra l-kliem espress tal-istess artikolu.

Il-kwistjoni li trid tigi deciza mill-Qorti hi fl-ewwel lok jekk din hix biss kwistjoni ta' interpretazzjoni ta' policy jew applikazzjoni hazina ta' policy. Hu biss fit-tieni ipotesi li l-Qorti ghandha jedd ta' sindakar tal-gudikat.

Jinghad l-PLP 20 hi biss gwida ta' kif ghandhom jigu applikati l-policies rigwardanti zviluppi f'ODZ. Ghalkemm bhala gwida ma ghandhomx forza ta' ligi bhal ma hi policy, pero bhala linji gwida jaghtu parametri lill-Awtorita u lit-Tribunal kif u safejn hu permess zvilupp f'ODZ. Bhala tali ghandhom safejn hu possibli jigu segwiti mill-Awtorita u t-Tribunal b'mod konsistenti sabiex jikkrejaw certezza u trattament uniformi ghal applikazzjonijiet simili.

Maghdud dan jidher illi l-kwistjoni quddiem it-Tribunal irrisolviet ruha fuq aspekk wiehed partikolari koncernanti dan l-izvilupp, għalkemm fir-realtà kien hemm zewġ raġunijiet ta' rifjut mogħtija mill-Awtorità. It-Tribunal tratta u ssofferma ruha fuq wiehed biss cioè t-tifsira tal-artikolu 8(2)(iii) tal-policy PLP 20. Qed jiġi kkwotat hawn l-artikolu 8(2) sal-parti relevant għall-iskop ta' dan l-appell billi l-istess artikolu jidhol f'diversi aspetti dwar eligibiltà ta' żvilupp simili li mhux parti minn dan l-appell. L-artikolu jgħid hekk:

Minor extensions to buildings and uses in rural areas may be acceptable provided the following criteria are met:

Extensions to buildings in rural areas

In addition to satisfying the requirements in paragraph 8.1 points (i) to (ix) above, proposals for extensions to buildings or uses outside the limits of development will only be acceptable if the following criteria are met:

Need and Eligibility

(i) The need for the new development must be clearly explained and justified, to the satisfaction of the Planning Authority, and in particular why the proposal cannot be accommodated on a site within the limits of development.

(ii) The application must be able to demonstrate that the original building or use is implemented in accordance with a valid development permit, or that the development dates from a period before such permits were necessary.

Site Area

(iii) Extension to existing buildings must not create a total floorspace which exceeds 150 sq.m. (ground floor area of existing building plus extension).

L-appellant jikkontendi illi l-kliem tal-artikolu rilevanti hu car. Biex estensjoni titqies elegibbli ma għandhiex tikkreja floor space ta' iktar minn 150 metri kwadri. Fil-parantesi l-floor space jingħata tifsira bħala ground floor of existing building plus extension. L-appellant jikkontendi illi l-footprint tal-ground floor bl-estensjoni ma jissuperax il-150 metri kwadri anzi hu ta' 127 metri kwadri biss.

It-Tribunal esprima ruha kontra dan l-argument. Hi jgħid illi essendo binjiet f'ODZ huma normalment ta' sular wiehed, it-tifsira li kellha tingħata lil artikolu hu illi l-ground floor area kif ukoll kull estensjoni oħra li ssir quda floor space ma għandux jeccedi l-150 metri kwadri. It-Tribunal għalhekk għamel interpretazzjoni tal-artikolu meta

jitkellem fuq total floor space tal-izvilupp mehud fl-intier tieghu li kellu jigi kkalkolat billi jitqies il-ground floor area u l-estensjoni ta' floor space fl-izvilupp. It-Tribunal ikkonferma c-cahda tal-applikazzjoni peress illi qua floor space cioe binja fuq zewg sulari dan kien gia jeccedi bil-bosta l-150 metri kwadri u ghalhekk kull zvilupp ulterjuri jmur kontra l-ispirtu tal-policy.

Il-Qorti tqis illi t-Tribunal ma ghamilx applikazzjoni hazina tal-kliem car tal-policy paper kif qed jargumenta l-appellant izda interpeta l-artikolu relevant meta hu kkunsidra li t-total floor space kien jinkludi l-ground floor area tal-binja piu l-estensjoni mehud fl-isfond ta' total floor space, cioe ghamel distinzjoni bejn floor space u footprint. Il-footprint hu relattiv ghal ground floor area u l-floor space hu intiz ghall-izvilupp kollu tenut kont tal-estensjoni rikjesta u dan a bazi tal-kliem uzat fl-artikolu 8(2)(iii).

Jista' jkun li wiehed ma jaqbilx mal-interpretazzjoni pero qari tal-artikolu jaghti lok ghall-interpretazzjoni li ghamel it-Tribunal u hawn mhux il-kaz li l-policy paper qed tghid l-oppost. Infatti l-istess artikolu fil-parti in parentesi li qajmet il-kontroversja ma tispecifikax jekk l-estensjoni tirreferix ghal ground floor area li ma ghandhiex teccedi l-150 metri kwadri qua footprint tal-ground floor jew intiza b'modolistiku li b'kollox bejn il-ground floor area u l-estensjoni fl-isfond ta' total floor space tal-binja ma teccediex il-150 metri kwadri. La darba l-artikolu mhux inekwivoku u jaghti lok ghal interpretazzjoni, tali interpretazzjoni sakemm mhix wahda assurda ghal kollox u ma tirrispekkjax il-fatti ma ghandhiex tigi disturbata, aktar u aktar meta bbazata fuq ragunijiet ta' planning.

Ghalhekk l-aggravju tal-appellant mhux sindakabbli ghax hawn si tratta ta' interpretazzjoni ta' policy paper li f'dan il-kaz ma fihix l-estremi sanzjonabbli li tirrikjedi intervent tal-Qorti.

Decide

Il-Qorti ghalhekk tichad l-appell ta' Ray Bugeja u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-30 ta' Lulju 2013. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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