



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tad-9 ta' Ottubru, 2013

Appell Civili Numru. 117/2012

James Zammit

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' James Zammit tad-9 ta' Lulju 2012 kontra d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-21 ta' Gunju 2012 ghar-rifjut tal-applikazzjoni PA 6020/07 'to construct washrooms over approved building (garages and flats);

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

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

Kopja Informali ta' Sentenza

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

B'applikazzjoni tal-1 t'Ottubru 2007 – Full Development Permission – PA/06020/07 fejn l-appellant, f' 182, Triq il-Kbira, Zebbug (Malta) talab:

“To construct washrooms over approved building (garages and flats).”

Illi permezz ta' rifjut tat-3 t'Awwissu 2009 l-Kummissjoni dwar il-Kontroll tal-Izvilupp cahdet it-talba għall-rikonsiderazzjoni tal-appellant għar-ragunijiet segwenti:

“1. The proposed development runs counter to Structure Plan policy UCO10 in that it would adversely affect views of the Urban Conservation Area and detract from the traditional urban skyline.

2. The proposed roof structures infringe permit PA 4387/05 condition 2 which clearly states that no roof structures are permitted over the approved development, except to provide access to the roof level for services.

3. The proposed development runs counter to Structure Plan policy UCO10 in that it would detract from the traditional urban skyline.”

Illi l-Perit Samuel Formosa ressaq l-aggravji tal-appellant kif gej:

“1. Washroom:

The previous permit, PA 4387/05, included a permanent access of a stairwell to the roof which was one storey high (refer to attached copy of permit plan- Doc A) and included a four course opramorta. Thus, the addition of a couple of washrooms - one per flat should not prove to be detrimental to the streetscape - once the stairwell structure (of the same height) was already approved. Moreover, the washrooms are recessed according to Policy and DC 2007 guidelines. Thus should not create the visual impact the DPA report is arguing about, since

the site is surrounded with wash-rooms on buildings having the same height.

2. Site Plan:

Furthermore the site is committed with other developments which include washrooms. In the Reconsideration Report, photographs and a site plan were submitted showing the location of these washrooms.”

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

“5.1.2 However, the Authority disagrees with this justification and states that when the existing three floors were approved in this particular site, the DCC's decision as taken on 24th April 2006 included a condition that whilst the Board had agreed that three floors could be permitted in this area due to other similar buildings (decision taken on April 2006, hence prior to the SMLP as issued on August 2006), the same Board declared that:

Conditions to include:

- no roof structures accept for access
- right side facade to be retained subject to Bank Guarantee.

This condition was imposed since the DCC, after inspecting the site, acknowledged the negative visual intrusion that the massing of washrooms at roof level would impose on this particular area. Hence, the three floors were only acceptable if no other structures were to be constructed at roof level.

5.1.3 In fact, when the analysis which led to the final issuing of the SMLP was conducted in this area, this study resulted that since the predominant height of this particular area is still two floors, the official planning designation of this area is now that of an Urban Conservation Area with a height limitation of 2 floors. Hence, while one could argue that the existing 3 floors

could be mitigated by washrooms built on adjacent buildings (ie. washrooms on 2 floors), the requested washrooms subject to this appeal would permanently remain one storey higher than the washrooms of the adjacent buildings. Thus, from a visual point of view, the requested 6 washrooms would create such a massing that would not be in line with the relevant policies governing Urban Conservation Areas which were identified as such due to their particular lower densities and low buildings.

5.1.4 Furthermore, while appellant has alleged that similar washrooms exists on site, no permit numbers were presented so that the Authority could carry out its investigations on the circumstances and period in which these could have been approved. An important issue is that one cannot cite permits which could have been issued under a different planning regime different to that valid today since when a policy is introduced I amended, any new or pending applications have to inevitably be assessed and decided in line with the latest lawfully valid policy. In this respect, the Authority makes reference to the citation below wherein the Planning Appeals Board had declared such a notion and specified that permits issued prior to the present valid policies cannot serve as an automatic precedent for approval of similar developments which breach present policies.

Il-Bord ikkunsidra wkoll illi permessi mahruqa taht policies differenti minn dawk tal-lum ma jistawx awtomatikament iservu ta' precedent sabiex illum jinhargu permessi li jmorru kontra l-policies in vigore fil-prezent. - PA 1154/05 - RT 29.07.09 - PAB 205/06.

5.1.5 In view of the above, the requested 6 washrooms are not acceptable on this particular development since the existing building already exceeds the permitted number of floors as set by the South Malta Local Plan and even more, the cumulative massing would disrupt the character of this UCA area of Zebbug and hence, is contrary to Structure Plan Policy UCO 10 which safeguards the views and skyline of designated Urban Conservation Areas.”

Illi l-Perit Formosa ressaq osservazzjonijiet ulterjuri kif gej:

“1. Existing Stairwell :

The site is already approved with a stairwell, thus my client is claiming that the addition of a couple of washrooms surrounding the approved structure should not cause any additional visual impact upon the surrounding environment. In fact, the site is not only committed with a permanent access which is one storey high but also with an opramorta which is also four courses high.

2. Similar Situations:

My client is presenting copies of permits of similar situations (in the village core of Malta) which have been granted washrooms and additional floors upon the existing buildings. Attached please find copies of the similar permits which my client has obtained a copy. Consequently, my client is arguing that mutatis mutandis, these washrooms should also be considered acceptable.”

Illi permezz tat-Tieni Statement taghha l-Awtorita' irrilevat inter alia kif gej:

“In these submissions, appellant has quoted 3 permits which are claimed to have identical planning considerations to this case under appeal. The Authority has noted the three cases and notes.

PA 6673/04

Location: Qormi

Proposal as per DPA:

This Full Development Permission Application seeks planning consent for the construction of residential units with underlying garages (on three floors at basement level).

DPA considerations:

According to the Temporary Provisions Schemes (1988) the height limitation for the area is that of two floors. However following the Interim Review of Building Heights Policy, the proposed height of three floors (with underlying basement) or two floors overlying a semi-basement can be considered as acceptable.

From the submitted schematic sections, it can be noted that the proposed height is that of three floors overlying a basement of three courses above street level. The overall height of the building 12.0m, thus in conformity to DC 2000 policy 2.1 which allows a maximum height of 12m for a three storey building.

The Draft Central Malta Local Plan designates the building height limitation at three floors. Even though this Plan is still not approved, it can be argued that since the proposed development complies with this designation, the strategic framework and subsequent implementation of this document would not be compromised.

PA 3654/02

Location: Qormi

Proposal as per DPA:

Request is for demolition and re-erection of two levels of basement garages, ground floor shops, and overlying flats at first and second floor level.

DPA considerations:

The demolition of the existing building is acceptable, while the proposed project as amended can be favorably considered as it will provide residential uses with parking provision, and a small scale commercial activity, in line with Structure Plan policy HOU 2 and the draft Local Plan for the area. Proposed development also conforms with Structure Plan policies for urban conservation, especially

Kopja Informali ta' Sentenza

with regards to the design of the facade as well as the proposed height.

DCC Decision: Gtd on 25.03.03

PA 1296/06

Location: Qormi

Proposal as per DPA:

This is a full development application to construct 2 penthouses.

DPA considerations:

Height limitation - Three floors plus semi-basement. According to the Draft Central Malta Local Plan the height limitation of the area is three floors.

Policy 2.1 of the Policy and Design Guidance 2005 states "where the allowable number of floors is 3 floors and above, a penthouse floor may be permitted, over and above the allowable number of floors, in accordance with policies 10.6 and 10.7."

Conclusion - In view of the above considerations, the proposal is favourably considered and an approval is being recommended.

DCC Decision: Gtd on 03.08.06

The above clearly shows that the three cases cited by appellant did not have identical planning considerations to the case under appeal since the request for a three floor building was considered acceptable by the Directorate and the DCC because, at that moment in time, (ie prior to the Local Plan) the applicable planning policies did in fact permit such a height and hence, since in principle, the overall number of floors was acceptable, washrooms at roof level were also acceptable. Extracts from the respective DPAs were cited above purposely to show the

Planning Appeals Board the exact planning assessment and outcome of the requested three floors vis-a-vis the valid planning policies at the time of their assessment. Furthermore, all of the cited permits relate to Qormi area whereas the case under appeal relates to a site in Zebbug. The closest cited permit is still more than 3Km away from the site under appeal and hence, the context, planning considerations and potential specific circumstances of each and every cited case is definitely alien to the case under appeal.

Moreover, the Authority wishes to reiterate that the case under appeal relates to an application submitted in October 2007 (ie. well after the issuing of the South Malta Local Plan in August 2006) in an area which is officially designated as UCA with a maximum height limitation of 2 floors. The site in question had been previously permitted as 3 floors as per permit PA 4387/05 in decision taken by the DCC on 24.04.06 and which thus rendered the approved building (now) with a height which is more than the present height limitation as per the South Malta Local plan. In such a scenario, the existing building already contains a full floor more than the height limitation and as such, the request to construct 6 (six) washrooms at roof level with a total footprint (excluding the already approved stairwell) of circa 57.5 sq.m. Such a floorspace is more than the minimum required for a one bed-room unit (45sq.m.) and hence, its visual massing is similar to a request for an additional new residential unit at roof level.

Furthermore, in previous application PA 4387/05, the initial drawings had requested 3 floors + 6 washrooms at roof level (re Org Red 24B), however the Authority had informed applicant through letter dated 26.04.06 (Red 27) that the DCC has accepted 3 floors but fresh plans were requested that showed a 3 floors building but showing roof structures and retaining only service access. Subsequently, fresh plans were submitted by applicant that no longer showed any washrooms at roof level and these were approved as part of the permit. Hence, this is being stated that when the DCC had approved a 3 floor building in April 2006, they specifically requested that no

further structures (other than the necessary access) are to be constructed at roof level due to the visual impact that these washrooms would inevitably create. Furthermore, this issue was so important to the DCC that in their decision minute No. 25 in file, they specifically listed this condition so as to be included in the permit. In fact, the permit as issued on 7th September 2006 included a condition (No.2) which specifically stated:

No roof structures are permitted over the approved development, except to provide access to the roof level for services.

Hence, the requested washrooms at roof level were already considered and denied by the DCC when the existing three floor building was approved in April 2006 (ie prior to the Local Plan), and thus, now that the approved Local Plan was approved in August 2006 and has designated this area as UCA with a height limitation of 2 floors, the Authority reiterates that there are no new planning grounds which could justify a change to the original DCC's decision to eliminate the original 6 washrooms and approve the now requested 6 washrooms in this appeal which are located on a building which already exceeds the height limitation of the area.

In this regard, the Authority reiterates that in line with its previous reports, the requested development goes against the present planning policies relevant to this area and states that the DCC's decision to dismiss this request for development was justified and hence respectfully requests the Planning Appeals Board to dismiss this request for appeal.”

Illi fl-access tat-3 ta' Gunju 2011 l-Awtorita' indikaw l-izvilupp in kwistjoni li jikkonsisti f'bini ta' tlett sulari. Fl-ewwel sular garages u zewg sulari sovvrastanti l-ewwel sular gallariji tal-injam u t-tieni sular gallariji tal-hadid.

L-appellant qed jipproponi li jibni washrooms fuq dan l-izvilupp. L-oggezzjoni tal-Awtorita' hija msejsa fuq il-fehma li l-izvilupp sar qabel ma gew fis-sehh il-Local

Plans. Skond il-Local Plan il-height limitation hija ta' zewg sulari, u ghalhekk l-izvilupp ezistenti huwa gja in excess tal-height limitation indikata fil-Local Plan. Il-washrooms proposti ghalhekk ma jistghux jigu approvati.

Illi l-Avukat Peter Borg Costanzi u l-Perit Samuel Formosa ressu s-sottomissjonijiet taghom ghal-appellant kif gej:

“1. Meta nhareg l-permess tal-bini fuq il-propjeta in kwistjoni, d-draft scheme kienet li tali propjeta setghet tinbena bl-gholi ta tlett sulari. Fil-fatt il-permess hekk hareg skond il pljan lokali li kien qed jigi propost u l-appellant ben a tlett sulari skond l-permess moghti u fuq il-bejt tal-istess blokk hemm ukoll it-tromba tat-tarag, kif ukoll opramorta ta 4 filati li huma necessarji u rikjesti meta wiehed ikollu access ta arja ta bejt.

2. L-appellant qed japplika biex jibni washrooms fuq l-istess bejt.

3. Wara li hareg il-permess, l-scheme inbidel u issa nizel ghal zewg sulari.

Il-punt ghalhekk iqum jekk l-appellant ghandux id-dritt jkollu permess ghal-washrooms a bazi tal-principju tal-committment u li jigi trattat similmment ghal-haddiehor.

Mill-banda 'l wahda hemm diversi sentenzi li jghidu illi l-Bord ghandu japplika l-policies vigenti u li l-Bord m'ghandux l-jedd jbidel l-local plans u z-zoning izda mill-banda l-ohra hemm daqstant iehor sentenzi li jsostnu illi l-principju ta' commitment u l-principju li all things be equal, kulhadd ghandu d-dritt li jigi trattat bl-istess mod u li ma jkunx hemm diskriminazzjoni, ghandhom certu import u sahha u ma jistghux jigu injorati. Hekk per eżempju fis-sentenza moghtija mil-Qorti ta' l-Appell (Dak iz-zmien presjedut minn tlett Imhallfin) fl-appell ta Consiglio D' Amato vs Kummissjoni ghal-Kontroll ta l-izvilupp (App 170/99) deciz f1-24 ta Mejju 2004 intqal hekk:

13. Din il-Qorti jidhrilha li meta l-Bord iddecieda li huwa ma kellux il-gurisdizzjoni jew is-setgha li jibdel iz-zoning

tat-Temporary Provision Schemes, huwa certament kien legalment korrett li jasal ghal din il-konkluzjoni. Pero, il-kwistjoni principali li l-Bord kien qiegħed jinvestiga ma kienitx il-kwistjoni jekk kellux jew le s-setgha li jbidel iz-zoning ta' l-ischemes, izda minflok huwa kellu jindaga jekk l-allegazzjoni ta' l-appellant dwar il-commitment o meno tas-sit kienitx valida jew le. Fil-fatt, il-kawza quddiem il-Bord jidher li tmexxiet biex issir tali investigazzjoni. Infatti, l-Bord zamm zewg accessi fuq il-post u, kif jirrizulta mid-decizjoni tal-Bord, huwa ikkonsulta numru sostanzjali ta' PA files li suppost kellhom jghinuh fl-investigazzjoni li kien qiegħed jagħmel. Din il-Qorti jidhrilha li l-Bord ma kellu bzonn jagħmel l-ebda access u lanqas jara ebda PA files ohra biex jasal għall-konkluzjoni li huwa ma kellux ssetgha li jbidel iz-zoning ta' l-ischemes.

14. L-Awtorita' għamlet referenza għal zewg decizionijiet li tat din il-Qorti biex issahhah it-tezi tagħha. F'dawk is-sentenzi din il-Qorti kienet ikkondividiet id-decizjoni tal-Bord li t-Temporary Provision Schemes kellhom is-sahha ta' ligi u li l-Bord ma kellux s-setgha gurdizzjonali li jbidel dawn l-ischemes. Pero, għandu jigi enfasizzat li fil-kaz odjern il-kwistjoni ma kienitx jekk il-Bord kellux din is-setgha jew le izda kienet wahda (strettament) ta' fatt, u cioe, jekk l-izvilupp propost mill-appellant kienx accettabbli in vista tal-commitment on site.

Din il-Qorti jidhrilha li kemm l-Awtorita' ta' l-Ippjanar kif ukoll il-Bord ta' l-Appell dwar l-Ippjanar, it-tnejn għandhom is-setgha, mingħajr ma jbiddu t-Temporary Provision Schemes li jevalwaw kull kaz fuq il-mertu u fuq il-fattispeci proprji tiegħu. Inoltr, fejn ikun jirrizulta car li hemm cirkostanzi specjali ta' commitment, kemm l-Awtorita' u kif ukoll il-Bord għandhom is-setgha gurdizzjonali li johorgu permess ta' zvilupp li jkun jiddipartixxi, per eżempju mill-maximum height limitation imposti fit-temporary provision schemes.

15. Il-konstestazzjoni sostanzjali f'dan il-kaz quddiem il-Bord kienet jekk hemmx commitment jew le fuq is-sit. L-appellant argumenta li kien hemm tali commitment u b'mod li from a planning point of view il-Bord seta'

jakkordalu t-talba ghall-hrug tal-permess mitlub. Mill-banda l-oħra l-Awtorita' kienet qeghdha tikkontesta din l-allegazzjoni ...

16. Id-decizjoni tal-Bord li huwa ma kellux is-setgha li jbidel iz-zoning tat-Temporary Provision Schemes kienet, bla dubju ta' xejn, dikjarazzjoni legalment korretta. Pero, bir-rispett kollu dovut, il-Bord ma kellux jiegaf hemm. Kellu l-kompitu wkoll li jzamina u jivvaluta sew issottomissjonijiet kontrastanti li ressqu quddiemu l-partijiet dwar il-commitment, jew in-nuqqas ta' commitment tas-sit, u dana fid-dawl tal-provi li l-Bord stess kien ippermetta li jitressqu quddiemu, u jghaddi biex jiddeciedi jekk kellux jilqa' l-appell jew le."

Dan il-hsieb baqa' jigi rifless konsistentement mill-Qorti tal-Appell fejn jigu trattati appelli simili u dan anke recentement permezz ta' sentenzi li inghataw WARA l-bidliet recenti fil-ligi.

Fis-sentenza moghtija mill-Qorti tal-Appell (Sede Inferjuri) wara appell minn decizjoni tal-Bord tal-Appelli dwar l-Ippjanar fil-kaz Leonard Cassar vs Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar moghtija fit-28 ta' Gunju 2011 gie kjarament kjarifikat mill-Oorti illi l-principji ta' commitment u cerimus paribus ghandhom jigu applikali u ma jistghux jigu injorati.

Decizjoni oħra importanti inghata fl-24 ta' Frar, 2011 - Appell Civili Numru. 6/2010 "Joseph Tonna vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar" fejn intqal:

"dak li l-Bord kellu jaghmel kien fl-ewwel lok jara jekk kienx hemm commitment ghal tali tip ta' zvilupp, u dan fil-mument li kienet ser tittiehed iddecizjoni, u dan isir b'riferenza ghall-izviluppp attwali li hemm fl-istess zona, inkluz li jiehu konjizzjoni ta' l-izviluppi koperti bil-permessi stess tal-Awtorita' appellata, u wara li jigi kkonsidrat dan, anke fid-dawl ta' decizjonijiet li l-istess Awtorita' hadet, mhux l-inqas l-istess Bord innifsu, jara x'effett ghandu l-istess commitment fid-dawl tal-izvilupp propost u fid-dawl ta' policies applikabbli, inkluz il-Pjan Lokali. ...

Biex waslet ghal din il-konkluzjoni l-Qorti anke rreferit ghal diversi sentenzi fosthom "J. Formosa Gauci o.b.o. Trident Development Limited vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar" - 29 ta' Frar 2008 (PAB290106 ISB), u qalet:

"li huwa proprju l-istess Bord li ta' d-decizjoni odjerna mertu ta' dan l-appell. Illi l-istess Bord proprju f'dik id-decizjoni sostna li "hemm diversi commitments ta' zviluppi li' gew approvati mill-MEPA ... 'Fil-fatt l-istess Bord hareg il-permess ghall-izvilupp mitlub minkejja dak li jipprovdi l-Pjan Lokali, u din il-Qorti qablet ma' tali kuncett kif propost u applikat bis-sentenza taghha tas-26 ta' Marzu 2009 gja hawn citata.'Dr. Graham Busuttil vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar" (28 ta' Frar 2008)"

"Fis-sentenza ta' Trident Development Limited inghad ukoll li:-

"Illi mela allura jirrizulta li l-istess Bord applika sew il-Ligi peress li l-kuncett ta' commitment huwa illum ben stability fil-gurisprudenza dwar regolamentazzjoni ta' ppjanar kif jirrizulta minn diversi decizjonijiet fosthom dawk ta' "Alex Montanaro nomine vs Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp" (AC. - 9 ta' Frar 2001); "Marie Louise Farugia vs Kummissjoni ghall-Kontroll ta' l-Izvilupp" (Al.C. 24 ta' Marzu 2003); u "Michael Gatt vs l-Awtorita' ta' l-Ippjanar" (AC. - 19 ta' Novembru 2001); "Max Zerafa vs Kummissjoni ghall-Kontroll ta' l-Izvilupp" (Al.C. (RCP) - 12 ta' Jannar 2004); "Santinu Gauci vs Kummissjoni ghall-Kontroll ta' l-Izvilupp"(Al. C. (RCP) – 24 ta' Marzu 2003); "Jimmy Vella vsKummissjoni ghall-Kontroll ta' l-Izvilupp" (Al.C. (RCP)- 24 ta' Marzu 2003); "Ignatius Attard vs Kummissjoni ghall-Kontroll ta' l-Izvilupp" (Al.C. (RCP) - 26 ta' Mejju 2004); "Andrew Mangion vs Kummissjoni ghall-Kontroll ta' l-Izvilupp" (Al.C. (Rep) - 27 ta' Ottubru 2003); u dawk citati mill-appelat fl-ismijiet "Joseph Muscat vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar" (Al.C. (PS) - 18 ta' Mejju 2005) u "Consiglio D'Amato vs Kummissjoni ghall-Kontroll ta' l-Izvilupp"(A.C. - 24 ta' Mejju 2004)."

Kopja Informali ta' Sentenza

Issir referenza wkoll ghall-kaz Anna Maria Degiorgio vs Kummissarju ghall-Kontroll tal-Izvilupp deciza mill-Bord tal-Appelli dwar l-Ippjanar fl-14 ta' April 1999 fejn l-istess Bord kien irritjena:

"illi kien hemm commitment anke sahanitra permessi u binjiet li kienu hargu mijiet ta metri 'l boghod, u anke sahanitra fi trieqat differenti u diversi mis-sit in kwistjoni."

Inoltre fil-Qorti tal-Appelli fil-kaz Ignatius Attard vs Kummissjoni ghall-Kontroll tal-Izvilupp deciza fis-26 ta' Mejju 2004 li ccitat is-sentenza Marie Louise Farrugia vs Kummissjoni ghall-Kontroll tal-Izvilupp, Appell 36/2011 u 37/2011 decizi fil-24 ta' Frar 2003, kif ukoll is-sentenza Michael Gatt vs L-Awtorita' tal-Ippjanar fejn inter alia jinghad:

"biex issir gustizzja mal-partijiet, dik it-tezi kellha tigi investigata sewwa u l-kwistjoni dibattuta bejn il-partijiet kellha tigi epurata u deciza. b'motivazzjoni debitament studjata biex taghti sodisfazzjon anke lill-parti telliefa, u mhux tigi dik it-tezi sempliciment skartata b'zewg kelmiet. ...

Il-process tal-gustizzja hu fin u delikat, li rament ikollu success meta wiehed jaghzel li jimxi fit-triq il-qasira biex jasal malajr. Min hu mgħobbi bir-responsabbilta tal-gudizzju ma jistghax jiehu short cut fejn il-gustizzja ma tkunx tippermettilu li jaghmel dan. Diversament l-effett kumulattiv jista jkun li jintilef il-kredibilita b'gudikat li ma jkunux motivati sewwa u b'hekk issir hsara kbira lill-amministrazzjoni tal-gustizzja."

Apparti dan, 'il fuq imsemmija sentenza ta' Cassar vs MEPA ghamlet referenza ghall-sentenzi Alex Montanaro nomine vs Kummissjoni ghall-Kontroll tal-Izvilupp l'Appell 9 ta' Frar 2001) u Michelle Din91i vs Kummissjoni ghall-Kontroll tal-Izvilupp deciza fis-6 ta' Ottubru 2000 u Emanuel G Cefai u Amalia Cefai vs Il-Kummissjoni ghall-Kontroll tal-Izvilupp deciza fit-30 ta' Marzu 2006 fejn fost affarijiet ohrajn intqalli:

"Hija l-fehma konsiderata ta: din il-Qorti illi jekk persuna aggravata b'decizjoni tal-Awtorita' tal-Ippjanar dwar kull haga ta kontroll ta zvilupp tappella quddiem il-Bord tal-Appell dwar l-Ippjanar, u dik il-persuna tallega li l-Awtorita' tal-Ippjanar kienet qed timxi b'mod diskriminatorju, irrazzjonali u b'mod arbitrarju fil-konfront taghha, il-Bord mhux biss jista' jikkonsidra dawk l-allegazzjonijiet, u jisma l-provi dwarhom, talli ghandu d-dritt jaghmel dan. Il-Qorti thoss li huwa obbligu tal-Bord li jaghmel dan, in vista tal-kompetenza tieghu, diment li l-istess huwa relevanti ghall-kaz li jkollha quddiemha."

Inoltre kif intqal fis-sentenza fuq citata Alex Montanaro nomine vs Kummissjoni ghall-Kontroll tal-Izvilupp tad-9 ta' Frar 2001, meta tqum kwistjoni ta' commitment u diskriminazzjoni bhalma qed isir f'dan il-kaz, huwa proprju dan it-Tribunal li ghandu jidhol f'dawn l-aspetti u jaghti l-konsiderazzjonijiet motivati taghha dwarha.

L-esponenti jaghamel referenza ghal decizjoni ohra important moghtija mill-Qorti tal-Appell fl-ismijiet "Grace Borg vs l-Awtorita' ta Malta dwar l-Ambjent u l-Ippjanar" li nghatat fid-29 ta' Ottubru 2009. Gie enfasizzat l-commitment hu relevanti ghad-determinazzjoni ta applikazzjoni anki jekk dak li qed jigi mitlub imur kontra l-provvedimenti tal-Pjan Lokali:-

"l-istess Bord kull ma ghamel kien biss li qal, li minghajr ma jidhol kif inhargu l-istess permessi u jekk kif inhargu dawn kienux gustifikati, l-istess 4 permessi kienu hargu qabel rna sar il-Pjan Lokali ta' Zvilupp, u allura la llum hemm il-Pjan Lokali, huwa ghal kollox immateriali lizvilupp dwar l-gholi li attwalment hemm fl-istess inhawi.

Fl-opinjoni ta din il-Qorti dan it-tip ta ragunament u motivazzjoni jinjoraw ghal kollox issoltmissjonijiet u l-aggravji li l-istess appellanti kienet ressqet quddiem il-Bord u dan fis-sens li l-Bord kien mistieden sabiex jiddeciedi li in vista tal-fatt li kien hemm commitment fl-area ghal tali gholi massimu ta' bini kif propost mill-appellanti, mela allura tali commitment kellu u ghandu

jkun rilevanti ghad-determinazzjoni tal-applikazzjoni tal-appellanti,"

Apparti dan issir referenza anke ghal decizjoni tal-Planning. Appeals Board fil-kaz fi-ismijiet George Farrugia vs MEPA deciz nhar id-29 ta' Lulju 2009 [PAB 89/09, RT. 1011/08], fejn intqal:

"minhabba l-ezistenza ta' permess tal-izvilupp b'mertu identiku mahrug mill-Awtorita stess fuq is-sit immedjatament adjacenti ma dik tal-appellant ... il-Bord (tal-Appell) wasal ghal konkluzjoni illi ma hemm ebda raguni 'l ghaliex iz-zewg kazijiet ma ghandhomx jigu kkunsidrati bl-istess mod" lili fil-kaz odjern, l-esponenti jissottometti illi l-bini in kwistjoni huwa gia committed u dan billi gia inghata permess li jitolghu llett sulari fuq imsemmija u li fuq il-bejt tal-imsemmija tlett sulari hemm tromba tat-tarag u konsegwentement dan l-ispazju huwa gia kommess. Ezatt faccata ta' din il-binja in kwistjoni, fl-istess triq, hemm proprju bini iehor bl-istess gholi bhal dik proprjeta' mertu ta dan il-kaz u liema bini wkoll ghandu l-washrooms fuq il-bejt u konsegwentement l-esponenti jissottometti bir-rispett illi fl-ewwel lok il-binja mertu ta dawn il-proceduri hija gia committed u ghalhekk m'hemm xejn xi jzomm milli jsiru l-washrooms kif milluba tenut kont tal-fatt ukoll illi anke waqt l-andament tal-proceduri quddiem id-OCC, kien hemm indikazzjonijiet positivi tal-istess Bord tant illi talbu lill-esponenti jbidel il-pjanti biex dawn ii-washrooms ikunu receded. Apparti dawn it fatti, l-applikant diga ssottometta kazijiet simili fejn l-Mepa approvat wash rooms fuq bjuet l arjiet go zviluppi simili li jinsabu f'siti identici ghall din in kwistjoni.

Illi appartu dan, hemm anke diskriminazzjoni fil-fatt illi l-binja ta' faccata tal-esponenti hija mibnija bl-istess gholi livelli bhalma hija mibnija l-binja in kwistjoni u konsegwentement l-esponenti jissottometti bir-rispett illi l-esponenti m'ghandux jigi diskriminat negattivament."

Illi permezz tat-Tielet Statement taghha l-Awtorita' rrilevat ulterjorment kif gej:

Kopja Informali ta' Sentenza

“The Authority disagrees that the requested washrooms at 3'd floor level could be acceptable by the Tribunal and this on the bases that these would exceed the height limitation of the area (the local plan designates this area as UCA with 2 floors and this site has already been granted 3 full floors in permit PA 4387/05 with condition 2 - NO structures at roof level except for access). as well as to the argument that the present law no longer recognizes any existing high buildings within an area as justification for breaching the height limitation of the Local Plan vide Art. 69 (2) (i) proviso.

The notion that the building heights should be respected in decisions taken today is manifested in several Tribunal decisions and. to name a few:

PA 1078/09 - PAB 318/07

To sanction construction of recessed floor in lieu of washrooms.

PA 4190/06 - PAB 59/09 Proposed penthouse.

L-uniku soljev li l-Appellant ghandu, hu, li kieku applika ghal tali proposta illum – bil-policies u l-pjan lokali kif in vigore - kien jitlef sular kif ukoll il-basement, u jakkwista semi-basement. Certament, in konfront ta ' dan kollu, l-Appellant illum jinsab ivvantaggjat sew.

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 ir-rifjut ghall-PA 4190/06

PA 706109 - PAB 145/09

Construction of washrooms at roof level over approved permit PA 5658/05.

Ma jistax jinghad f'dan il-kas li l-Policies qed jigu applikati retroattivament, billi dak li l-appellant akkwista b 'decizjoni

Kopja Informali ta' Sentenza

precedenti tal-Bord tal-Appell - cioe' zvilupp ta' '4 full floors' b' 'ebda mod ma ser jigi pregudikat, nonostante l-fatt li l-height limitation indikata fil-Local Plan hi fa' 3 floors plus semi-basement.

Il-washrooms proposti huma ghalhekk abundantament in excess ta' dak koncess mill-Local Plan, u fit-termini tal-Artiklu 69 (2) (i), fuq citat, ma jistghux jigu approvati.

It-Tribunal ghalhekk qed jiddisponi minn dan l-Appell billi jichad l-istess u jikkonferma r-rifjut tat-28 ta' Gunju 2009 ghall-applikazzjoni PA 0706/09.

Additionally, when the last permit was issued on 07/09/06, appellant did not contest Condition 2 which clearly prohibited ANY such structures at roof level and this so as to assure that since the local plan has now designated this area as UCA - 2 floors, no such structures would be requested at roof level which would not be sympathetic with the adjacent 2 floors buildings on both sides. Hence, the requested 6 rooms at roof level would clearly be of a much higher level than both the adjacent 2 floor buildings and would never be concealed from long distance views since this area is clearly marked as UCA.

Hence, the Tribunal is invited to take note of these recent decisions as delivered by the same Tribunal in which the notion to respect both the maximum height (and massing) as permissible by the Local Plans AND the need that every new development respects the character in which it is located is of paramount importance. In this respect, the requested 6 washrooms at roof level would create a much negative impact on this neighbourhood than any claimed benefit to their owners. Furthermore, once such washrooms are granted, there could be also a further request for their change of use into an independent unit (ie a penthouse) since, on visual grounds there would be little or no effect as seen from the street below. Such requests are common to the Tribunal since an independent unit is of much greater use to owners than 6 washrooms.

Kopja Informali ta' Sentenza

In this regard, the Authority reiterates that in line with its previous reports, this request for appeal is not justified by the relevant planning policies and states that the Board's decision was warranted and hence respectfully requests the Tribunal to dismiss this request for appeal.”

Ikkunsidra ulterjorment:

Wara li kkonsidra il-premess u minn ezami tad-dokumenti li hemm fil-files PAB 179/09 u PA 6020/07, it-Tribunal jikkumenta kif gej:

Il-mertu ta' dan l-appell jirrigwarda talba biex jinbnew 6 washrooms fuq bini approvat ta' tliet sulari u basement li jikkonsisti f' appartamenti u garages sottostanti.

Is-sit mertu ta' dan l-appell jinsab fiz-zona tal-izvilupp u gewwa l-UCA f' Main Street Zebbug kif indicat fis-South Malta Local Plan, Map ZG1.

L-Awtorita' cahdet it-talba in vista li:

- Tikser il-policy UCO 10 tal-Pjan ta' Struttura u dan peress li l-izvilupp jaffetwa l-veduti tal- Urban Conservation Area u jillimita t-traditional urban skyline ; u
- Fil-permess originali ghal-bini tal-block in ezami (PA 4387/05) kien hemm kondizzjoni specifika (Condition 2) li tghid li strutturi mhux permessi fuq il-bejt hlief biex jaghtu access.

Fl-appell tieghu l-appellant jiddikjara li:

- Il-washrooms m'humix ta' daqshekk impatt u li huma propensi li jkunu rtirati skond Policy and DC 2007 guidelines; u
- Jezisti zvilupp simili fiz-zona.

L-oggezzjonijiet tal-Awtorita' huma ibbazati fuq il-fatti segwenti:

- Meta id-DCC kien approva l-permess originali (PA 4387/05) f' April 2006, jigifieri qabel ma' dahal fis-sehh il-pjan lokali, id-DCC kien accetta li f' dan il-kas jinghataw tliet sulari biss bil-kundizzjoni li l-permess kellu jinkludi kundizzjoni li ma' kellhomx jinbnew strutturi fuq il-bejt hlief

ghall-access. Fil-fatt din kienet il-kundizzjoni 2 li harget mal-permess;

- Il-washrooms li qed jitlob l-appellant diga kienu intalbu fl-applikazzjoni PA 4387/05 u dawn kienu gew michuda u infatti kienet giet inkluzja il-kundizzjoni imsemmija hawn fuq wara li d-DCC kien ordna lill-appellant jissottometti pjanti godda;
- L-izvilupp originali (PA 4387/05) kien gie approvat qabel ma gew fis-sehh il-Local Plans. Skond is-South Malta Local Plan il-height limitation fiz-zona in ezami hija ta' zewg sulari, u ghalhekk l-izvilupp ezistenti huwa gja in excess tal-height limitation indikata fil-Local Plan;
- Il-bini ta' washrooms fuq dan il-bini ikollu impatt vizwali negattiv fuq il-UCA u dan bi ksur car tal-policy UCO 10 tal-Pjan ta' Struttura; u
- Il-permessi li jsemmi l-appellant m'humiex simili ghall-kaz in ezami mill-lat ta' ippjanar u dan ghal diversi ragunijiet teknici li gew spjegati fid-dettal.

Fil-fehma kunsidrata ta' dan it-Tribunal, il-pozizzjoni tal-Awtorita' f'dan il-kas hija wahda soda u dan peress li:

- Din l-istess talba, jigifieri il-bini ta' 6 washrooms fuq il-bejt ta' dan il-bini, kienet giet maghmula fil-permess originali u dak iz-zmien id-DCC kien iddecieda li l-permess ghandu jinghata biss jekk tiddahhal kundizzjoni fil-permess li specifikament tghid li m'ghandhomx jinbnew strutturi fuq il-bejt hlief service access. L-appellant m'appellax minn din il-kundizzjoni fiz-zmien preskritt mill-ligi u ghalhekk il-kundizzjoni ghada tghodd.
- Bid-dhul fis-sehh tal-pjan lokali il-height limitation taz-zona in ezami hija ta' two floors. Ghalhekk l-appellant ghandu sular izjed munn dak li jippermetti l-pjan lokali illum;
- Bid-dhul fis-sehh tal-ligi tal-ippjanar il-gdida f' Dicembru tas-sena 2010 japplika l-Artiklu 69(2) (i) proviso li jghid li bini esistenti vicin is-sit in ezami li huwa ghola mill-height limitation ghaz-zona, m'ghandhux jittiehed bhala commitment; u
- Il-proposta tikser il-policy UCO 10 tal Pjan ta' Struttura.

Fil-kors tas-smiegh ta' dan l-appell, l-appellant ma' giebx argumenti li huma konvincenti f' terminu ta' ippjanar biex

jirribatti jew jikkontradixxi il-punti li ssottomettiet l-Awtorita'. Ikun perikoluz hafna li wiehed jipprova igebbed izjed dawn il-policies ghaliex b' hekk ikun qed jinfetah il-bieb ghal numru kbir ta' talbiet simili li jistghu jwasslu ghad-distruzzjoni totali tal-UCA f' numru ta' villaggi f' dawn il-gzejjer u dan kontra wiehed mill-principji fondmantali tal-iStructure Plan.

L-Awtorita' kienet konvincenti fl-ispjegazzjoni li tat ghall-ghoti tal-permessi li ikkwota l-appellant bhala ezempji ta' dak li huwa allega li kienu precedenti favur li jinhareg dan il-permess. Anki kieku kien jirrizulta li kien gustifikat li jissemma xi permess li nghata li hu simili ghal din it-talba, dan it-Tribunal ihoss li dan m'ghandux jitqies bhala precedent sufficenti ghas-semplici raguni li fi kwalunqwe kas l-Awtorita' tista iggib numru kbir ta' ezempji ta' applikazzjonijiet biex isir zvilupp simili li gew rifjutati u kull wiehed minn dawn jikkostitwixxi precedent il-kontra.

In konkluzjoni, kif jidher mill-fatti li hargu fil-kors tas-smiegh ta' dan l-appell, billi jirrizulta li l-proposta tal-izvilupp tikser il-kundizzjoni numru 2 li hemm fil-permess originali, PA 4387/05, li specifkament jipprojbixxi il-bini ta' strutturi fuq il-bejt ta' dan il-bini hlief ghal access u l-policy UCO 10 tal-Pjan ta' Struttura, dan il-permess ma jistax jigi milquh.

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut tal-applikazzjoni PA 6020/07, mahrug mid-DCC fit-3 ta' Awwissu, 2009.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal naqas anzi rifjuta li jikkonsidra l-commitment li hemm dwar l-gholi tal-binjiet f'siti adjacenti ghal dak in ezami u kwindi ma trattax lill-applikant bl-istess mod bhal applikanti ohra li nhargilhom permess u ghalhekk gie diskrimiant u strah biss fuq l-artikolu 69(2) li ma kienx applikabbli meta saret l-applikazzjoni;
2. It-Tribunal ma hux marbut bil-precedent u l-fatt li l-permess ezistenti kien jivjeta li jsir bini ulterjuri ma jfissirx

li tali kondizzjoni ma tistax tinbidel b'applikazzjoni sussegwenti. Il-ligi ma tivjetahx u kondizzjoni f'permess precedenti ma ghandhiex effett ta' res judicata.

L-ewwel aggravju

Tajjeb li l-ewwel u qabel kollox jigi trattat il-kwistjoni dwar l-applikabilita ta' ligi jew emenda ta' ligi li tkun dahlet in vigore wara li tkun saret applikazzjoni ghal zvilupp. L-insenjament li taghti l-Qorti tal-Appell Inferjuri fil-kawza **Jack M.A. Olin et vs Anthony Sant Portanier nomine** deciza fis-6 ta' Ottubru 2010 tinkapsula l-principji regolaturi in materja fejn jinghad hekk:

Huwa utli li jibda biex jigi osservat illi, kif deciz, "meta gudikant jew interpretu jigi biex japplika l-ligi ghall-kaz prattiku, l-ewwel tfittxija u indagni li ghandha ssir minnhom hija dik li jaraw liema ligi ghandha tigi applikata; u din innecessita tidher aktar cara speċjalment meta ligi gdida tigi attivata u maghmula effikaci dwar materja li qabel jew ma tkunx regolata, jew li tkun regolata mil-ligi anterjuri. Dan aktar u aktar johrog car meta jigi kunsidrat fejn il-materja in diskussjoni tkun tirrigwarda fattijiet kompjudi, jew li kellhom il-bidu u l-inkomincjament taghhom taht l-imperu tal-ligi antika jew anterjuri li tkun irregolathom u jipprotraw ruhhom, f'din l-ahhar ipotesis (mhux fl-ewwel wahda tal-fatt kompjud), taht il-ligi l-gdida". ("**Chev. Antonio Cassar Torreggiani nomine -vs- Nutar Dr. Vincenzo Gatt nomine**", Appell Civili, 12 ta' Mejju, 1950);

Din il-predetta decizjoni tkompli tillustra fuq l-insenjament ta' awturi kontinentali illi f'tema ta' dritt transitorju ghandhom jigu rigwardati fost ohrajn dawn il-principji:-

- i. li l-attijiet jew it-trasferimenti huma regolati mil-ligi li tahtha jkunu gew kompjudi;
- ii. li l-attijiet mibdija taht il-ligi l-antika u li jestendu ruhhom taht il-gdida, ghandhom jigu regolati minn din ta' l-ahhar;
- iii. li meta jkun jezisti veru u proprju dritt kwezit kompjud taht il-ligi antecedenti, dak id-dritt ghandu effikacija fih innifsu li jirrezisti ghall-applikazzjoni tal-ligi l-gdida f'kaz ta' mutament tal-ligi anterjuri;

Applikati dawn il-principji ghal kaz in ezami, din il-Qorti tqis illi applikazzjoni ghal zvilupp ma tikkostitwix dritt izda biss rieda u xewqa ghal zvilupp sakemm dan ikun permissibbli skond il-pjanijiet u policies vigenti meta jinhareg jew tigi rifjutata l-applikazzjoni. Dan ghaliex il-pjanijiet u policies jinbidlu jew jigu aggrustati jew modifikati tul iz-zmien fl-interess generali tal-izvilupp sostenibbli fil-pajiz u fejn allura l-interess pubbliku irid jipprevali fuq l-interess purament privat. Applikazzjoni mhix att kompjut jew terminat izda biss process mibdi taht regim antik li jista' jestendi ruhu taht ligi gdida fejn allura ma japplikax u ma jigix regolat mir-regim l-antik izda dak gdid.

Din hi sitwazzjoni prevalenti fil-ligijiet ta' ppjanar kif tifhimha din il-Qorti u ghalhekk it-Tribunal kellu kull dritt japplika l-artikolu 69(2) u l-provizo taghha kif ezistenti fiz-zmien li ttiehdet id-decizjoni. It-tibdil fil-ligi hu biss modifikazzjoni ta' kif ghandhom jittiehdu d-decizjonijiet li jolqtu zviluppi li ghandhom sotto skrutinju u mhux gia approvati f'liema kaz jikkostiwixxu dritt kwezit favur dak li favur tieghu gia ghandu permess. Din il-Qorti tqis li l-artikolu 9 tal-Kap. 249 li jitratta l-effett retroattiv ta' ligijiet godda ghandu jitqies fil-kuntest tal-principju regolatur dwar dak li jikkostitwixxi att jew trasferiment kompjut u kwindi regolat bir-regim legali applikabbli fiz-zmien tal-att jew trasferiment.

Tenut kont ta' dak li ntqal l-ewwel aggravju ma jistax jintlaqa' ghaliex it-Tribunal applika l-pjan lokali li gie fis-sehh wara li kien gie approvat l-izvilupp bil-permess 4387/05 li kien jippermetti gholi ta' bini li kien gia anqas minn dak approvat bil-permess, liema permess kien inhareg wara li kienet giet imposta l-kondizzjoni li ma jizdiedux strutturi ohra fuq il-bini approvat u b'hekk cahdet it-talba li kienet saret ghall-kostruzzjoni ta' washrooms maghmula fl-applikazzjoni originali, u meta l-istess Awtorita kienet imponiet din il-kondizzjoni minhabba 'the negative visual intrusion that the massing of washrooms at roof level would impose on this particular area'.

It-Tribunal zied li mill-impozizzjoni ta' dik il-kondizzjoni ma kien inbidel xejn mill-lat ta' ippjanar u ghalhekk l-

Kopja Informali ta' Sentenza

applikazzjoni kienet ser tikser l-policy UCO 10 cioe zvilupp li 'adversley affects views of or from an Urban Conservation Area'. Din hi kwistjoni ta' lppjanar li din il-Qorti ma ghandhiex jedd tissindaka.

In oltre l-istess Tribunal ma kkonsidrax il-kwistjoni tal-commitment ta' gholi ta' binjiet adjacenti kemm ghal dak esplicitament maghdud fl-artikolu 69(2) tal-Kap. 504 u kemm ghaliex permessi ohra jistghu jigu ribaduti b'ezempji ta' applikazzjonijiet ohra simili li gew rifjutati, cioe li t-Tribunal mhix marbut ma ebda forma ta' precedent gudizjarju sakemm ikun qed japplika l-pjanijiet u policies rilevanti.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Ghalkemm dan l-aggravju ma jbidel xejn minn dak gia deciz, in linea ta' principju l-Qorti taqbel mal-appellant li permess ezistenti jista' jintalab tibdil tieghu b'applikazzjoni ohra. Pero dan l-aggravju ittiehed barra mill-kuntest tad-decizjoni appellata. It-Tribunal sostna illi l-applikazzjoni tmur kontra l-permess ezistenti ghax il-kondizzjoni imposta kienet intiza biex tissalvagwardja l-gholi tal-binja mill-lat ta' lppjanar cioe urban skyline f'urban conservation area. Din l-applikazzjoni, skond it-Tribunal, kienet intiza biex ibiddel kondizzjoni li skond il-pjanijiet u policies vigenti illum ma tbiddel xejn u kwindi l-kondizzjoni imposta bl-ewwel permess kellha tibqa' valida u l-applikazzjoni l-gdida kienet in effett qed tivvjola tali kondizzjoni fil-permess.

Ghalhekk dan l-aggravju wkoll qed jigi michud.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' James Zammit u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ppjanar tal-21 ta' Gunju 2012. Spejjez ghall-appellant.

Kopja Informali ta' Sentenza

< Sentenza Finali >

-----TMIEM-----