



**QORTI TAL-APPELL**

**(KOMPETENZA INFERJURI)**

**(TRIBUNAL TA' REVIZJONI TAL-AMBJENT U L-IPPJANAR)**

**ONOR. IMHALLEF MARK CHETCUTI LL.D.**

**Illum L-Erbgha, 18 ta' Mejju, 2016**

Numru 5

**Appell Nru. 4/2016**

**Dr. Mark Fenech**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell tat-terzi interessati tas-16 ta' Marzu 2016 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-25 ta' Frar 2016 li approvat l-applikazzjoni PA 5701/09 'demolition of existing apartments and redevelopment of site for residential purposes', f'San Pawl il-Bahar;

Rat ir-risposti tal-Awtorita u l-applikant, fejn l-applikant talab li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata u l-Awtorita ssottomettiet li hi ssostni li d-decizjoni tal-Awtorita tat-28 ta' Ottubru 2010 kienet wahda gusta;

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

L-applikazzjoni giet deciza mill-Bord tal-Awtorita' ta' Malta dwar l-Ambjent ul-lppjanar fil-laqgħa tat-28 t'Ottubru 2010, billi dawret ir-rakommandazzjoni għal hrug tal-permess tad-Direttorat tal-lppjanar, u rrifjutat l-applikazzjoni odjerna għal dawn ir-ragunijiet s-segwenti:

"1. The height and coverage of 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. The proposed development, in terms of its floor area, height, number of dwelling units and site coverage, is of an excessive scale and would lead to an overdevelopment of the site. This would not be in the interests of the amenity of the area as a whole and it would exacerbate the problems of overdevelopment in the area. The proposal is therefore unacceptable and runs counter to Structure Plan policy BEN 1.";

Ra r-ragunijiet tal-appell li huma s-segwenti:-

"We refer to the refusal handed down by the Mepa Board on 16 March 2011 and submit herewith an Appeal against this refusal.

The reasons for refusal are based on Structure Plan Policies BEN 1 and BEN 2 implying that the proposal is an overdevelopment of the site. However, in the analysis contained in the Development Permit Application Report, it is clearly stated that the proposal lies in an area zoned by the North West Local Plan for four-storey development. Not only, but in the Town Planning Schemes which may preceded the Local Plan, the area was also zoned for multi-storey development. Therefore, what the Local Plan did, is to confirm what had been laid down in the TPS.

We submit that to rule that a proposal breaches policies BEN 1 and BEN 2, when the same proposal is fully compliant with the provisions of the Local Plan, is arbitrary and contradictory. If anything, a detailed list of areas or points where the proposal offends against BEN 1 and BEN 2 should have been presented so remedial action could be taken.

We reserve the right to submit further written and oral submissions to explain our case. Please find attached proof of payment of the required fee.";

Ra r-risposta tal-Awtorita' għal dan l-appell li taqra hekk kif gej:

"The Directorate has the following comments to make:

5.2.1 The area surrounding the site is committed and characterized by 2-storey detached villa blocks built in the late 1960s/early 1970s as a result of the town planning schemes of the time.

5.2.2 The existing urban fabric indicates that the two sides of Triq is-Simar were conceived to complement each other in design terms. In fact the villas along the opposite side of the site are higher (by way of a high semi-basement) than the buildings along the side of the site in order to respect the topography that slopes down towards the coast.

5.2.3 The existing urban layout is quite particular with its employment of side curtilages, terracing effect and open spaces, giving rise to a low-density residential environment.

5.2.4 MEPA notes that commitment on site with 4 floors has not been made yet and the effect which will be achieved should this take place will be the inverse of the existing terracing effect and will ruin in the process the character of the area. The proposal if approved would lead to the following:

- disturbance of the existing semi-detached context and continuity of floor heights,
- adverse remodelling of the streetscape,
- exclusion of side curtilage with the resulting loss of open space and views,
- disruption of the terracing formed in line with the area's topography, and

5.2.5 The appellant is arguing that the development respects the height limitation of the local plan and therefore it should be approved. However the Authority notes that respect for the height limitation is only one of several criteria which a proposed development should achieve and this criterion must not be seen in isolation and as absolute but in a holistic outlook taking into consideration the surrounding context and other policies.

5.2.6 Whilst the proposed development may be within the maximum height permissible in the area, the structure with its lack of side curtilages or appropriate open spaces is being proposed at the expense of the environmental characteristics of the area including the residential amenity (in terms of dwelling density) and visual impact (in terms of the sense of openness afforded to the area). Thus, the proposal being considered to constitute overdevelopment in relation to the surroundings will be detrimental to the overall arching sense of balance that is synonymous with this particular urban area – characteristics that are particularly protected by the Structure Plan.

5.2.7 The height and coverage of 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.

5.2.8 The proposed development, in terms of its floor area, height, number of dwelling units and site coverage, is of an excessive scale and would lead to an overdevelopment of the site. This would not be in the interests of the

amenity of the area as a whole and it would exacerbate the problems of overdevelopment in the area. The proposal is therefore unacceptable and runs counter to Structure Plan policy BEN 1.

6.1 For the above-mentioned reasons, the Malta Environment & Planning Authority respectfully requests the Environment and Planning Review Tribunal to confirm the decision of the MEPA Board and to refuse this appeal for development permission.”

Ra r-risposta tal-Avukat Dottor Rudolfo Ragonesi ghan-nom tat-terzi persuni nterresati li taqra hekk kif gej:

“I write on behalf of the Registered Objectors (hereinafter, Objectors) in the said application. I am hereby submitting comments for the kind attention of the Tribunal.

The Appellant has stated in his appeal that Policies BEN 1 and BEN 2 of the Structure Plan for the Maltese Islands should not be applicable in its reasons for refusal because the development applied for falls within the Local Plan. This argument holds no water since as per Article 69 of the Environment and Development Planning Act (Cap 504) (hereinafter, EDP A) decisions are taken inter alia on the basis of both plans and policies, and not exclusively on the basis of plans.

POLICY BEN 1 states: Development will not normally be permitted if the proposal is likely to have a deleterious impact on existing or planned 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 neighbourliness.

POLICY BEN 2 states: Development will not normally be permitted if, in the opinion of the Planning Authority, it is incompatible with the good urban design, natural heritage, and environmental characteristics of existing or planned adjacent uses, and is unlikely to maintain the good visual integrity of the area in which it is located. There will be a presumption against development which does not generally observe the design guidelines issued by the Planning Authority for built-up areas.

Strong arguments were made by the Objectors based in fact upon bad neighbourliness, bad urban design, incompatibility with planned adjacent uses, like side curtilages, and bad visual integrity of the area. These included the following:

Removal of side curtilages, thus changing the nature of the development which no longer classifies as semi detached.

Interruption of the good urban design that was originally secured in the plans for the area in the 1960' sand 1970' s, where the streets were terraced and

with semi-detached units in order to achieve a high planning design with sufficient space and greenery.

Inclusion of a penthouse, in addition to the maximum height limitations listed in the Local Plan, in an area which from the 1960's was actually planned without washrooms so as to preserve the integrity of the overall town planning design.

While the upper part of Xemxija, which is largely a new area, has been compromised in terms of good visual integrity of the area, the lower and older part of Xemxija still enjoys the splendid visual integrity that was factored in to its original design. The application in question falls within this area. If the side curtilages go and the maximum heights are allowed along with penthouses, this would spell the end of the Lower Xemxija design which has come to represent a fine example of good planning, clear to all who drive up North and see what is essentially one of the very few towns that are actually still detached from the rest of the urban sprawl, being surrounded by rural areas and the sea. This factor alone makes it somewhat unique in our urban heritage.

While the Local Plan contemplates a maximum of 4 floors on the site in question, it reduced the height limitation across the road to 2 floors, thus creating a highly anomalous planning scenario which departed radically from the good urban design for the area in the 1960's, where each row of houses further up was slightly higher than the rows in front. While MEPA is by no means obliged to give the maximum height contemplated in the Local Plans, which by definition are height limitations, and not minimums or standards, there is a strong argument against further interruption of the original plan by accepting a penthouse in addition to the height limitations, as well as the removal of side curtilages.

The MEPA decision was furthermore correctly based upon the criteria and provisos set out in Article 69 of the EDP A, which is the ultimate Law upon which any decisions on applications can be made. Article 69 makes it amply clear that while decisions are to be based upon plans as well as policies, such decisions are furthermore to take into account material considerations. The provisos here make it clear that in a decision, height limitations can be modified, but ONLY downwards, and NEVER upwards.

The approval of the development in question would result in overdevelopment, among other things because it will generate substantial amounts of traffic in Triq is-Simar, which would in-turn cause serious problems at the over-burdened and very dangerous Telghet ix-Xemxija/Triq ir-Ridott junction. Furthermore, drivers from or to residences in Triq is--Simar trying to avoid this junction would have to make use of the Triq il-Mistra/Telghet ix-Xemxija Roudabout. This would result in dangerous rat-running within the Xemxija residential access roads. This is clearly in conflict with Policy BEN 1, and is an environmental and public-health-and-safety consideration which is evidently material to this case under Article 69(2)(a) of the EDPA.

The evident adverse impact on the Xemxija landscape which would result from the development in question, would be in conflict with Policy BEN 2 and is clearly an aesthetic consideration which is material to the case under the above-mentioned Article 69(2)(a) of the EDP A.

For the above reasons, it is clear that the refusal of the development in question is within the framework of the Rule of Law, and the Objectors have every reason to expect the Appellant to be aware of this reality. The decision, which was taken by the MEPA Board itself, and by a unanimous vote, after making an on-site inspection of the area, reached the right conclusions in its decision to refuse the said application, which, if accepted, would have paved the way for the utter eradication of the sensible planning and topography of Lower Xemxija. This can be seen in the attached presentation submitted to MEP A during the hearing, herein again attached for easy reference. The Objectors therefore humbly submit that the Tribunal should confirm the unanimous decision of the Board.

The Objectors furthermore humbly request that they be allowed to make verbal representations before the Tribunal to further elaborate on the reasons for refusing this appeal.”

Ra s-sottomissjonijiet ulterjuri prezentati mill-partijiet fil-kors ta' dan l-appell;

Ra l-verbal tal-access mizmum fuq is-sit minn dan it-Tribunal fit-18 ta' Dicembru 2014;

Ra s-sottomissjoni finali tal-Avukat Dottor Kenneth Grima ghall-appellant ipprezentata lit-Tribunal fl-4 t'Awissu 2015 li taqra hekk kif gej:

“Illi dan l-Appell ghandu jintlaqa' minhabba r-ragunijiet segwenti:

L-applikazzjoni ghall-permess in kwis~oni giet rikonoxxuta mill-MEPA fil-21 ta' Dicembru 2009 u ghalhekk qabel ma gie ppublikat l-Att Nru. X tal-2010 (Kap. 504 tal-Ligijiet ta' Malta) u qabel ma gew abrogate d-disposizzjonijiet applikabbli ghall-kaz in kwistjoni permezz tal Awiz Legali 512 tal-2010 fil-31 ta' Dicembru, 2010 u cioe' dawk tal-Artikolu 33 tal-Kap. 356 tal-Ligijiet ta' Malta (liema disposizzjonijiet huma xorta wahda replikati fl-Artikolu 69 tal-Kap. 504 - vide Alfred Magro vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar - Q.A. Citazz. Nru. 3/2015 - deciza 20 ta' Mejju, 2015).

Illi ai termini tal-Artikolu 33(1) tal-Kap. 356 (rifless ukoll fl-Artikolu 69 tal-Kap. 504), 1 Awtorita' "ghandha tapplikd' l-pjanijiet ta' zvilupp inkluzi l-pjanijiet lokali u l-unika sitwazzjoniji espressament ikkontemplata fejn l-Awtorita' ghandha d-diskrezzjoni li tmur lil hinn minn dak li jipprovdu l-pjanijiet hija fir-rigward tal-limitazzjonijiet dwar l-gholi u dan biss meta tezisti "policy ta' ppjanar li jkollha x'taqsam specifikament ma' l-gholi massimu ta' bini li jista' jigi permess f'sit liema policy ghandha tiehu in konsiderazzjoni kemm is-site coverage kif ukoll lf-volum tal-bini li jista' jkun permess f'sit."

Illi ghalhekk, peress illi l-izvilupp propost meritu tal-applikazzjoni odjerna huwa entro l-limitazzjonijiet tal-gholi tal-Pjan Lokali, u peress illi, ghajr il-Pjan Lokali, ma tezisti l-ebda policy li ghandha "x'taqsam specifikament" mal-gholi massimu jew mas-site coverage in kwistjoni, l-Awtorita' bl-ebda mod ma tista' tittenta tiddevja minn dak li jipprovdi l-Pjan Lokali; li ghandha forza ta' Ligi u kwalunkwe Ligi ghandha sahha guridika oghla minn dik ta' kwalunkwe policy li tinbiedel minn zmien ghal zmien meta ligi tista' tinbiedel biss b'att bil-Parlament tal-pajjiz.

L-Awtorita' qeghda ssejjes ir-rifjut taghha fuq policies generali ghall-ahhar, u cioe' policies tal-Pjan ta' Struttura li ilhom vigenti mill-1990, senjatament Policy BEN 1 u Policy BEN 2, liema policies jipprevedu l-Pjan Lokali tal-2006 b'sittax-il sena, u liema policies, naturalment, ntuzaw bhala pedament fit-thejjija tal-istess Pjan Lokali, li kien gie approvat mill-Awtorita' nfisha u mill-Ministru koncernat! Il-ligi hija cara u ma thalli lill-Awtorita' l-ebda diskrezzjoni biex tiddepartixxi minn dak li jipprovdi l-Pjan Lokali hlief meta jezistu policies specifici li jaghtuha din id-diskrezzjoni limitata, u ghalhekk il-legislatur certament m'huwiex qieghed jirreferi ghall-policies bhal Policy BEN 1 u Policy BEN 2 meta jirreferi ghal"policy ta' ppjanar li jkollha x'taqsam specifikament":

Illi fil-fatt din ma hijiex l-ewwel darba fejn l-Awtorita' ppruvat tvesti lilha nfisha b'diskrezzjoni li ma tohrogx mil-Ligi u lanqas ma hija l-ewwel darba fejn ippruvat taghmel dan abbazi tal-imsemmija Policy BEN 1 u Policy BEN 2, fejn, minkejja li l-argument taghha kien sab sostenn minn dan it-Tribunal, id-decizzjoni tieghu kienet opposta bil-qawwa mill-Onorabbli Qorti tal-Appell u l-esponenti ser jiccitaw din is-sentenza fit-tul ghaliex hija relevanti hafna ghall-appell odjern. Illi ghalhekk fis-sentenza deciza mill-Onorabbli Qorti tal-Appell fis-7 ta' Novembru 2013 fl-ismijiet Chris Dixson et Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et, il-Qorti sostniet:

“Wara li l-qorti rat l-atti hi tal-fehma li l-appell ta' Galea huwa gustifikat mehud in konsiderazzjoni s-segwenti :-

i.It- Tribunal naqas milli japplika l-height limitations stabbiliti mill-pjan lokali. Ir-riferenza ghall-policies BEN 1 u BEN 2, li jitrattaw il-materji dwar bad neighbourliness u urban design m'hijix wahda felci. Il-qorti ser tirriproduci dak li jinghad f'dawn il-policies:-

**POLICY BEN 1:** Development will not normally be permitted if the proposal is likely to have a deleterious impact on existing or planned 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 neighbourliness.

**Policy BEN 2:** Development will not normally be permitted if, in the opinion of the Planning Authority, it is incompatible with the good urban design, natural heritage, and environmental characteristics of existing or planned adjacent uses, and is unlikely to maintain the good visual integrity of the area in which

it is located There will be a presumption against development which does not generally observe the design guidelines issued by the Planning Authority for built-up areas.

Dawn huma policies generali. Il-pjan ta' struttura hareg snin qabel il-pjanijiet lokali li zviluppaw fuq dak li jinghad fil-policies fuq citati. Pjanijiet li ghal dak li jikkoncerna zoni urbani, stabbilew l-gholi massimu ghall-bini. Pjanijiet li l-qorti tifhem li meta gew maghmula hadu in konsiderazzjoni dak li jinghad fil-pjan ta' struttura. F'dan ir-rigward il -Professor Kevin Aquilina osserva: 'Article 23 of the Development Planning Act, 1992 defines what are subsidiary plans. These are subject plans, local plans and action plans. Where the Planning Authority considers that for the proper and effective management of development it is necessary to prepare more detailed proposals than can be appropriately embodied in the structure plan, it can prepare such subsidiary plans.';

Hi l-fehma tal-qorti li gialadarba l-pjan applikabbli ghas-sit in kwistjoni jaghti massimu ta' tlett sulari u basement allura l-appellanti ghandhom jedd jaghmlu zvilupp bi tlett sulari u basement. Ghal dak li jirrigwarda l-penthouse, ma jezistix xi dritt awtomatiku li jinghata permess u jridu jigu kkunsidrati aspetti teknici li huma trattati wkoll fil-Policy and Design Guidance tal-2007.

Materja li tirregola height limitation hi kkunsidrata li ghandha l-forza ta' ligi. F'dan il-kuntest il-Qorti tal-Appell fil-kaz Alfred Cauchi vs Chairman, Awtorita' ta' l-lppjanar tal-15 ta' Dicembru 1997, osservat

“Ghandu jkun car li din il-Qorti, hija marbuta li tapplika l-ligi tal-pajjiz, u ma tistax taccetta l-pretensjoni ta' l-appellant li hu ghandu jigi awtorizzat li jeccedi l-maximum height limitation applikabbli skond ir-regolamenti mhux ghax il-ligi taghtih xi dritt li jaghmel dan izda sempliciment ghaliex terzi persuni fil-vicin allegatament thallew jiksru din ir-regola bil-barka ta' l-Awtorita: Il-Qorti tifhem il-predikament ta' l-appellant izda ma tista qatt tissanzjona xi haga li tkun qieghda tikser il-ligi':

L -appellanti ma talbux biex jibnu iktar milli tatihom dritt illigt: Ghal dak li jikkoncerna l-gholi ta' bini hu essenzjali li jkun hemm ic-certezza. Hu maghruf li f'hafna miz-zoni fejn jista' jsir il-bini dan hu l-fattur li jirregola l-prezz tal-propjeta' fis-suq.

ii. Il-qorti tqies li l-osservazzjoni li ghamel it Tribunal li jekk isir it-bini propost allura ser jaghti lok ghal blank party walls, tistona ferm meqjus il-blank party wall li hemm bid-dar tal-konjugi Dixon. Il-qorti ma teskludix li t-Tribunal fehem hazin liema hi d-dar ta' Dixon ghaliex fid- decizjoni jinghad- 'Fuq in-naha tax-xellug tas-sit fid-direzzjoni tan-nizla, tinsab is-semi-detached villa tal-appellanti, mibnija fuq il-kantuniera u fuq sular wiehed, b'setback li jirrizulta kwazi daqs tal-bini fuq in-naha l-ohra tas-sit in ezami': Fir-realta' d-dar ta' Dixon fiha zewg sulari u fuq il-bejt hemm kamra (ara ritratti a fol. 23).

iii: Sabiex it- Tribunal jiggusttfika gha/iex kien qieghed jiddipartixxi minn dak li jipprovdi l-pjan lokali applikabbli ghall-kaz in ezami; ghamel riferenza ghall-



Artikolu 69 tal-Att X tal-2010, fejn jinghad li fl iprocessar ta' applikazzjoni ghall-permess ta' zvilupp, ghandhom jigu applikati l-pjanijiet;

"Izda l-limitazzjoni dwar l-gholi (height limitation) tista' biss tinbidel billi tigi applikata policy li jkollha x'taqsam mal-gholi massimu li jista' jigi permess f'sit u dik il-policy tista' tiehu f'konsiderazzjoni s-site coverage, il-volum tal-bini li jista' jkun permess f'sit jew kull konsiderazzjoni mateljali ohra':

Jibda biex jinghad li fil-fehma ta' din il-qorti dan il-proviso m'huwiex jipprovdi biss ghas-sitwazzjoni ta' zieda fin-numru ta' sulari fil-height limitation li hemm fil-pjanijiet lokali. Dan il-proviso qiegħed jipprovdi kif jista' jsir tibdil fil-height limitation li hemm kontemplat fil-pjani lokali. Ma jagħmel l-ebda distinzjoni bejn zieda jew tnaqqis fin-numru ta' sulari li jkunu jistghu jinbnew. Għalhekk, fil-fehma tal-qorti japplika fir- rigward ta' kwalsiasi tibdil.

It-Tribunal għamel interpretazzjoni skorretta ta' dan il-proviso biex isahhah l-argument li l-izvilupp tal-appellanti m'għandux ikun tal-gholi li jissema fil-Local Plan. Il-height limitation fiz-zona fejn qegħda l-art tal-appellanti hi ta' three floors, three courses. It-Tribunal ma għamel ebda riferenza għal policy li għandha x'taqsam mal-gholi massimu li jista' jigi permess fiz-zona in kwistjoni. Il-policies BEN1 u BEN2 tal-pjan ta' struttura m'humix ad hoc policy li jitrattaw l-gholi massimu li jista' jinbena fiz-zona in kwistjoni. Mela l-height limitation ta' three floors u three courses, trid tigi applikata.

iv. L-appell jikkwalifika bhala punt ta' dritt għaliex it-Tribunal naqas milli japplika dak li jipprovdi l-pjan lokali fir-rigward tan-numru ta' sulari li jistghu jinbnew fil-post fejn hemm il-propjeta' tal-appellanti Galea. It-Tribunal għazel li jezercita d-diskrezzjoni tiegħu, u skarta għal kollox il-height limitation stabbilit mill-Pjan Lokali;, mingħajr ma kellu l-jedd" (enfasi tal-Qorti)

Illi għalhekk johrog car, kemm mil-Ligi kif ukoll mill-interpretazzjoni tiegħu mogħtija mill -Qorti tal-Appell, illi sabiex ikun hemm bdil fil-limitazzjoni tal-gholi msemmija fil-Pjan Lokali irid ikun hemm policy li tittratta specifkament dwar dik il-limitazzjoni tal-gholi, haga din li zgur ma hijiex kontemplata fil-policies citati mill-Awtorita' u għalhekk xejn ma jista' jxekkel lill-appellanti milli jgħollu sal-limitu stabbilit fil-Pjan Lokali. Għaldaqstant qed jigi sottomess il-MEPA, trid jew ma trid għandha d-dover skond il-Ligi li tilqa' din l-approvazzjoni billi m'għandha l-ebda diskrezzjoni mogħtija lilha bil-Ligi li tiddeciedi tilqax jew le l-istess applikazzjoni.

Illi recentement, u biss fl-20 ta' Mejju, 2015, fis-sentenza deciza mill-Onorabbli Qorti tal -Appell fl-ismijiet Charles Fenech vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar, liema sentenza ttrattat id-diskrezzjoni definita tal-Awtorita' uta' dan it-Tribunal f'kazijiet fejn permess huwa konformi mal-Pjan Lokali, il-Qorti sostniet illi:

"Dan l-aggravju kien punt specifiku imqajjem mill-Awtorita' fis-sottomissjoni tagħha tal-II ta' Awwissu 2014. Kif kien ġia innota t-Tribunal fid-decizjoni tiegħu tas-16 ta' Ottubru 2009 l-art fejn qed jigi propost l-izvilupp hu desinjat fis-South Malta Local Plan bhala zona agrikola skond il-policy SMAG 01. Il-

policy hi cara fl-intendiment taghha cioe illi f'dawk is-siti hekk indikati ebda zvilupp ma jista' jsir hlief dak relatat mal-agrikoltura u anki hemm, dan l-izvilupp irid ikun tali li ma jaffettwax il-karatteristici tas-sit cioe dak agrikolu. It-Tribunal sfortunatament flok applika l-policy kif inhu obbligat li jaghmel u semmai jirreferi ghal xi policy ohra li tista' tigi addottata flimkien ma' jew b'ecceujoni cara ghal din il-policy, ghazel li jaghmel konsiderazzjonijiet fuq il-valur agrikolu prezenti tal-istess sit.

Il-Qorti ma taqbifx li t- Tribunal seta' jaghmel dan ghax interpretawjoni ta' policy li hi fdata esklussivament f'idejn it- Tribunal tista' issir meta l-policy taghti lok jew fakolta ghal tali interpretazzjoni. F'dan il-kaz il policy SMAG 01, almenu ghal dak li jidher mill-atti u gie dibattut ma jippermetti ebda interpretazzjoni arbitratja tal-valur agrikolu ta' sit. Jekk sit hu desinjat bhala agrikolu, hu biss il-pjan lokali li jista' jnehhih minn tali desinjazzjoni, u mhux b'diskrezzjoni arbitrarja tal-Awtorita' jew it-Tribunal, li jifli jekk fil-fatt is-sit hux qed jigi utilizzat ghall-iskop agrikolu fil-pjenezza tieghu.

Il-Qorti tqis illi l-evalwazzjoni tat-Tribunal f'dan l-aspett kienet errata fil-ligi u ebda EIA ma jista' jxejjen l-effetti sanciti ta' policy jew pian lokali. Ghalkemm it-Tribunal ikkunsidra kwistjonijiet ohra cioe illi fil- vicinanzi hemm barriera ohra, li l-applikant ma kienx qed japplika ghal barrier gdida izda biss rilokazzjoni u illi meta tieqaf topera l-barriera s-sit jigi ripristinat dawn l-argument ma jistghux jintuzaw biex tigi injorata l-policy SMAG 01 jekk mhux b'applikazzjoni ta' policy ohra rilevanti u li tinnewtralizza din il-policy" (enfasi mizjud)

Illi inoltre, il-premess isib soljev ukoll f'diversi decizjonijiet moghtija minn dan it-Tribunal, u sahsitra anke mill-Awtorita' nfisha, fosthom fid-decizjoni tal-15 ta' Meju 2014 fejn it -Tribunal ikkonferma l-hrug tal-permess PA 3058/12, liema decizjoni, sa fejn tikkoncerna l-appell odjern (billi l-ewwel aggravju gie michud), giet konfermata wkoll fis-sentenza deciza mill-Qorti tal-Appell (Sede Inferjuri) fl-14 ta' Jannar 2015 fl-ismijiet Joseph Pisani et vs l-Awtorita' ta' Malta dwar l-Ambjent u l-ppjanar, fejn dan it-Tribunal kien sostna:

"l-appellanti qed jibbazaw l-oggezzjonijiet taghhom minhabba illi dan l-izvilupp ta' hanut fi Klassi 6, inkluz l-imwejjed u siggijiet fit-terrazzin ta' barra, li jinsab sottostanti r-residenza taghhom, ser jiggenera storbju, irwejjah, u traffiku, u ghaldaqstant qed imur kontra l-principji" tal- Pjan ta' Struttura skont policies BEN 1 u BEN 2

Illi l-appellanti qed joggezzjonaw ghal horizontal duct tas-sistema ta' ventilazzjoni li gie approvat bhala parti mill-izvilupp ta' hanut fi Klassi 6. Skont l-appellanti dan imur kontra l-policy 15.5 tal-linja gwida dwar il-kontroll ta' l-izvilupp tas-sena 2007, li fil-kaz ta' flues din l-istess policy tippermetti li dawn jittterminaw 'l fuq mill-livell tal-bejt.

Minn naha tal-Awtorita' u l-applikant, irribattew dawn l-aggravvi mressqa fl-appell billi ssottomettew illi l-permess hareg skont il- provizionijiet tal-Pjan Lokali li jippermetti l-uzu ta' hanut fi Klassi 6 peress li s-sit jinsab f'Town Centre. Fir-rigward tal-fume extraction system approvata fil-permess, din hija

konformi mal-policy 15.5 tal-linja gwida msemija fl-appell peress li l-permess jahseb sabiex l-ventilation duct ikun 'l boghod mill-bini tal-appellant skont kif tesigi l-istess policy.

Illi dan it-Tribunal seta' jinnota lis-sit jinsab fil-Primary Town Centre li huwa wiehed mit-tlett centri kbar fil-konfini ta' Central Malta Local Plan skont il-policy CG12 tal-istess pjan lokali, fejn l-uzu kummercjali huwa dak predominanti Skont din l-istess policy fil-pjan lokali, uzu fi Klassi 6 huwa accettabli, u ghaldaqstant dan it-Tribunal jista' jikkonkludi li l-Kummissjoni kienet korretta fl-applikazzjoni tal-policy li tirregola dan l-izvilupp permiss.

Illi l-appellant qed jinsisti illi l-izvilupp 'is plainly in breach of the principle of good neighbourliness regulated by BEN1 u Ben of the Structure Plan:

Rigward BEN 2, din titratta dwar id-disinn tal-bim' u certament mhux marbut ma bad neighbourliness.

Il-policy principali tibqa dik ta' BEN1 fejn titratta dwar zvilupp li mhux accettabli jekk jikkawza 'bad neighbourliness' u li dan qed jifisser zvilupp li 'is likely to have a deleterious impact on existing or planned adjacent use because of visual intrusion, noise, vibration, atmospheric pollution, unusually high traffic generation, unusual operating times. Illi din il-policy trid tingara fil-kuntest tal-paragrafu 7.1 fil-Pjan ta' Struttura precedent ghal din il-policy fejn dan jispjega illi:

'It is the intention to exercise strict control of development in all parts of the Islands through the medium of the Structure Plan and of Local Plans when these have been completed Development will be permitted only if in the opinion of the Planning Authority the proposal fulfils all of the conditions applicable to the particular type of area in which it is located These areas will be zoned in terms of their predominant use (e.g. residential and ancillary uses) and of their urban design, and architectural and environmental characteristics.'

F'dan il-kaz, l-izvilupp permiss huwa kompatibbli fiz-zona ta' predominanza kummercjali hekk kif giet identifikata bhala primary town centre fil-Pjan lokali u ghaldaqstant f'termini ta' ppjanar, l-izvilupp huwa konformi mal-principji elenkati fil-Pjan ta' Struttura. F'dan ir-rigward Policy BEN 1 mhix intiza biex twaqqaf zvilupp jekk kemm-il darba dan ikun mahsub fil-Pjaniiet u policies li jirregolaw l-ippjanar taz- zona fejn jinsab, dment li ikunu sodisfatti dawk ir-regolamenti li jirregolaw l-istess zvilupp." (enfasi mizjud)

B'zieda mal-kunsiderazzjonijiet hawn fuq enuncjati ma jistax ma jsirx riferiment ghar-rapport redatt mill-Case Officer Ivan Fava fejn huwa rakkomanda l-approvazzjoni tal-permess in kwistjoni minghajr ebda tlaqliq:

"The proposed development is acceptable since the demolition is acceptable and the proposal complies with the height limitation, car parking requirements, design considerations, and DC2007 Policies.

### Height Limitation

The Local Plan designates the height limitation for the area as 4 floors. The proposal is for a 4 storey building with underlying semi-basement and overlying penthouse. The height limitation is being complied with. The proposal is also in line with DC2007 Policies 2.1 and 10.6, which set out building height in metres and regulate penthouse development, respectively.

### Design

The design of the elevation is considered to be acceptable and complies with the applicable DC2007 policies in terms of projections and balconies. As proposed the building is not in context with the current streetscape within which the site is located, since it is characterised by detached buildings. However it complies with the Local Plans designation for the area: that is four storey terraced development and hence the proposal thus complies with SP Policy BEN 2 which seeks the compatibility of development with the characteristics of existing or planned adjacent uses.

(Fil-kaz in ezami hawn sitratta mhux ta' "planned adjacent uses" izda adirittura tal-ezistenza ta' diversi blokki ta' appartamenti lkoll gholjin daqs dak li qed jipproponu li jtellghu l-appellanti u anki ferm oghla, u li sahanitra illum ilhom jghixu n-nies fihom is-snin wara li kienu nhargu l-permessi mill-MEPA biex dawn il-binjiet jinhargilhom il-permess; ghal xi raguni jew ohra pero' u fl-istess triq u taht l-istess cirkostanzi ezatt il-MEPA issa qed tirrifjuta li tohrog dan il-permess kif ghamlet fir-rigward ta' dawk il-binjiet l-ohra. Qed nitkellmu hawn mhux ta' sit wiehed izolat izda ta' diversi siti)  
 ..... (omisis)

### Proposed penthouse

Considering the staggering design of the building along the official alignment, the proposed penthouse is adequately set back from the front and back of the building and respects the 3.4 metres external height set out in DC2007 Policy 10.6. "(enfasi mizjud)

In vista tas-suespost huwa car ukoll illi l-policies tal-Pjan ta' Struttura tal-1990, li fuqhom qeghda tishaq l-Awtorita " gew ukoll ikkunsidrati mill-Case Officer fit-thejjija ta' dan ir- rapport. Illi ghalhekk, dato ma non concesso, anke jekk dawn il-policies jigu erronjament ikkunsidrati bhala eccezzjonijiet ghall-Pjan Lokali, l-Awtorita' qeghda tippretendi illi tirrifjuta l-permess odjern abbazi ta' policies generali li hija qeghda tifhem mod u li l-Case Officer fehem mod iehor! Qed taghmel iktar minn hekk l-Awtorita'; qieghda tati preferenza ghall policies ambigwi, policies ambigwi bi preferenza fuq il-Local plan li hija ligi u bhala tali ghandha forza u precedenza certament oghla minn kwalunkwe policy.

Illi minkejja illi l-appellant, ghar-ragunijiet kollha diga' msemija, lanqas biss ghandu ghalfejn jenfasizza l-fatt illi l-Awtorita' diga' harget permess ghal zvilupp ta' blokk appartamenti b'gholi ta' hames sulari u penthouse biss circa hamin (50) metru l-bog hod mill izvilupp propost odjern, xorta ma jistax ma jattakkax ir-ragunament tal-Awtorita' fit-tieni dikjarazzjoni taghha ("Second Statement") fejn targumenta illi: "The principle to develop the site in PA

4192/08 into an apartment block was already committed by a previous permit - PA 2530/03." X'qeghda tipprova targumenta hawn l-Awtorita' ? Illi l-permess 2530/03 inhareg qabel ma gie infurzat il-Pjan Lokali? Mela ma tafx illi fl-istess dikjarazzjoni tammetti illi l-izvilupp propost in kwistjoni huwa "within the maximum height permissible in the area" u ghalhekk ma jeccedix il-limiti tal-Pjan Lokali? Mela nsiet illi rrifjutat li tohrog il-permess abbazi tal-policies BEN 1 u BEN 2 tal-Pjan Strutturali tal-1990, meta dawn kienu ilhom jezistu sahanitra 13-il sena qabel il-PA2530/03. La l-MEPA u la hadd ma ghandu d-dritt tal-"pick and choose" meta si tratta ta' ligi omogenja daqstant importanti ghall-pajjiz u maghmulha appozitament biex kulhadd ikun jaf fejn qieghed.

L-Awtorita', minkejja illi l-permess numru 4192/08 jikkoncerna zvilupp gewwa Triq is-Simar tkompli targumenta illi: "More importantly, the location of PA 4192/08 is on the fringe of the villa dominated area, adjacent to a number of other apartment blocks that characterise further up the street. Therefore the impact of the development in PA 4192/08 on the surrounding villas is much less than that of the proposal which is wedged in the central part of this pleasantly developed area." Illi bir-rispett kollu l-Pjan Lokali, il-policy li jholl u jorbot, ma jaghmel ebda distinzjoni bhal din u ghalhekk l-Awtorita' m'ghandha l-ebda diskrezzjoni li tasal ghal dawn il-konkluzjonijiet soggettivi. Illi fil-fatt l-Awtorita' qisha qeghda tipprova tuza l-principju ta' commitment (pero' b'mod restrittiv) biex tipprova ssahhah l-argument taghha li jmur lil hinn mill-policies. Di piu' ma hemm l-ebda dubju illi sid il-vilel li jinsabu bieb ma bieb ma dawn il-blokkok ta' appartamenti li l-MEPA tathom permess jghollu mhux daqs imma izjed mill-gholi propost mill-appellanti kellhom u ghad ghandhom ferm izjed x'jitilfu tenut kont il-valur tal-proprjeta' taghhom minn dawk is-sidien jew okkupanti tal- appartamenti zghar li jezistu fil-vicinanze u quddiem il-blokk propost mill-appellanti. Kif jghidu l-Inglizi "what's sauce for the goose is sauce for the gander". Il-MEPA ma tista' qatt tiddiskrimina bejn persuna u ohra billi fuq l-istess cirkostanzi u fl-istess lokalita u sahanitra fl-istess triq tiddikjara li Titius u Sempornius jista' jtella' binja fl-gholi ndikat fil-pjan lokali pero' mbaghad titratta b'mod differenti meta tigi biex tiddeciedi fuq il-proprjeta' ta' Caius.

Illi l-Qorti tal-Appell, fis-sentenza deciza fl-20 ta' Mejju, 2015 fl-ismijiet Alfred Magro vs L Awtorita' tal Malta dwar l-Ambjent u l-Ippjanar tghallimna illi:

'Din il-Qorti hi tal-fehma illi l-legislatur bl-emendi li dahlu in vigour fl-2001 u li gew riprodotti fl-emendi u l-introduzzjoni tal-Kap. 504 fl-2010, l-enfasi li kienet tinghata lil 'konsiderazzjonijiet ohra' fosthom kwistjonijiet tal-commitment u ugwaljanza, ghalkemm huma ta' relevanza pero huma subordinati ghad-dover tal-Awtorita u Tnbunal li l-ewwel u qabel xejn ghandu japplika u mhux biss iqis, il-pjanijiet u policies fl-ipprocessar tal-applikazzjoni. Il-Qorti tqis li l-element dikrezzjonali tat- Tnbunal meta fid-determinazzjoni tal-applikazzjoni iqis kwistjonijiet ohra hu llum mrazzan u ghandu jigi ezercitat barra l-parametri tal-ligi pjanijiet u policies fejn l-istess ligi pjan jew policy tippermetti eccezzjoni jew tippermetti l-uzu ta' diskrezzjoni fl-interpretazzjoni jew fil-generalita tal-applikazzjoni taghhom meta dawn jipprovdu biss gwida

jew ghajnuna (ara Anthony Attard vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar, App Inf 02/05/2013)' (enfasi tal-Qorti)

Illi fil-waqt illi l-esponenti jerga' jtenni dak illi kkunsidrat l-Onorabbli Qorti tal-Appell fl-ahhar sentenza hawn fuq citata, fis-sens illi kunsiderazzjonijiet bhall-kwistjoni ta' commitment, ghalkemm huma ta' relevanza, huma subordinati ghad-dover tal Awtorita' u tat-Tribunal li l-ewwel u qabel xejn ghandhom japplikaw il-pjanijiet u l-polices, qiegħed jigi sotto mess illi jekk dan it-Tribunal jasal biex jikkunsidra l-principju ta' commitment flimkien mal-Pjan Lokali applikabbli għas-sit in kwistjoni sabiex jiehu d-decizjoni tiegħu, mil-lat tal-applikazzjoni ta' dan il-principju wkoll, in vista tal-permessi l-oħra li nhargu fl-istess Triq is-Simar, għal żvilupp li jmur saħansitra anke lil hinn minn dak li jistipula l-Pjan Lokali, dan il-permess għandu jinhareg.

Illi, dwar il-principju ta' commitment, l-Onorabbli Qorti tal-Appell, fis-sentenza deciza fit-2 ta' Ottubru, 2012 fl-ismijiet Victor Vella vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar, issostni:

"Illi ma' dan jizjed jingħad li skont l-artikoli 15 (12) u 33 (1) u (2) tal-Kap. 356 tal- Ligijiet ta' Malta it-Tribunal bħal l-Awtorita' huwa obligat li jibbaza d decizjonijiet tiegħu kemm fuq il-Pjan Lokali kif ukoll fuq il-kunsiderazzjonijiet kollha ta' l-ppjanar inkluż 'kull haga oħra ta' sustanza' (artikolu 33 (1) (b)). Hawn jidhol il-kuncett ta' commitment ukoll (u mhux biss).

Illi anke jekk din il-Qorti kellha thares lejn l-artikolu 69 tal-Kap. 504 citat mit-Tribunal dan jgħid espressament li l-Awtorita' għandha tiddeciedi l-applikazzjonijiet kemm fir-rigward tal-pjanijiet, tal-polices, u wkoll skont is-subartikolu 2 jingħad li "fid-determinazzjoni tagħha fuq applikazzjoni l-Awtorita' għandha wkoll tqis:-

(i) kull haga oħra ta' sustanza, komprizi konsiderazzjonijiet ambjentali, estetici u sanitarji li l-Awtorita' tista' tikkonsidra rilevanti:

Izda ebda konsiderazzjoni materjali nkluz konsiderazzjoni bbazata fuq l-eżistenza ta' binjiet fil-madwar ma tista' tigi interpretata jew tintuza sabiex izjed il-limitazzjoni ta' l-gholi stabbilita' fil-pjan ...".

Illi mela allura l-Kap. 504 anke jekk applikabbli għal dan il-kaz, u għall-kaz in ezami jipprovdri proprju l-oppost ta' dak li ddecieda t-Tribunal, għaliex qed jagħti rikonoxximent specifiku legali jew aħjar legislattiv għall-kuncett ta' commitment u t-Tribunal, iktar u iktar meta sottomess quddiemu b'tali fatti mill-appellanti jew anke mill-Awtorita' stess, għandu jidhol fil-kuncett ta' commitment u japplika l-istess anke fid-dawl ta' dak li illum jipprovdri l-Pjan Lokali, u allura l-enuncjazzjoni li għamel it-Tribunal fuq dan il-punt hija għal kollox legalment zbaljata.

Illi dan għaliex ma hemmx dubju li ai termini tal-artikoli msemmija, ad validatem, fid-decizjoni tiegħu kellu jiehu konjizzjoni kemm tal-Pjan Lokali izda wkoll tal-'commitment' fiz-zona fil-konsiderazzjoni tal-appell tiegħu u dan stante li l-'commitment jaqa' taht il-kliem 'kull haga oħra ta' sustanza' u li

tikkwalifika bhala konsiderazzjoni ta' ppjanar jew materjali, skont liema Kap qed jigi applikat.

F'dan is-sens ma kien hemm ebda tibdil minn dak li kien jipprovdi l-Kap. 356 ghal dak li qed jipprovdi l-Kap. 504 u dan qed jinghad fil-kuntest tal-kaz attwali (li mhux qed jitratta dwar limitazzjoni ta' gholi)."

Finalment ghandu jinghad illi dan it-Tribunal m'ghandu bl-ebda mod jigi zvijat milli jiddeciedi skond u entro d-diskrezzjoni li taghtih il-Ligi u ghalhekk mhux abbazi ta' policies li huma kompletament generali izda skond il-Pjan Lokali ai termini tal- Artikolu 33 tal-Kap. 356 jew Artikolu 69 tal-Kap. 504) u skond il-linja gwida preciza li taghtih l-Onorabli Qorti tal-Appell fis-sentenzi hawn fuq citati. Alla hares ghandha l-MEPA tagixxi kif jidher illi qed tagixxi bhalissa minkejja d-decizjoni tal -case officer taghha stess li kien irrakkomanda li l-permess mitlub kellu jinhareg mill-MEPA tissokkombi ghall-pressjoni ta' sidien jew okkupanti ohra fl-inhawi ta' fejn 1 appellanti qed jitolbu l-hrug ta' dan il-permess, zvilupp dan skond il-ligi u konformi mija fil-mija mad-dettalji tal-pjan lokali ghas-semplici raguni illi jkun hemm numru ta' third party objectors li jidhrilhom illi jkun ahjar ghalihom illi l-permess ma jinharigx ghax jekk jinhareg huma kapaci ma jibqghux igawdu mill-veduta tal-bahar u/jew tal-kampanja li kienu qed igawdu qabel u li issa kapaci ma jibqghux igawdu bil-hrug tal-permess de quo. Dana meta gewwa dan il-pajjiz hadd m'ghnadu xi dritt li jgawdu veduti ta' bahar ujjew kampanja jekk mhux biss ghaliex dik il-persuna jkollha d-dritt li ta' quddiema ma jibnix jew ma jibnix oghla minn certu livell ghax tkun tgawdi s-servitu tal-altius non tollendi. Hadd minn dawn it-third party objectors qatt semma' jew sahsitra alluda li ghandu dan id-dritt izda joggezzjonaw biss mhux abbazi ta' xi dritt izda ghar-raguni egoista biss illi jekk ma jilghabux allura jhassru. Kif ghandhom dritt l-appellanti juzufuwixxu mid-dritt moghti lilhom permess tal-local plan li jghollu l-binja ezistenti taghhom ghal erba' sulari skond kif indikat mill-istess local plan, ghandhom dritt huma li jaghmlu l-istess jekk dan id-dritt huwa wkoll lilhom moghti skond il-lig u jekk dan id-dritt mhuwiex hekk lilhom moghti jitolbu kambajment fl-imsemmi local plan biex huma wkoll ikunu jistghu jghollu fuq il-proprjeta' taghhom. Il-MEPA mhux qieghda hem biex tithassar lil min mhux ser jibqa' jgawdi xi vedutta izda qieghda hemm biss biex timxu skond il-ligi u tohrog kull permess mitlub lilha li jinhareg jekk it-talba tkun konformi mal-ligi li turbot mhux biss lis-sidien tal-proprjeta' izda lill-MEPA innifisa. Hekk missa l-MEPA! Taghzel ghal min thenn u waqt li qed taghzel ghal min thenn, tikser il-ligi li ghamlet hija stess.

Li kieku l-MEPA tista' taghmel hekk u allura tinjora l-ligi u tikkundanna lil min kull min ghandu dritt jgholli skond il-ligi jigi lilu michud permess li jgholli, allura parti sostanzjali tal-izvilupp f'dan il-pajjiz u li seh minn meta giet ikkrejata l-MEPA stagna kompletament. L-MEPA allura tista' tohrog permess ta' kwantita' ta' skyscrapers ghaliex il-ligi tippermetti li dan jista' jsir u fl-istess nifs tichad il-hrug tal premess odjern meta l-istess permess ghandu legalment jinhareg skond il-pjan lokali. L-esponenti jista' jaghmel riferiment ghal favola tal-ktejjeb Animal Farm ta' George Orwell meta l-annimali li bdew immexxu r-razzett Manor Farm li wara r rewwixta tal-annimali gie msejjah Animal Farm ghall-ewwel kienu jhambqu four legs good -two legs

bad u wara ftit zmien dawwru d-diska u bdew jinsistu li four legs good - two legs better. Hekk donnha qed tippretendi u tissottometti l-MEPA.

Ghar-ragunijiet premissi l-appellanti jitolbu bir-rispett lil dan it-Tribunal sabiex jilqa' dan l-appell u jordna li l-MEPA tohrog il-permess mitlub."

Ra r-risposta tal-Avukat Dottor Rodolfo Ragonesi ghan-nom tat-terzi persuni nterressati pprezentata lil dan it-Tribunal fit-30 ta' Settembru 2015 u li taqra hekk kif gej:

"In the following reply to the long note of submissions submitted by Appellant, Respondent is hereby listing clearly and succinctly the relevant points upon which it humbly believes the decision is to be based.

As is so often the case with very long submissions, Respondent humbly submits that Appellant's submissions, despite their length, or possibly as a result of them, are actually missing the central points of the case entirely, and building a case which is thus ignoring the basis of the first judgement which is very clear and based upon sound Law.

Article 33 of Chapter 356 has been interpreted incorrectly by appellant, who tries to make a case based upon the false premise that the restrictive nature presented by this article on decisions going beyond height limitations also applies to decisions taken below the said height limitations. This is clearly incorrect, and certainly if this were the case, then there would not even be the need for decision making of applications, and the tribunals would simply become rubber stamps with no discretion as to determining the acceptability or otherwise of applications that fall within the local plan height limitations.

This is of course absurd, and in fact was also recognised by the MEPA Board in its decision making process, when the then Chairman stated several times publicly that MEPA cannot be considered a rubber stamp automatically approving any application filed within height limitations. The Law in fact talks not about standard heights to be automatically applicable in every case, but indeed about height "limitations". They are maximums, and not also automatic minimums that give applicants some acquired rights. If this were the case the Lawmaker would not have used the term "height limitations", but the term "standard heights".

Appellant adds a remark at the end of the quote of the judgement Alfred Cauchi vs Chairman, Awtorita' ta' l-Ippjanar, as follows: "Ghaldaqstant qed jigi sottomess il-MEPA, trid jew ma tridx ghandha d-dover skond il-Ligi li tilqa' din l-approvazzjoni billi m'ghandha l-ebda diskrezzjoni moghtija lilha bil-Ligi li tiddeciedi tilqax jew le 1 istess applikazzjoni." (vide Page 5)

This is both factually and legally incorrect and misleading because the MEPA and the Tribunal have every right to use their discretion in not approving a permit which, in this case, requested approval of a development, over and above the height limitations according to the local plan, by also requesting a penthouse, when the entire history of the area has shown that



even washrooms were not permitted in the past in order to maintain to the full the integrity of the area in accordance with the height limitations set from time to time.

The application is therefore incorrect in such a statement, since it is clear that apart from having a general discretion in deciding the overall development of an application, MEPA also has a clear discretion in determining whether or not to accept a penthouse to the said development. This is a clear case where in his application, appellant applicant chose not only to avail himself of the change in the height limitations which very mysteriously remained the same for the whole area except for one side of one street, but was still not satisfied with such fortune as a result of such anomalous height limitation change, to the point where he also applied for a penthouse over and above said height limitations.

It is therefore manifestly incorrect for appellant to base his argument upon any alleged right to be granted the maximum according to height limitations according to the current local plan, independently of whether or not that argument would hold water with the nature of the excessive development plans submitted, when his application, by virtue of including a penthouse, goes beyond the said height limitations, that would require wise discretion on the part of any entity assessing such plans.

It is this last fact that adds to the already clear evidence of "excessive and unwarranted development", in the words of MEPA, that will not only create a "great wall of china" all along the southern face of Triq is-Simar, with the disappearance of side gardens that have given lower Xemxija its charming and well designed character, but that is including, as if by right, even a penthouse to further aggravate the over development content and nature of the application in question. Yet appellant incorrectly argues that MEPA, and by implication the Appeals tribunal, "m'ghandha 1 ebda diskrezzjoni moghtija lilha bil-Ligi li tiddeciedi tilqax jew le l-istess applikazzjoni. "

Appellant is therefore totally incorrect in stating that MEPA did not have any discretion in choosing to dismiss an application which includes a penthouse in this very sensitive area. Such discretion has in fact been confirmed, inter alia, by the very judgement Appellant has quoted, Alfred Cauchi vs Chairman, Awtorita' tal-Ippjanar, in a vain attempt to substantiate his erroneous and misleading argument.

It is furthermore being submitted for clarity that while, in accordance with current local plans, the Southern face of Triq is-Simar has a height limitation of 4 floors, the Northern face has a height limitation of 2 floors. It is only because of the nature of Xemxija Hill that the 2 floor houses currently on this Northern side of the road also have garages on the ground floor at Triq is-Simar, which were incorporated in the old and new plan because of the level of the hill. The older plan was therefore based on the upper part of the properties rising to 2 floors, with the lower ends incorporating an additional ground floor, usually a garage, as a lower ground floor to the houses, while the upper ground floor on the other side would be the ground floor abutting

the upper street on the other side. This scheme has remained intact in the local plan of lower Xemxija, with the one and only essential change being made strangely to the increase of the height limitation of just one side of Triq is-Simar, by allowing it to rise to four floors instead of two. With such a highly anomalous planning situation, the addition furthermore of a penthouse would therefore further aggravate the overall plan and character of lower Xemxija. To make matters worse, the problem of overdevelopment is compounded by even more over development through the destruction of side gardens, which have been such an essential feature of lower Xemxija.

The quoted judgement Charles Fenech vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar, is furthermore irrelevant because the case was decided on the basis that a decision cannot be more permissive than policies according to law, not less permissive.

The judgement of MEPA which is the subject of this appeal was very clear when it stated that:

"The proposed development, in terms of its floor area, height, number of dwelling units and site coverage, is of an excessive scale and would lead to an overdevelopment of the site. This would not be in the interests of the amenity of the area as a whole and it would exacerbate the problems of overdevelopment in the area. The proposal is therefore unacceptable and runs counter to Structure Plan policy BEN 1."

There is no way one could even remotely argue that the above sentence did not also factor in the inclusion of the removal of side gardens and the inclusion of a penthouse in its assessment, as part of the overall height, number of dwelling units and site coverage, and that the quoted "overdevelopment of the site" was so glaringly obvious to the MEPA Board that its decision to refuse the application was unanimous.

Despite Appellant's argument that the Penthouse "is adequately set back from the front and back of the building", the entire layout and design of lower Xemxija, with each street level staggered, cannot retain its integrity with a penthouse sticking out beyond the height limitations. If the landscape were flat, then the fact that a penthouse is made to recede would effectively mean that the actual elevation of the building would not be seen as exceeding the height limitation of the street. This is why penthouses were allowed "through the window", as it were, because they would not affect the integrity of the area layout as a whole. Not so in lower Xemxija. The height limitations in lower Xemxija serve as an overall plan for the sloped area, and such a penthouse would be clearly visible and highly intrusive in the whole area. This is one of the reasons for the Mepa judgement that concluded unanimously that even the penthouse, which is not a given right, contributed to what it deemed to be excessive overdevelopment.

The very unanimity of this appraisal by the Mepa Board itself cannot be overemphasised. No matter how appellant words it, and what judgements it may quote, it cannot escape from the glaringly obvious fact that the

application has requested even more than the limits contemplated in the local plan, leading to excessive development which is purporting not only to wipe out side gardens with the stroke of a pen, substituting them with an inevitable wall from one end of the street to another, but also insisting on a penthouse in an area where washrooms were not even permitted under the original scheme, precisely for reasons submitted above, owing to the lay of the land at lower Xemxija. With Appellant's flawed line of reasoning, it would appear that it is not only the 2 additional floors, but also such penthouse that is being claimed as some almost "Divine" legal right. Quite the reverse, respondent humbly submits that the inclusion of the penthouse is adding an insult to injury in the already over development design request in an area where, as stated, one side of one street has been looked upon so benignly by the planners who, in their mysterious planning criteria, chose to adjust the local plan in such a unique and anomalous way that strangely benefits just one side of one street.

Yet another judgement that appellant chose to quote, namely, Joseph Pisani et vs l-Awtorita' ta' Malta dwar l-Ambjent u l-lppjanar, is totally irrelevant to the case, and in the humble opinion of respondent, only serves to distract the Appeals Tribunal from the real and essential point upon which this case is based, that is, the point of overdevelopment.

It is considered most pertinent to add that the legal notion of over development is not to be confused with the notion of exceeding height limitations, which is the fatal flaw in Appellant's argument. Height limitations are exactly what they state to be, limitations according to Law, and cannot be exceeded. If they are, an application would be dismissed offhand on the grounds of exceeding the height limitations, and not on the specific grounds of over development. The MEPA Board was very clear in its judgement that the application was refused on the grounds of over development, and not on the grounds of exceeding height limitation per se. Appellant can therefore never argue that the fact that the Local Plan gives him a chance to apply for up to a height limitation of 4 floors, exempts him from clearly demonstrating first to MEPA, and to an eventual Tribunal that the application as submitted is not in fact a case of excessive over development. This can only be decided on a case by case basis, and by taking into account all aspects of the development and the character of the area, including those of side gardens and penthouse, as already argued here and in the case before the MEPA Board, which decided to hear the case instead of the DCC. This argument and demonstration appellant has totally failed to present, and has entirely built his appeal's case purely on the alleged right or otherwise of obtaining the maximum height limitation according to Law, thus ignoring all the criteria of over development, as opposed to just height limitations.

Respondent submits, furthermore, that if the first MEPA decision is overturned it would send the wrong message to all prospective applicants that the rules and policies of "over development" would be "dead letters", and would be seen as nothing more than the equivalent of the height limitations policy, and will thus no longer remain an important, separate part of the planning laws. The Planning laws would effectively be reduced to just

one rubber stamp "criterion", namely that height limitations are to be read also as automatic height minimums as well as limitations, and that penthouses are an automatic given, over and above the said height limitations, regardless of any criteria pertaining to what may on a case by case basis be considered as constituting overdevelopment. This is certainly not the scope of existing planning legislation or the intention of the legislators.

It is submitted furthermore that in such cases of over development, if an application is turned down, there is nothing stopping applicant from re submitting fresh plans in a new application in an effort to redesign and build a more reasonable and sensitive development that would respect the integrity of the existing layout and lay of the land of lower Xemxija, and its unique character. However if the Mepa judgement is overturned it would seal the fate of lower Xemxija for once and for all, and would spell a death knell to all of lower Xemxija.

For these reasons Respondent humbly submits that the unanimous decision of the MEPA Board was indeed based upon good and sensible planning judgement and good Law, and supported by Mepa's exercise of its discretion as clearly contemplated by Law, but apparently contested by appellant. The MEPA decision, it is humbly submitted, should therefore be confirmed on Appeal, with costs.”;

Ra l-PA files bin-numru 5701/09 u 4192/08;

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

Ikkunsidra ulterjorment;

Illi l-appellant qed jinsisti illi l-izvilupp kif propost minnhu fl-applikazzjoni odjerna hija konformi mal-policies fil-Pjan Lokali (North West Local Plan), b'mod partikolari dwar l-gholi ta' bini ta' erba' sulari. Iktar minn hekk, l-appellant qed jinsisti illi l-istess Pjan Lokali ma biddel xejn mill-parametri ta' zvilupp minn kif kien regolat fit-Temporary Provisions Schemes applikabbli qabel ma gie fis-sehh il-Pjan Lokali

Illi l-Awtorita' qed tinsisti illi l-izvilupp propost fl-applikazzjoni odjerna ma jirrispettax il-karatteristici urbana tal-madwar is-sit inkwistjoni li jikkonsistenti minn villel b'gholi ta' zewg sulari. L-Awtorita' identifikat erba' elementi ta' disinn fejn il-proposta odjerna qed tohloq impatt negattiv, li huma s-segwent:

- i. disturbance of the existing semi-detached contest and continuity of floor heights;
- ii. adverse remodelling of the streetscape;
- iii. exclusion of side curtilage with the resulting loss of open space and views;
- iv. disruption of the terracing formed in line with the area's topography.

F'dan il-kuntest, l-Awtorita' qed tinsisti illi l-height limitation kif indikat fil-Pjan Lokali ghandu jitqies bhala wiehed mill-fatturi ta' konsiderazzjoni u ma jistax jitqies b'mod izolat mill-kuntest fejn jinsab is-sit, u dan skont kif huwa kontemplat fil-Pjan ta' Struttura, b'mod partikolari Policy BEN 2, applikabbli meta giet deciza din l-applikazzjoni mertu ta' dan l-appell.

Illi fuq l-istess linja t'argument, it-terzi persuni neterressati qed jinsistu illi filwaqt li l-Pjan Lokali jistabillixxi l-gholi massimu ta' erba' (4) sulari, dan mhux necessarjament ghandu jigi applikat b'mod tassattiv minghajr ma jittiehdu nkonsiderazzjoni policies ohra ta' ippjanar li huma ntizi li jiprotegu l-visual integriy u good urban design. It-terzi persuni neterressati qed jirrivevaw illi z-zona fejn jinsab is-sit mertu ta' dan l-appell hija kkaraterrizzata minn djar residenzjali fuq zewg sulari, b'side cartilages miftuha, u ghaldaqstant il-proposta ta' zvilupp fl-applikazzjoni odjerna ta' erba' sulari b'zieda ta' penthouse sovrastanti ser tohloq zvilupp massiv, fejn ser jigi eliminat is-side curtilage bir-rizultat li ser jinholoq appogg gholi mikxuf, b'detriment fuq il-valur xenografiku urban tal-madwar.

Illi l-appellant irribatta billi qed jinsisti illi l-izvilupp propost huwa entro l-limitazzjonijiet tal-gholi tal-Pjan Lokali li ghandu forza ta' ligi u nsosten ta' dan ghamel referenza ghas-sentenza tal-Qorti tal-Appell, moqrija fis-7 ta' Novembru 2013, fl-ismijiet Dixson et Awtorita' ta' Malta dwar l-Ambjent u l-ippjanar et, li jitratta mertu simili ghal kaz odjern.

It-terzi persuni nterressati baqghu fermi fl-oggezzjoni tagghom u nsistew illi kemm l-Awtorita' kif ukoll dan it-Tribunal ghandhom id-diskrezzjoni li jirriffjutaw permess meta f'dan il-kaz, l-izvilupp propost li jinkludi penthouse li qed teccedi l-gholi massimu ta' erba' sulari ukoll.

Illi fl-ewwel lok dan it-Tribunal kif ukoll l-Awtorita' huma marbuta skont l-artikolu 69 tal-Kap 504 li japplika dawk il-pjanijiet u l-policies, u dan kif ukoll huwa ccarat f'diversi decizjoni tal-Qorti ta' l-Appell bhal fl-ismijiet Jimmy Vella kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-ippjanar, kif ukoll George Mifsud kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-ippjanar (decizi fl-4 ta' Dicembru, 2013). Fid-decizjoni bl-ismijiet Stephen Seychell kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-ippjanar (deciza fis-27 ta' Gunju, 2013) il-Qorti ta' l-Appell sostniet dan li gej:

"[...] Hu minnu li fi kwistjonijiet ta' ippjanar l-Awtorita' u l-Bord huma f'dati b'hafna diskrezzjoni, diskrezzjoni li tirrizulta mill-applikazzjoni ta' varji policies, pjanijiet lokali u strutturali u interpretation documents u l-korrelazzjoni tagghom mehud kont tal-fattispecie ta' kull kaz. Il-ligi stess taghti lil Awtorita' u Tribunal il-mansjoni li filwaqt li ghandu japplika l-pjanijiet u policies, irid ukoll iqis kwistjonijiet ohra ta' sustanza bhal ma huma kwistjonijiet ta' commitment, ta' ugwaljanza fit-trattament ta' applikazzjonijiet identici, ta' konsistenza fil-principji li fuqhom jiddeciedi t-Tribunal ghalkemm mhux marbut bil-precedent. Pero kif ighid l-istess ligi fl-artikolu 69 tal-Kap. 504 gia artikolu 33 tal-Kap. 356, jipprevalu l-ewwel il-policies u pjanijiet fejn dawn ma jhallux lok ta' diskrezzjoni afdana lit-Tribunal."

Il-decisjoni tal-Qorti tal-Appell fl-ismijiet Dixson et vs Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et, imsemmija mill-appellant tipprovdi direzzjoni cara dwar l-applikazzjoni ta' Policies BEN 1 u BEN 2 fil-kuntest ta' gholi massimu ta' sulari kif stipulat fil-Pjan Lokali. F'dan il-kaz, il-Qorti tal-Appell spjegat hekk:

“i. It-Tribunal naqas milli japplika l-height limitations stabbiliti mill-pjan lokali. Ir-riferenza ghall-policies BEN 1 u BEN 2, li jitrattaw il-materji dwar bad neighbourliness u urban design m'hijjex wahda felici. Il-qorti ser tirriproduci dak li jinghad f'dawn il-policies:-

POLICY BEN 1: Development will not normally be permitted if the proposal is likely to have a deleterious impact on existing or planned 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 neighbourliness.

POLICY BEN 2: Development will not normally be permitted if, in the opinion of the Planning Authority, it is incompatible with the good urban design, natural heritage, and environmental characteristics of existing or planned adjacent uses, and is unlikely to maintain the good visual integrity of the area in which it is located. There will be a presumption against development which does not generally observe the design guidelines issued by the Planning Authority for built-up areas.

Dawn huma policies generali. Il-pjan ta' struttura hareg snin qabel il-pjanijiet lokali li zviluppaw fuq dak li jinghad fil-policies fuq citati. Pjanijiet li ghal dak li jikkoncerna zoni urbani, stabbilew l-gholi massimu ghall-bini. Pjanijiet li lqorti tifhem li meta gew maghmula hadu in konsiderazzjoni dak li jinghad fil-pjan ta' struttura. F'dan irrigward il-Professor Kevin Aquilina osserva: “Article 23 of the Development Planning Act, 1992 defines what are subsidiary plans. These are subject plans, local plans and action plans. Where the Planning Authority considers that for the proper and effective management of development it is necessary to prepare more detailed proposals than can be appropriately embodied in the structure plan, it can prepare such subsidiary plans”.

Hi l-fehma tal-qorti li gialadarba l-pjan applikabbli ghas-sit in kwistjoni jaghti massimu ta' tlett sulari u basement, allura l-appellanti ghandhom jedd jaghmlu zvilupp bi tlett sulari u basement. Ghal dak li jirrigwarda l-penthouse, ma jezistix xi dritt awtomatiku li jinghata permess u jridu jigu kkunsidrati aspetti teknici li huma trattati wkoll fil-Policy and Design Guidance tal-2007.

Materja li tirregola height limitation hi kkunsidrata li ghandha l-forza ta' ligi. F'dan il-kuntest il-Qorti tal-Appell fil-kaz Alfred Cauchi vs Chairman, Awtorita' ta' l-Ippjanar tal-15 ta' Dicembru 1997, osservat:

“Ghandu jkun car li din il-Qorti, hija marbuta li tapplika l-ligi tal-pajjiz, u ma tistax taccetta l-pretensjoni ta' l-appellant li hu ghandu jigi awtorizzat li

jeccedi l-maximum height limitation applikabbli skond ir-regolamenti mhux ghax il-ligi taghtih xi dritt li jaghmel dan izda sempliciment ghaliex terzi persuni fil-vicin allegatament thallew jiksru din irregola bil-barka ta' l-Awtorita'. Il-Qorti tifhem il-predikament ta' l-appellant, izda ma tista qatt tissanzjona xi haga li tkun qieghda tikser il-ligi”.

L-appellanti ma talbux biex jibnu iktar milli tatihom dritt illigi. Ghal dak li jikkoncerna l-gholi ta' bini hu essenzjali li jkun hemm ic-certezza. Hu maghruf li f'hafna miz-zoni fejn jista' jsir il-bini dan hu l-fattur li jirregola l-prezz tal-proprjeta' fis-suq.”

Illi dan it-Tribunal, huwa tal-fehema illi l-policies BEN 1 u BEN 2 fil-Pjan ta' Struttura applikabbli meta giet deciza din l-applikazzjoni de quo, mhux intizi li jwaqqfu zvilupp jekk kemm il-darba dan ikun mahsub fil-pjanijiet u policies li jirregolaw l-ippjanar taz-zona fejn jinsab, filwaqt li l-zvilupp propost jissodisfa dawk il-regolamenti li jirregolaw l-istess zvilupp.

F'dan ir-rigward, gjaladarba l-Pjan Lokali stabbilixxa l-uzu u d-disinn tal-izvilupp, inkluz l-gholi ta' sulari permessibbli (li f'dan il-kaz il-Pjan Lokali kkonferma l-parametri ta' zvilupp gja applikabbli fit-Temporary Provision Schemes, ossia terraced house zoning, b'erba sulari), ma tistax l-Awtorita' tibqa' tirreferi ghal Policies BEN 1 u BEN 2 u tinjora l-Pjan Lokali. Dan johrog car fil-Policy BEN 4 tal-istess Pjan ta' Struttura meta l-Awtorita' kellha tapplika l-policies BEN 1 , BEN 2 u BEN 3 fin-nuqqas (empfazi tat-Tribunal) tal-Pjannijiet Lokali li kienu ghadhom ma gewx imfassal meta gie fis-sehh il-Pjan Lokali, u ghaldaqstant issa li hargu dawn il-Pjannijiet, l-Awtorita' kif ukoll dan it-Tribunal ghandu japplika b'mod tassattiv skont id-dispost tal-Artikolu 69 tal-Kap 504.

Ta min isemmi ukoll illi l-istess Pjan Lokali ghadda mill-iskrutinju pubbliku wara l-process ta' konsultazzjoni pubblika. Ghaldaqstant ma jistax wiehed jezercita bidla fl-istess pjan lokali permezz ta' applikazzjoni tal-izvilupp. Bl-istess mod oggezzjonijiet li wiehed jista jkollu ghal zvilupp propost iridu jigu kkunsidrati fid-dawl ta' dak li jistipula l-istess pjan lokali.

Id-diskrezzjoni msemmija mit-terzi persuni nterressati tista' tigi applikata fil-kaz tal-izvilupp ta' penthouse. F'dan il-kaz il-Qorti tal-Appell fl-istess decizjoni ta' Dixson et imsemmija supra, ghamlet dawn l-osservazzjonijiet: “Ghal dak li jirrigwarda l-penthouse, ma jezistix xi dritt awtomatiku li jinghata permess u jridu jigu kkunsidrati aspetti teknici li huma trattati wkoll fil-Policy and Design Guidance tal-2007.”

Illi skont il-policy 10.6 dwar il-linja gwida dwar il-kontroll tal-izvilupp tal-2007, l-izvilupp ta' penthouse huwa permessibli fuq bini ta' mill-inqas tlett (3) sulari gholi. F'dan ir-rigward, l-izvilupp ta' penthouse jista' jigi kunsidrat fuq dan is-sit mertu ta' dan l-appell meta l-height limitation hija dik ta' erba' (4) sulari.

Illi f'dan il-kaz, il-policy qed tirreferi ghall-‘important long range or short range views, particularly those defined in local plan’. Illi f'dan il-kaz, ma ngabet ebda prova li s-sit jinsab f'xi view line li hija protetta mill-Pjan Lokali. Minn

naha l-ohra l-izvilupp, inkluz il-bini tal-penthouse, irid jigi kunsidrat fil-kunest taz-zona kif inhu ppjanat skont il-Pjan Lokali, fejn f'dan ir-rigward is-sit jinsab f'parti ta' zona residenzjali b'gholi massimu ta' erba' sulari fejn hemm permess ukoll l-bini ta' penthouse.

Ta' minn isemmi illi fil-Mappa numru 44, il-Pjan Lokali jidentifika zona partikolari ta' erba' sulari fejn il-penthouse hija eskluza, fil-lokalita' tax-Xemxija ghalkemm ma tinkludix is-sit inezami. Illi f'dan il-kaz, fiz-zona fejn jinsab is-sit indezamina, ma hemm l-ebda cirkostanzi, inkluz views protetti, jew skedar ta' zona jew bini, li b'xi mod jistghu jholqu ostaklu ghal bini tal-penthouse.

Il-kwistjoni principali huwa l-allegat overdevelopment li kemm l-Awtorita' kif ukoll it-terzi persuni nteressati qed jinsistu fuqha bhala bazi ta' rifjut. F'dan il-kaz ukoll, dan it-Tribunal huwa tal-fehema li l-konsiderazzjoni ta' overdevelopment ma tohrogx mill-ebda policy msemmija fir-ragunijiet ta' rifjut, ossia BEN 1 jew BEN 2 tal-Pjan ta' Struttura. Dawn il-policies jaghmlu accenn importanti kemm ghall-impatt fuq existing and planned uses. F'dan il-kaz, l-uzu residenzjali propost huwa dak konformi kemm maz-zona residenzjali ezistenti kif ukoll ma dak indikat fil-Pjan Lokali.

Illi rigward l-elementi ndikati bhala bazi ta' overdevelopment jew excessive scale, cioe, 'floor area, height, number of dwelling units u site coverage' ma jirrizultax li l-proposta fl-applikazzjoni qed tikser xi regolament jew policy f'dan ir-rigward. Bhala floor area, height u numru ta' djar residenzjali, l-izvilupp propost huwa konformi mal-parametri ta' zvilupp kemm dak indikat fil-Pjan Lokali kif ukoll fil-linja gwida dwar il-kontroll tal-izvilupp, filwaqt li site coverage m'ghandha l-ebda relevanza fil-kaz ta' zvilupp fis-sit inkwisjtoni li huwa ta' terraced development u mhux villel.

Ghal dawn il-mottivi, u wara li kkunsidra l-fatti speci kollha tal-kaz, dan it-Tribunal qed jilqa' dan l-appell, ihassar ir-rifjut tal-permess u jordna lis-Segretarju tal-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar sabiex johrog il-permess tal-izvilupp skont il-pjanti u l-kondizzjonijiet elenkati fil-case officer report a fol 46 fl-inkartament tal-PA 5701/09.

## **Ikkunsidrat**

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal naqas li jikkonsidra l-policies vigenti BEN1 u BEN2 citati mit-terzi appellanti u injorathom speċjalment meta l-istess Awtorita kienet ikkunsidrathom bhala raguni ta' rifjut. Dan imur kontra d-dispost tal-artikolu 69(1) tal-Kap. 504 fejn decizjoni trid tinghata tenut kont tal-policies applikabbli. In oltre t-Tribunal kien zbaljat meta qies dawn il-policies inkompatibbli mal-pjan lokali ghax ir-regoli tal-pjan lokali ma jinkludux konsiderazzjonijiet u kriterji ta' policies ohra li jaghtu linji gwida ghal



applikazzjoni ta' zvilupp. It-Tribunal kien zbaljat meta qal li l-Awtorita injorat il-pjan lokali;

2. Anki jekk ghal grazzja tal-argument it-Tribunal ikkonsidra l-policies BEN1 u BEN2, applikahom hazin u kien zbaljat it-Tribunal meta qal illi l-Awtorita ma setghetx tuza d-diskrezzjoni fil-height limitation ghax policies BEN1 u BEN2 mhux policies li ghandhom x'jaqsmu ma' height limitation u dan hu eskluż fil-proviso tal-artikolu 69(1) tal-Kap. 504. Dan mhux minnu ghax il-policies BEN1 u BEN2 huma ta' applikazzjoni generali u ghandhom x'jaqsmu mal-gholi massimu permessi fis-sit. Anki jekk dan l-argument kellu jigi skartat il-proviso kien intiz ghal policies li jippermettu aktar sulari milli jippermetti l-pjan lokali. Ghalhekk l-eskluzjoni tal-policies fil-fatti specie tal-kaz saret ghal raguni mhux xierqa.

### **L-aggravji**

Dan l-appell jirrigwarda punti ta' ligi li ghandhom jigu kunsidrati. L-appellant jissottometti illi t-Tribunal ma kkonsidrax il-policies BEN1 u BEN2 meta l-istess Awtorita ikkonsidrathom fir-ragunijiet ta' rifjut. Dan in-nuqqas imur kontra l-artikolu 69(1) fejn it-Tribunal hu obligat jikkonsidra l-policies. In oltre zied li t-Tribunal zbalja meta qal li l-policies huma inkompatibbli mal-pjan lokali ghax tali policies huma linji gwida ghal pjan lokali.

Din il-Qorti tqis li l-appellant ma ghandux ragun li t-Tribunal ma kkonsidrax policies BEN1 u BEN2. Dak li ma ghamilx it-Tribunal hu li ma qabilx mal-Awtorita dwar l-importanza li tali policies kienu jimmeritaw fil-kuntest ta' din l-applikazzjoni ta' zvilupp. It-Tribunal fil-fatt applika ad litteram id-dispost tal-artikolu 69 meta sahaq li hu kien qed japplika l-pjan lokali ghal kaz ghax dan il-pjan lokali sar appozitament biex jirregola l-izvilupp fiz-zona cioe in-North West Local Plan. Hu spjega illi darba li l-istess pjan lokali kien qed jippermetti l-binja bl-gholi rikjest, it-Tribunal kellu l-obbligu li jottempera ruhu mal-pjan lokali. Dan il-pjan lokali kkonferma parametri ta' zvilupp gia approvati fit-Temporary Provision Schemes (cioe terraced house zoning b'erba' sulari). Zied illi l-Awtorita ma setghetx torbot ic-cahda mal-policies BEN1 u 2 u tinjora l-pjan lokali billi kien qed jahseb ghal zvilupp f'zona specifika mentri policies BEN1 u 2 u anki 3, li gew promulgati qabel il-pjan lokali, saru biex jigu applikati fin-nuqqas ta'

pjan lokali. Dan kien jorbot id min qed jiggudika dwar approvazzjoni jew cahda ta' zvilupp.

Il-Qorti ssib li dawn l-argumenti tat-Tribunal jirrispondu ghal aggravju tal-appellant. Mhux kompitu ta' din il-Qorti li terga' tikkunsidra dak gia deciz mit-Tribunal ghal kwezit specifiku indirizzat mill-istess Tribunal. Interpretazzjoni ta' dak li ghandu jipprevali bejn policy u ohra u pjan u iehor huma parti mill-mansjoni fdata f'idejn it-Tribunal li sakemm ma hix wahda assurda jew tmur kjarament kontra xi dispost tal-ligi jew kontra dak li jridu l-pjanijiet u policies, ma jikkompetix lil din il-Qorti li tiddisturbah kif mhix ser taghmel f'dan il-kaz. Ma jistax ma jigix rilevat illi t-Tribunal qies l-aggravju tal-appellanti fil-kuntest tal-policies BEN1 u 2 meta kkonsidra l-kwistjoni ta' overdevelopment li fil-fehma tat-Tribunal ma tirrizultax mill-policies BEN1 u 2 li jaghmlu accenn fuq l-impatt fuq existing and planned uses. Qies illi l-pjan lokali stess kien qed jippermetti l-uzu intiz mis-sit mill-applikant. In kwantu ghal fatt innifsu ta' overdevelopment fis-sens ta' excessive scale f'dak li hu floor area, height, number of dwelling units, it-Tribunal ma sab ebda ksur ta' ebda regolament jew policy ghax l-izvilupp propost hu konformi mal-parametri ta' zvilupp fil-pjan lokali u linji gwida dwar kontroll ta' zvilupp tal-2007. Zied li site coverage mhix rilevanti f'dan il-kaz ghax dan hu terraced development u mhux vilel. Dawn il-konsiderazzjonijiet, apparti li ttiehdu in konsiderazzjonijiet aspetti fattwali u teknici li din il-Qorti ma ghandhiex poter tissindaka billi tista' tissindaka biss kwistjonijiet ta' ligi mhux kwistjonijiet fattwali u teknici jinnewtralizzaw l-aggravju tal-appellant.

In kwantu ghall-ilment dwar l-applikazzjoni hazina ta' policies BEN1 u 2 fil-kwistjoni tad-diskrezzjoni rigward zvilupp ta' penthouse, din il-Qorti tqis illi t-Tribunal ikkunsidra wkoll il-kwistjoni u interpreta l-kaz fejn l-Awtorita setghet tirrifjuta l-bini ta' penthouse fejn tali penthouse hu permissibbli fuq binjiet ta' mill-anqas tlett sulari ai termini tal-policy 10.6 tal-linji gwida dwar il-kontroll ta' zvilupp 2007. It-Tribunal qal li l-policy tirreferi ghal 'important long range or short range views particularly those defined in the local plans'. It-Tribunal ikkonkluda li tali konsiderazzjoni fattwali ma gietx pruvata f'dan il-kaz u l-izvilupp in kwistjoni kellu jigi kunsidrat fil-kuntest taz-zona cioe f'dan il-kaz f'zona residenzjali b'gholi massimu ta' erba' sulari fejn hemm permess ukoll il-bini ta' penthouses. It-Tribunal zied li l-pjan lokali jidentifika zona partikolari ta' erba'

sulari fil-lokalita tax-Xemxija fejn penthouse hi eskluza, izda mhux f'dan is-sit. Ghalhekk ikkonkluda li ma kien hemm ebda divjet ghal zvilupp ta' penthouse. Il-Qorti tqis li tali konsiderazzjonijiet teknici bbazati fuq il-pjan lokali ma jistghux jigu mittiefsa minn din il-Qorti ghaliex ma humiex kwistjoni ta' applikazzjoni hazina ta' policies izda interpretazzjoni ta' kif ghandhom jigu applikati policies specifici b'korrelazzjoni jew eskluzjoni ta' ohrajn aktar generici.

Il-Qorti ma ssibx li saret interpretazzjoni asurda jew kontra l-ligi, u ghalhekk tqis l-aggravji tal-appellant bhala mhux misthoqqa. It-Tribunal, minn qari tad-decizjoni tieghu mexa strettament ma' dak li jipprovdli l-pjan lokali fl-ispirtu li ried l-istess pian ghaz-zona. Jista' jkun li interpreta l-pjan lokali b'mod rigidu pero dan hu fattur fdat fid-diskrezzjoni tat-Tribunal u l-appellant ma jistax juza dan bhala pretest biex jinterponi appell quddiem il-Qorti b'argumenti li mhux ghajr riapprezzament tal-istess fatti, ta' pian u policies b'talba ghal decizjoni bazata fuq interpretazzjoni legali differenti minn dik li wasal ghalha t-Tribunal, meta ebda applikazzjoni hazina ta' ligi ma tista' tinstab li kkommetta t-Tribunal.

## **Decide**

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell tat-terzi interessati u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-25 ta' Frar 2016, bl-ispejjez kontra l-appellanti.

Onor. Mark Chetcuti LL.D.

Imhalled

Anne Xuereb

Deputat Registratur