



MALTA

QORTI TA' L-APPELL

**S.T.O. PRIM IMHALLEF
VINCENT DE GAETANO**

**ONOR. IMHALLEF
JOSEPH D. CAMILLERI**

**ONOR. IMHALLEF
JOSEPH A. FILLETTI**

Seduta tas-7 ta' April, 2003

Appell Civili Numru. 249/1998/1

Joseph C Grech

Vs

Il-Kummissjoni ghall-Kontroll ta' L-Izvilupp

Il-Qorti;

I PRELIMINARI

1. FI-4 ta' Marzu 1996, l-Awtorita` ta' L-ippjanar ("L-Awtorita`") irregistrat bhala validament prezentata

applikazzjoni ghal "outline development permit". L-applikazzjoni saret minn Joseph Grech ("l-appellat") "to construct high class retirement residences" f'sit, f'San Gwann Evangelista, Madliena Heights, Gharghur (PA File No. 1252/96).

2. Kien hemm diversi persuni u entitajiet li opponew ghall-ghoti tal-permess mitlub ghar-ragunijiet li huma esponew lill-Awtorita`.

3. Fid-9 ta' April 1997, il-Kummissjoni ghall-Kontroll ta' l-Izvilupp ("il-Kummissjoni") harget dokument indirzzat lill-appellat li bih irrifjutat li taghti l-permess mitlub. Id-dokument relattiv isemmi diversi ragunijiet li gew elenkati taht 11-il paragrafu separat:-

" 1. The site lies outside the limits for development defined in the Temporary Provisions scheme number 13 for Madliena and so it is located in an area which is proposed to remain undeveloped and open. The proposed development would run counter to this scheme and as it would represent unacceptable urban development outside the limits to development as defined by such Scheme. The boundaries, the layout and other provisions of the Temporary Provisions Schemes are endorsed by Structure Plan Policy SET 8, and therefore the proposal would be in conflict with this Policy.

2. The proposed development conflicts with Structure Plan Policy SET 11, which does not permit urban development outside existing and committed built-up areas. The development does not fall into a category of non urban development which may be permitted outside existing or committed built-up areas in accordance with Paragraph 7.6 of the Structure Plan. The proposed development also therefore runs counter to policy BEN 5.

3. There is no justification for the development of this site as required by Structure Plan Policy SET 12. It is apparent that there are no reasons, from a planning point of view, why the proposed development cannot be located in an area designated for development or in an existing built-up area.

4. The site lies in a Rural Conservation Area (as designated by the Structure Plan and indicated on the Key Diagram). The proposal does not comply with Structure Plan Policy RCO 2 which clearly states that no form of urban development will be permitted within Rural Conservation Areas.

5. The proposal does not fall within one of the categories of development, namely structures or facilities essential to agricultural, ecological or scenic interests, which may be permitted in Rural Conservation Areas where they meet the principles and criteria set out in Structure Plan policy RCO 4. The proposal is not essential to, nor does it enhance agricultural, ecological, or scenic interests.

6. Structure Plan Policy RCO 4 provides that, particularly within Rural Conservation Areas, areas of scenic value will be protected and enhanced. The area in which the site is located is of considerable scenic value. The proposal would detract from this, and so it would conflict with Structure Plan Policy RCO 4.

7. The site is located on the side of a valley and the proposed development does not fall into one of those categories of development permitted in this type of location. It would therefore run counter to Structure Plan Policy RCO 29, which prohibits new physical development on the sides of valleys.

8. The site is located in an Area of Ecological Value and Site of Scientific Importance, in accordance with Structure Plan Policies RCO 10 and RCO 11, where further human intervention, particularly in the form proposed, is not desirable. The proposal would therefore adversely affect the area, hinder its protection, and run counter to the rural conservation and ecological objectives of the Structure Plan.

9. Development of this site would constitute an extension to the boundary of the limits to development as defined by the Temporary Provisions Schemes. The Planning

Authority may review the boundary for development, if necessary, through the Local Plan process as proposed in Structure Plan Policies SET 8 and BEN 4. Piecemeal amendments to this boundary are not appropriate and, since the Local Plan for the area has not been prepared, the proposal is considered to be premature and therefore counter to Structure Plan Policies SET 8 and BEN 4.

10. The design of the proposal is unacceptable and it is considered to be inappropriate to the area in which it is proposed to be located. The development is unlikely to maintain the visual integrity of the area and it is therefore counter to Structure Plan Policies BEN 1 and BEN 2, which do not permit development that would create a visual intrusion and which is incompatible with the environmental characteristics of the area.

11. The proposal runs counter to Structure Plan policy SOC 20 as it is not located in the vicinity of health centres, social centres, shops and public transport.”

4. Billi l-appellat hassu aggravat minn din id-decizjoni tal-Kummissjoni, huwa appella minnha quddiem il-Bord ta' l-Appell dwar l-Ippjanar ('Il-Bord") testwalment hekk:-

“My client is appealing from this decision as the reasons therein stated for the refusal are generally unsound and do not reflect a proper assessment of the circumstance of the appellants application. It is submitted that a proper assessment of the policies mentioned in the refusal were applicable to my client's site should have brought the Development Control Commission to a conclusion of granting that permit and not refusing it. These grounds for refusal will be dealt with in detail in the course of the hearing of the appeal. The appellant however submits that the grounds as stated there are generally unsound and do not reflect the position of the site and the circumstances of the development and its protected views. The appellant submits that the site in question is ideal for the projected development and especially when one considers the development that has been allowed to take place in the area even in areas specifically designated as outside development scheme is not

apparent while the proposal of the appellant should be refused as it has been done by the Development Control Commission.”

5. Il-Bord wara li ra l-file PA 1252/96 u ikkonsidra s-sottomissjonijiet orali u bil-miktub tal-partijiet, zamm access fuq il-post fit-3 ta' Gunju, 1998. Il-Bord ta d-decizjoni tieghu fis-7 ta' Ottubru 1998. Din id-decizjoni tirriproduci testwalment parti mis-sottomissjonijiet bil-miktub tal-kontendenti u tikkonkludi billi tilqa' l-appell, thassar ir-rifjut relattiv u tordna lis-segretarja tal-Kummissjoni sabiex tohrog il-permess (outline) 1252/96 fi zmien tletin jum mid-data ta' l-istess decizjoni.

6. Il-Bord wasal ghal din id-decizjoni wara li kkonsidra hekk:-

“Huwa importanti l-ewwelnett li jigi kjarifikat li hawn li stratta ta' “Outline Development Application” li jfisser li esitu favorevoli jwassal imbaghad ghall-applikazzjoni ohra “full development” taht kundizzjonijiet (jekk hemm) imposti fl-“outline development application”.

Hemm xi punti li jridu jigu kjarifikati:

1. Il-fatti ta' dan il-kaz juru bl-aktar mod car illi s-sit huwa mal-genb ta' tlett siti ODZ li huma muniti bil-permess ta' vilel. Fuq il-parti ta' wara tas-sit hemm imbaghad diversi vilel mibnija fi zona ta' zvilupp. Ghalhekk is-sit huwa **marginalment** il-barra miz-zona ta' zvilupp u jmiss (jew kwazi) ma zviluppli li huma l-barra miz- miz-zona ta' zvilupp relattiva.

2. Irid jizdied ukoll illi l-inhawi kollha kemm hi minn “Busietta Gardens” sas-sit de quo hija dotted bi diversi vilel “high class” lkoll muniti bi permess relattivi. Ghalkemm si tratta certament ta' ODZ area hemm certu ammont ta' commitment in generali limitament ghal vilel ta' certu tip u entita'.

3 L-appellant indika li huwa lest li jaccetta kwalunkwe tibdil fil-pjanti kemm fis-sulari, fid-design u fil-landscaping jekk huwa l-kaz. Huwa minnu li fil-formula relattiva kull

ma zamm bhala reserved kienu “siting” u “external appearance” u ma nzammewx bhala “reserved” id-disnn u landscaping IZDA:

- si tratt biss ta' formula ta' applikazzjoni u zgur li meta giet krejata l-Awtorita` hadd ma kellu f'mohhu li applikazzjoni tigi rifjutata ghax hemm “tick” nieqsa.
- si tratta ta' “outline development” illi fl-ahhar mill-ahhar hija essenzjalment turija ta' intenzjoni ta' zvilupp billi trid issir applikazzjoni ohra.
- il-Bord ta' l-Appell ghandu kull dritt li jaccetta jew ma jaccettax disinni jew pjanti anke jekk mhux “ticked”.

4. Artiklu 9.6 tal-Istructure plan tghid **bl-aktar mod car** illi “homes for the elderly” “may need to be located outside or adjacent to existing built up areas as defined in the structure plan...”.

5. L-Objections li saru jidhru li primarjament huma koncernati dwar l-entita` tal-izvilupp specjalment l-gholi.

6. L-applikazzjoni kellha no-objections tad-dipartimenti koncernati – Id-dipartiment tal-Argrikoltura innotat illi “such large buildings will surely have and (sic!) adverse effect on such scenic beauty”.

Huwa minnu illi si tratta ta' sit li jhares fuq Wied ta' certu “scenic beauty” izda l-Bord ma jistax jittraskrura l-commitment gja imsemmi u l-fatt li si tratta ta' “outline development”. Mhux ser ikun hemm ebda impatt negattiv fuq sitwazzjoni fattwali gja ezistenti.

Ghalhekk il-Bord huwa tal-fehma illi s-sit in kwistjoni huwa sit adattat ghall-izvilupp propost billi huwa sitwat “adjacent ta' existing built-up area” u jaqa' ghalhekk pjenament fil-parametri tal-artikolu 9.3 tal-Istructure Plan.

Il-Bord pero` irid jaghmel certu kundizzjonijiet li ghandhom jigu riflessi fil-“full development application”;

1. li l-izvilupp propost ikun simili ghal design u kundizzjonijiet ta' vilel

2. li l-bini ghandu jkun “terraced” sabiex jirrispetta “the contours of the slope”

3. li ghandu jkun hemm spazju bizzejjed mill-Victoria Lines sabiex ikun hemm access ghall-pubbliku u ma jsir l-ebda dannu lil Victoria Lines

4. Is-siting tal-bini ghandu jkun mat-triq sabiex imbaghad isir landscaping adegwat fil-parti t'isfel tas-sitt vicin il-Wied sabiex il-bini jkun konsonanti mal-bqija tal-bini fil-lokalita`.

5. Il-landscaping ghandu jkun tali li jikkreja ammont ta' screening konsiderevoli mill-punto di vista tan-naha l-oħra tal-wied.”

II APPELL

7. L-Awtorita` appellat minn din id-decizjoni tal-Bord b'rikors ipprezentat quddiem dina l-Qorti fis-16 ta' Ottubru 1998. Ghar-ragunijiet spjegati fl-istess rikors, l-Awtorita` talbet li din il-Qorti joghgobha thassar id-decizjoni appellata tal-Bord fl-intier tagħha u tibghat l-atti lura lill-Bord biex jerga jisma' l-appell “fil-limiti mitluba mill-istess appellanti”.

8. Fir-risposta tal-appell tieghu, l-appellat ressaq eccezzjoni preliminari u rrileva li d-decizjoni tal-Bord kienet korretta u ghalhekk sostna li din ghandi tigi konfermata u l-appella ghandu jigi michud.

III KONSIDERAZZJONIJIET TA' DINA L-QORTI

9. Bazikament l-aggavji li ressqet l-Awtorita` jistghu jigu migbura taht raguni generali wahda u cjoe` li fid-decizjoni tieghu, l-Bord agixxa “ultra vires”. L-Awtorita` tallega li l-operat tal-Bord huwa “ultra vires” taht erba' aspetti, li l-Qorti sejra tfisser fi kliemha stess u telenkahom b'dan il-mod:-

(a) Il-Bord identifika s-sit in kwistjoni bhala li qieghed f'zona barra l-izvilupp izda adjacent ma' zona fejn l-

izvilupp huwa permess. Pero`, meta l-Bord laqa' l-appell, huwa agixxa "ultra vires" ghaliex assuma poteri semi-ezekuttivi billi estenda l-limiti taz-zona ta' zvilupp.

(b) Meta l-Bord irrefera ghall-paragrafu 9.6 tal-Pjan ta' Struttura biex jiggustifika d-decizjoni tieghu, huwa halla barra parti sostanzjali tal-paragrafju fejn jinghad "Locations will be identified in confirmation with the Planning Authority and added to the Structure Plan". Din is-sentenza tindika li biex jizjeddu zoni ohri, fejn zvilupp ta' din in-natura jista' jsir, ikun hemm bzonn ta' revizjoni tal-Pjan ta' Struttura. Il-Bord spicca biex estenda l-iskema ta' zvilupp u b'hekk assuma funzjoni ta' l-istess Parlament ta' Malta.

(c) Il-Bord agixxa "ultra vires" anke ghaliex ma qghadx ghal dak li talab l-appellat fl-applikazzjoni tieghu.

(d) Il-Bord agixxa "ultra vires" ghax ma iddecidiex fuq il-pjanti li ssottometta l-appellat mal-applikazzjoni tieghu.

10. L-appellat ressaq eccezzjoni preliminari fil-konfront ta' l-appell odjern. Qed jaghlegga li l-appell huwa null billi ma hemm l-ebda punt ta' ligi deciz mill-Bord fuq liema l-Awtorita` setghet tintavola appell.

11. M'hemmx dubbju li l-aggravji tal-Awtorita` bazat fuq il-kuncett ta' "ultra vires" jinvolvu punt ta' dritt. Il-kwistjoni jekk jinvolviv ukoll punt ta' dritt deciz mill-Bord giet investagata diversi drabi minn din il-Qorti f'diversi sentenzi ricenti. Gie deciz li l-Bord, meta jaghti d-decizjoni li jkun ta, ikun "iddecieda" li ghandu s-setgha li jaghtiha dik id-decizjoni. B'hekk, din il-kwistjoni tkun giet deciza, sia pure indirettament, mill-Bord. Isewgi li l-pregudizzjali tal-appellat ma tistax tintlaqa' u qeghda tigi respinta.

12. Fir-risposta tieghu, l-appellat irribatta hekk ghall-aggravji mressqa f'dan l-appell:-

"L-aggravji migjuba 'l quddiem mill-appellant la huma fondati fil-fatt u lanqas fid-dritt. L-argument principali tal-appellant huwa li l-Bord ta' l-Appell biddel il-Pjan ta'

Struttura. Dan ma hux assolutament il-kaz. L-unika haga li ddecieda l-Bord kien li skond il-policies vigenti, it-tip ta' struttura proposta setghet issir f'arja li kienet ODZ purke` jigu osservati certu parametri. Huwa notorju fil-fatt li l-policies innifishom jippremettu diversi tipi ta' svilupp f'arji markati bhala zoni barra zvilupp, u jezistu diversi permessi ta' dan it-tip. Kull ma ghamel il-Bord kien li applika dawk il-policies biex jiddetermina jekk tali permess kellux jinghata. F'tali determinazzjoni m'hemm involut l-ebda punt ta' dritt u kull ma kien hemm involut huwa l-uzu tad-diskrezzjoni taghhom fl-apprezzament tal-fatturi kollha rilevanti ghal din id-decizjoni.

It-tieni argument huwa li l-Bord ma setax biddel totalment il-pjanti. Dan l-aggravju jinza (sic) kompletament li l-Bord iddecieda li hawn si tratta ta' "outline application" u agixxa fuq dik il-bazi."

13. Fid-dawl ta' din il-kontestazzjoni, il-Qorti sejra tinvestiga l-aggravji tal-Awtorita`, biex tara jekk humiex ben fondati jew le u sejra tinvestigahom mhux fl-ordni elenkata f'din is-sentenza izda serja tibda mit-tielet aggravju.

14. F'dan it-tielet aggravju l-Awtorita` qeghda tallega li l-Bord agixxa "ultra vires" ghaliex ma qaghadx ghal dak li l-appellat talab fl-applikazzjoni tieghu ghall-permess ta' zvilupp "outline" in kwistjoni. Dan l-aggravju huwa bazat fuq il-fatt li fuq il-formola ta' din l-applikazzjoni, ezattament fil-parti 8 taghha (ara fol 8 tal-process), hemm imnizzel hekk:-

"TICK AND DESCRIBE those matters that are reserved for further approval"

Fuq l-applikazzjoni zewg "items" huma "ticked" jew immarkati u cjoe` "SITING" u "EXTERNAL APPEARANCE". Hdejn ta' l-ewwel tnizzlet ir-rimarka : "SITE SHOULD BE WITHIN DEV. ZONE BUT HAS BEEN OBJECTED" waqt li hdejn it-tieni item, li gie mmarkat, tnizzlet ir-rimarka: "SHOULD NOT ENCUMBER BEAUTY OF VALLEY BELOW". L-"items" l-ohra cjoe` "DESIGN", "MEANS OF ACCESS", "LANDSCAPING" u "OTHERS

(SPECIFY)" ma gewx immarkati. Mela, b'din l-applikazzjoni, l-appellat kien qiegħed jittlob li l-kwisjtonijiet tas-"siting" u tal-"external appearance" ma kellhomx jigu decizi fuq din l-applikazzjoni izda kellhom ikunu "reserved for further approval".

15. F'dana l-istadju huwa opportun li tigi citata il-Policy BEN 8 tal-Pjan ta' Struttura sabiex toħrog cara id-differenza li tezisti fil-ligi bejn "Outline Permit" u "Full Permit".

"POLICY BEN 8: Intending applicants for permission to develop are advised to consider applications for outline permits which establish the principles and general characteristics of a development proposal before the applicant is faced with the expense of the more detailed application for a full permit to develop. Where this procedure is used, the application fee will be payable for the outline application only.

Two types of development permit can be granted:

1. OUTLINE PERMIT which gives approval in principle to the proposed development, but specifies reserved matters which need to be included in a full permit application or applications. A time is given within which full permit applications shall be submitted otherwise the Outline Permit becomes invalid. No development may commence without a full permit.

2. FULL PERMIT which is required before any development can commence whether or not an Outline Permit has been issued. Full permits will also include Conditions which must be followed by the development."

16. Nonostante li l-kwistjoni tas-"siting" u l-kwistjoni tal-"external appearances" l-appellat riedhom li jkunu "reserved", u cjoe`, fi kliem BEN 8, "which need to be included in a full permit application", il-Bord iddecieda hu stess dawn il-materji fuq l-outline application li kellu quddiemu. Fil-fehma tal-Qorti, il-Bord ma kienx korrett

meta ghamel hekk, ghaliex kien dover preciz tieghu li joqghod strettament ghat-talba tal-appellat, kif maghmulha fl-applikazzjoni tieghu, u li jiddeciedi l-kwistjoni fil-parametri tal-istess talba. Il-Bord ma kellux jiddeciedi materji li l-appellat stess ried li jithallew ghal “full permit application”. Jekk l-appellat, fil-pendenza tal-applikazzjoni bidel fehmtu, huwa kellu jiehu l-passi necessari biex jitlob li ssir korrezzjoni fl-applikazzjoni tieghu jew jaghmel applikazzjoni ohra, jekk tali talba ghall-korrezzjoni ma tkunx konsentita. Din mhix xi semplici kwistjoni ta' formalizmu izda kwistjoni ta' prattika tajba, bazata fuq is-serjeta` intrinsika li applikazzjoni li tirrigwarda zvilupp ta' certa entita`, bhal dik in kwistjoni, ghandu jkollha.

17. X'aktarx li l-Bord gie zvizjat f'dan l-operat tieghu mill-agir stess tal-Awtorita`. Infatti, meta din tat ir-ragunijiet taghha ghar-rifjut, ibbazat tista' tghid ir-ragunijiet kollha taghha ezattament fuq iz-zoning tas-sit indikat mill-appellat fl-applikazzjoni tieghu. L-Awtorita` enfasizzat li dana kien wiehed 'l barra minn zona ta' zvilupp, f'“Rural Conservation area”, f'area ta' “considerable scenic value”, f'area ta' “ecological value” u “on the side of a valley” u citat il-Policies tal-Pjan ta' Struttura relattvi biex tiggustifika r-rifjut li tat ghall-progett tal-appellat.

18. Ghalhekk, din il-Qorti jidhrilha li t-tielet aggravju tal-Awtorita`, u cjoe` li l-Bord kien “ultra vires” fil-konfront tal-kontenut ta' l-applikazzjoni nnifisha, huwa gustifikat.

19. Konness mat-tielet l-aggravju hemm ukoll ir-raba' aggravju, li huwa fis-sens li l-Bord agixxa “ultra vires” meta ma ddecidiex fuq il-pjanti li l-appellat ressaq ma' l-applikazzjoni tieghu. L-Awtorita` tilmenta li l-Bord, minflok ma ibbaza d-decizjoni tieghu fuq dawk il-pjanti, skarta l-istess pjanti u ddecieda li jimponi certi kondizzjonijiet li kellhom “jigu riflessi fil-full development application” u rabat lill-Kummissjoni li “tohog il-permess (outline) 1252/96 fi zmien tletin jum mil-lum”.

20. Din il-Qorti jidhrilha li anke dan l-aggravju huwa ben fondat. Il-Qorti tinsab perplessa kif l-Awtorita` tista' tohog permess “outline”, kif ordnalha l-Bord, meta d-decizjoni

tal-Bord tidher in parti tant vaga u neboluza u kwazi fit-totalita` kollha taghha ma tirrispettax it-talbiet partikolari li l-appellat ghamel fl-“outline application” tieghu. Infatti l-Bord, kif diga` intqal, iddecieda materja li kellha tibqa` riservata ghal “full development application” u ma ddecidiex kwistjonijiet li johorgu mill-pjanti esebeiti ma` l-applikazzjoni u li fil-fatt intalab li jigu decizi.

21. Din il-Qorti diga` affermat f`decizjonijiet ricenti taghha, li l-Bord certament, igawdi certa flessibilita` fl-ezercizzju tas-setghat konferiti lilu fil-ligi, u hawn issir riferenza ghas-sentenza moghtija fil-31 ta' Mejju 2002 minn dinil-Qorti fil-kawza “Zaren Grima vs Kummissjoni ghall-Kontroll ta' l-Izvilupp.”

22. Pero`, din il-flessibilita` ma tistax tigi estiza sal-punt kif il-Bord ipprova jestendiha, fil-kaz odjern, ghaliex meta jjiigri hekk il-Bord ikun oltrepassa l-limiti tas-setghat gurdizzjonali konferiti fuqu mil-ligi. Ezempjij ta' operat simili johorgu minn gurdprudenza ta' din il-Qorti, fosthom il-kazijiet ta' Joe Cortis (27/2/96), John Pace (31/5/96), Francis Pace (7/10/97) u Carmelo Fenech (15/12/97).

23. La darba l-Qorti waslet ghal din il-konkluzjoni, ma tara ebda utilita` li tkompli tinvestiga l-aggravji l-ohra tal-Awtorita`, li wkoll jitrattaw aspetti ohra tal-kuncett ta' “ultra vires”.

24. Ghal dawn il-motivi, tilqa' l-appell, tirrevoka d-decizjoni appellata tal-Bord, tpoggi l-kontendenti fl-istess stat li kienu fih qabel inghatat id-decizjoni imsemmija tal-Bord, u tordna li l-atti jigu rinvjati lill-Bord sabiex fid-dawl ta' dak li ntqal f`din is-sentenza, ikompli jisma' l-appell in kwistjoni u jiddeterminah skond il-ligi.

Fic-cirkostanzi, l-ispejjez ta' dana l-appell jibqghu bla taxa bejn il-kontendenti.

-----TMIEM-----