



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tas-17 ta' Gunju, 2015

Appell Civili Numru. 9/2015

Frankie Calleja

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Frankie Calleja tas-16 ta' Marzu 2015 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-26 ta' Frar 2015 fir-rigward ta' PA 1926/03 'sanctioning of reservoir and construction of swimming pool';

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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:

Il-Kummissjoni tal-Kontroll tal-Izvilupp irrifjutat l-proposta ghal dawn ir-ragunijiet segwenti :-

1. The proposal lies within a scheduled Area of Archaeological Importance (as per Government Notice 356/98, dated 05/05/1998) and a Class A Site of Archaeological Importance (NW_0097), running counter to Structure Plan policy ARC 6 and ARC 2, which give top priority conservation to such sites and prohibits any development within 100m around their periphery.

2. The unauthorised excavations in this Area of Archaeological Importance have compromised the necessary archaeological investigations of the site and therefore the proposal runs counter to Structure Plan policies ARC 2, ARC 3 and ARC 6.

3. The proposed pool lies within a scheduled Area of Archaeological Importance and Area of High Landscape Value (Victoria Lines), running counter to section 5.1(1) of the adopted Development Control Policy: Swimming Pools Outside Development Zone.

4. Structure Plan policy RCO 4 provides that, particularly within Rural Conservation Areas, areas of scenic value will be protected and enhanced. The site lies within a scheduled Area of High Landscape Value (GN 085/01, dated 23/01/01) and is of considerable scenic value. The proposal would detract from this, and so it would conflict with Structure Plan policy RCO 4.

5. The proposed paving exceeds the maximum permitted limit of 25m², running counter to section 5.1(3) of the adopted Development Control Policy: Swimming Pools Outside Development Zone;

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Ra l-aggravji tal-appell li huma s-segwenti:-

1. The application, which was submitted 7 years ago, was linked to another application that was in the final stages of an appeal PB 245/08 (PA 1221/05). This latter application was filed specifically to address an issue raised by the DCC in P A 1926/03. The DCC was aware of this fact and should not have determined the application until after the latter application was fully determined.
2. In the application for a reconsideration of PA 1926/03, the undersigned also made a request to be present for the DCC hearing. Before the DCC reconsideration date 6 April 2010 the undersigned requested the DCC (letter dated 24 March 2010 and received by MEPA on 25 March 2010) to defer the hearing until the PB 245/08 was determined. However, the DCC still determined the application.
3. Point 6 of the Reconsideration Notice states that "The proposal cannot be considered the illegal development consists of a residential use not covered by permit...". The application PA 1221/05 PB 245/08 was made specifically to address this issue and the DCC had voted to approve this application. Thus the decision taken by the DCC in PA 1926/03 was also based on incorrect information.
4. The application was made to sanction the existing reservoir in front of the house and to construct a small swimming pool in an area of the garden that is already committed.
5. As pointed out to the DCC, my client is prepared to abide by any conditions suggested by the Board to ensure that the presence of any archaeological or historical heritage will not be adversely affected.
6. The Reconsideration Notice does not take cognizance of the fact that the extent of the paving had been reduced to comply with the policy criteria. Amended plans were forwarded earlier.
7. The proposal in no way affects the skyline or has any visual impact on the surroundings. The garden is surrounded by numerous mature trees that screen the area off completely.

It would be appreciated if the following files are brought to the Appeals Board hearing as I would like to refer to these documents directly. These relate to the construction of swimming pools or other structures along Victoria Lines or in similar conditions that have been approved.

PA 4359/05 Construction of villas and swimming pools at Madliena

PA 4797/00 Construction of detached bungalow and swimming pool at Madliena

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PA 6547/06 Construction of winery

PA 6336/02 Swimming pool at Mdina

PA 3848/95 Sea Ridge off Madliena Tower

PA 4991/00 Triq I-Ghaxqet il-Ghajn, Gharghur

PA 6678/94 Targa Gap, Mosta

PA 2133/03 Extension to Villa at Madliena

PA 1620/01 Tax-Xih, Gharghur

PA 6749/00 Cottonera Waterfront

The above applications were favourably considered precisely because:

1. the development could be mitigated by the landscaping and/or
2. the site was already committed
3. safeguards or guarantees could be imposed to ensure that the site was not adversely affected

I respectfully request the Board to consider the above points and uphold this appeal.”;

Ra n-nota tal-Awtorita' fuq il-mertu ta' dan l-appell li giet ipprezentata lit-Tribunal fl-10 t'Ottubru 2013, u li jaqraw kif gej:

5.2 The Authority has the following comments to make:

Although swimming pools are popular features in gardens and other private open spaces, their potential impact, both visually on the landscape and through their contribution to the urbanisation of the countryside, must be balanced against their evident benefits. Whilst swimming pools are not a traditional characteristic of the landscape and may be considered to be urban development, they are normally proposed within the curtilage of existing buildings. To this extent, their wider urbanisation impact is likely to be limited. However, there may be instances when such structures would lead to adverse environmental impacts, particularly when sited within areas of scenic, ecological and/or archaeological importance.

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The general objective within areas outside the limits of development boundaries is to contain the spatial spread of development, to minimize the take-up of land and, to limit the extent of visual intrusion. Conversely, the construction of a swimming pool and ancillary facilities within an existing garden may only be considered acceptable if the following criteria, as set out in the associated Development Control Policy, are met:

- the development would not lead to the loss of fertile good quality agricultural land or adversely affect valleys, cliff sides, scheduled property or other site of ecological, geological, archaeological, cultural or historic importance;
- the development is either adequately screened from views from outside the site by an existing boundary wall and/or by other existing structures or planting; or is proposed to be adequately screened. The hard and soft landscaping proposed, including boundary walls [rubble - para. 4.4] should be appropriate, in terms of siting; height; form; materials; type of plants, to its setting and not have an adverse impact on the landscape;
- the construction of the pool would not require the removal of any existing indigenous or archaeophytic trees or the disturbance of other existing valuable landscaping. The extent of paving or hard surfacing around the swimming pool should normally 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 encouraged;
- the area of the swimming pool does not exceed 50m² for a single residential unit and 70m² for multiple residential units;
- ancillary facilities which should not exceed more than one floor, should be well designed and appropriate to their setting. The shortest distance between facilities ancillary to the pool and the residential unit does not exceed 4 metres. Structures such as pump rooms should be located completely underground;
- the swimming pool meets the conditions for the type of pool as approved by the Malta Resources Authority.

Although the external area of the pool is less than the maximum limit of 50m² the surrounding paved area is 40m² and hence exceed the 25m² limit. However, since

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the pool is located within a very sensitive Area of Archaeological Importance and Area of High Landscape Value the proposal is unacceptable in principle even if the paved area was reduced. Conversely the construction of a pool so close to Victoria Lines would mar within the wider historical and context.

Although not proposed in this application, the introduction of a landscaping scheme as a form of mitigation measure would not outweigh the negative impacts brought about by this development on the historical and archaeological sensitivity of the area. In fact, the introduction of a landscaping scheme might itself create more damage to the archaeological remains.

The proposal contravenes the objectives of Section 5.1(1) of the adopted Policy on Swimming Pools Outside Development Zone and also runs counter to Structure Plan policies ARC 2, ARC 3, ARC 6 and RCO 4. The reservoir is also not deemed sanctionable in view of the site's scheduling as an Area of Archaeological Importance, and hence due to its environmental damage that it is likely to have caused. In view of the above material planning considerations the proposal is unacceptable and is recommended for refusal.”;

Ra ukoll il-PA files bin-numri 1926/03 u 1221/05;

Ra l-atti kollha ta' dan l-appell.

Ikkunsidra ulterjorment:

Illi dan l-appell jirrigwarda l-izvilupp ta' giebja u swimming pool f'art biswit farmhouse ezistenti f'sit fi Triq Bingemma fil-limiti tal-Imgarr. Il-farmhouse ezistenti hija koperta b'permess ricenti bin-numru PA 1221/05 mahrug fis-26 t'Awissu, 2013 favur l-appellant, fejn gie sanzjonat il-bini ezistenti tal-farmhouse inkluz id-dahla u l-car-port quddiem id-dar u patio fuq in-naha retrostanti tad-dar skont il-pjanti approvati numru PA 1221/05/1E u 61C. Illi dan il-permess ma jkopriex is-sanzjonar tal-giebja taht il-livell tal-car port, u l-kostruzzjoni tas-swimming pool fil-parti retrostanti tad-dar li huma s-suggett ta' din l-applikazzjoni mertu ta' dan l-appell odjern.

Illi r-raguni tar-rifjut jirrigwardjaw l-illgalita' tal-farmhouse skont raguni ta' rifjut numru 6; il-valur arkeologiku gholi taz-zona fejn jinsab is-sit skont ragunijiet numru 1 u 2; il-

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valur xenografiku gholi tal-madwar skont kif indikat fir-ragunijiet numru 3 u 4; u d-daqs tal-paving madwar is-swimming pool kif indikat fir-raguni ta' rifjut numru 5.

Illi s-sitt (6) raguni ta' rifjut rigward l-illegalitajiet tal-farmhouse illum tinsab ezawrita wara l-hrug tal-permess PA 1221/05, filwaqt li f'dan l-istess permess gie approvat paving estensiv madwar id-dar li ghaldaqstant hija ukoll superfluwa r-raguni numru 5 tar-rifjut.

Illi waqt il-process ta' din l-applikazzjoni il-Kummissjoni tal-Kontroll tal-Izvilupp esprimet li m'hemmx oggezzjoni ghal giebja ezistenti taht il-livell tal-carport, u ghaldaqstant jidher illi l-oggezzjoni principali tirrigwarda l-izvilupp tas-swimming pool.

It-tieni raguni ta' rifjut titratta dwar il-fatt li t-thaffir tal-giebja seta' wassal ghat-telf ta' arkeologija minhabba li ma kienx hemm monitoragg, ghalkemm f'dan il-kaz, il-Heritage Planning Unit fi hdan id-Direttorat tal-Ippjanar irrakomanda li l-applikant (illum l-appellant) ihallas kumpens ghal dan in-nuqqas.

Illi l-ewwel raguni ta' rifjut hija relatata mal-importanza arkeologika tas-sit hekk li fil-inhawi ta' Bingemma fejn jinsab is-sit hemm diversi fdalijiet arkeologici u bini ta' mportanza storika. F'dan ir-rigward dan it-Tribunal seta' jinnota dan li gej :

a) Illi s-sit jinsab f'zona protetta ghal-valur arkeologiku, skont l-iskedar pubblikat fil-Gazzetta tal-Gvern Nru. 356 tal-5 ta' Mejju 1998, fejn skont l-mappa annessa fl-istess avviz, s-sit jaghmel parti mil-buffer zone estensiv madwar siti identifikati ghal-valur arkeologiku taghhom, li gew protetti fil-kategoriji, 'A' u 'B';

b) Illi dawn il-kategoriji ta' protezzjoni johorgu mill-policies ARC 1 u ARC 2 tal-Pjan ta' Struttura, fejn jirrizulta li huma l-oghla livell ta' protezzjoni ghal siti arkeologici;

c) Illi s-sit jinsab madwar 100 metru lejn id-direzzjoni tan-Nofsinhar tas-sit skedat fil-Klassi 'A' li huwa l-lpogej Paleokristjani (indikati bahal numru 2 fil-mappa fl-Avviz), filwaqt li jinsab iktar vicin ta' fdalijiet Puniku-Rumani, Columbariam u oqbra Paleokristjani li huma fil-Klassi B ta' protezzjoni;

d) Illi s-sit jinsab fil-vicinanze immedjati tal-Kappella tal-Madonna ta' Hagedidria li hija skedata fi Grad 1 li huwa l-oghla grad ta' protezzjoni skont il-Policy UCO 7 fil-Pjan ta' Struttura;

e) Illi skont l-policy ARC 2 tal-Pjan ta' Struttura, il-buffer zone madwar siti f'kategorija 'A' ghandu jkun ta' mill-inqas 100 metru fejn mhux permess li jsir

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zvilupp, filwaqt li l-buffer zone identifikat fl-avviz tal-Gvern 356 tal-1998 jestendi ferm aktar.

f) Illi l-policy ARC 2 tipprovdi dan li gej fir-rigward siti skedati fil-kategoriji 'A' u 'B':

“In making the designations referred to in Policy ARC 1, the Planning Authority will give protection ratings as appropriate to local circumstances as follows:

Class A: Top priority conservation. No development to be allowed which would adversely affect the natural setting of these monuments or sites. A minimum buffer zone of at least 100m around the periphery of the site will be established in which no development will be allowed.

Class B: Very important to be preserved at all costs. Adequate measures to be taken to preclude any damage from immediate development.”

Illi dan it-Tribunal jinnota li l-policy ARC 2 ma teskludix b'mod awtomatiku zvilupp li jinsab f'siti skedati fil-kategorija massima ghal valur arkeologiku, dment li dan ma jwassalx ghal disturb ta' l-ambjent li jikkarakterizza l-isfond tal-monumenti u siti li qed jigu protetti bl-iskedar.

Illi f'dan ir-rigward, dan it-Tribunal jidhirlu li l-izvilupp ta' din is-swimming pool hija wisq vicin u fil-fatt tinsab fil-qalba ta' dan il-kuntest kulturali ta' valur gholi storiku u arkeologiku. Illi wiehed jista' jargumenta li l-kwistjoni ta' arkeologija tista tigi ndrizzata billi jsir monitoragg waqt it-thaffir u l-kostruzzjoni tas-swimming pool, jew inkella jista jigi evitat ghal kollox it-thaffir billi hemm il-possibilita ta' above ground swimming pools li huma alternattiva ghal kostruzzjoni ta' swimming pools konvenzjonali.

Illi dan it-Tribunal huwa tal-fehema illi iktar milli l-qerda jew id-disturb tal-arkaeologija li jista jinstab fuq is-sit, il-kwistjoni ewlenija hija marbuta mal-kuntest kulturali li s-sit joffri u jekk l-izvilupp ta' swimming pool jistax ikollu impatt negattiv kemm fuq il-kuntest u d-dehra tal-madwar.

Illi barra l-valur arkeologiku, s-sit jinsab mdawwar bl-istrutturi tal-Victoria Lines (li fihom infushom huma fdalijiet arkeologici barra li huma strutturi militari storici ta' epoka iktar ricenti fl-istorja ta' Malta), u li fil-fatt jinsabu f'it metri 'il boghod lejn in-naha tan-Nofsinhar tas-sit. Illi fil-fatt id-dehra tas-sit fejn ser tinbenda s-swimming pool huwa ferm espost minn naha tal-Victoria Lines li jinsabu f'livell gholi, peress li dawn qeghdin f'tarf ix-xifer li jikkarakterizza d-delinijazzjoni naturali tan-naha tan-Nofsinhar tal-wied ta' Bingemma.

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Hawnhekk dan it-Tribunal qed jaghti valur u importanza ghar-raba' raguni ta' rifjut fejn qed jigi kunsidrat il-valur gholi xenografiku tal-madwar skont kif gie pubblikat fil-Gazzetta tal-Gvern Nru. 85 tat-23 ta' Jannar 2001. Dan it-Tribunal qiegħed jaqbel mal-konkluzjoni tal-Awtorita' li l-izvilupp ta' swimming pool ser iwassal għal strutturi u elementi estranji u li jispikkaw fil-kuntest ta' valur xenografiku li għandu importanza kulturali qawwi għal dak li huwa naturali, storiku u arkeologiku.

Illi f'dan ir-rigward ikun inutli li dan it-Tribunal jidhol f'argument ta' permessi ta' swimming pools f'zoni barra l-izvilupp jew li jinsabu f'kuntest storiku jew xenografiku għoli imsemmija mill-appellant, meta f'dan il-kaz il-konsiderazzjonijiet magħmula fir-rigward jekk permess għandux jigi milqugħ jew michud huma marbuta b'mod intrinsiku mal-kuntest fejn jinsab is-sit. Fl-ebda kaz ikkwotat mill-appellant ma jinsab permess simili fiz-zona ta' Bingemma fejn jinsab is-sit, u dan it-Tribunal mhux tal-fehma li b'sempliciment mitigazzjoni ta' landscaping jew garanziji jistgħu jindirizzaw il-kwistjoni ewlenija dwar l-impatt negattiv fuq il-valur u l-protezzjoni għoli tal-erja ta' Bingemma fejn jinsab is-sit.

F'dan ir-rigward, dan it-Tribunal huwa propens li jilqa limitament dan l-appell, fir-rigward tal-izvilupp tal-giebjja li għa saret mingħajr talba ta' permess u qed jichad dik il-parti tal-appell għal bini ta' swimming pool.

Peress li fuq is-sit jirrizulta li sar zvilupp mingħajr talba ta' permess, dan it-Tribunal ser jimponi multa ta' Eur 500;

Għal dawn il-motivi, u wara li kkunsidra l-fattispeci tal-kaz, dan it-Tribunal qed jilqa limitament dan l-appell, ihassar ir-rifjut tal-permess għall-izvilupp u jordna sabiex l-appellant ihallas il-multa ta' Eur 500 u jipprezenta pjanti godda li jeskludu l-proposta ta' swimming pool fi zmien tletin gurnata minn din id-decizjoni, sabiex is-Segretarju tal-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar ikun jista' johrog il-permess fi zmien tletin gurnata bil-kundizzjonijiet standard.

Ikkunsidrat

L-aggravju tal-appellant hu s-segwenti:

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1. It-Tribunal issofferma ruhu fuq l-effett tal-izvilupp fuq id-dehra tal-ambjent bla ma evalwa l-applikazzjoni fid-dawl tal-policies ghal swimming pools. It-Tribunal kellu jpoggi l-valur xenografiku kif sejhu t-Tribunal, fl-isfond tal-policies rilevanti. L-effett fuq id-dehra tal-ambjent kellha tinghata konsiderazzjoni izda mhux ad esklużjoni tal-policies. L-effett fuq l-ambjent jiddependi mill-mod kif jigi kondizzjonat l-izvilupp mhux mill-izvilupp innifsu. Ghalhekk it-Tribunal ikkommetta zball ta' ligi.

Il-Qorti ma taqbilx mal-aggravju tal-appellant. Ma jirrizultax minnu illi t-Tribunal issofferma ruhu fuq id-dehra tal-izvilupp izda ma applikax il-policies rilevanti. It-Tribunal ibbaza l-konsiderazzjonijiet tieghu fuq in-natura tas-sit skond l-ewwel, it-tieni u t-tielet raguni ta' rifjut cioe li hu sit li ghandu jircevi l-oghla protezzjoni ta' siti arkeologici kif stabbilit fil-policies ARC 1 u ARC 2 tal-pjan ta' struttura. Jekk wiehed ihares lejn dak li jghid it-Tribunal rigward l-ewwel raguni ta' rifjut fuq il-portezzjoni li ghandha tigi akkordata lil siti ta' dak it-tip, it-Tribunal izid illi l-policy ARC 2 ma tiskludix b'mod awtomatiku zvilupp f'siti skedati fil-kategorija massima ghal valur arkeologiku izda dan ma ghandux iwassal ghal disturb tal-ambjent li jikkarakterizza l-isfond tal-monumenti u siti protetti, u dan ukoll a bazi tar-raba raguni ta' rifjut cioe l-konflitt mal-policy RCO 4.

Kwindi hu ampjament car illi kuntrarjament ghall-ilment tal-appellant, it-Tribunal ikkonsidra primarjament il-policies rilevanti u kif l-izvilupp jista' jeffettwa negattivament jew pozittivament l-istess policies. It-Tribunal agixxa korrettement u fl-ambitu tal-mansjonijiet tieghu fejn kwistjonijiet teknici u ta' ippjanar ghandhom jigu kunsidrati fid-dawl tal-policies rilevanti. Del resto din il-Qorti konkordi li kwistjonijiet ta' teknika u ippjanar huma prerogattiva tat-Tribunal u l-konsiderazzjonijiet maghmula mit-Tribunal ma ghandhomx jigu disturbati jekk mhux eccezzjonalment. Dan mhux wiehed mill-kazijiet.

It-Tribunal ikkunsidra r-raba raguni ta' rifjut tal-Awtorita cioe l-valur xenografiku gholi bhala ta' importanza izda mhux kif jallega l-appellant li dan gie kunsidrat lil hinn mill-policies rilevanti.

Maghdud dan l-appellant li jallega li t-Tribunal kellu jikkunsidra l-policies rilevanti ghal swimming pools, din il-Qorti tqis illi t-Tribunal kellu kull dritt japplika l-policies li dehrlu l-aktar

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rilevanti ghal kaz u in oltre l-appellant lanqas semma jew qajjem din il-kwistjoni bhala aggravju quddiem it-Tribunal u anqas fl-appell ma jsemmi xi policy partikolari li tista' jew setghet b'xi mod tinfluenza d-decizjoni tat-Tribunal.

Fl-ahhar jinghad illi t-Tribunal ikkunsidra l-permessi li ikkwota l-appellant li skond hu kienu simili ghal din l-applikazzjoni pero wasal ghal konkluzzjoni li ebda paragon ma seta' jsir la darba dan is-sit kien jinsab f'zona differenti u ghalhekk japplikaw ghalih konsiderazzjonijiet marbutin specifikament mieghu. La darba l-kwistjoni giet kunsidrata mit-Tribunal u inghatat raguni valida ghaliex l-aggravju ma kienx qed jintlaqa', din il-Qorti ma ghandhiex tiddisturba dan.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Frankie Calleja u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-26 ta' Frar 2015, bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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