



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-14 ta' Novembru, 2013

Appell Civili Numru. 140/2012

Joe Debono

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Joe Debono tal-20 ta' Awwissu 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Lulju 2012 kontra r-rifjut ta' PA 3259/10;

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

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

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

B'applikazzjoni – Full Development Permission – PA/03259/10 fejn l-appellant, fit-13 ta' Lulju, 2010, f' 57, Xatt is-Sajjieda, Marsaxlokk, talab:

“To place a generator at roof level.”

Illi permezz ta' rifjut tal-24 ta' Frar 2011, l-Awtorita' cahdet it-talba tal-applikant ghar-ragunijiet segwenti:

“1. The proposed development is unacceptable in a residential area as it would have a deleterious impact on the amenity of the area and of existing adjoining uses by virtue of noise, vibration, additional traffic generation and operating times. It therefore constitutes bad neighbour development and so conflicts with Structure Policy BEN 1 which seeks to protect the amenity of existing uses.

2. The proposed development is unacceptable since it does not comply with policy 13.5 of Development Control Policy & Design Guidance 2007.”

Illi l-Perit Ellul ressaq l-aggravji tal-appellant inter alia kif gej:

“1. The use of a generator does not constitute additional traffic generation. It will only be used when there is a power cut to allow restaurant's patrons enjoy their meal. The generator will have low noise levels and will not cause vibrations.

2. The generator is located at roof level and not on the roof of washroom.

3. Similar permits were 2120/08 and 5130/07.”

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

“The Authority is hereby presenting a copy of the DPA Report since it has no further comments to add in relation to the merits of this Appeal other than those mentioned in the said report. In this report it is clearly shown that policy 13.5 of DC 2007 is applicable to the case since it clearly states that generators will not be allowed on the roof of washrooms, penthouses, or any other parts of the roof.

In addition, the Authority wishes to clarify that contrary to what the appellant is stating, i.e. similar permits were PA 2120/08 and PA 5130/07, the EPC was fully aware of these comments which were addressed by the Planning Directorate in Notes to Committee 3.1 of the DPA Report.”

“4.7 DISCUSSION

The generator is to be positioned on the roof of the second floor and being receded 12.5m from the building frontage.

Policy 13.5 of DC2007 indicates that for all buildings, the placing of commercial generators or any other bulky equipment on the roof of washrooms, penthouse or any other part of the roofs, will not be permitted. The generator is positioned on the roof of the second floor thus running counter to the above mentioned policy.

The generator is likely to have a deleterious impact on the existing uses by virtue of nuisance being created to the surrounding residents caused by noise, fumes, atmospheric pollution and unusual operating times. The proposal would therefore constitute bad neighbourliness thus running counter to Structure Plan Policy BEN 1 and as such, the proposal should not be accepted.

4.8 COMMUNICATION WITH ARCHITECT/APPLICANT

Since the principle of the proposal is not acceptable, no technical specifications of the generator, noise report, mitigation measures and a report on the expected operational hours are being requested from architect. One should note that in the event of an overturning of the recommendation, such a report would still have to be requested and submitted.”

Ikkunsidra ulterjorment:

Wara li kkunsidra il-premess u minn ezami tad-dokumenti li hemm fil-files PAB 198/11 u PA 3259/10, it-Tribunal jikkumenta kif gej:

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Il-mertu ta' dan l-appell jirrigwarda talba biex jigi installat generator fuq il-bejt tas-sit in ezami.

Skond il-mappa Map7 tal-Marsaxlokk Bay Local Plan is-sit mertu ta' dan l-appell jiffirma parti mill-Marsaxlokk Urban Conservation Area u jikkonsisti f' bini fuq zewg sulari. Il-ground floor jintuza bhala restaurant waqt li s-sular ta' fuq jintuza bhala residenza.

It-talba giet michuda peress li din tista tohloq inkonvenjent ghall-girien u ghalhekk tikser il-policy BEN 1 tal-Pjan ta' Struttura. It-talba tikser ukoll il-policy 3.5 tad-DC 2007 li tghid li mhux permess li jitqieghed dan it-tip ta' apparat fuq il-bejt.

L-argumenti li tqajmu fil-kors tas-smiegh ta' dan l-appell jistghu jingabru fil-qosor kif gej.

Skond l-appellant:

- Il-generator ser jintuza biss meta jmur l-eletriku u mhux ser jikkawza storbu jew vibrazzjonijiet;
- Il-generator ser jitqieghed fuq il-bejt tal-first floor u mhux fuq il-bejt tal-washroom; u
- Permessi simili inghataw qabel u cioe PA 2120/08 u PA 5130/07.

Fir-rapport taghha l-Awtorita' terga tirrepeti ir-reasons for refusal u ticcara li miz-zewg permessi li jikkwota l-appellant wiehed kien inghata wara overturning mid-DCC tar-rakkomandazzjoni tad-Direttorat u l-iehor kien permess ghal enclosed generator.

Fis-sottomisjonijiet tieghu l-appellant jerga jirrepeti l-argumenti identici (b' ittra identika) li kien ghamel fl-appell tieghu u ma' gabx ragunijiet ohra validi u ibbazati fuq principji ta' ippjanar biex jikkonvinci lit-Tribunal li dan l-izvilupp huwa gustifikat. Wara li kien ra r-risposta tal-Awtorita' l-appellant kellu l-opportunita' jispjega izjed fid-dettal fix kienet tikkonsisti l-proposta tieghu u dan m'ghamlux.

Fuq il-permessi simili ghal dak in ezami li l-appellant jsemmi li nghataw, l-appellant ma kkumentax fir-risposta

tieghu ghar-rapport tal-Awtorita'. Ghalkemm jidher li wiehed minnhom jista jkun li kien simili ghal kas in ezami it-Tribunal huwa tal-fehma li ma' jistax jinghad li b' daqshekk tezisti sitwazzjoni fejn inholog xi tip ta' commitment.

Generalment meta sistema ta' ippjanar tkun ilha certu zmien topera, kull meta jitqajjem xi kas ta' zvilupp li jkun inghata permess minkejja li jkun imur kontra l-policies tal-ippjanar u ghalhekk dan jigi ikkwotat bhala commitment, jirrizulta li hafna drabi jew il-permess ikun inghata taht regime ta' ippjanar differenti jew ikunu jezistu numru akbar ta' kazi fejn talbiet simili jkunu gew rifjutati u ghalhekk ikunu jistghu jigu citati bhala commitments il-kontra.

Fi kwalunkwe kas irid jinghad li l-kuncett ta' commitment f' terminu ta' ippjanar ghandu japplika biss f' kazi eccezzjonali u ghandu jigi uzat b' kawtela kbira u dan ghaliex id-dixxiplina teknika u xjentifika ta' land use planning giet stabbilita f' pajjizi zviluppanti u avanzati appuntu biex permezz ta' pjani fit-tul u management ghaqli jitwaqqfu u addirittura jigu mmregga lura tendenzi ta' zvilupp u land uses ohrajn li jkunu qed ikollhom effetti mhux desiderabbli fit-territorju li fuqu jkunu japplikaw u li jkunu qed jixxerdu propju bis-sahha tal-argument li zviluppi u uzi simili diga jezistu fil-madwar. Ghalhekk, by definition, land use plans u policies li jkollhom is-sahha ta' ligi ghandhom generalment japplikaw irrispettivament minn kwalunkwe indikazzjoni ta' commitment li jista jkun hemm u dan sakemm mal-commitment ma' jkunx ta' entita massicca kif spjegat hawn taht. Jekk ma' jsirx dan, l-ebda sistema ta' land use planning ma' tista qatt tahdem.

Fil-fehma kunsidrata ta' dan it-Tribunal, biex sistema ta' ippjanar tahdem kif suppost u fl-interess publiku, il-kazi fejn jista legittimament, f' sens tekniku, jintuza il-principju ta' commitment huwa meta il-maggoranza kbira ta' permessi potenzjali ta' xi tip partikolari li jkunu jistghu jinghataw jkunu fil-fatt inhargu.

Li qed jinghad hawn fuq ma' jnaqqas bl-ebda mod id-dritt li jista' jkollu l-appellant li jipprocedi kontra l-Awtorita'

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civilment jekk iħoss li hu kien haqqu jiehu permess għaliex fil-passat kien inghata permess simili għat-talba tiegħu. Id-differenza hi li din il-kawza civili ma' tistax issir bhala parti mill-process tal-ippjanar.

Fil-fehma kunsidrata ta' dan it-Tribunal, mill-premess jirrizulta li l-pozizzjoni tal-Awtorita' f' dan il-kas hija wahda soda u li hija pjenement sostnuta mill-plans u policies tal-ippjanar vigenti.

Għalhekk peress li l-proposta ta' l-appellant tikser il-policy BEN 1 ta' l-iStructure Plan kif ukoll il-policy 13.5 tal-Development Control Policy and Design Guidance, 2007, dan l-appell ma jirrizultax fondat u ma jimmeritax kunsiderazzjoni favorevoli.

It-Tribunal, għalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut tal-applikazzjoni PA 3259/10, mahrug mill-EPC fl-24 ta' Frar, 2011.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Li a bazi ta' prior commitment tal-Awtorita f'zewg permessi simili, din l-applikazzjoni kellha tigi milqugħa;
2. It-Tribunal applika hazin policy BEN 1 tal-l-structure Plan;
3. It-Tribunal applika hazin l-artikolu 13.5 tad-Development Control Policy and Deisgn Guidance 2007.

L-ewwel aggravju

Il-Qorti tqis li dan l-aggravju dwar il-commitment allegat la darba kkunsidrat mit-Tribunal u deciz minnu ma għandux jerga' jitqajjem quddiem il-Qorti. Kien ikun differenti kieku tqajmet il-kwistjoni tal-commitment u t-Tribunal ma ndirizzax l-aggravju. Appelli isiru fuq punti ta' ligi mhux fuq aggravji dibattuti u decizi mit-Tribunal. Madankollu l-Qorti qieset dak li qal it-Tribunal fejn miz-zewg permessi kkwotati mill-appellant, wiehed biss kien simili għal dan in kwistjoni. Pero kif gustament qal it-Tribunal dan wahdu ma johloq ebda drittijiet favur l-applikant li jircevi l-istess

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trattament fuq bazi ta' xi 'commitment' kemm ghaliex kaz wiehed ma jikkostitwix commitment, liema kuncett ghandu jigi applikat f'kazijiet eccezzjonali u uzat b'kawtela u fejn ma jmurx kontra pjanijiet u policies ezistenti u sakemm il-commitment ma jkunx ta' entita massiva. Kull ma zied it-Tribunal hu illi jekk l-appellant ihossu aggravat mit-trattament tal-Awtorita, ir-rimedju tieghu jista' jkun wiehed civili izda mhux ta' ppjanar.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju qed jigi michud billi si tratta ta' kwistjoni ta' fatt mhux ta' ligi. Il-Qorti ma tistax tissindaka jekk dan il-generator hux tali li jista' jikkawza inkonvenjent ta' storbju ghax din mhix kwistjoni legali.

Ghalhekk dan l-aggravju qed jigi michud.

It-tielet aggravju

L-appellant jallega illi l-artikolu 13.5 tad-Development Control Policy and Design guidance 2007 ma japplikax ghax it-talba ma tmurx kontra l-ispirtu taghha billi jista' jitqieghed servizz fuq bejt li ma jkunx ta' impatt negattiv fuq il-madwar. L-Awtorita u t-Tribunal invece agixxew billi applikaw l-artikolu specifiku ghal generators billi l-artikolu 13.5 ighid li commercial generators mhux permessi fuq bjut ta' washrooms, penthouses jew kull parti ohra tal-bjut. Billi dan il-generator kien ser jitqieghed fuq il-bejt tat-tieni sular, kien jaqa' fid-divjet tal-policy. Din hi interpretazzjoni testwali ta' dak li jipprovdi l-policy u din il-Qorti tqis li ma tistax tissostitwixxi l-interpretazzjoni taghha ghal dak li qalet l-Awtorita u konfermat mit-Tribunal. Kwindi ma jistax jinghad li hemm applikazzjoni hazina tal-policy.

Ghalhekk dan l-aggravju qed jigi michud.

Decide

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Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Joe Debono u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Lulju 2012. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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