



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-14 ta' Novembru, 2013

Appell Civili Numru. 98/2012

**Caroline Fenech ghan-nom ta'
Marsaxlokk Local Council**

vs

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

Il-Qorti,

Rat ir-rikors tal-appell tal-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar tad-29 ta' Meju 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-10 ta' Meju 2012 fejn inghata permess PA 1017/07 ghal 'construction of jogging track and embellishment of adjoining area', kemm-il darba li l-Kavallerizza Planning Guidance ma jkunx sar fi zmien tlett xhur mid-decizjoni;

Rat ir-risposta ta' Marsaxlokk Local Council li ssottometta li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata ghar-ragunijiet moghtija minnu fosthom illi dan

Kopja Informali ta' Sentenza

il-planning guidance ilu jistenna li jsir sittax-il sena wara li ntarget il-Marsaxlokk Local Plan, u fejn fl-intervall inghata permess ghal privat fl-istess zona.

Rat l-atti kollha;

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

Dan huwa appell minn rifjut tal-Awtorita' tal-applikazzjoni PA 1017/07 'Construction of jogging track and embellishment of adjoining area', b' decizjoni tat-18 ta' Jannar, 2011.

Ir-raguni li ghalha l-Awtorita' irrifjutat l-applikazzjoni PA 1017/07 kienet s-segwenti:

"1. The proposed embellishment project would prejudice the outcome of the Kavallerizza Planning Guidance in accordance with the Marsaxlokk Bay Local Plan Policy MM07, and therefore proposal is considered premature."

Fl-appell taghha tal-11 ta' Awwissu, 2011, l-appellanti nomine, permezz tal-Perit Micallef, taghti r-ragunijiet taghha ghal dan l-appell billi tghid:

"The following is the extract of Policy MM07 from the Marsaxlokk Bay Plan:

The il-Kavallerizza – Seafront opportunity area is centered on the valley between Port Ruman/M'Xlokk and the waterfront area of boat maintenance facilitated. It is about 6.75 ha in extent but it is envisaged that only a modest proportion of the area would be subject to development proposals. It is essential to maintain its open character. The objectives for this area:

1. To provide better community, leisure, sports and playground facilities in a landscaped setting,
2. To assist in integrating Port Ruman and Marsaxlokk,
3. TO upgrade the waterfall area,
4. to provide an area reserved exclusively for the storage of boats and for minor maintenance,

5. To encourage appropriate commercial – including marine based – activities,
6. To establish footpath/walkway links with the rural fringe.

Although the Marsaxlokk Bay Local Plan was published in 1995, to date 916 years later) the proposed Kavalierizza Planning Guidance has not yet been issued. Thus the policies that are in force are those listed in the Marsaxlokk Bay Local Council as listed above.

The proposed jogging track is actually in line with policy MM07 since it provides better community, leisure, and sports facilities in a landscaped setting. Thus this proposal does not prejudice the outcome of the Kavalierizza Planning Guidance and is in conformity with the basis of this guidance, i.e. the respective Local Plan.

It is to be noted that whilst MEPA has now refused this application on the basis that it would prejudice the outcome of the Kavalierizza Planning Guidance, it did not find this problem when on the 9th March 2003, MEPA approved the permit PA 5308/03 for "Proposed hardstand area for 16 No. 22 meter large fishing boats, to service 100 No per annum MM07 and MM08 Marsaxlokk Bay Local Plan. This despite the fact that the site falls also within the same opportunity area that was earmarked by the MBLP for the Kavalierizza Guidance, and that the hardstanding development is more of a permanent nature and of larger financial commitment on the site than the proposed jogging track, i.e. the hardstanding has prejudiced the outcome of the Kavalierizza Guidance by far more than the proposed jogging track (which is still in line with policy MM07).

The Marsaxlokk Local Council feels aggrieved by this attitude of two weighs and two measures by MEPA to the detriment of the residents and the environment which is suppose to enhance.";

Fir-risposta tieghu taz-19 ta' Jannar, 2012, Darren Fava ghall-Awtorita' jippresenta kopja tad-DPA report u jghid li l-Awtorita' m'ghandiex izjed kummenti x'tagħmel fil-mertu.

Is-segweni huma siltiet minn dan ir-rapport li t-Tribunal jhoss ghandhom jigu ssottolineati:

"4.7 DISCUSSION

This full development application seeks the construction of jogging track and embellishment of adjoining area. The proposal is for the conversion of a derelict area located on the edge of the development zone into a jogging track, (Red 18A).

The site lies within an Opportunity Area and it conforms with the Kavallerizza Planning Guidance, which is still at public consultation stage, but not yet approved and to this effect. At Minutes 29/34/38 the Local Plans confirmed that the Planning Directorate cannot recommend the proposal positively, since the development is premature and could be prejudicial to the Planning Guidance.

The architect was requested to instruct whether the applicant would like to await the outcome of the Planning Guidance, or whether he prefers the application to be forwarded to the DCC, even though the recommendation would in this case be a negative one for the above reasons. This correspondence was carried out on 11/6/08. However, to date no reply was received from the architect.

4.8 COMMUNICATION WITH ARCHITECT/APPLICANT

At Doc 16, the architect was requested to submit a block plan of the site clearly indicating the existing plant/tree species indicating their names in latin and English; a revised drawings in which the paved areas are drastically reduced and replaced with planting in line with the the 'Guidlelines on Trees, Shrubs and Plants for Planting and Landscaping in the Maltese Islands' and plans with a detailed legend indicating the different plants/trees/shrubs to be planted as well as the materials and colours to be used for the track, paving and street furniture. Moreover, detailed drawings and specifications of the street furniture are to be submitted. The architect requested for an extension of time at Doc 17. At Doc 18/18A the architect submitted revised plans in which the paved areas are

reduced and legend shows the proposed plants/trees/shrubs to be planted.

At Doc 30, the architect was informed that the site is to conform with the Kavallerizza Planning Guidance, which is still at public consultation stage, but not yet approved and to this effect, the Planning Directorate cannot recommend the proposal positively, since the development is premature and could be prejudicial to the Planning Guidance. The architect was requested to instruct whether the applicant would like to await the outcome of the Planning Guidance, or whether he prefers the application to be forwarded to the DCC at this stage even though the recommendation would in this case be a negative one for the reasons outlined above. This correspondence was carried out on 11/6/08. However, to date no reply was received from the architect.";

Fin-nota tal-Perit Micallef ghan-nom tal-appellanti, tal-1 ta' Novembru, 2011, huwa jissottometti li:

"1. If the Local Plan had established that a Planning Guidance is required for the area of "Il-Kavallerizza" why did not MEPA find application PA 5308/03 also 'pre-mature' when the process of this Planning Guidance was not yet started?

2. The fact that MEPA started consultation period on the Planning Guidance in 2006/7 does not change any legal planning framework form that established by the Marsaxlokk Bay Local Plan in 1995 and so these two applications should have been treated the same.

3. It is to be noted that 16 years have passed from the approve al of the MBLP and now more than 4 years from the start of the process that is to establish the Kavallerizza Planning Guidance and still with NO target date as to when this is to be completed. This is leaving this area in abeyance.

4. The proposed embellishment and jogging track consist mostly of soft landscaping and so does not constitute a development that would really prejudice the area. This

situation is very different from the Hard standing facility (PA 5308/03) which has changed a natural bay into a concrete platform (without going into the merits of that application but comparing only with respect to the argument of creating a prejudice).

5. By refusing this application, MEPA – the Environmental Authority, is inhibiting the Local Council from upgrading the Environment of this particular area of Marsaxlokk without giving any particular reason except that it has slept over the process that is to establish a Planning Guidance.

6. As stated in my original submission, the proposal is in line with the policy MM07 since it provides better community, leisure, and sport facilities in a landscaped setting. Thus this proposal does not prejudice the outcome of the Kavallerizza Planning Guidance and is in conformity with the basis of this guidance, i.e. the respective Local Plan.”

Fit-tieni risposta ta' l-Awtorita' ipprezentata fit-12 ta' Jannar, 2012 minn Jonathan Borg huwa jippreciza li:
"Nevertheless the Authority wishes to clarify, in relation to point no.1 of the appellant's latest submission, that Authority could not state that PA5308/03 (the permit regarding the hard-standing facility) was premature vis-à-vis the Kavallerizza Planning Guidance since this process has not yet even started by the time that PA5308/03 was decided; i.e. at the time of the decision there was no emergent policy guidance for the area or at least indication that such a policy guidance was to be created later on. Therefore in view of the above, how could the Authority declare PA5308/03 premature as implied by the appellant in point no. 1?"

Ikkunsidra ulterjorment:

Wara li kkonsidra il-premess u minn ezami tal-pjanti, ritratti u dokumenti li hemm fil-files PAB 622/11 u PA 1017/11, it-Tribunal jikkumenta kif gej:

Il-mertu ta' dan l-appell jirrigwarda talba ghall-kostruzzjoni ta' jogging track u it-tisbieh taz-zoni tal-madwar.

Din il-proposta tipproponi il-konversjoni ta' area mitluqa fi Triq il-Port Ruman u Triq it-Trunciera. Is-sit huwa imdawwar minn triq fuq tliet nahat u zvilupp industriali fuq ir-raba' naha. Is-sit jinsab gewwa il-Kavallerizza Development Brief Area. Il-Marsaxlokk Bay Local Plan jidentifika din iz-zona bhala Opportunity Area. Kien hemm numru ta' applikazzjonijiet ghal zvilupp varju fuq dan is-sit li issa skadew jew gew irtirati.

L-applikazzjoni giet rifjutata peress li l-Kavallerizza Planning Guidance ghadu ma' giex approvat u ghalhekk, skond il-Marsaxlokk Bay Local Plan, ghadu prematur biex din l-applikazzjoni tigi approvata peress li din tista tikkomprometti l-ghanijiet ta' dan il-pjan.

L-appellanti qed tghid li l-proposta hija konformi mal-Policy MM07 tal-Marsaxlokk Bay Local Plan. Din il-policy taghti linji gwida ta' kif ghandha tigi zviluppata l-area maghrufa bhala l-Kavallerizza. Din il-proposta hija konformi ma' dawn il-linji gwida. Hija tghid li l-Awtorita' fis-sena 2003 approvat zvilupp kbir fil-Kavallerizza li huwa hafna akbar mill-proposta in ezami u ghalhekk ma' tifhimx ghaliex f' dan il-kas l-Awtorita' qed tirrifjuta li tapprova din l-applikazzjoni. Ghalhekk il-Kunsill Lokali ta' Marsaxlokk ihoss li l-Awtorita' qed tuza 'two weights and two measures' f'dan il-kas ghad-dannu tar-residenti ta' Marsaxlokk.

Fir-risposta taghha l-Awtorita' taqbel li din il-proposta tidher li hi konformi mal-Policy MM07 imma tinsisti li ma' tistax tapprovha peress li r-rizutat finali tal-Planning Guidance ghadu mhux maghruf. L-Awtorita' tghid li hija kienet staqsiet lill-perit tal-appellanti biex l-applikazzjoni tinzamm sakemm ma' jigi finallizzat dan il-Planning Guidance izda dan ma' kienx irrisponda din il-korrispondenza.

Fl-opinjoni konsidrata ta' dan it-Tribunal, l-argumenti li qed iggib l-appellanti huma konvincenti. Kif tista l-Awtorita' tkun kredibbli f'dan il-kas meta halliet dan il-Planning Guidance imdendel ghal izjed minn sittax il-sena f'area

daqshekk sensitiva bhalma hi l-Kavallerizza? Dan il-perjodu ta' zmien li fih ma sar xejn tant hu twil li anke il-Marsaxlokk Bay Local Plan innifsu probabbilment issa wkoll wasal ghal revizjoni. Fuq il permess li inghata fl-istess area koperta minn dan il-Planning Guidance, jigifieri il-PA 5308/03, l-Awtorita' tghid li kien gustifikat li jinghata ghax il-Planning Guidance kien ghadu ma' bediex jinhadem. Din hija skuza fjakka ghall-ahhar ghas-semplici raguni li l-Marsaxlokk Bay Local Plan kien fis-sehh u dan kien jghid, dak iz-zmien bhall-lum, li kull zvilupp f'din l-area ghandu jistenna l-Planning Guidance. Izjed minn hekk, kif sewwa tghid l-appellanti, dak l-izvilupp kien hafna izjed intensiv u li jikkommetti minn dak in ezami.

Madankollu, in generali, dan it-Tribunal ihoss li fejn jidhol l-ippjanar, meta jkun sar zball u inghata permess meta ma' kellux jinghata skond il-policies tal-ippjanar vigenti, ma' ghandux jithalla li jsir zball iehor sempliciment minhabba xi tip ta' precedent li jkun inholog minhabba l-ewwel zball. Dan ghaliex waqt li jista jigi argumentat li b'hekk tkun qed issir gustizzja mat-tieni applikant, fil-verita' tkun qed issir ingustizzja akbar mal-pubbliku in generali li jkollu jsofri zball iehor. F' dan il-kas pero dan l-argument ma' jregix ghal zewg ragunijiet u cioe ghax l-pubbliku ilu jistenna izjed minn sittax il-sena biex isir xi haga u kif ukoll ghaliex il-proposta in ezami tikkonsisti fil-parti l-kbira taghha f'tindif u landscaping f' area mitluqa u zdingata.

Ghalhekk f' dan il-kas it-Tribunal ihoss li ghandu jinghata perjodu ta' mhux izjed minn tliet xhur biex il-Planning Guidance tal-Kavallerizza jigi iffinalizzat u jekk dan ma' jsirx allura l-Awtorita' ghandha tohrog dan il-permess li wara kollox huwa konformi mal-policy MM07 tal-Marsaxlokk Local Plan.

It-Tribunal ghalhekk, in vista tal-kunsiderazzjonijiet hawn fuq maghmula, qieghed jilqa' dan l-appell limitatament u jordna li jekk il-Kavallerizza Planning Guidance ma' jkunx iffinalizzat sa zmien tliet xhur mill-lum, ghandu jithassar ir-rifjut tat-18 ta' Jannar, 2011, tal-applikazzjoni PA 1017/07 'Construction of jogging track and embellishment of

adjoining area', u l-appellant ghandu jinghata il-permess kif minnu mitlub b'dana illi l-izvilupp jigi approvat bil-kundizzjonijiet normalment imposti f'applikazzjoniet simili.

Ikkunsidrat

L-aggravji tal-Awtorita huma s-segwenti:

1. It-thejjija ta' pjanijiet, policies u linji gwida huma prerogattiva tal-Awtorita u soggetti ghad-diskrezzjoni tal-Ministru u t-Tribunal ma ghandu ebda jedd jimponi termini biex dawn jigu finalizzati u ghalhekk id-decizjoni b'impozizzjoni ta' terminu hi ultra vires il-poter tat-Tribunal;
2. Oltre minn hekk l-impozizzjoni ta' terminu tal tlett xhur hu fattwalment impossibli;
3. Ghoti ta' permess ma jistax jkun soggett jekk l-Awtorita appellanta twettaqx jew le planning guidance izda irid jigi analizzat fuq planning considerations.

Il-Qorti ser titratta dan l-appell f'salt, ghax jirrigwarda punt ta' ligi li jimmerita konsiderazzjoni. Jibda biex jinghad illi bhala stat fattwali jezisti l-Marsaxlokk Bay Local Plan MM07 u skond dan il-pjan li fih linji gwida l-applikazzjoni tal-appellati taqa' fil-parametru tal-oggettivi ta' dan il-pjan. Pero jidher illi s-sit jaqa' fil-Kavallerizza Development Brief Area li fl-istess pjan lokali hu deskritt bhala Opportunity Area. Kellu jsir skond il-pjan lokali, Kavallerizza Planning Guidance biex iz-zona tigi zviluppata holistikament. Jidher li wara sittax-il sena u sena u nofs wara li nghatat id-decizjoni tat-Tribunal, dan ghadu ma sarx.

L-Awtorita qed tappella ghax qed tallega li t-Tribunal ma ghandux jedd jimponi termini biex isiru affarijiet fdati esklussivament f'idejn l-Awtorita bil-kunsens tal-Ministru. Il-Qorti ma taqbilx. It-Tribunal ghandu jedd jaghti dawk l-ordnijiet li jidhirlu xierqa f'decizjoni (ara para. 5 tat-Tieni Skeda Kap. 504). Hu minnu illi t-Tribunal ma ghandux jedd jordna li jsir xi pjan, policy jew dokument iehor bhal dan il-planning guidance hu stess pero meta gia jezisti bhala stat fattwali u legali l-obbligu li dan isir, obbligu maghmul mill-Awtorita fuqha nfisha, allura t-Tribunal ghandu kull jedd li jinvestiga jekk l-Awtorita adempietx dmirha f'zmien ragonevoli u fin-nuqqas jobbliga lill-

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Awtorita koncernati biex tottempera ruhha ma' dan l-obbligu.

It-Tribunal hu Awtorita quasi gudizjarja u l-Awtorita ma tistax tippretendi li tesigi hi stess kondizzjonijiet qabel jinhargu permessi, u fl-istess waqt ma taghmel xejn biex tippubblicizza u tipromulga dawn il-kundizzjonijiet, ikunu f'liema forma jkunu.

L-aggravju tal-Awtorita kien ikun validu li kieku t-Tribunal impona fuq l-Awtorita li jsir xi pjan jew policy pero mhix fejn il-pjan skeletriku qiegħed hemm u l-Awtorita naqset li tlahhmu biex ic-cittadin jibbenefika mill-possibilita li jizviluppa skond il-pjan, policy jew linji gwida. Hawnhekk hu l-kompitu tat-Tribunal li jara li l-Awtorita tezercita l-funzjonijiet tagħha b'diligenza, serjeta, u fi zmien ragonevoli biex jigi assikurat is-servizz li l-Awtorita hi obbligata tagħti. Sittax-il sena ma jistax jigi kunsidrat bhala terminu ragonevoli biex isir planning guidance.

Dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju mhux punt ta' ligi izda kwistjoni fattwali ta' planning u amministrazzjoni afdana f'idejn it-Tribunal. Jingħad biss illi oltre s-sittax-il sena, ghaddew sena u nofs ohra mid-decizjoni li kienu jigu mpjegati ahjar li kieku ngħata tagħrif lil Qorti dwar progress li seta' sar biex jigi attwat il-planning guidance.

It-tielet aggravju

L-Awtorita appellanti hi skorretta li permess hu assoggettat jekk isirx planning guidance jew le. It-Tribunal qies il-fattispecie tal-kaz u ra li l-applikazzjoni hi konformi mal-policy u wahedha kien jimmerita li tigi approvata bla ebda konsiderazzjoni ohra. Fost il-konsiderazzjoni li għamel it-Tribunal irrileva illi ġia inhareg permess lil terzi fiz-zona hafna akbar minn dak propost. It-Tribunal iddeskriva l-argument tal-Awtorita li l-permess inhareg ghax kien għadu ma bedix jigi kunsidrat il-planning

guidance hi skuza fjakka li din il-Qorti tikkondividi. Kien ghalhekk illi l-istess Tribunal wizen l-ingustizzja lampanti li kienet qed issir mill-applikant f'dan il-kaz fejn ma ntuzax l-istess kejl bhal ma ntuza ghal zvilupp privat. Madankollu kif qal gustament it-Tribunal, biex ma jidhirx li zball qed jigi korrett bi zball iehor, ikkunsidra terminu lill-Awtorita biex jiffinalizza l-planning guidance. Ghalhekk approva l-applikazzjoni, sospiza ghal terminu. Jekk it-terminu jiskadi u ma jkunux hargu linji gwida, l-applikazzjoni, li kienet in sintonia mal-linji gwida tal-pjan lokali kellha titqies approvata ab initio. Il-Qorti ma ssib xejn x'ticcensura b'din id-decizjoni ragunata u maghmula b'sens kbir ta' gusizzja mal-partijiet kollha inkluz l-Awtorita. Ghalhekk dan l-aggravju qed jigi michud.

Decide

Il-Qorti ghalhekk qed taqta' u tiddeciedi billi tichad l-appell tal-Awtorita ta' Malta dwar l-Ambjent u l-lppjanar u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-lppjanar tal-10 ta' Mejju 2012.

Spejjez ghall-Awtorita.

< Sentenza Finali >

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