



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-20 ta' Gunju, 2013

Appell Civili Numru. 119/2012

Joseph Delia

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Joseph Delia tal-10 ta' Lulju 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-21 ta' Gunju 2012 li cahdet l-applikazzjoni PA 3431/06 ghal sanzjonar ta' bini ezistenti u bdil ta' uzu ghal facilitajiet ta' agro-turizmu;

Rat ir-risposta tal-Awtorita li ssottomettiet il l-appell ghandu jigi michud u d-decizjoni tat-Tribunal tigi konfermata;

Kopja Informali ta' Sentenza

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

A. B'applikazzjoni tas-26 ta' Mejju 2006 - Full Development Permission – PA/03431/06 fejn l-appellant, f'Site at, Taz-Ziri, l/o Siggiewi talab: "To sanction existing building and change use to agro-tourism facilities."

Illi l-Awtorita cahdet it-talba ghall-hrug tal-permess relattiv ghar-ragunijiet segwenti:

"1. The proposed development conflicts with Structure Plan Policy SET 11, which does not permit urban development outside the limits of development. 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.

2. 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.

3. The proposed development does not fall within one of the categories of development, namely structures or facilities that are really 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. In this respect, the buildings are considered as unacceptable also in terms of North West Local Plan policy NWAG 1.

4. This application seeks permission for sanctioning of existing structures on site, thus running counter to Policies 3.3B and 3.4B of the Policy and Design Guidance:

Agriculture, Farm Diversification, and Stables, which does not allow for new development of agro-tourism accommodation and/or visitor centres, and solely seeks the rehabilitation of existing abandoned buildings for such uses."

B. Illi l-perit Robert Musumeci ressaq l-aggravji tal-appellant inter alia kif gej:

"1. Although the proposal, prima facie, does not necessarily adheres fully to all the design requisites laid out in the active policy guidelines, it may be safely considered within the spirit of Structure Plan Policy RCO 41 which encourages the establishment of field centres and of 'interpretive Visitor Centres associated with Conservation Areas.'

2. The proposal must be therefore assessed within the broad framework of Policy 3.4 Agro-Tourism Accommodation Policy [...]

3. The development is precisely aimed to allow farm-based accommodation, where the visitor stays overnight in a rural building within the boundaries of an operational farm. The main activities of the visitor also involve some hands-on experience in the basic day-to-day operation of the farm [...]

4. The operation of the farm and the operation of the building where the tourism accommodation is provided shall be managed by applicant who is a farmer

5. The scale of the development is relatively small, with the onus of the activity being mainly limited to serviced or self catering in line with the key objectives of Policy 3.4. The predominant use of the area is to remain agricultural, and the proposal will result in further encouragement of agricultural activity

6. In line with the provisions of Policy 3.4, the proposed use is complementary and ancillary to the operation of the applicant's established farming enterprise and will not

lead to the cessation of the applicant's farming enterprise or adversely affect its viability or operations.

7. The existing building, in terms of design, scale, form and mass, is compatible with the character of the surrounding rural area and is not intrusive in the landscape [...]

8. The development shall not be used as a dwelling or as a residential institution.”

C. Illi l-Awtorita, permezz tar-rapport taghha, ressqet il-kummenti taghha inter alia kif gej:

"5.1.2 [The] site is presently covered by an enforcement notice ECF 315/06 [...]: 'Ghandek zvilupp minghajr permess li jikkonsisti minn bini ta' kmamar li qed jintuzaw bhala residenza (farmhouse), garaxx, pavimentar kif ukoll ma giex osservat il-permess PA 4600/01 datat 8 t'April 2002 u dan peress li ma thawwlux is-sigar indikati fil-pjanti approvati.'

5.1.3 In this respect, since the building which is presently used for habitation and the garage were constructed without permit, the site is to be considered as not having any (legal) commitment apart from a permitted reservoir (agriculture related) and a small pump room.

5.1.4 The Authority thus state that while it is correct for appellant to state that the PDG - Agriculture, Farm Diversification and Stables, December 2007 policy document caters for eligible agro-accommodation in ODZ, it is equally important to list the approved criteria which could permit such a development.

5.1.5 Appellant is citing Policy 3.4 of this policy document to be the relevant policy, hence the Authority will inform the Board the details of this policy vis-a-vis the case under appeal. This policy's first criteria states that:

'1. Permission may be granted for the conversion of an underutilized or abandoned agricultural building for agro-

tourism accommodation ODZ, provided that all of the following criteria are satisfied.'

In the case under appeal, the request does not involve a conversion of an old structure but the sanctioning of a new, illegal structure used for habitation (illegally). Hence, policy 3.4A is clearly not applicable for the proposed used.

Criteria no. 7 of 3.4A also states that:

'7. the proposed agro-tourism accommodation has a total floorspace (measured externally) of not more than 10% of the floorspace of the existing farm buildings on-site (measured externally). However, the permitted total floorspace for agro-tourism accommodation use shall, under no circumstances, exceed 100 square metres measured externally).'

In the case under appeal, the total footprint of the buildings proposed for agrotourism use amounts to 150 sq. m. and constitutes 100% of the total floorspace of the buildings within the area. Hence the development being requested for sanctioning and for a change of use is not eligible through this policy.

5.1.6 Furthermore, the same policy document includes Policy 3.4B which states that:

'New buildings for agro-tourism accommodation
Permission will not be granted for the construction of a new building for agro-tourism accommodation, except in rural settlements as designated in a Local Plan, and in accordance with the relevant policies of that Plan.'

In this regard, Policy 3.4 further clarifies that all agro-tourism accommodation is solely considered when old, underutilized or abandoned buildings in ODZ could be re-utilized for such an activity (under strict criteria) as per policy 3.4A and further imposes through policy 3.4B that no new buildings could be constructed in ODZ for such a use. This is directly relevant to the case under appeal since the existing buildings having a total footprint of 150

sq.m. were not legally built and hence, are not considered as old, underutilized or abandoned buildings which merit redevelopment through conservation and reuse.

5.1.7 In addition to the above and in line with reason for refusal no. 4 of the refusal notice, Policy 3.3 of the same policy document also apply. In fact, Policy 3.3A states that:

'Conversions to visitor attractions

Permission may be granted for the change of use or conversion of an abandoned agricultural building, or a building of historical or architectural value, to a visitor attraction use which will enhance the experience of visitors, including tourists, to rural areas, provided that all of the following criteria are satisfied. [...]."

D. Illi permezz ta' rikors il-Perit Robert Musumeci ressaq is-sottomissjonijiet tieghu inter alia kif gej:

"2. In kwantu ir-ragunijiet tar-rifjut sollevati minn 1 sa 3 (riprodotti f'paragrafu 3 ta' listess ittra ta' l-Awtorita), irid jigi sottomess li kwalsijasi facilita ta' agro-turizmu hi intimament marbuta ma' zona li tinsab barra l-iskema ta' l-izvilupp. In ogni kaz, l-Awtorita ma tistax fluq naha wahda tinkoragixxi din it-tip ta' attivita (ara Policy 3.4 tal-Policy and Design Guidance for agricultural buildings, 2007) billi sahansitra stabbiliet li dak il-bini li kien jesisti qabel il-promulgazzjoni ta' dawn il-gwidi fl-2007 jista' jigi ikkunsidrat ghal tali attivita (u dan peress li tali bini ma jaqax that il-kategorija ta' new buildings), u fl-istess nifs tinsisti li tali attivita ma tistax tigi akkomodata barra l-iskema ta' l-izvilupp! Kif inghad fil-premess, bil-promulgazzjoni tal-Policy and Design Guidance for Agricultural Buildings (2007), gie stabbilit li tali zvilupp huma permessi barra l-iskema ta' l-zvilupp, dan purche l-bini ikun gja mibni f'perjodu antecendnti ghal Dicembru 2007. Jikkonsegwi allura, u dan partikularment fid-dawl ta' tali kunsiderazzjonijiet, li il-bini mertu ta' dan l-appell huwa sanzjonabbli purche l-uzu tieghu jigi definit kif indikat fil-proposta.

Illi dwar ir-raba raguni tar-rifjut, fejn issir riferenza ghal Policy 3.3B u 3.4B tal-Policy and Design Guidance for Agricultural Buildings (2007) qed jigi sottomess mill-gdid li l-izvilupp in kwistjoni ma jinkwadrax bhala new building u dan stante li d-dokument Policy and Design Guidance for agricultural buildings (2007) jistabilixxi inter alia li a new building refers to the construction of a building over un-built land after the adoption of this Policy & Design Guidance', u cioe bini li nbena wara Dicembru 2007. Issa, fil-kaz in ezami, il-bini kien diga jesisti meta dahal fis-sehh id-dokument Policy and Design Guidance for agricultural buildings (2007), tant li ntabab sanzjonament dwaru permezz ta' din l-applikazzjoni dak in-nhar tas-26 ta' Mejju 2006. Percio, jikkonsegwi li il-policies li gew citati fir-ragunijiet tar- rifjut, u cioe Policy 3.4 B u Policy 3.3 B, ma humiex applikabbli fil-kaz odjern, stante li dawn ilkoll jitrattaw new buildings, u cioe binjiet li gew konstruwiti wara Dicembru 2007."

E. Illi permezz tat-Tieni Statement taghha l-Awtorita ressqet il-kummenti ulterjuri taghha kif gej:

"1.1 [...] With regards to new building, in this PDG for agriculture guidelines under the heading Glossary of Terms-'new developments' states that 'unless otherwise indicated, new development shall be taken to refer to legal development permitted after the adoption of this Policy & Design Guidance'. [...] On this site under appeal only a reservoir (agriculture related) and a small pump room has been permitted in PA 4600/01.

1.2 The appellant also remarked that this activity (agro-tourism) does not fall within a new building as per PDG Agriculture since the building existed before December 2007. Appellant added that this request was submitted on 26.5.06 and reasons for refusal and therefore Policy 3.48 are not applicable as these are treated for 'new building' in which building that were constructed after December 2007. The Authority is also not in agreement with these statements since although it existed prior to the issue of PDG for agriculture (January 2008) this building has been built illegally [...].

1.3 Point 3 by appellant is stating that Policy 3.4B of PDG Agriculture does not apply since the request was submitted before January 2008. However the Tribunal is to note that DCC 133-01A107 meeting held on 21 November 2007 (minute 45) deferred case at architect's request pending the approval of relevant policies (NTC 8 in DPAR blue 48) and the first decision (Refusal) by the DCC have been taken on 3rd June, 2008. The Local Plan Interpretation Document (section ii) specifies that all planning applications which were still pending as on 3rd August 2006, the date of formal approval by the Hon. Minister of the Local Plan, or which having been referred to the relative decision making body (MEPA, DCC or Appeals' Board) prior to such date, but no decision (minuted) has been taken prior to such a date, are to be assessed and determined with the current policies, i.e. including the Local Plan."

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba ghall-issanzjonar ta' bini ezistentiu tibdil fl-uzu ghall-iskop tal-agriturismu. Is-sit mertu ta' dan l-appell jinsab f'Taz-Ziri, limiti tas-Siggiewi.

Din l-applikazzjoni giet rifjutata peress li l-izvilupp propost mhuwiex in linea mal-policies SET 11, BEN 5, RCO 2 u RCO 4 tal-Pjan ta' Struttra, kif ukoll tal-policy NWAG 1 tal-Pjan Lokali u i-policies 3.3B u 3.4B tal-Policy and Design Guidance - Agriculture, Farm Diversification and Stables.

L-argumenti li tqajmu mill-partijiet fil-kors tas-smiegh ta' dan l-appell jistghu jigu migburin fil-qosor kif gej:

- L-appellant jissottometti li l-progett ghandu jigi kkunsidrat fl-ambitu tal-pjan ta' struttura RCO 41, li l-progett huwa zghir, huwa kompatibbli mal-inhawi u li sejjer jintuza strettament ghal skop limitatament marbut mal-operat tal-agroturizmu, u mhux bhala residenza;

- L-Awtorita tissottometti li fuq is-sit jezistu illegalitajiet koperti b'ordni ghall-infurzar ECF 315/06, u li fil-generalita l-kriterji tal-policy relativa li tippermetti zvilupp ghal skop t'agriturismu mhumiex sodisfatti.

Ezaminati fid-dettal is-sottomissjonijiet tal-partijiet johrog li l-proposta hi in kontravvenzjoni tal-policies tal-Pjan ta' Struttura li ma jippermettux bini barra z-zona tal-izvilupp, b'mod partikolari bini li ghandu xehta urbanizzanti u li m'ghandux bhala ghan l-ammeljorament tal-karatteristici ambjentali (agrikoli, ekoloigici u xenografici) tal-kampanja. In oltre il-proposta hi f kunflitt mal-Policy and Design Guidance - Agriculture, Farm Diversification, and Stables li ma tippermettix zvilupp konsistenti mal-attivita gdida ta' agroturizmu eccetti dawk li ghandhom bhala mira r-riabilitazzjoni ta' strutturi mitluqa jew abbandunati fil-kampanja.

L-aggravji tal-appellant jsitriehu fuq il-fatt li l-izvilupp propost a prima facie jaghti l-impressjoni li jmur kontra l-policies citati fir-rifjut, izda li mhux il-kaz. Ic-centru ta' interpretazzjoni kif propost ghandu bhala ghan is-sensitizzazzjoni tal-konservazzjoni tal-kampanja u li ghalhekk il-proposta ghandu tigi kkunsidrata pienament fid-dawl tal-policy 3.4 - Agro-tourism Accommodation Policy. Jissokta jispjega li hu jahdem bhala bidwi u li l-izvilupp propost tant ghandu qisien zaghar li minn aspett t'impatt fuq il-kampanja, ser jirrizulta insinifikanti, u li ghalhekk ser jintegra sew mal-ambjent fejn qed jigi propost. In oltre jiddikjara li mhix l-intenzjoni tieghu li juza din il-proprjeta bhala dar jew residenza.

L-Awtorita tirrileva li prezentement is-sit hu milqut b'avviz ta' twettieq (ECF 315/06) propju minhabba l-fatt li qed jintuza bhala residenza (i.e. abitazzjoni inkluz garaxx) u ghax ma gewx rispettati l-kundizzjonijiet li kienu gew imposti permezz tal-permess PA 4600/01, cjoe ghax ma thawlux is-sigar indikati fil-pjanti approvati.

Fir-rigward tal-policy li tirregola l-agroturizmu, jigi rilevati li i-policies 3.3 u 3.4 jippermettu inter alia r-riabilitazzjoni ta' bini abbandunati, previa kundizzjonijiet specifici bhal per

ezempju; li bini jkollu karatteristici worthy of preservation, etc.; izda binjiet godda huma eskluzi a priori. Il-kaz in ezami si tratta minn bini gdid li tela' illegalment u li qed jigi ttentat is-ssanar tieghu. In oltre l-policy 3.4A tispecifica li l-facilita tal-agroturizmu trid tokkupa mhux aktar minn ghaxra fil-mijja tal-bini ezistenti u in ogni caso mhux aktar minn mitt metru kwadru. Fil-kaz in ezami, qed tigi proposta attivita tal-agroturizmu mifruxa fuq 150 metru kwadru u li tokkupa l-binja kollha.

L-Appellant jispjega li huwa non sequitur li; minn banda, l-Awtorita tinkoragixxi l-attivita ta' agroturizmu u mill-banda l-ohra ma tippermettix il-bini ta' strutturi godda barra z-zona tal-izvilupp. Fic-cirkostanzi irid jigi rilevat li dan it-tip t'argument hu monk ghall-ahhar, ghax dak li hu zgur hu li sabiex tigi sostenuta attivita partikolari (tkun xi tkun u mhux bilfors ta' agroturizmu) ma jsegwix li bilfors isegwi li ghandu jigi tollerat zvilupp gdid. Il-principju ta' change of use huwa ben risaput u sostenut minn kwalsiasi regime t'ippjanar - u binja antika li jkun spiccata l-uzu originali tkun tista' tigi riabilitata prevja li jinstabilha uzu kompatibbli.

In oltre, l-Appellant jissokta l-argument tieghu billi jispjega li peress li l-bini in ezami tela' (guarda caso illegalment) qabel ma dahal fis-sehh il-Policy and Design Guidance fl-2007, ghandu fic-cirkostanzi jitqies bhala old building. Anke hawnhekk si tratta ta' linja ta' argumentar monk, ghax anke fir-rigward ta' zvilupp gdid, il-glossarju tal-Policy and Design Guidance - Agriculture, Farm Diversification and Stables jispecifica li:

"unless otherwise indicated, new development shall be taken to refer to legal development permitted after the adoption of this Policy & Design Guidance".

Fic-cirkostanzi, l-unika zvilupp legali li jirrizulta fuq is-sit (u li hu kopert b'permess) huma l-giebjja u i-pump room koperti bil-permess PA 4600/01.

Fl-ahhamett, l-Awtorita tirrileva li permezz ta' laqgha li saret mal-perit konsulent tal-Appellant (DCC 133-

01A107), l-istess perit talab diferiment propju sabiex din l-applikazzjoni tigi deciza wara li jidhol fis-sehh il-planning regime il-gdid (NTC 8 fid-DPAR, blue 48). Fil-Local Plan Interpretation Document (section ii), hemm indikat li applikazzjonijiet ghall-izvilupp li kienu ghandhom pendent sat-3 t'Awwissu 2006, ghandhom jigu kkunsidrati skond il-policies il-godda, u allura l-Awtorita imxiet tajjeb meta ddecidiet din l-applikazzjoni skond il-parametri tar-regime tal-ippjanar il-gdid.

Ghalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, u fuq kollox sabiex ikun konformi mal-policies tal-ippjanar vigenti, dan it-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma r-rifjut ghall-PA 3431/06 mahrug mill-Kummissjoni ghall-Kontroll ta' l-Izvilupp, fis-6 ta' Frar 2009.

Ghalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, u fuq kollox sabiex ikun konformi mal-policies tal-ippjanar vigenti, dan it-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma r-rifjut ghall-PA 3431/06 mahrug mill-Kummissjoni ghall-Kontroll ta' l-Izvilupp, fis-6 ta' Frar 2009.

Ikunsidrat

L-aggravju tal-appellant hu s-segwenti:

1. It-Tribunal applika hazin il-kuncett ta' 'new' development fl-Agriculture, Farm. Diversification and Stables, December 2007 u l-konkluzzjonijiet tieghu fil-mertu tal-applikazzjoni kineu erroneji, ghax ibbazati fuq din l-applikazzjoni hazina.

Dan hu punt ta' ligi li jisthoqqlu jigi evalwat minn din il-Qorti jekk hu minnu dak li qed jigi allegat. Fl-ewwel lok jigi ravvizat li mhux kontrovers illi parti mill-konsiderazzjonijiet tat-Tribunal kienu bbazati fuq l-effett lil kellu jinghata l-policy 3.4 tal-istess policy u li t-Tribunal semma' fid-decizjoni. Din il-policy tghid illi permess ghal akkomodazzjoni ghall-agro turizmu f'ODZ (kif jirrizulta li hu s-sit in kwistjoni) jista' jinghata f'kaz ta' konverzjoni ta'

'underutilised' jew 'abandoned agricultural building'. F'dan il-kaz it-Tribunal irreleva illi l-policies 3.3 u 3.4 jippermettu inter alia illi jkun hemm riabilitazzjoni ta' bini abbandunati prevja kondizzjonijiet specifici li per eżempju jkollu karatteristiki worthy of preservation. F'dan il-kaz it-Tribunal wasal għal kostatazzjoni fuq bazi fattwali u mhux sindakabbli mill-Qorti illi din hi binja li ttellgħet illegalment tant li kien kolpit b'enforcement notice fl-2006. In oltre t-Tribunal sahaq li ma jaqbilx mal-appellant illi ebda bini gdid ma jigi permess barra z-zona ta' żvilupp izda spjega li l-policy tippermetti biss l-uzu alternattiv skond il-policy ta' bini gdid legalment żviluppati wara l-introduzzjoni tal-ligi fl-2007. F'dan il-kaz il-binja li qed tintalab tigi sanzjonata xorta hi binja 'gdida' li saret qabel l-2007 u li kienet kontra l-ligi u għalhekk ma taqax fil-parametri tal-policy.

Il-Qorti tqis illi l-appellant ipprova jagħmel distinzjoni bejn binja gdida kif issemmi l-ligi wara l-introduzzjoni tal-ligi fl-2007 u ad esklużzjoni, kull binja oħra, titqies binja qadima bil-possibilita li tikkwalifika biex jinhareg permess. It-Tribunal skarta din l-interpretazzjoni tal-policy billi kien tal-fehma li l-binja ezistenti ma tikkwalifikax fuq kwistjoni ta' fatt u cioe li din ma kinitx binja gdida li saret legalment wara l-2007 kif trid il-policy jew li tikkwalifika bħala underutilised or abandoned building. It-Tribunal wasal għal konkluzzjoni fattwali li dan mhux bini qadim izda bini gdid li ttella' illegalment qabel il-policy tal-2007. Qies ukoll li kienet binja okkupata. F'dan l-aspett tal-kondiserażżjonijiet tat-Tribunal il-Qorti tqis illi t-Tribunal uza d-diskreżżjoni tiegħu fuq kwistjonijiet purament teknici dwar dak li kienet id-deskrizzjoni tal-binja u wasal għal konkluzzjoni li l-binja ma tikkwalifikax bħala bini underutilised jew abandoned. L-appellant mhux qed jattakka din l-interpretazzjoni izda qed jipprova biss jagħti l-veduti tiegħu dwar l-interpretazzjoni tal-policy li strettament mhux punt appellabbli quddiem il-Qorti.

Apparti dan għandu jigi rilevati illi l-applikazzjoni tal-appellant kienet ukoll tfalli fuq punti oħra rilevanti tal-istess policy cioe l-kobor massimu permess għal din it-tip ta' attivita liema qies kien għal kollox jisboq dak li trid il-policy li l-appellant naqas lil jichad fl-appell li għamel.

Kopja Informali ta' Sentenza

Il-Qorti ghalhekk tqis illi l-appellant ma kellux punt ta' ligi validu li fuqu seta' jappella u in ogni kaz it-Tribunal ma wera ebda nuqqas sostanzjali fl-applikazzjoni tal-policy in kwistjoni li jimmerita censura.

Decide

Ghalhekk il-Qorti tichad l-appell ta' Joseph Delia u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-21 ta' Gunju 2012. Bl-ispejjez jithallsu kontra l-appellant.

< Sentenza Finali >

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