



**QORTI TAL-APPELL**

**(KOMPETENZA INFERJURI)**

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

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

**Illum L-Erbgha, 28 ta' Frar, 2018**

Numru 6

**Appell Nru. 32/2017**

**Planet Court Owners Association**

**vs**

**L-Awtorita tal-Ippjanar  
(gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u  
l-kjamat in kawza Michael Gatt in rapprezentanza ta' Howards Limited**

**Il-Qorti,**

Rat ir-rikors tal-appell tal-applikant Michael Gatt nomine tat-18 ta' Dicembru 2017 kontra r-rifjut tal-PA 4046/15 b'decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-30 ta' Novembru 2017 rigward 'change of use from class 4b to class 4d to include proposed internal alterations and sanctioning of minor changes carried out' f'tas-Sliema;

Rat ir-risposta tal-Awtorita li ssottomettiet li ma ghandhiex tbatli spejjez tal-appell billi ma sarx minnha;

Rat ir-risposta tal-appellata Planet Court Owners Association li ssottometta 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:

Illi l-aggravji huma s-segwenti:

- i) Illi l-izvilupp fi Klassi 4d mhux kompatibbli maz-zona residenzjali skont il-Pjan Lokali.
- ii) Illi z-zona hija strettament residenzjali u mhux heavily committed bi zvilupp kummercjali u ghaldaqstant ma setax jigi applikat l-eccezzjoni tal-Flexibility Policy.
- iii) Illi l-ftit zvilupp kummercjali li jinsab fiz-zona ossia f'din il-parti tax-Xatt ta' Tigne kien gja jezistenti qabel ma gie fis-sehh il-Pjan Lokali li identifika z-zona bhala residenzjali [Mappa SJ1 fin-North Harbours Local Plan (2006)];
- iv) Illi l-fatt li l-lokalita' ta' Sliema hija kunsidrata bhala zona Turistika ma jistax jigi applikat l-eccezzjoni tal-Flexibility Policy b'mod indiskriminat mill-fatt li z-zona hija wahda strettament residenzjali Illi l-permit holder sostna li z-zona hija wahda committed bi zvilupp kummercjali filwaqt li l-pjan lokali jidentifika ukoll iz-zona ghall-izvilupp ta' hotels. Illi fil-kaz odjern, l-Awtorita' applikat b'mod korrett l-eccezzjoni tal-Policy FL-GNRL-1 billi l-proposta tikkonferma mal-proviso 'a' ta' din il-policy peress li s-sit jinsab f'zona turistika (Ibid.).

L-permit holder qed jinsisti illi l-konsiderazzjoni ta' commitment ghandu jinkludu ukoll dak gja ezistenti qabel ma gie fis-sehh il-pjan lokali, billi dak li ghandu jigi stabbili huwa jekk tali commitment ikunx wiehed legali sabiex japplika fil-kaz odjern indipendentament mill-perjodu ta' meta l-attivita' bdiet tigi gestita.

Illi dan it-Tribunal ra ukoll id-DPA report fejn il-case officer dwar il-gustifikazzjoni favur l-izvilupp propost spjegat dan li gej:

"The proposal requests permission for the change of use of the present Class 4B outlet into a Class 4D commercial space. According to the North Harbour Local Plan, the site falls in a designated residential area subject to policy NHHO 01. The proposed Class 4D shop is not listed as one of the allowable uses indicated in policy NHHO 01 of the North Harbour Local Plan. However notwithstanding this, the proposal was assessed in terms of Policy FL-GNRL-1 of the Partial Review of Subsidiary Plans: General Policy Relating to Regeneration / Consolidation Initiatives. Policy FL-GNRL-1 considers proposals in tourism zones given that the proposed use is compatible with the neighbourhood and does not result in unacceptable negative impacts on the locality even if this would entail departing from the provisions of the subsidiary plans. The site in question is a tourism zone and

in an area that the area is already heavily committed to more intensive land uses, namely bars and restaurants. Indeed, the site lies within an area earmarked for new hotel developments. In view of this, Paragraph FL-GNRL-1 of the Partial Review of Subsidiary Plans: General Policy relating to Regeneration/Consolidation Initiatives applies.”

Ra ukoll il-policy F L-GNRL-1 tal-‘Partial Review of Subsidiary Plan: General Policy relating to Regeneration/Consolidation Initiatives’ (Jannar 2013 – maghrufa bhala ‘Flexibility Policy’), fejn l-Awtorita’ tista tikkunsidra zvilupp bhala ‘neighbour compatible’ ghalkemm jista ma jkunx konformi mal-polices vigenti fil-Pjan Lokali jew Pjan sussidjarju.

Il-paragrafu 1.2 fl-istess dokument jispjega l-oggettiv ta’ din il-policy hekk kif gej:

“MEPA is of the opinion that in certain cases the approved subsidiary policies may not reflect realities which transpired since the said policies’ approval. This situation may hinder otherwise commendable and neighbour compatible proposals from obtaining development planning consent. Consequently, MEPA is proposing to introduce in all local plans a general policy to the effect that the interpretation of policies in such instances is rendered more flexible.”

Illi l-policy FL-GNRL-1 f’dan id-dokument telenka seba’ (7) istanzi fejn din il-policy tista tigi applikata. F’dan il-kaz din lizvilupp gie meqjus skont il-kriterju (a) li jinkludi zvilupp gewwa;

“Areas within Tourism Localities as identified by the Structure Plan for the Maltese Islands and the Local Plans through the following policies:

(i) Structure Plan Policy TOU 4 (Mellieha, St. Paul’s Bay/Bugibba, St. Julian’s/Paceville, Sliema, Marsascala, Marsaxlokk and Birzebbuga in Malta and Marsalforn, Xlendi and Mgarr in Gozo) and

(ii) Tourism and Entertainment Priority Areas as designated in respective Local Plans.”

F’dan il-kaz il-policy tesigi li kemm il-darba zvilupp ikun meqjus bhala ‘neighbour compatible and will not result in unacceptable cumulative adverse impacts on the locality but may not be in line with the detailed provisions of approved Subsidiary Plans’, l-Awtorita’ tista tikkunsidra ‘justifiable departues from policies which can be adequately justified from a planning perspective;’. Illi ghal dan il-ghan, il-policy tinkludi diversi objettivi elenkati fil-paragrafi numru ‘i’ sa ‘vi’ li l-Awtorita’ stess ghandha tikkunsidra biex tiggustifika divergenza mill-pjanijiet u policies vigenti. Dawn huma s-segwenti:

i) The proposed development does not exceed the height limitation of the area as stipulated in local plans and as guided by the respective policies in the Policy and Design Guidance 2007; and

ii) In the more sensitive locations (eg. Ridge Lines, Ridge Edges Development Zone Edges, in scheduled property or in properties identified as qualifying for scheduling as indicated in clause C of this policy); adjacent or in the proximity of UCAs, near landmark buildings etc.), special care would need to be taken to ensure that the conservation attributes and the surrounding context are fully respected; and

- iii) The proposed development would not create an environment which goes diametrically against the thrust of the local plan policy. Particular attention would need to be paid to the traffic and parking carrying capacity of the surrounding transportation network, neighbour compatibility issues as well as surrounding existing and planned uses; and
- iv) Proposals will be strongly encouraged to cater for all its parking as well as loading/unloading requirements on site unless heritage conservation considerations drastically curtails this possibility;
- v) Measures are taken to satisfactorily address infrastructural service provision shortcomings identified to result from the implementation of the proposal; and
- vi) In cases covered by a legitimate development permit which apply for a proposal which is not in line within the relevant Subsidiary Plan Policy but which is more compatible than that contemplated in the original permit may in certain circumstances also be given favorable consideration.

Illi fil-fehma ta' dan it-Tribunal, il-Kummissjoni applikat b'mod superficjali l-Policy FL-GNRL-1 sucitata, b'dan illi mhux bizzejjed li jigi kunsidrat li zvilupp jikkwalifika bhala zvilupp taht xi wiehed mill-proviso immarkati 'a' sa 'g', imma kellhom jigu kunsidrati ukoll dawk l-objettivi fl-ahhar parti tal-policy sabiex il-Kummissjoni tkun tista tiggustifika d-dipartenza mill-Policy fil-Pjan Lokali.

Illi l-kwisjtoni in mertu tirrigwardja l-fatt li s-sit jinsab f'zona residenzjali skont kif identifikat fil-Pjan Lokali. L-istess Pjan Lokali jidentifika z-zona ghall-izvilupp ta' lukandi kif regolati bil-Policy NHSJ15. Certament fil-kaz odjern, tali policy ma tapplikax tenut illi l-izvilupp huwa dak relatat ma bdil fl-uzu minn Klassi 4b ghal Klassi 4d f'sit li jinsab fil-pjan terran sottostanti apartamenti residenzjali ezistenti.

Minn naha l-ohra, il-Pjan Lokali jidentifika l-lokalita' ta' Sliema bhala zona Turistika (Part 10 tan-North West Local Plan. Ara ukoll paragrafu 10.1.1. tal-Pjan Lokali) fejn l-istess pjan qed jirrikonoxxi l-kunflitt bejn zvilupp favur tal-attrazzjoni turistika u dak residenzjali. Fil-kaz odjern il-Pjan Lokali jipprovdi tali osservazzjonijiet hekk kif gej:

"10.2.4 The main concern for residents in the area, according to Local Councils is that, although tourism represents a major economic asset, it causes considerable congestion, generates noise and increases the amount of refuse deposited. Entertainment and tourist uses (particularly in Paceville) create considerable strain on the existing infrastructure and cause disturbance to local residents, who largely comprise of elderly people. The pressure on the road network has a knock-on effect on neighbouring residential areas of Swieqi and St. Julian's since these areas are used extensively for parking and access into Paceville.

[...]

10.2.6 It should be noted that although these problems are partly a consequence of tourism activity, there are various policies that aim to address them through this plan and not solely through general policies for Tourism. Policies such as NHHO01 (Residential Areas), NHHO02 (Residential Priority Areas), NHRL02 and NHRE01 (relating to the location of

visitor attractions, bars and restaurants) and the various Area Policies for Paceville play an important collective role in controlling the type of development within and on the boundaries of main tourist areas.” (emfazi tat-Tribunal)

Illi fil-fehma kunsidrata ta’ dan it-Tribunal l-izvilupp indezamina, qieghed johloq “an environment which goes diametrically against the thrust of the local plan policy’, meta fil-kaz odjern il-Pjan Lokali qed jidentifika dawk iz-zoni specifkament fejn qed jinkoraggixzi zvilupp ghat-turismu, billi minn naha l-ohra qed jiprotegi dawk iz-zoni residenzjali minn tali zvilupp.

L-istess jista’ jinghad dwar il-commitments ta’ zvilupp simili. Minn dak li seta’ jigi konstata mill-access mizmum fuq is-sit, kif ukoll minn ezami tal-provi provduti, tali commitments ezistenti huma limitati biss ghal zewg stabbilimenti simili fil-vicinazi immedjati u li jinsabu f’zona residenzjali, ghalkemm evidenti ukoll lukanda pjuttost kbira bil-facilitajiet ancillari li tinsab fil-vicinani immedjati fiddirezzjoni tal-Lvant. Minn naha l-ohra, il-maggor parti tal-commitments simili identifikati jinsabu kemm fiz-zona kummerjali fix-Xatt ta’ Tigne madwar 200 metru fid-direzzjoni tal-Punent, jew fil-kumpless komprensiv fil-Ponta ta’ Tigne’ madwar 150 metru ‘il boghod fid-direzzjoni tal-Lvant tas-sit inezami.

F’dan il-kaz, l-argument tal-permit holder illi l-izvilupp jista’ jiqies ukoll a bazi tal-proviso ‘g’ tal-Policy sucitata mhux sostuna. Dan il-proviso ‘g’ jipprovdi cirkostanza fejn iz-zona fejn jinsab jinsab l-izvilupp propost hija gja ‘already occupied by a considerable level of legitimate commitment whose nature may not necessarily be in line with local plan policies or on a site which is a legitimately established business outlet’. F’dan il-kaz, minn dak li seta’ jikkonstata dan it-Tribunal, din il-parti tax-Xatt ta’ Tigne mhux okkupata bi zvilupp konsiderevoli fi Klassi 4D (jew anke 4C).

F’dan ir-rigward, dan it-Tribunal qed jilqa’ l-aggravji tal-appellanti, peress li l-obiettivi tal-Policy FL-GNRL-1 ma gewx milhuqa u ghaldaqstant ma jezistux dawk ic-cirkostanzi specifiki li jiggustifikaw id-dipartenza mill-policies fil-Pjan Lokali. F’dan ir-rigward, id-dettami tal-Policy NHHO01 li jirregolaw l-izvilupp gewwa zoni residenzjali li jeskludi uzu fi Klassi 4D japplikaw ghal kaz odjern.

Ghal dawn il-motivi, u wara li ezamina l-fattispeci kollha tal-kaz, dan it-Tribunal qieghed jilqa’ l-appell u konsegwentament qieghed ihassar il-permess tal-izvilupp PA 4046/15.

## **Ikkunsidrat**

L-aggravju uniku tal-appellant hu illi t-Tribunal ma immotivax ir-raguni tieghu ghar-rifjut tal-applikazzjoni meta l-Awtorita kienet approvat il-permess. Jissottometti illi ghalkemm it-Tribunal wasal ghal konkluzzjoni li l-izvilupp imur kontra s-sustanza u spirtu tal-local plan policy, ma tax raguni valida ghaliex l-eccezzjoni ghal pjan lokali ma issibx sostenn f’dan l-izvilupp kif kienet ikkonkludiet l-Awtorita. It-Tribunal, fil-

fehma tal-appellant filwaqt li irrikonoxxa konflitt bejn zvilupp favur zona turistika u dik residenzjali u semma diversi policies fil-pjan lokali, ma immotivax id-decizjoni li waslitu jichad il-permess.

Din il-Qorti issib illi l-appell tal-applikant ma ghandux mis-sewwa. It-Tribunal b'mod preciz elenka s-sottomissjonijiet tal-partijiet, imbaghad ghadda biex qies illi l-izvilupp ghalkemm mhux wiehed permissibbli a bazi tal-policy NHHO 01 (North Harbour Local Plan) pero seta' jigi kunsidrat a bazi tal-policy FL-GNRL-1 (Flexibility Policy) li hi eccezzjoni ghal policy principali u jippermetti certu uzu f'zoni turistici basta li tali uzu hu kompatibbli mad-dintorni u ma jikkrejax impatt negattiv fuq il-lok u dan avolja ma jkunx konformi mal-pjan lokali. It-Tribunal imbaghad spjega illi l-istess Flexibility Policy telenka diversi obiettivi li l-Awtorita trid tqis qabel ma tiddipartixxi mill-policy principali u tapplika l-flexibility policy.

It-Tribunal qies illi l-Awtorita applikat b'mod superficjali l-obiettivi imsemmija numerati (i) sa (vi) fl-istess flexibility policy. Hu tenna li s-sit jinsab f'zona residenzjali kif jghid il-pjan lokali ghalkemm jidentifika z-zona ghal zvilupp ta' lukandi kif regolat bil-policy NHSJ 15 liema policy pero ma tapplikax fil-fehma tat-Tribunal ghax l-izvilupp in kwistjoni jinsab fil-pjan terran ta' appartamenti residenzjali ezistenti (sottolinear tal-Qorti). It-Tribunal imbaghad ghadda biex ippuntwalizza li l-pjan lokali fil-paragrafu 10.2.6 ghalkemm iqis il-lokalita bhala wahda turistika li jikkreja piz fuq ir-residenti pero hemm diversi policies fosthom NHHO 01(residential areas) u NHHO 02 (residential priority areas) fost ohrajn li jikkontrollaw zvilupp li jqieghed piz ingustifikat fuq ir-residenti.

It-Tribunal meta qies il-bilanc li kellu jinholoq bejn l-izvilupp turistiku u z-zona residenzjali fl-istess lok ghamel access u wasal ghal konkluzjoni fejn ma qabilx mal-Awtorita li l-commitments massicci ta' zvilupp turistiku fiz-zona huma tant vicin tal-izvilupp in kwistjoni li jiggustifikaw l-uzu tal-Flexibility Policy paragrafu (g) f'dan il-kaz. Qies li l-izvilupp turistiku magguri jinsab bejn 150 u 200 metru boghod ghajr ghal zewg stabbilimenti simili fil-vicinanza u fil-fehma tat-Tribunal ma kienx jikkostitwixxi 'considerable level of legitimate commitment' kif irid il-paragrafu 'g' tal-Flexibility Policy.

Din il-Qorti mhix ser tiddisturba kostatazzjoni teknika maghmula mit-Tribunal li mhux biss illimita ruhu ghal atti processwali izda mar di persona jivvaluta l-livell ta' commitment li kien il-bazi tal-approvazzjoni da parti tal-Awtorita, liema livell fil-fehma tat-Tribunal ma giex milqugh biex tigi applikata l-eccezzjoni tal-Flexibility Policy kontra dak li jipprovdi l-pjan lokali.

L-appell tal-applikant hu limitat biss ghal aggravju li t-Tribunal ma immotivax id-decizjoni pero hu car illi t-Tribunal kien ferm car u fokat fuq il-kwistjoni quddiemu u spjega r-raguni ghaliex l-izvilupp ma setghax jigi approvat a bazi ta' dak li jipprovdi l-pjan lokali tenut kont ta' dak li tipprovdi l-Flexibility Policy u l-applikazzjoni korretta tal-istess.

Ghalhekk l-appell tal-applikant qed jigi michud billi hu bla bazi fil-ligi.

## **Decide**

Ghal dawn ir-ragunijiet il-Qorti taqta' u tiddeciedi billi tichad l-appell tal-appellant Michael Gatt nomine u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tat-30 ta' Novembru 2017. Spejjez ghall-appellant.

Onor. Mark Chetcuti LL.D.

Imhallel

Anne Xuereb

Deputat Registratur