



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tas-7 ta' Mejju, 2014

Appell Civili Numru. 2/2004

Emanuel Micallef

vs

Il-Kummissjoni ghall-Kontroll tal-Izvilupp

Il-Qorti,

Rat ir-rikors tal-appell ta' Emanuel Micallef tat-18 ta' Marzu 2004 mid-decizjoni tal-Bord tal-Appell dwar l-ippjanar tal-10 ta' Marzu 2004 ghal sanzjoni ta' penthouse u washroom PAB 235/03;

Kopja Informali ta' Sentenza

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

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

Rat id-decizjoni tal-Bord li tghid hekk:

Ikkunsidra:

Illi l-appellant applika sabiex jissanzjona penthouse u washroom fil-fond "Prestige Court", Triq il-Port Ruman, San Pawl il-Bahar. L-applikazzjoni giet rifjutata mill-Kummissjoni ghall-Kontroll tal-Izvilupp wara talba ghal rikonsiderazzjoni ghas-segwenti ragunijiet:

"1. The proposed development is unacceptable since it does not comply with policy 10.3 Penthouses of Development Control Policy & Design Guidance 2000 which requires that:

- a) the building is 4 or more floors in height;
- b) the penthouse shall be set back at least 4.25 metres from each frontage;
- c) the external height of the penthouse is not more than 12 courses (3.4 metres) above roof level;
- d) no washrooms stairwells, or solar water heaters will be permitted on the roof or the penthouse; and
- e) there is no permanent means of access to the roof of the penthouse.

2. The height of the proposed building exceeds the maximum height limitation for St. Paul's Bay i.e. 4 floors plus penthouse. It is therefore incompatible with the characteristics of the area and with the Temporary Provisions Scheme for the area, which seeks to limit height in order to safeguard the general amenity of the area. The proposed development runs counter to Structure Plan Policy SET 8, which requires that the layouts and other provisions of the Schemes will only be reviewed as part of the Local Plans to be prepared for the areas in which the schemes are located

Kopja Informali ta' Sentenza

3. The proposed development is incompatible with the urban design and environmental characteristics of the area. It would not maintain the visual integrity of the area and so does not comply with Structure Plan Policy BEN 2.";

Ra l-appell tal-Perit Hector Zammit B.E. &A.(Hons.) A.&C.E. f'isem l-appellant li jaqra kif gej:-

"On behalf and the request of my client Mr. Emanuel Micallef, I wish to submit this appeal from DCC decision dated 25-7-2003 and request to be present during this meeting.

2 Proposal

2.1 The proposed development consists in a request to sanction the penthouse as built and overlying washroom/stairwell

3 Discussion

3.1 The reasons for refusal refer to the height limitation and state that it is being infringed. The area is for four floors and a penthouse and therefore the reasons for refusal is incorrect from the point of view of the penthouse. In addition the adjacent properties have structures approved to be higher even than the level of the washroom. This is also true for a number of nearby developments, some of which are 7 stories high. The policy cannot be applied to my client's property and not to the others. A site visit will immediately highlight this point.

3.2 With regards to the height it must be noted that the height limitation in metres is calculated as follows

It is clear that this height will not be exceeded since the height of the building is 19.20 m from street level including washroom

3.3 Although the setback is not 4.25m from facade, the penthouse cannot be seen from road level. the same cannot be said to the adjacent property that has the stairwell going up to 7 storeys and is located on the facade. It must also be noted that the facade has been built receded from official alignment

Kopja Informali ta' Sentenza

3.4 With regard to the parking and although the case officer stated that the CPPS can be applied, it must be noted that the applicant has four parking spaces within the same building at basement level and therefore he has an excess of two spaces.

For the above reasons I respectfully ask the planning appeal board to grant my client necessary permit.";

Ra n-nota ta' sottomissjonijiet tal-Awtorita datata 13 ta' Ottubru 2003 li taqra kif gej:

"DESCRIPTION OF PROPOSED DEVELOPMENT:

This is a Full Development Permission application to sanction penthouse and washroom.

1.1 Site Profile:

The site lies within an existing built-up area zoned for terraced housing with front garden as per Temporary Provision Scheme (TPS) 5, with a height limitation of four floors with semi-basement, having a maximum allowable height of 17.75m. In this case, a penthouse is permitted, over and above the allowable number of floors as per policies 10.3 & 10.4 of Policy & Design Guidance 2000.

1.2 Date of Refusal:

This application was refused by DCC on 13th May 2002, during Board Meeting 05-033/02, held on 30th April 2002. An application for reconsideration was refused by DCC on 25th July 2003, during Board Meeting 68-033/03, held on 15th July 2003.

1.3 Reasons for Refusal:

1.3.1 The proposed development is unacceptable since it does not comply with policy 10.3 Penthouses of Development Control Policy & Design Guidance 2000 which requires that:

Kopja Informali ta' Sentenza

- (a) the building is 4 or more floors in height;
- (b) the penthouse shall be set back at least 4.25 metres from each frontage;
- (c) the external height of the penthouse is not more than 12 courses (3.4 metres) above roof level;
- (d) no washrooms stairwells, or solar water heaters will be permitted on the roof of the penthouse; and
- (e) there is no permanent means of access to the roof of the penthouse.

1.3.2 The height of the proposed building exceeds the maximum height limitation for St. Paul's Bay i.e. 4 floors plus penthouse. It is therefore incompatible with the characteristics of the area and with the Temporary Provisions Scheme for the area, which seeks to limit height in order to safeguard the general amenity of the area. The proposed development runs counter to Structure Plan Policy SET 8, which requires that the layouts and other provisions of the Schemes will only be reviewed as part of the Local Plans to be prepared for the areas in which the schemes are located.

1.3.3 The proposed development is incompatible with the urban design and environmental characteristics of the area. It would not maintain the visual integrity of the area and so does not comply with Structure Plan policy BEN 2.

2. POLICY CONTEXT:

2.1 Temporary Provision Schemes

The TPS for the area (sheet number 5) designates the site in question within a built-up area for terraced housing with front garden, with a maximum height limitation of four floors and semi-basement.

2.2 Structure Plan Policies:

SET 8 : The present layouts and other provisions of the Temporary Provisions Schemes will be reviewed as part of the Local Plan preparation.

SET 9 : during the interim period between the commencement date of the Structure Plan and the adoption of the particular Local Plan, applications will be assessed in accordance with policies Ben 1, 2, 3 and 4, and SET 7.

Kopja Informali ta' Sentenza

BEN 1 : states that development will not normally be permitted if the proposal is likely to have a deleterious impact on existing adjacent uses because of visual intrusion, noise, vibration, atmospheric pollution, unusually high traffic generation, unusual operating times, or any other characteristic which in the opinion of the Planning Authority would constitute bad neighborliness.

BEN 2 : relates to the assessment of proposals, which need to be compatible with good urban design, natural heritage and environmental characteristics of the area, and particularly with the design guidelines issued by the Planning Authority for built-up areas.

BEN 4 : permission will not normally be given unless the Planning Authority is satisfied that such permission would be unlikely to compromise the objectives of the review forming part of the Local Plan preparation.

2.3 Policy & Design Guidance 2000

Part 2.1 related to building heights.

Part 10.3 & 10.4 related to penthouses on the roofs of buildings.

3. DIRECTORATE'S COMMENTS:

3.1 The proposal includes the sanctioning of the penthouse and overlying washroom. The proposed development is governed by policies related to structures at roof level, since the existing building has a height of four floors, with a receded structure at roof level and an overlying washroom.

3.2 Part 10 of the Policy & Design Guidance 2000 give clear guidance on permitted structures on the roofs of buildings. Of particular relevance to this case are policies 10.3 and 10.4, related to penthouses and parking requirements for penthouses respectively. Policy 10.3 gives clear provisions, which regulate permission for penthouses on roofs of buildings, which have reached maximum height limitation. In this regard, the proposed development cannot be permitted since:

existing building is not set back 4.25m from the facades, as required by part 10.3(c),

- i. existing washroom overlying the structure at roof level cannot be permitted since it runs counter to part 10.3(e),
- ii. which prohibits structures on roofs of penthouses.

3.3 The appellant makes reference to the reasons for refusal and claims that the proposed penthouse is not exceeding height limitation. Since the existing structure does not fulfil the requirements for penthouses, it cannot be considered as a penthouse and thus, the second reason for refusal is justified.

3.4 Reference is also made, in the appellant's submissions, to buildings in the vicinity, which are seven storeys high. The maximum height limitation is governed by the TPS and relative Structure Plan policies. Any existing buildings, which exceed maximum height limitation and are covered by a valid planning permit are not a valid justification to exceed maximum height limitation, but should be considered in the assessment of the streetscape. It is also to be noted that the maximum height limitation limits development both to the number of floors, as specified in the Temporary Provision Schemes, the Height Limitation Guidance and Local Plans, where applicable, and also the allowable maximum height in metres. Thus, both criteria shall be applied in assessing the maximum allowable building envelope. Submitted photos with this application show that the adjacent buildings are built on four floors or less. The building on the opposite corner shown in red 1g (PA 405/02) Photo A, is subject to enforcement action.

4. RECOMMENDATION:

For the above-mentioned reasons, the Planning Authority respectfully requests the Planning Appeals Board to confirm the decision of the Development Control Commission and to refuse this appeal.";

Ra d-dokumenti kollha esibiti;

Ra l-policies tal-Awtorita;

Ra ukoll il-PA file 405/02, 4615/91 u 4092/98;

Ikkunsidra ulterjorment;

Kopja Informali ta' Sentenza

L-appell in ezami jitratta t-talba tal-appellant sabiex jissanzjona l-bini ta' livell tal-penthouse u washroom fuq l-istess penthouse. Is-sit jinsab kantuniera u jinsab mibni fuq erba' sulari 'l fuq mil-livell tal-triq flimkien mal-izvilupp tal-penthouse illi l-appellant qieghed jittenta illi jissanzjona.

It-tlett ragunijiet ghall-appell jirreferu ghall-fatt illi l-livell ta' penthouse ma jikkonformax mal-policy 10.3 tal-Policy & Design Guidance 2000, minhabba illi qieghed jinghad illi jmur kontra policy SET 8 billi jeccedi l-gholi massimu ghal San Pawl il-Bahar u illi l-izvilupp huwa nkompatibbli mal-izvilupp urban u l-karatteristici ambjentali taz-zona. U b'hekk imur kontra l-policy BEN 2;

Ghal dawn ir-ragunijiet, l-appellant issottometta illi jezisti zvilupp vicin is-sit illi huwa oltre l-gholi massimu ta' erba' sulari u penthouse u sahsitra hemm zvilupp ta' seba' sulari. Ghalhekk, huwa jissottometti illi r-regoli ghandhom japplikaw ghal kulhadd u mhux ghalih biss. Huwa jikkontendi illi l-gholi tal-izvilupp meta mkejjel f'metri huwa entro l-limitu stabbilit fir-regolamenti u illi ghalkemm huwa minnu illi l-livell tal-penthouse mhuwiex irtirat b'4.25 metri mill-faccata, xorta dan mhuwiex vizibbli mil-livell tat-triq u li, oltre dan, il-faccata giet anke rtirata mill-linja tal-bini. Fl-ahhar nett u b'riferenza ghall-kwistjoni tan-nuqqas ta' parkegg, l-appellant jissottometti illi hemm zewg spazji fuq is-sit illi jistghu jigu pprovduti sabiex jissodisfax in-numru ta' spazji illi l-livell tal-penthouse jirrikjedi.

Il-Bord ezamina r-ritratti esibiti minn fejn jirrizulta illi l-gholi tal-bini fil-vicinanze tas-sit jvarja minn tlett sulari u livell ta' semi-basement ghal seba' sulari, ghalkemm ghandu jinghad illi l-predominanza tal-gholi ta' bini huwa dak ta' erba' sulari. Ghaldaqstant, il-Bord jikkonkludi illi ma jezistix commitment illi jista' jinduci lil dan il-Bord sabiex jaccetta dan il-livell abbazi ta' dan. Oltre dan, minn ezami tan-North West Local Plan illi ghadu fi stadju ta' abbozz, id-Direttorat tal-Awtorita qieghed jipproponi illi l-gholi ghandu jibqa' dak illi hu l-lum u cioe ta' erba' sulari u livell ta' semi-basement u ghalhekk, m'hemm l-ebda proposta illi l-gholi ghandu jizdied.

Ghaldaqstant, wara li kkunsidra l-fattispecje kollha tal-kaz, dan il-Bord huwa tal-fehma illi dan il-livell illi l-appellant qieghed jittenta jissana mhuwiex accettabbli billi jeccedi l-gholi massimu a tenur tat-Temporary Provisions Schemes, u l-proposta lanqas ma tikkwalifika ruhha taht xi wiehed mid-dispozizzjonijiet a tenur tal-policy dwar l-Interim Review of Building Heights Pending Local Plan Completion u ghalhekk, dan il-Bord sejjer ighaddi biex jexamina jekk il-proposta tissoddisfax il-kriterji rikjesti skond paragrafu 10.3 tal-Policy & Design Guidance 2000 illi jitratta penthouses.

Kopja Informali ta' Sentenza

Il-Bord, wara illi ezamina dawn id-dispozizzjonijiet, huwa tal-fehma illi l-proposta ma tissodisfax dawn il-kriterji minhabba illi tezisti struttura fuq il-livell tal-penthouse konsistenti wkoll minn tromba tat-tarag u ghalhekk, mhijiex konformi ma' din il-policy illi tezigi illi l-ebda strutturi konsistenti f'washrooms, trombi tat-tarag jew solar water heaters m'ghandhom jigu permessi fuq il-bejt tal-penthouse. Fit-tieni lok, il-bini mhuwiex irtirat 4.25 metri mill-faccata kif jezigi sub-paragrafu (b) tal-policy 10.3. u ghalhekk ma jistax jigi permess.

Illi ghalhekk it-talbiet tal-appellant huma inaccettabbli;

Ghal dawn il-motivi, il-Bord jichad l-appell u jikkonferma l-r-rifjut tal-permess ghall-izvilupp.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. In-nullita tad-decizjoni billi nghatat fil-konfront tal-appellant personalment meta l-proprjeta tappartjeni lis-socjeta Micallef Estates Limited;
2. In-nullita tad-decizjoni ghax kien hemm ksur ta' smigh xieraq u tal-audi alteram partem billi mhux dejjem gie notifikat ghas-smigh u peress illi l-Bord ma accediex ghat-talba li ssir site visit, minn fejn kien jirrizulta li hemm binjiet ohra fiz-zona oghla minn dak propost u illi l-binja proposta kienet irtirata u ma tikkreja ebda impatt visiv, u dawn l-argumenti kienu jigu apprezzati aktar kieku sar site visit, u l-appellant jinghata l-opportunita li jressaq il-kaz tieghu kif imiss;
3. Id-decizjoni hi nulla ghax mibnija fuq abboz tan-North West Local Plan;
4. Il-Bord injora l-offerta tal-appellant li jnehhi l-washroom fil-kors tal-appell liema washroom kienet wahda mir-ragunijiet ghac-cahda tal-appell, u kwindi d-decizjoni hi motivata fuq vertenza li ma kinitx tiffirma parti mill-mertu;
5. It-Tribunal interpreta hazin r-regolament 10.3 tal-Policy dwar penthouses minn fejn tigi kalkolata d-distanza tal-irtirar li kellu jsir mill-faccata. Id-distanza kellha tigi kalkolata mill-faccata tal-galleriji maghluqa, u l-Bord ma hax in konsiderazzjoni illi l-binja ma saritx fuq il-linja ufficjali izda lura aktar mill-linja ufficjali tal-binja.

L-ewwel aggravju

Dan l-aggravju qed jigi michud ghal zewg ragunijiet. Fl-ewwel lok, fl-ebda stadju tal-proceduri hlief quddiem din il-Qorti ma tqajmet din il-kwistjoni mill-appellant li jidher li dejjem accetta li l-kwistjoni kienet indirizzata minnu u fil-konfront tieghu. Aktar minn hekk pero, kemm l-applikazzjoni u l-appell quddiem il-Bord saru mill-appellant f'ismu personali u qatt ma informa lil hadd li ma kienx hu l-legittimu kontradittur f'dawn il-proceduri.

It-tieni aggravju

L-appellant jikkontendi li mhux dejjem gie notifikat bis-smigh tal-appell u dan irendi l-gudikat null. Hu minnu li fl-atti jidher li kien hemm okkazzjoni wahda fejn ser tentattiv ta' notifika ghas-seduta tal-10 ta' Dicembru 2003 u l-ittra giet lura unclaimed. Pero dan wahdu ma jwassal ghal ebda nullita billi ghas-seduta tal-10 ta' Dicembru 2003 deher il-perit Martin Zammit in rappresentanza tal-appellant li pprezenta xi ritratti u ma saret ebda oggezzjoni jew riserva meta f'dik is-seduta l-appell thalla ghad-decizjoni. In fatti minn dakinhar sal-10 ta' Marzu 2004 meta nghatat id-decizjoni ma saret ebda talba ghal prolazzjoni tad-decizjoni.

L-appellant jilmenta li l-Bord ma accediex ghat-talba ta' on site visit. Ma jirrizultax li qatt saret din it-talba ghalkemm fl-ittra tal-appell, l-appellant jirrivea dwar l-gholi tal-binjiet fiz-zona li setghu jigu accertati b'on site visit. Din ma tikkostitwix talba u ma saret ebda talba li giet michuda. Kwindi fuq bazi fattwali dan l-aggravju jonqos bil-kbir. Pero l-Qorti zzid li hi fil-prerogattiva tal-Bord li tilqa' jew tichad talba li ssirilha basta li tkun motivata. F'dan il-kaz mhux qed jigi allegat dan. Del resto l-kwistjoni tal-gholi tal-binjiet ittiehed in konsiderazzjoni mill-Bord minn ezami tar-ritratti esebiti mill-istess appellant, u wasal ghal konkluzzjonijiet tieghu a rigward tenut kont ta' dak ipprezentat u li jirrizulta mill-atti. Il-kwistjoni dwar ir-relevanza o meno tal-impatt visiv hi wahda ta' fatt li din il-Qorti ma tissindakax. In oltre l-Qorti hi sodisfatta illi ma kien hemm ebda lezjoni tad-dritt ta' smigh xieraq jew nuqqas ta' opportunita li l-appellant ressaq il-kaz tieghu semplicement ghax fl-atti ma jirrizulta ebda nuqqas simili. Il-partijiet inghataw l-opportunita jressqu l-kaz taghom u kienu kuntenti li

Kopja Informali ta' Sentenza

jhallu l-kaz imur ghad-decizjoni bla ebda oggezzjoni jew riserva. Il-Bord kellu d-dritt u l-obbligu jirrispetta li jimxi, jikkunsidra u jiddeciedi fuq l-atti li kellu quddiemu.

Kwindi dan l-aggravju ma fihx mertu.

It-tielet aggravju

Dan ukoll hu aggravju bla ebda mertu. In-North West Local Plan issemma bhala argument pero ma kienx il-bazi tad-decizjoni tal-Bord, li jidher car li rrifjutat l-appell fuq zewg konsiderazzjonijiet ta' element li ma gewx sodisfatti mill-appellant skond paragrafu 10.3 tal-Policy and Design guidance 2000 dwar penthouses cioe d-distanza li bih kienet irtirata l-penthouse li kien anqas minn dak preskritt fil-paragrafu 10.3, u struttura fuq il-penthouse kif ukoll tromba tat-tarag li mhix permessi skond paragrafu 10.3.

Ir-raba aggravju

Il-Qorti ma rriskontrat fil-process ebda proposta tal-appellant li jnehhi l-washroom u kwindi ma tistax taghti aditu lil dan l-aggravju fuq il-mertu tieghu. Pero anki jekk ghal grazzja tal-argument kellu jigi accettat li saret din l-offerta l-applikazzjoni xorta kienet tippekka minhabba l-kwistjoni tal-irtirar tal-penthouse mill-faccata.

Kwindi dan l-aggravju kif maghmul lanqas hu korrett bhala fatt u anki kieku, xorta ma kienx l-uniku raguni ghar-rifjut.

Il-hames aggravju

Kopja Informali ta' Sentenza

Dan l-aggravju hu kwistjoni ta' interpretazzjoni ta' policy li l-Qorti ma tissindakax sakemm ma tmurx kontra l-kliem espress tal-ligi jew hi assurda talment li tikkreja ingustizzja lampanti b'effetti u riperkussjonijiet negattivi fuq decizjonijiet futuri.

F'dan il-kaz, il-Qorti tqis illi l-Bord interpreta d-distanza mill-faccata tal-bini kif ighid ir-regolament. L-appellant jikkontendi illi l-faccata kellha titqies mill-galerija u illi l-allinament tat-triq hu aktar il-barra mill-binja kif saret. Dawn huma argument ta' interpretazzjoni tar-regolament. Jidher li l-Bord mexa fuq il-kliem strett tal-ligi cioe l-faccata tal-bini. Taqbel jew ma taqbilx mieghu, ir-regolament ihalli lok diskrezzjonali ghal interpretazzjoni tat-tifsira 'frontage' jew 'faccata' u tali interpretazzjoni kif inghatat mill-Bord ma hix assurda jew tmurx kontra l-kliem espress tal-ligi u ghalhekk mhix sindikabbli mill-Qorti ghax ma tinkwadrix ruhha bhala applikazzjoni hazina tal-ligi.

Ghalhekk dan l-aggravju qed jigi michud.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Emanuel Micallef u tikkonferma d-decizjoni tal-Bord tal-Appell dwar l-Ippjanar tal-10 ta' Marzu 2004. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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