



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

Seduta tas-26 ta' Marzu, 2014
Appell Civili Numru. 35/2013

**Anthony Laferla u Mario Muscat
ghal Lite Bite Company Limited**

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Lite Bite Company Limited tal-21 ta' Mejju 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-2 ta' Mejju 2013 dwar applikazzjoni PA 713/09 'proposed penthouse over existing residence';

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

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

B'applikazzjoni pprezentata fil-25 ta' Frar 2009, Full Development Permission PA 713/09, l-appellanti fis-sit f'139, Triq San Edwardu c/w Triq Bonnici u Misrah is-Summit, Birzebbugia talbu:

“Proposed penthouse over existing premises.”

L-applikazzjoni giet michuda b'rifjut tad-19 ta' Lulju 2010 ghar-ragunijiet segwenti:

"1. The proposed penthouse over the existing building would further exceed the four-storey height limitation as designated by the Local Plan for the area, and would result in excessive overdevelopment of the site. This would not be in the interests of the amenity of the area as a whole, running counter to Structure Plan policy BEN 2.

2. The proposal runs counter to policy 10.6 of the Policy and Design Guidance 2007 in that the existing building already exceeds the maximum allowable height of 15.75m, and the proposed penthouse is not setback by 4.25 metres from the facade overlooking Triq Bonnici."

FI-appell tieghu l-Perit Dottor Edwin Mintoff ghall-appellanti ssottometta li kif konfermat mir-ritratt minnu anness Red 31A, f'tit metri biss 'l boghod mis-sit in kwistjoni qed jinbena sular addizzjonali, konsistenti f'penthouse b'setback fil-faccata, li hu zvilupp accettabbli fuq l-gholi massimu permissibbli mhux sewwa li applikazzjonijiet simili ma jigux hekk trattati.

Fir-rapport taghha l-Awtorita' kkummentat kif gej;

“6.2.1 Issue of height limitation

The area is designated with a height limitation of 4 floors according to Fig.7 of the Marsaxlokk Bay Local Plan. The proposed development consists of a penthouse dwelling above an existing (and covered with permit) five-storey building. Therefore the existing building already exceeds the height limitation of the site.

The appellant is not wholly correct when stating that a penthouse/recede level is permitted over and above the height limitation. Policy 10.6A(b) of the DC2007 states that penthouses are only permitted when the overall height of the building, excluding the penthouse, does not exceed the overall permissible height in metres of the building as shown in the Table in policy 2.1 and as set out in the local plan.

As stated above, the existing building already exceeds the height limitation established by the local plan (and by default that set in policy 2.1 of the DC2007). Hence the proposed penthouse runs counter to Policy 10.6A(b) of DC2007.

6.2.2 Issue of setback at penthouse level

Policy 10.6A(c) of the DC2007 requires penthouse structures to be receded by 4.25m from all front elevations. The proposed penthouse has only a setback of 2.5m from the façade fronting Triq Bonnici. The roof area cannot be claimed to be restricted in any sense since a 4.25m setback from all

elevations would still leave over 45sq.m of floorspace; enough to cater for a 1-bedroom dwelling. In view of these arguments, the proposed penthouse also runs counter to policy 10.6A(c) of the DC2007.

6.2.3 PA6580/04 – the permit referred to by the appellant

The permit referred to by the appellant is PA6580/04. This development, which is located at the corner fronting immediately the bay, consists of a double-height ground floor, four overlying floors and a penthouse level (not receded in certain parts) when seen from the lowest of the streets that surround the development. The Planning Directorate recognised that the proposal did not respect the height limitation of the area as set by the local plan. However, the Planning Directorate maintained that in this case such departure from policy is acceptable (subject to the fulfilment of a list of criteria to safeguard the amenity of the area) in order to have a landmark building in the area which lacks from innovative and superior designed architecture (and which is important to have since it is a major tourist area). This position is actually backed by Policy 1.7 - Visual Architectural Gain - of the DC2005 (and maintained in the subsequent design guidelines).

It is clear that the case referred to by the appellant is quite particular and site specific and its context is acutely different from that of the appellant's. The criteria used to assess it are substantially different from those that apply in the Appellant's case, and therefore it should not be used to justify the appellant's proposal."

Fis-second statement tagħha l-Awtorita' kkummentat kif gej:-

"1.2.1 Repeat of Earlier Comments

At second statement the appellant is once again making reference to PA 6580/04 which permitted development in vicinity of the appellant site. In this regard the Authority retains the comments made in para. 6.2.3 of the initial report. As mentioned earlier, it is clear that this case is quite particular and site specific with a context acutely different from that of the appellant's; and that the criteria used to assess the two separate cases is substantially different.

1.2.2 Principle of Development vis-à-vis Commitment

In arguments submitted, the appellant is also stating that in the case of the proposed development, the site is situated in an area where other similar developments are present; hence is requesting that permit be approved in view of the concept of *cerimus paribus*.

In this respect, MEPA highlights the importance of respecting the zoning designations in the local plan in order to ensure comprehensive planning. This position finds comfort in a recent decision given by the Planning Appeals Board (PA 5727/05; PAB 161/07) which stated that: *Il-Pjan Lokali kien specificament mahsub sabiex jaghti direzzjoni ta' kif z-zoni differenti*

ghandhom jkomplu jigu zviluppanti. Kieku wiehed kellu jinjora l-pjan lokali u johrog permessi abbazi biss ta' xi tip ta' kommittment dan jkun jfisser illi l-ghannijiet tal-Pjan Lokali ma jkunu jistghu qatt jintlahqu u l-ezercizzju kollu tal-pjanijiet lokali jkun sar ghall-xejn. Therefore it is clear that whilst existing (legal) commitment must be taken into account by the Authority when assessing and deciding a proposed development, respecting the local plan zoning designations is essential."

Il-konsulenti legali tal-appellant, infatti insistew fin-nota taghhom datata 5 ta' Lulju 2012 li l-izvilupp propost kellu jigi accettat, kif gie awtorizzat l-permess PA 6580/04; u li l-kuncett ta' 'Cerimus paribus' gie kkonfermat mill-Qorti ta' l-Appell Sede Inferjuri, fil-kawza, fost'ohrajn "Leonard Cassar vs MEPA" deciza fit-28 ta' Gunju 2011. Gie allegat in oltre, li l-appellanti huma vittmi ta' diskriminazzjoni. Finalment il-konsulenti tal-appellanti iddikjaraw:

"As it has already been outlined above, the existing development is in line with its relative permit and therefore the proposed penthouse over the existing building should not be considered as over-development. Other similar permits in the vicinity like the one permitted PA 6580/04 show that the area is at this point in time deemed to be a 'committed' area'

With reference to the DCC's second ground for refusal that is that the proposed penthouse is not set back by 4.25 metres from the façade overlooking Triq Bonnici. The Tribunal must note that the proposed penthouse is to be developed on a site considered to be 'restricted' in nature. Therefore the proposed penthouse in terms of Policy 10.6 (C) may be constructed with a 2.5 metre recess."

Ikkunsidra ulterjorment:

L-appellanti qed jipproponu l-bini ta' penthouse ghall-uzu residenzjali fuq r-raba' sular ta' zvilupp ezistenti; block kummercjali u residenzjal li ghandu tlett faccati, wahda minnhom fuq Pretty Bay, Birzebbuga. Dan jikkonsisti f'garaxx fil-livell tal-basement, accessibbli minn Car lift, restaurant fil-ground u first floor u sitt appartamenti, tnejn kull sular fit-tlett sulari sovrastanti. Il-bini hu hames sulari gholi mill-livell tat-triq, f'kull faccata.

Skond l-Marsaxlokk Bay Local Plan (2006) s-sit jinsab fil-Birzebbuga Action Area, u hu disinjat b'height limitation ta' erba' sulari.

Il-perit tal-appellant jiggustifika l-applikazzjoni esklusivament fuq il-fatt li fuq sit vicin PA 6580/04, nghata permess ghall-izvilupp fl-istess gholi minnu propost. L-Awtorita' dwar dan il-permess citat ghalkemm ikkoncediet li l-izvilupp ddipartixxa mill-Policy, dan hu kaz eccezzjonali billi l-lokalita', bhala area turistica kienet tinhtieg land mark building, ta' certu livell ta' disinn arkitettoniku, f'area partikolari, fejn dan l-izvilupp innovattiv hu inezistenti ghal dak il-kaz ghalhekk kienu japplikaw kriterji ta' ippjanar li ma japplikawx ghal kaz in ezami, fejn qed jintalab sular receeded addizzjonali fuq zvilupp ezistenti.

Kopja Informali ta' Sentenza

L-approvazzjoni tal-permess citat fl-gholi mitlub, kienet unikament intiza biex f'din iz-zona ikun hemm zvilupp ta' certu pregju u valur mill-aspett arkitettoniku, u mhux biex dan jikkostitwixxi precedent biex effettivament tinbidel il-height limitation indikata fil-Pjan Lokali.

Applikazzjonijiet għall-izvilupp jigu kkunsidrati u determinati fil-kuntest tal-Artikolu 69 tal-Att X ta' l-2010, Kap. 504.

L-Awtorita' skond dan l-Artikolu tiddeciedi l-applikazzjoni principalment skond l-Plans u l-Policies approvati; jittiehed kont ukoll ta' konsiderazzjonijiet materjali fosthom dawk ambjentali, estetici u sanitarji jekk l-Awtorita' jidrilha rilevanti.

L-Artikolu 69(2)(i) proviso, dwar l-commitment minn bini iehor fil-vicinanzi, jistabilixxi li dan ma jstax jigi interpretat jew utilizzat biex izid l-height limitation indikat fil-pjan.

Skond l-Artikolu hawn citat, l-proposta prezenti ta' sular addizzjonali, ma tistax tigi approvata billi l-izvilupp propsot ikun jeccedi l-height limitation indikat fil-Pjan.

L-appellanti, in oltre ddikjaraw li billi s-sit hu wiehed 'restricted', l-Penthouse proposta tista' tigi approvata b'setback ta' 2.5 metres.

Dan hu kkontestat mill-Awtorita' billi s-sit għandu faccata fuq tlett triqat billi jinsab f'kantuniera, u mill-pjanti pprezentati jirrizulta' li anke b'setback ta' 4.25m, skond il-Policy, jibqa'spazzju sufficjenti biex jakkommoda 'one bedroom residence'.

Il-proposta hi għalhekk in kontravvenzjoni tal-Policy 10.6A(c) tal-Policy and Design Guidance 2007.

Ezaminata fid-dettal l-proposta prezenti, l-motivazzjonijiet tar-rifjut, u l-aggravju tal-Appell, fil-kuntest tal-Policies tal-Ippjanar rilevanti, l-Appell ma jimmeritax konsiderazzjoni favorevoli.

It-Tribunal għalhekk qed jiddisponi minn dan l-Appell, billi jichad l-istess u jikkonferma r-rifjut tad-19 ta' Lulju 2010 għall-applikazzjoni PA 713/09.

Ikkunsidrat

L-aggravju tal-appellant hu s-segwent:

1. It-Tribunal zbalja meta ddecieda din l-applikazzjoni a bazi tal-provvedimenti tal-artikolu 69 tal-Kap. 504 billi hadd mill-partijiet ma resqu bhala argument u ma kienx fis-sehh meta giet deciza l-applikazzjoni fil-31 ta' Awwissu 2009 u r-rikonsiderazzjoni

fl-2010. Ghalhekk il-provvediemnti ta' dan l-artikolu ma setghux jigu applikati retroattivament quddiem it-Tribunal tal-Appell.

Din il-Qorti tirrileva fl-ewwel lok illi l-appellant hu skorrett li l-artikolu 69 ma tqajjimx quddiem it-Tribunal. Fis-seduta quddiem it-Tribunal tas-17 ta' Marzu 2011, ir-rapprezentant legali tal-Awtorita irrefera specifikament ghalih u l-appellant fis-seduti sussegwenti u fin-noti minnu prezentati ma accennax ghalih.

Harsa lejn id-decizjoni tat-Tribunal wiehed isib li kien hemm aggravju wiehed kontra r-rifjut tal-Awtorita cioe illi f'sit vicin dan in kwistjoni kien qed isir bini oghla mill-massimu permess. Ir-rifjut tal-Awtorita kien ibbazat fuq zewg punti cioe li l-izvilupp propost kien jivjola l-height limitation taz-zona skond il-Marsaxlokk Bay Local Plan tant illi anki l-binja ezistenti kienet gia tissupera l-oghli permess. In oltre jikkostitwixxi ghalhekk over development u jmur kontra Structure Plan Policy BEN 2. Mhux hekk biss izda s-setback propost tal-penthouse jivjola l-policy 10.6 tal-Policy and Design Guidance 2007 billi hu anqas minn dak permess.

It-Tribunal dahal fil-kwistjoni sollevata billi semma' l-argumenti tal-partijiet dwar l-izvilupp fil-vicinanze li skond l-appellant kien jirrikjedi trattament simili ghal din l-applikazzjoni. It-Tribunal wasal ghal konkluzjoni illi l-approvazzjoni tal-permess citat mill-appellant kien wiehed ta' natura eccezzjonali intiz biex fiz-zona ikun hemm zvilupp ta' certu pregju u valur arkitettoniku u bl-ebda mod ma kien jikkostitwixxi precedent biex tinbidel height limitation fi pjan lokali.

It-Tribunal izid illi kull applikazzjoni trid tirrispetta dak li jghid l-artikolu 69 tal-Kap. 504 cioe li applikazzjoni tigi deciza skond il-plans u policies approvati u jittiehed kont ta' konsiderazzjonijiet materjali li l-Awtorita jidhrilha rilevanti. Hu minnu illi t-Tribunal seta' rrefera ghall-artikolu 33 tal-Kap. 356 bhala dak ezistenti meta giet deciza mill-Awtorita l-applikazzjoni pero f'din il-parti fuq riferita l-artikolu 33 tal-Kap. 356 hu identiku ghall-artikolu 69 tal-Kap. 504 u kwindi kull referenza ghal artikolu jew iehor ma tbiddel xejn mis-sustanza ta' dak li kkunsidra t-Tribunal. Billi dan l-artikolu ma nbidel xejn fih kull argument li jista' jitqajjem hu biss wiehed addademiku billi r-rizultat jibqa' l-istess cioe li l-izvilupp jeccedi l-height limitation tal-pjan lokali, u anki qua zvilupp li kieku ma kienx jeccedi l-height limitation kien oggezzjonabbli ghax ma

Kopja Informali ta' Sentenza

zammx setback kif trid il-Policy and Design Guidance tal-2007, zewg principji ezistenti anki meta saret l-applikazzjoni.

Dawn kienu l-punti li fuqhom gie deciz l-appell. Il-Qorti taghmilha cara illi l-principju regolatur hu illi huma l-pjanijiet u policies ezistenti fi zmien tad-decizjoni li jipprevalu ghal approvazzjoni jew rifjut ta' zvilupp. Ma jistax jinghad li applikant ikun akkwista xi dritt qabel ma tigi deciza l-applikazzjoni u kull aplikazzjoni hi soggetta ghal-pjanijiet u policies ezistenti meta tkun ser tinghata d-decizjoni b'dan illi kull parti ghandha tinghata l-opportunita li tottempera u tidderigi ruhha f'kaz ta' bdil fil-mori ta' processar ta' aplikazzjoni. Dan jinghad peress illi regoli ta' planning huma ta' natura ta' interess pubbliku li jipprevalu fuq l-interess privat dment li ma jkunx gia hemm dritt vestit jew il-ligi tipprovdi mod iehor.

Hu minnu illi t-Tribunal semma' l-artikolu 69(2)(i) fil-proviso tieghu li dahal fis-sehh fil-mori tal-appell pero kuntrarjament ghal dak li jghid l-appellant dan ma kienx il-fattur determinanti tal-appell tant li t-Tribunal iggustifika li l-pjanijiet u policies ma setghux jigu vjolati billi enfazizza li l-proviso kien jaghmilha cara illi l-argument tal-commitment ma jistax jintuza biex ibiddel height limitation ta' pjan lokali. Wara kollox dan hu l-argument tat-Tribunal li waslu ghad-decizjoni tieghu minghajr il-bzonn tal-applikazzjoni tal-proviso tal-artikolu 69(2)(i).

Kwindi kien errat l-appellant li jargumenta illi l-artikolu 69 ma ssemmix, li mhux applikabli jew li gie uzat b'mod retroattiv, billi dak li gie applikat kien il-principju regolatur kif kien fil-Kap. 356 u baqa' fil-Kap. 504 cioe li aplikazzjoni tigi valutata billi jigu skrupolozament applikati l-ewwel il-pjanijiet u policies u f'dan l-ezercizju jittiehed kont ta' fatturi rilevanti li jistghu jghinu biex jigi deciz il-mertu ta' aplikazzjoni.

Decide

Ghalhekk ghar-ragunijiet moghtija, l-appell ta' Lite Bite Company Limited qed jigi michud u d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-2 ta' Meju 2013 qed tigi konfermata. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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