



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tad-9 ta' Ottubru, 2013

Appell Civili Numru. 110/2012

Oliver Ruggier

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Oliver Ruggier tal-4 ta' Lulju 2012 kontra d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-21 ta' Gunju 2012 li cahdet l-applikazzjoni PA 4736/96 'to erect 1 apartment and 1 common garage;

Rat ir-risposta tal-Awtorita li sottomettiet li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konferma;

Rat l-atti kollha u n-noti ta' sottomissjonijiet, u semghet lid-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:
Ikkunsidra:

A. Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp, fl-10 ta' Awissu 2007, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 4736/96 "Site at Triq Sant' Andrija Sqaq nru 1, Lija: To erect 1 apartment and 1 common garage."

Iz-zewg ragunijiet ghar-rifjut kienu s-segwenti:

"1. The proposal development would detract from the overall objectives of the Structure plan for the preservation and enhancement of buildings, spaces and townspaces within Urban Conservation Areas and so does not comply with Structure Plan Policy UCO6.

2. The proposed development is located within a designated Open Space Enclave as per Central Malta Local Plan Map LJM1, thus the proposal runs counter to Local Plan Policy CG09 which seeks to limit development and safeguard these open spaces within the Urban Conservation Area of Lija"

B. In-nota tal-Perit Anthony Fenech Vella ghall-Appellant, ipprezentata fis-17 ta' Settembru 2007, inter alia l-punti segwenti:

"Skop tal-applikazzjoni:

L-applikant hu sid ta' bicca art li tikkompreni dak li kienet kwazi ghalqa u gardina zghira li fiha hemm karma ghall-ghodda u affarijiet konnessi max-xoghol tal-gnien bhal ma wiehed isib tradizzjonalment f'dawn il-kazi, u li tintlahaq minn sqaq li jaghti ghal parti ta' Hal-Lija li tinsab ezatt fin-nofs bejn il-qalba tar-rahall (UCA) u l-parti moderna mibnija fis-snin 70.

Peress li l-access hu limitat, hu haseb biex l-ewwel jikkonverti din l-ghalqa fi gnin sabih, billi jidhlu il-vehikoli kbar, imbaghad jfassal post zghir ghalih fil-gardina ta' barra. Originarjament, il-pjanta taghha kienet tinkludi 3

sualri bini, konsistenti f'2 appartamenti fuq garage kbir fil-pjan terren bl-iskop li hemm il-karrozzi privati tieghu, kif ukoll xi van (pickup) li jollu bzonn regolarment biex jindukra l-gnien (fertilizzanti, garr ta' pjanti, pipijiet, muturi ta' hart anke xi ingenji zghar gaht-tiswija kontinwa tal-hitan ta' sejjiegh, mantenzjoni ta' pompi etc..) jkunu jistghu jdur u fl-art tieghu. B'hekk jidhlu u johorgu bil-quddiem, kif kienu ghamlu qabel l-ingenji kbar fl-apert. Id-DCC ma kienux qablu ma din l-ideja u l-kobor u ghalhekk l-ewwel eliminajna wiehed mill-postijiet biex baqghet biss residenza wahda u imbaghad eliminajna il-garage kompletament, kif rikjest fl-ittra tal-25 ta' Mejju 2006. Sa dak in-nhar, ma kienx jidher li l-Bord kellu xi oggezzjoni.

Decizjoni affetwata mid-Dewmien tal-Process (11 sena):

Jekk qatt kien hemm kax fejn il-MEPA affetwat ingustizzja permezz ta' tkaxkir inaccettabbli u li wasal certament, ghal rizultat negattiv, apparti ir-ragunijiet ta' ipplanar li ser nirribattu aktar tard, hu propju dan il-kaz. Applikazzjoni validata fl-1 ta' Ottubru 1996, li l-ewwel decizjoni ttiehdet fil-25 ta' Awwissu 2005, b'rikonsiderazzjoni issir fis-16 ta' April tas-sena 2007. [...] B'hekk dak li deher li kien ccertament accettabbli fl-1996 u anke, b'daqxejn riservi fil-kemm fl-2005 u fl-2006, fejn id-DCC kien talab xi ammendi li jnaqqsu l-izvilupp, gie imbaghad assorbit bl-argument tal-hrug tal-Pjan Lokali f'Awwissu 2006. Altriment jekk id-DCC kien car f'mohha il-hin kollu li tirrifjuta, x'kienet il-htiega li titlob ghal dawn it-tibdiliet.

Policy CG09 Open Space Enclave:

Hu tajjed li l-ispazji miftuha tal-UCA jigu protetti l-ispazji u gonna fil-qalba tar-rah, izda certament mhux biex tigi ikkrejata sitwazzjoni fejn wiehed li ghandu kwazi 50 % ta' l-art affetwata jispicca ghandu gnien bla ma ghandu daru waqt li l-girien, li ghandhom darjhom u ghand gonna zghar, jgawdu u jitpaxxew bil-gnien tieghu. [...] Apparti minn dan kollu, wiehed irid jargumenta illi l-footprint ta' l-izvilupp rikjest tant hu zghir meta pparagunat ma l-estenzjoni ta' l-art ta' l-appellant (circa 6500sq. m) illi l-effet tieghu fuq l-ambjent mibni hu minimu, aktar u aktar

meta wiehed jiehu ukoll in konsiderazzjoni il-fatt li l-access hu minn sqaq li jibda minn zona moderna, u ghalhekk ma hemm l-ebda hjiel meta wiehed riesaq lejha li jinstab go UCA. Is-sit hu inkorporat biss fil-UCA f'dak li hi posizzjoni. [...] Fl-ahhar, nikkonkludi illi tant din il-kuncett ta' protezzjoni assoluta, ma kienx jezisti meta applikajna fl-1996, illi il-MEPA approvat permiss PA 5473/98, fis-sena 1999 f'sit ezatt faccata taghna u li tigi kompletament mqabba mal-UCA.”

C. In-nota risposta ta' Mario Scicluna ghall-Awtorita', ipprezentata fil-25 t'Ottubru 2007, inter alia l-erba' punti segwenti:

“5.2.1 As regards to the claim that the proposal was in line with the planning policies prior to the issuing of the Central Malta Local Plan, the Authority disagrees with this statement since up till the 25th May 2006 (i.e. before the issuing of the Local Plans in August 2006), the DCC had communicated with appellant and requested fresh plans 'showing the proposal on the existing alignment and no garage on site'. This clearly shows that the proposal as submitted to that stage was not acceptable even by the DCC since fresh plans were requested by the Board for their reconsideration. During this period, the Local Plans were officially issued [... and in] this particular case, a note was made (notes to committee) to inform the DCC that this open enclave had been identified to be safeguarded from such development and the proposal was much more objectionable. Consequently, the DCC had assessed the proposed development visavis the present applicable policies at that time and eventually unanimously decided against the proposed development in this particular site.

5.2.2 It is also important to note that the Public Consultation Draft – Central Malta Local Plan included a specific section to Lija's unique character and in para. 11.1.1 it was stated that: 'The private gardens located within the Urban Conservation Area need to be protected and conserved as these are fundamental to the traditional characteristics of the Three Villages.'

This clearly shows that the process to protect such areas had already been stated in the draft document of the CMLP and hence the approval of the CMLP had galvanized what the draft document had issued for public consultation.

5.2.3. Map LJM1 of the Central Malta Local Plan identifies this site as being located within the Urban Conservation Area of Lija. Additionally this specific area is also identified as an 'Open Space Enclave' with the relevant policy CG09. This policy states that: 'In the open space enclaves in the UCAs of Attard, Balzan, Birkirkara, Gharghur, Lija, Mosta, Naxxar and Santa Venera as designated on the relevant Area Policy Maps, MEPA will not consider any development or redevelopment proposals that create new independent residential/non-residential units, including garages for the parking of vehicles.'

5.2.4 The Central Malta Local Plan [...] policy CG09 clearly does not permit such a structure which includes a new residential unit at first floor level overlying a ground floor garden store. "

D. Il-verbal tal-access fuq il-post tas-Seduta numru 10 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fil-10 ta' Novembru 2008, precizament il-punti segwenti:

"Il-Bord innota illi s-sit in kwistjoni huwa gnien kbir b'area fejn jinzammu hafna annimali u tjur, qisu zoo. Is-sit ghalkemm huwa enclaved, huwa mdawwar bil-bini. Il-Bord innota illi kif tidhol fis-sqaq hemm sub-station u li l-bini li hem mint u diehel fl-isqaq, in-naha ta' fuq tal-isqaq huwa bini relattivament modern."

E. In-nota ulterjuri tal-Perit Anthony Fenech Vella ghall-Appellant, ipprezentata fit-22 ta' Novembru 2011, inter alia l-punti segwenti:

"Whilst MEPA is contending that this case should be treated according to the policies valid at the time of the

decision, [... therefore] that the site is now within a CMLP policy regarding open spaces and garden in UCAs and which it argues precludes any construction, it contradicts itself when indicating that in para 5.2.1 the fact that the DCC, in May 2006, had requested 'fresh plans on the existing alignment with no garage' meant 'no construction'. It, in fact, proves that the DCC was considering a mitigated solution to the original proposed at the time when there was not only the Draft Local Plan on line as quoted by the DAPR of the 26th February 2004, but the approved Local plan was just round the corner, i.e. in August 2006. [sic.] The DCC was fully cognisant of the overall policy approach and yet, chose to propose a feasible solution as opposed to a downright [...] non-starter.

This attitude is further reinforced by the massive development or rather redevelopment of the old people's home in the garden of the protected Art Nouveau building in Attard, Roseville in PA 4186/04 and which was approved in April 2004. It is now not only a matter of UCA but of a scheduled building with its gardens. Two weights and two measures?

It is also relevant that policy CG 09 does not exclude completely the possibility of new buildings but obviously give control measures. Considering that the site is enormous, because although at the time of the application the site was only limited to the front part of the property, this extends into the garden at the back of about 6000 sq.m [...] Moreover it is significant that MEPA has issued several permits in this enclave that tend to intensify the urban density even if it is simply an amenity such as

PA 759/04 for an aviary

PA 3575/04 for embellishments and additions

PA932/08 renewal for alterations and addition

PA 2683/08 for the internal alterations and extensions to make two large dwellings.

Moreover as it will be closing up the gap that existing in the urban string that surrounds the enclave, it will neither

create a bulge[sic.] or be noticeable in relation to the adjacent buildings, all the more so when [...] those forming the entrance and access to the alley are all 1960s as they are not and never were UCA.”

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda proposta sabiex f'parti minn sit konsistenti minn gnien privat li ghandu access minn sqaq u li jinsab gewwa l-urban conservation area ta' Hal Lija, jinbnew residenza u garaxx.

Originarjament, il-proposta kienet tikkonsisti fil-bini ta' garaxx livell mat-triq u zewg appartamenti sovrastanti, izda sussegwentement, fuq talba tal-Awtorita', il-proposta giet ridimensjonata f' residenza (wahda) fl-ewwwel sular u mahzen (garden store) fil-pjan terren.

Skond l-Awtorita', il-proposta hi in kontravenzjoni kemm tal-policy UCO 6 tal-Pjan ta' Struttura kif ukoll tal-policy CG 09 tal-Pjan Lokali; peress li din iz-zona hi ddesinjata bhala open space enclave intiza sabiex jigi mrazzan l-izvilupp u sabiex tigi protetta l-istess urban conservation area.

L-aggravji tal-Appellant jistrieħu fuq il-fatt li galadarba l-proposta kienet giet ridimensjonata billi tneħha sular - u għalhekk tnaqqas l-impatt fuq l-ambjent cirkostanti - l-Awtorita' kien imissha approvat din l-applikazzjoni. Jargumenta wkoll li anke minhabba l-fatt li z-zmien tal-processar tal-applikazzjoni kien ha gmielu (l-applikazzjoni kienet giet intavolata fl-1996), ir-regime tal-ippjanar qadim kien jiffavorixxi l-proposta li illum hi in ezami, u għalhekk l-Awtorita' ma kelliex għalfejn tapplika policies li dahlu in vigore hafna wara li giet intavolata l-applikazzjoni tieghu.

L-Awtorita' tirribatti l-argumenti tal-Appellant billi tispjega li anke dakinhar li giet sottomessa l-applikazzjoni, id-Direttorat kien talab lill-Appellant li jnaqqas l-izvilupp minnhu propost – saħansitra li jneħhi l-garaxx u li jzomm mal-allinjament prezenti. Fil-frattemp pero' dahal fis-seħħ il-Pjan Lokali u għalhekk l-Awtorita' kienet kostretta timxi

ma' dan ir-regime ta' ppjanar il-gdid. Ghalhekk, fl-ottika tal-Pjan Lokali u fejn jirrigwarda lill-Awtorita', il-proposta kienet saret ferm akter oggezzjonabbli.

F' ir-rigward tal-allegament tkaxkir fl-ipprocessar tal-applikazzjoni (madwar hdax il-sena), jigi rilevat mill-file PA 4736/96 li hemm diskontinwita' fl-ipprocessar tal-applikazzjoni bejn it-2 ta' Frar 1998 u l-1 ta' Settembru 2003 (blue 28 u red 32 rispettivament). In oltre, jidher li hemm tlett dokumenti neqsin fil-file u li mill-minuti annessi jidher li kien hemm xi kwistjoni fuq hajt tas-sejjieh li ghandu (jew kellhu) karatteristici fl-ghamla u f' it-tfassil tieghu li kienu jimmeritaw kunsiderazzjoni ulterjuri mill-aspett ta' konservazzjoni.

Fil-frattemp pero', ma jidhirx li kien hemm xi intervent jew komunikazzjoni da parti tal-Appellant li tissolecita' lill-Awtorita' sabiex tghaggel ticcediedi l-applikazzjoni tieghu, f' terminu ta' zmien xieraq. Altro che tkaxkir fl-ipprocessar tal-applikazzjoni. Jekk xejn f' hames snin bejn is-sena 1998 u l-2003, kellhom jigu pprezentati pjanti godda li ma' jirrizultax li qatt gew ipprezentati u jekk kienu pprezentati, ma gewx registrati fil-file. Konferma ta' dan huma l-minuti 27 u 28 li jaqraw kif gej:

“Minute 27 [ta' l-1 ta' Mejju 1998]

Meeting with architect in which it was decided that he is to submit fresh plans eliminating garage.

Minute 28 [ta' t-8 ta' Lulju 2003]

Architect asked status of file. File referred for of processing.”

Ghal dak li ghandu x' jaqsam ma kif decizjoni ghadha tittiehed - cjoe' jekk ghandhomx jigu applikati l-policies ta' meta giet sottomessa l-istess applikazzjoni jew inkella ta' dakinhar li giet deciza l-applikazzjoni, hemm diversi decizjonijiet tal-Qorti ta' l-Appell li jikkonfermaw li ghandhom jigu kkunsidrati l-policies in vigour dakinhar li tittiehed decizjoni. Hawnhekk issir referenza ghall-Appell numru PB 612/94 - Angelo Farrugia vs Chairman ta' l-Awtorita' ta' l-Ippjanar, fejn il-Qorti ddikjarat dan li gej:

“hi f’ postha l-osservazzjoni ta’ l-intimat illi l-Awtorita, ta’ l-lppjanar tikkunsidra l-applikazzjonijiet skond il-policies u pjanti kif inhuma llum. Dana fit-termini tal-Att ta’ l-1992.”

Jirrizulta ghalhekk li l-Awtorita’ kienet korretta li tinterpreta l-policies li kienu in vigour u casomai kif kienu gew aggornati sa’ dakinhar li ddecidiet l-applikazzjoni odjerna (Artikolu 47). In oltre, billi ma jirrizultax li diga’ kien jezisti permess validu – u ghalhekk f’ ic-cirkostanzi, xi dritt kwezit fuq il-font in ezami – lanqas ma jirrizulta li d-decizjoni tal-Awtorita’ giet applikata retroattivament (Artikolu 69). Di konsegwenza, l-allegazzjoni tal-Appellant li l-Awtorita’ kienet zbaljata meta ddecidiet l-applikazzjoni tieghu skond il-policies ta’ dakinhar huma ghal kollox infondati.

Mill-banda l-ohra, fir-rigward tal-applikazzjonijiet iccitati mill-Appellant bhala kazistika u in sostenn tal-argumenti mressqa minnhu; dawn kienu jew gew decizi ferm qabel ma dahal fis-sehh il-Pjan Lokali, jew inkella ma kienux jittrattaw zieda f’in-numru ta’ residenzi. Fil-fatt per eżempju; PA 932/08 kienet talba sabiex isir estensjoni ta’ residenza ezistenti. In oltre, il-permess ghal PA 2683/08 inhareg sabiex tlett residenzi jigu mmodifikati f’ zewg residenzi; cjo’ minn tlieta jsiru tnejn, altro che intensifikazzjoni fl-izvilupp. In-nota tal-Appellant pero’ taghti l-wiehed x’ jifhem li dik il-proposta kienet sabiex isiru xi tibdiliet f’ zvilupp ezistenti sabiex isiru zewg residenzi kbar; ‘for the internal alterations and extensions to make 2 large dwellings’.

Wiehed jifhem il preokkupazzjoni tal-Appellant; li ghandu gnien li qed jitgawda mill-girien li jharsu fuqu. Madankollu l-policy CG 09 tal-Pjan Lokali hi cara: ma jistax jigi permess la zvilupp gdid u lanqas tqassim ta’ zvilupp ezistenti li jista jirrizulta f’residenzi godda f’ iz-zona, inkluz il-bini ta’ garaxxijiet. Dan hu propju l-mertu tal-applikazzjoni in ezami u li f’ ic-cirkostanzi ma timmeritax kunsiderazzjoni favorevoli.

Ghalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, u fuq kollox sabiex ikun konformi mal-policies

tal-ippjanar vigenti, dan il-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma ir-rifjut ghall-PA 4736/96 mahrug mill-Kummissjoni ghall-Kontroll ta' l-Izvilupp fl-10 ta' Awissu 2007

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Ghalkemm l-appellant jaqbel li l-policies applikabbli huma dawk in vigore meta tingahta decizjoni, pero f'dan il-kaz, l-Awtorita, minhabba nuqqasijiet taghha damet ma pprocessat l-applikazzjoni u giet deciza biss meta nbidlu l-policies u l-appellant ma inghatax permess u ghalhekk l-appellant gie mcahhad minn dritt spettanti lilu meta saret l-applikazzjoni;
2. It-Tribunal issanzjona agir abusiv u illegali tal-Awtorita.

Il-Qorti tqis li dawn l-aggravji ma fihomx mertu fil-ligi. L-appellant mhux jappella mid-decizjoni per se li hi fondata fuq policies vigenti fil-mument tad-decizjoni li hi l-perspettiva legali gusta li biha ghandhom jigu decizi applikazzjoni ghal zvilupp. Dan hu konsegwenti ghal fatt li applikazzjoni ma tikkreja ebda dritt izda biss rieda ta' zvilupp soggetta ghal dak permissibbli u sostenibbli fl-interess pubbliku fejn jidhlu kwistjonijiet ta' ppjanar fil-mument li tittiehed decizjoni ghax hu f'dak il-hin li jista' jinsorgi dritt jekk il-ligijiet, pjani jiet u policies jippermettu tali zvilupp.

Din il-Qorti hi marbuta tisma' appelli minn punti ta' dritt izda l-appellant qed jibbaza l-appell tieghu fuq binarji ohra, li gustifikati jew le ma jistghux jigu ventilati quddiem din il-Qorti izda f'sede ohra idonea biex tittratta kwistjonijiet ta' abbuz ammistrattiv. Id-dewmien tal-Awtorita li tiddeciedi l-kaz u r-raguni warajha ma jistghux ikunu soggetti ghal skrutinju quddiem din il-Qorti li l-mansjoni taghha hi biss li tisma' appelli fuq punti ta' ligi mqajma. F'dan il-kaz, kif inghad it-Tribunal iddecieda l-applikazzjoni skond il-policies vigenti fi zmien id-decizjoni u minn din id-decizjoni fuq il-mertu tal-applikazzjoni ma sar ebda appell.

Decide

Kopja Informali ta' Sentenza

Ghalhekk il-Qorti qed tichad l-appell ta' Oliver Ruggier u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tal-21 ta' Gunju 2012. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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