



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-14 ta' Novembru, 2013

Appell Civili Numru. 34/2012

Amabile Camilleri

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Amabile Camilleri tad-9 ta' April 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Marzu 2012 li cahdet l-applikazzjoni ghal hrug ta' permess PA 2780/07 'to erect second floor over parts existing/approved ground floor and first floor flats';

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

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

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

B'applikazzjoni tal-24 t'April 2007 – Full Development Permission – PA/02780/07 fejn l-appellant, Amabile Camilleri, f'sit fi Triq Dun Karm Psaila, Zebbug (Malta) talab:

“To erect second floor over part existing/approved ground and first floor flats.”

Illi inhareg rifjut fit-28 ta' Frar 2008, u l-konferma tal-istess mid-DCC fid-29 ta' Jannar 2009 ghar-ragunijiet segwenti:

“The height of the proposed building exceeds the maximum height limitation for Zebbug. It is therefore incompatible with the characteristics of the area and with the Local Plan for the area, which seeks to limit height in order to safeguard the general amenity of the area.”

Illi l-Avukat Borg Costanzi ghall-appellant wiegeb inter alia illi:

“In this line kindly note that the proposed development lies outside the UCA and therefore the relative policies are not applicable to the development in question.

Furthermore, my client's existing property has been developed in such a way that no alterations are being made on the façade and the bulk of the development has been substantially receded and is accessed from a drive-in leading to the façade. The area surrounding my client's property is already committed with three floors of building as shown by the photos herewith being attached. It is respectfully submitted that this is one of those instances where a building height relaxation is justified in terms of policy 16(1) under DC 2007 particularly in view of the fact that the development, if allowed, will not effect the streetscape in any way whatsoever.”

Illi l-Awtorita' wiegbet inter alia kif gej:

“5.0 COMMENTS ON APPELLANT'S ARGUMENTS & REFUSAL NOTICE

5.1 The proposed additional unit at second floor level is objected to by the Authority on the grounds that it would exceed the height limitation established for this site through the Local Plan. Accepting such would infringe the Local Plan's zoning designations, and would in effect be detrimental to the visual integrity of this locality's UCA.

5.2 The appellant claims that as the part of the site affected by the development is located outside the Urban Conservation Area, "the relative policies are not applicable to the development in question". On this issue, the Authority points out that the proposed development has been refused on the grounds that the proposed additional floor would result in the development exceeding the height limitation established for this site. The height limitations established in Local Plan are to be respected at all times and in all localities, irrespective of whether the site is located within the Urban Conservation Area or not. Hence, the height limitation of two floors applicable to this site as designated in the Local Plan is to be respected.

5.3 The appellant also claims that the area surrounding the site is committed with three storey high development. On this issue, the appellant has however failed to provide adequate evidence of this, and therefore it cannot be established whether the additional floor may be accepted under DC2007 Part 16(1), as claimed by the appellant.

5.4 Accepting the proposed additional floor would go beyond the scope of the Local Plan, which now sets out the definite height limitation for each locality. Hence, approving the proposed additional floor would only undermine the zoning designations established in this Local Plan. The Planning Appeals Board has conceded to this notion in several decisions, requiring that the height limitations defined in the Local Plan are respected. Cases in point include those for:

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- Kevin Azzopardi vs. MEPA, 6th March 2009, PA 1235/06, PAB 190107;
- John Caruana vs. MEPA, 15th February 2008, PAB 184/06, PA 4804/04;
- Warren Azzopardi vs. MEPA, 20th July 2007, PAB 230106, PA 3691/06;
- Marco Zammit vs. MEPA, 20th July 2007, PAB 258/06, PA 2386/06.

The same considerations taken for these cited decisions are similarly applicable to the application presently subject to appeal.”

Illi permezz ta' ittra l-Avukat Borg Costanzi wiegeb inter alia:

“During the site inspection, a query was raised as to the extent of the boundary of the village core and whether the site in question infringes on the village core or not.

I am enclosing a copy of a site plan indicating the extent of the village core and I am also indicating on the said plan, the area which is proposed for development by my client and which forms the subject of the current appeal. It is clear from the map herewith attached that the site in question is not within the village core but is within the development zone in Zebbug which permits development up to three floors.

My client is requesting that he be granted a permit for the floors indicated for the area namely upto the third floor.”

Illi ghamel riferenza wkoll ghal rapport mhejji mill-Perit Pierre Attard taz-17 ta' Frar 2009 fejn stqarr illi:

“From this report you will note that there are properties which had been granted permits for third floor even though they were situated within the village core and thus from a planning point of view it is respectfully submitted that my client should be permitted to develop the site up to the third floor in line with the policies pertinent to the site to which the application refers and which site is definitely not within the village core.”

Illi permezz ta' Second Statement l-Awtorita' wiegbet illi:

"1. The appellant submitted a letter (dated 8th June 2011) as a follow up to the Tribunal's site visit and in reply to the Authority's submissions (in writing and verbally).

2. The appellant continues to mislead the Tribunal when he states that the site being for the major part outside the boundary of the UCA qualifies for 3 floors; indeed this part is highlighted (by being in underline) in the appellant's submission. This assertion is incorrect. Even the part of the proposed development falling outside the UCA boundary is designated by the local plan for a height of 2 floors. A copy of the local plan map showing the height limitations of the area (site earmarked on said plans) is being attached to dispel any further doubt on the matter.

3. The appellant also re-submitted a report indicating various permits that have been issued in the neighbourhood for developments with 3 floors. However none of these quoted permits are adjacent to the appellant's property. Therefore, automatically, the provisions of Policy 16.1 of the DC2007 do not apply.

Even more importantly, all the permits that have been referred to were granted before the enactment of the local plan. The height of the local plan is clear and definite. Approving the proposed additional floor would only undermine the zoning designations established in this Local Plan. This notion has been reiterated various times by the Planning Appeals Board in several decisions, requiring that the height limitations defined in the Local Plan are respected. Cases in point include those for:

- Kevin Azzopardi vs. MEPA, 6th March 2009, PA 1235/06, PAB 190107;
- John Caruana vs. MEPA, 15th February 2008, PAB 184/06, PA 4804/04;
- Warren Azzopardi vs. MEPA, 20th July 2007, PAB 230106, PA 3691/06;

- Marco Zammit vs. MEPA, 20th July 2007, PAB 258/06, PA 2386/06.

Furthermore, the Authority remarks that according to the proviso in Article 69 (2) (i) of Act X of 2010 (Environment and Development Planning Act) no commitment from other buildings may be interpreted or used to increase the height limitation established in the local plan. This means that buildings that legally exceed the height limitation do not constitute any planning material that should be taken into consideration in the assessment of a planning development.”

Illi l-Avukat Borg Costanzi ressaq il-kummenti tieghu inter alia kif gej:

“In the first place, it must be emphasised that the site in question is not within the UCA as can be seen upon a proper examination of the plan submitted by MEPA in its second statement. It is clear that the site is outside the dotted line indicating the boundary of the UCA.

In fact the adjacent site having PA permit PA 4511/04 was granted a permit by the Board on the 4th of February 2009 wherein the Board confirmed that the application complies with Article 16(1) (ii) of DC 2007 "in view of the several three floor commitments along and directly adjoining the site".

Secondly and without prejudice to the above, even had the site been within the UCA, in terms of policy SMSE 03 paragraph 3, which states that "where the predominant building height of buildings along the same frontage is more than two floors. an additional floor may be permitted".

Finally reference is also made to the case decided by the Court of Appeal, on an appeal from a decision given by the Planning Appeals Board, in the case "Leonard Cassar vs MEPA" (Rik 5/2010RCP). decided by the Court on the 28th June 2011 whereby the Court made it clear that all things being equal (*cerimus paribus*), similar applications should be treated equally. It is pertinent to note that this

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judgement was delivered after the recent amendments to the Development Planning Act.

Consequently it is respectfully submitted that client is therefore be entitled to the permit in the same way as the properties adjoining him have been granted permits.”

Illi permezz ta' Third Statement l-Awtorita' wiegbet inter alia kif gej:

“2. The Authority has the following points to raise:

2.1 The Authority never disputed the fact that the majority of the site is outside the UCA. However the appellant continues to stress every time this issue implying that the Authority refused the application because it assessed the proposal description as if it is in UCA. This is simply not true. The Authority has already in the previous submissions made it clear that the application has been refused because it exceeds the height limitation whether in UCA or not.

MEPA will stress once again, even if the appellant conveniently skips the following fact every time, that even the part of the proposed development falling outside the UCA boundary is designated by the local plan for a height of 2 floors. The proposal is for a 3 storey development and therefore it is not acceptable.

2.2 All the permits referred to by the appellant except one were granted before the enactment of the local plan. The height of the local plan is clear and definite. Approving the proposed additional floor would only undermine the zoning designations established in this Local Plan. This notion has been reiterated various times by the Planning Appeals Board in several decisions, requiring that the height limitations defined in the Local Plan are respected. Cases in point include those for:

- Kevin Azzopardi vs. MEPA, 6th March 2009, PA 1235/06, PAB 190107;

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- John Caruana VS. MEPA, 15th February 2008, PAB 184/06, PA 4804/04:
- Warren Azzopardi VS. MEPA, 20th July 2007, PAB 230106, PA 3691/06:
- Marco Zammit vs. MEPA, 20th July 2007, PAB 258/06, PA 2386/06.

Furthermore the Authority remarks that according to the proviso in Article 69 (2) (i) of Act X of 2010 (Environment and Development Planning Act) no commitment from other buildings may be interpreted or used to increase the height limitation established in the local plan. This means that buildings that legally exceed the height limitation (as in PA4511/04) do not constitute any planning material that should be taken into consideration in the assessment of a planning development.

2.3 The appellant makes reference to the concept of *cerimus paribus* and to a recent decision of the Court of Appeals which highlighted the need to respect this concept. The Authority notes that the case referred to by the appellant does not even regard an issue of height but it is about change of use from Class 5 to Class 4. Moreover the concept of *cerimus paribus* relates to the issue of commitments. In the case highlighted by the appellant, the issue revolved on similar uses in the vicinity and these had to be taken into account. However as explained above in paragraph 2.2, Article 69 (2) (i) of Act X of 2010 commitments related to height no longer constitute a material bearing to be considered in the assessment of a planning development.”

Ikkunsidra ulterjorment:

Wara li kkonsidra il-premess u minn ezami tal-pjanti, ritratti u dokumenti li hemm fil-files PAB 28/09 u PA2780/07, it-Tribunal jikkumenta kif gej:

Il-mertu ta' dan l-appell jirrigwarda talba ghal full development permission biex jinbena' sular fuq bini residenzjali b' zewg sulari li huwa diga approvat. Il-bini approvat huwa internal development li jikkonsisti f' basement garages u zewg sulari ta' zvilupp residenzjali.

Bis-sular addizzjonali propost l-izvilupp jirrizulta f' bini ta' tliet sulari li jzidu n-numru ta' residenzi b' erbgħa. Huwa propost ukoll li jinbnew tmien washrooms.

Is-sit mertu ta' dan l-appell jinsab għewwa d-development zone ta' Haz-Zebbug u jikkonsisti f' internal development b' access minn Triq Dun Karm Psaila. Il-faccata qiegħda fil-UCA waqt li l-parti fejn jinsab l-internal development tinsab barra mill-UCA.

Originarjament kien hareg outline development permit fuq is-sit (PA 3934/99) għall-kostruzzjoni ta' basement garages u maisonettes sovrastanti. Il-full development permit kien gie approvat (PA 6416/00) u wara kien sar tibdil li kien gie approvat bil-permess PA 2293/05.

Biex jiggustifika it-talba tiegħu għat-tielet sular fuq dan l-internal development fuq il-bicca tas-sit li qiegħda barra l-UCA l-appellant jibbaza il-kas tiegħu fuq is-segħenti argumenti:

- Il-parti l-kbira tas-sit tinsab barra l-UCA;
- Fuq is-sit adjacenti hareg permess (PA 4511/04) għall-bini ta' zvilupp fuq tliet sulari;
- Il-policy SMSE 3 tal-pjan lokali tippermetti l-bini ta' sular zejjed fuq dak permess fil-UCA jekk l-gholi predominanti tal-bini madwar is-sit ikun ta' l-istess għoli; u
- Il-kas fil-qorti tal-appell Leonard Cassar vs MEPA tagħmilha cara li l-principju ta' cerimus paribus għandu japplika f' kazi bħal dawn.

L-argument principali f' dan il kas, kif anki tirrileva l-Awtorita', huwa li s-sit kollu kemm hu, jgħifieri kemm il parti li qiegħda fil-UCA kif ukoll il-parti li qiegħda barra mill-UCA, jinsab f' zona li skond il-local plan għandha height limitation ta' 2 floors. Għalhekk il-proposta, li hija binja ta' tliet sulari, ma' tistax tigi accettata. Dan it-Tribunal ma' jistax japprova applikazzjoni li tmur kontra principju hekk fundamentali fil-pjani lokali. Dan hu ikkonfermat ukoll minn numru ta' decizjonijiet li għamel dan it-Tribunal u kif ukoll il-PAB qablu.

L-Awtorita' tinnota li l-permessi citati mill-appellant, barra wiehed, inghataw qabel ma' dahal fis-sehh il-pjan lokali. Fil fehma kunsidrata ta' dan it-Tribunal, il-height limitation imsemmi fil-pjan lokali huwa car u ma' jista jkun hemm ebda dubju fuqu. It-Tribunal jaqbel ma' l-Awtorita' li jekk jinghata dan il-permess jinholoq precedent serju li jdajjed iz-zoning kollu li qed jigu stabbiliti bil-pjani lokali. Hemm ukoll il-fatt li skond l-artiklu 69 (2) (i) tal-Att X tat-2010, l-gholi tal-bini ta' madwar is-sit in ezami ma' jistax jittiehed bhala precedent biex jizdied il-height limitation stabbilit ghal dik iz-zona.

Dwar il-kas citat mill-appellant Leonard Cassar vs MEPA, l-Awtorita', ticcara li l-kas mhux wiehed ta' gholi imma ta' change of use. Kif spjegat hawn fuq, minn mindu dahal fis-sehh l-artiklu 69 tal-Att X tat-2010, commitments li ghandhom x'jaqsmu ma' gholi m'ghadhomx jikkostitwixxu raguni li ghandha tigi ikkonsidrata fl-iprocessar ta' applikazzjoni ghal zvilupp.

In konkluzjoni, kif jirrizulta mill-fatti li hargu fil-kors tas-smiegh ta' dan l-appell, billi jirrizulta li il-proposta in ezami tikser il-height limitation kif stabbilit fis-South Malta Local Plan, dan l-appell ma jirrizultax fondat u ma jimmeritax kunsiderazzjoni favorevoli;

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut mahrug mill-Awtorita' ta' l-applikazzjoni, PA 2780/07, "To erect second floor over part existing/approved ground and first floor flats", fit-28 ta' Frar, 2008.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Bl-introduzzjoni tal-artikolu 69(2) fl-2010 gie lez id-dritt lill-applikant li jigi kunsidrat il-principju ta' cerimus paribus in konnesjoni ma gholi ta' bini iehor fiz-zona meta l-applikazzjoni tieghu saret hafna qabel din il-ligi;
2. In oltre anki kieku l-istess artikolu kellu xi effett negattiv fuq l-applikazzjoni, hu gie mcahhad mid-dritt ghal smiegh xieraq billi hu ghandu dritt igawdi l-propjeta teighu bl-

istess mod li haddiehor inghata permess simili u b'rizultat tal-imsemmija ligi dan id-dritt gie mnehhi minghajr forma ta' kumpens.

Dawn l-aggravji ser jigu kundisrati flimkien. Il-Qorti tqis li l-appellant ma ghandu ebda raguni legali f'dan l-appell. Harsa lejn id-decizjoni tat-Tribunal turi illi l-pjan lokali tal-2006 iddesinja din iz-zona fejn qed jintalab l-izvilupp bhala zona b'gholi massimu ta' zewg sulari. Din kienet il-konsiderazzjoni principali u determinanti li wassal lill-Awtorita u t-Tribunal jiddeciedu kontra l-izvilupp. It-Tribunal infatti qal b'mod kategoriku li ma jistax japprova zvilupp li jmur kontra principju fundamentali tal-plan lokali. Il-pjan lokali hi ligi li l-Awtorita u t-Tribunal ghandhom josservaw minghajr eccezzjoni sakemm il-policies infushom ma jaghtux kejl ta' diskrezzjoni. Hu minnu illi t-Tribunal zied illi ma jistax jittiehed kont ta' argumenti dwar l-gholi ta' binjiet ohra fil-vicinanze minhabba l-artikolu 69(2) tal-Kap. 504 li jeskludi tali konsiderazzjoni, pero d-decizjoni ma ttehditx a bazi tal-artikolu 69(2) imma kif jidher fid-decide fuq il-height limitation impost fil-pjan lokali li t-Tribunal ma jistax jinjora ghax ma ghandux dik id-diskrezzjoni afdana fil-ligi. Ma jistax jinghad li gie lez xi dritt ghal smigh xieraq rigward id-dritt ta' tgawdija ghal proprjeta billi hi l-fehma tal-Qorti illi d-dritt ghat-tgawdija tal-proprjeta tal-appellant ma giet bl-ebda mod milquta izda dan id-dritt hu soggett ghall-ligijiet tal-ippjanar li huma maghmula fl-interess tas-socjeta li minn zmien ghal zmien jinbidlu l-esigenzi taghha fejn jidhol zvilupp.

Din il-Qorti ghalhekk tqis li l-appellant ibbaza l-appell tieghu fuq premessa fattwalment inkorretta. Jibqa' impregudikat pero d-dritt tal-appellant f'sede ohra li jipprova jiehu rimedju ghal xi ksur ta' dritt jekk jirrizulta li mieghu saret xi ingustizzja amministrattiva fil-konfront tieghu li pero mhux il-kompitu ta' din il-Qorti li tikkunsidra.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Amabile Camilleri u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tad-29 ta' Marzu 2012.

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Spejjez ghall-appellant.

< Sentenza Finali >

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