



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tat-3 ta' Dicembru, 2013

Appell Civili Numru. 151/2012

Bahar ic-Caghaq and Madliena Residents

vs

**L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u
kjamat in kawza Patrick Vella ghan-nom u
in rapprezentanza ta' Leisure and Theme Park**

Il-Qorti,

Rat ir-rikors tal-appell ta' Leisure and Theme Park Limited tal-15 ta' Ottubru 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Settembru 2012 rigward applikazzjoni PA 3467/05 'proposed amendments to location of sanitary facilities approved in PA 3459/03 and proposed erection of seasonal structures (gazebos) for shading, tent and cover to contained areas of site and construction of ramp to pump rooms';

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Rat ir-risposta tal-appellati li ssottomettew illi d-decizjoni tat-Tribunal ghandha tigi konfermata u l-appell michud;

Rat l-atti kollha;

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

B'applikazzjoni, Full Development Permission – PA 03467/05 fejn l-appellant, f'Splash and Fun park, Triq is-Salini, Bahar ic-Caghaq, talab:

“Proposed amendments to location of sanitary facilities approved in PA 3459/03 and proposed erection of seasonal structures (Gazebos) for shading, tent and cover to contained areas of site and construction of ramp to pump rooms.”

ADI Associates, ghall-appellanti ressu l-aggravji segwenti:

“We are instructed by the under-mentioned residents of Bahar ic-Caghaq and Madliena to lodge a third party appeal against MEPA’s approval of PA 3467/05.

The persons listed below are bone fide third party objectors. PA 3467/05 was notified in the Malta Independent on Saturday 24th February 2007. The objection was lodged by Adi Associates Environmental Consultants Ltd. On 9th March 2007.

MEPA notified the Applicant of the grant of permission by way of a letter dated 6th July 2007, which was received on the 12th July 2007.

Grounds for Appeal

The grounds for appeal to the proposed use and the conditions pertaining thereto are:

a) Contrary to Structure Plan Policy BEN 1. The noise arising from the uses permitted in PA 03467/05 will result

in severe disturbance of the peace and tranquility of the nearby residential area: an area that is largely zoned as a Residential Priority Area.

Everyday through summer, entertainment noise from the Splash and Fun Park already disturbs the peace and tranquility of the residential area adjacent to and overlooking it. The approval of the tented structure will increase the noise and by creating an indoor facility that may be used throughout the year, will increase the period of noise generation.

Noise levels arising from the Splash and Fun Park have been measured at 78dB(A) LA90, at the nearest residential façade. When compared to background noise levels measured when the Splash and Fun Park was not operating (48dB(A)LA90), the change in noise climate is unacceptable. Such a change in noise climate severely degrades the amenity for the area and continues to give rise to widespread complaints from residents within the Bahar ic-Caghaq – Madliena areas, and is thus contrary to Structure Plan Policy BEN 1.

b) Condition 9: Noise: This condition refers to the mitigation measures described in the noise report in approved document PA 3459/03/94A, and stipulates that “noise levels on site shall not exceed 85dBA.” Although the

noise level on-site and the mitigation measures have been operative since the approval of PA 3459/03 (and before that time), the residents in Bahar ic-Caghaq and Madliena continue to be severely disturbed by the noise disturbance arising from the Splash and Fun Park. The mitigation measures do not work and the noise control condition is uncertain, unworkable, contrary to the best practice in noise control and results in an unacceptable degradation of the noise climate of the area. The continued degradation of the amenity of the nearby residential area demonstrates that the noise control condition is unworkable and that it fails to ensure that there should be no noise “of an excessive nature, which would result in a nuisance to the amenity of the nearby residential area.”

The noise control condition must be substituted with a condition that provides a means for the noise climate of the nearby residential area to be protected.

c) Contrary to Structure Plan Policy BEN 2, because the proposed development is incompatible with the environmental characteristics of the area and because the structures are not likely to maintain the visual integrity of the area.

d) Contrary to Structure Plan Policy TRA 2, TRA 4, and RDS 5 The proposed development qualifies under TRA 2 and MEPA's TIS Guidelines for a Traffic Impact Statement. Access to the development is inadequate in so far as the egress is directly onto an arterial road, and the current traffic island arrangement only provides right turn refuge (in and out) for one car at a time and visibility is compromised by street signage. This results in an extremely hazardous situation and has resulted in a number of accidents. Despite the provision of a 1000m² facility, no additional parking is required. The current provision of 217 car parking spaces is inadequate and frequently results in buses parking on the arterial road and cars on the narrow residential roads in the area, creating traffic hazards.

e) Contrary to Structure Plan Policy TEM 4 because it results in parking on the arterial road.

f) Does not conform to MEPA policy in respect of off-street parking provision;

g) Condition 11 is contrary to Central Malta Local Plan Policy NA 05. Condition 11 stipulates that the "premises shall only be used for swimming bath or pool, gymnasium, health club, sauna, sports hall, or other indoor or outdoor land based sports of recreation not involving motorised vehicles or fire arms." The "premises" is assumed to refer to "Multipurpose All Weather Recreational Area," that is the tented structure. The erection and use of a building that provides indoor facilities is contrary to CMLP Policy NA 05 which stipulates that only outdoor recreational

activities will be permitted in accordance with Class 9 (d) (Use Classes Order, 1994). Such outdoor uses are limited to "Swimming bath or pool, skating rink and other outdoor land-based sports or recreations not involving motorized vehicles or firearms". Uses such as "gymnasium, health club, sauna, sports hall" are indoor activities; of tented structure is contrary to the Policy.

h) The plans are not in accordance with other aspects of NA 05: "Attention will be given to the proper layout, design and appearance of these uses with particular emphasis on the heavy landscaping of the entire designated area. A landscaped buffer zone is to be provided between this designated area and the residential area to the south".

Fir-rapport taghha tas-7 ta' Settembru, 2007 l-Awtorita' tissottometti li:

"APPEAL NO: PAB 185/07 RT.

LOCATION: Splash and Fun Park, Triq is-Salini, Bahar ic-Caghaq

APPELLANT: ADI Associates Environmental Consultants Ltd.

PROPOSAL: Proposed amendments to location of sanitary facilities approved in PA 3459/03 and proposed erection of seasonal structures (Gazebos) for shading, tent and cover to contained areas of site and construction of ramp to pump rooms.

1.0 THE PROPOSAL

The proposed development involves amendments to location of sanitary facilities approved in PA3459/03 & proposed erection of seasonal structures (gazebos) for shading & cover to contained area of site & construction of ramp to pump rooms & demolition of ex army camp kitchen.

2.0 COMMENTS ON APPELLANT'S ARGUMENTS

2.1 In his request for Appeal, appellant has stated that the noise arising from such a use will inevitably disturb the nearby residential area. The parking provision is also inadequate since on many occasions buses have to park on the arterial road.

2.2 On the other hand the Authority notes:

2.2.1 As regards the noise issue, the permit includes a condition to ensure a controlled and limited noise generation level in line with those imposed in the previous permit PA 3459/03. In this respect, condition No. 9 states:

“The noise generated by the development should be controlled and not of an excessive nature, which would result in a nuisance to the amenity of the nearby residential area. Hence, the measures identified by the noise report (approved document PA 3459/03/94A) shall be respected at all times, and noise levels on site shall not exceed 85dBA.”

2.2.2 Furthermore, this permit is not increasing the footprint of this leisure park, hence the parking provision as included in approved drawing PA 3467/05/21A is considered as adequate. One must note that this area had been leased to the applicant from the Government in 1987, with an emphyteusis agreement for a period of fifty (50) years. The site leased under this agreement covers an area of 63,540m², and was leased for the exclusive use of the construction of a “fun park” and to be kept fully functional for the whole term of the emphyteusis. In this respect, certain facilities necessitate shelter from the elements and hence, require the erection of structures in certain parts of this leisure complex.

2.2.3 Additionally, the permitted uses in this permit has been issued in line with Class 9 (d) of the Uses Classes Order 1994 and are listed in Condition No. 11 which states:

“The premises shall be used only for Swimming bath or pool, gymnasium, health club, sauna, sports hall, or other indoor or outdoor land-based sports or recreation not involving motorized vehicles or fire arms and for no other purpose.”

2.2.4 All the structures as approved in this permit are acceptable and congruent to a fun park and provide ample open space between them. The landscaping which is located next to these structures will help to minimize any visual impacts and mitigate to conceal the impacts to within the fun park.

Conclusion. In view of the above arguments, the Malta Environment & Planning Authority respectfully requests the Planning Appeals Board to confirm the decision as issued by the Development Control Commission, whereby an approval for development permission was issued."

L-Perit Anthony Anthony Fenech Vella ghall-applikant ressaq il-kummenti tieghu fl-20 ta' Settembru, 2011, kif gej:

“In response to that submitted by Mr. Kevin Morris on his behalf and on that of the Naxxar Local Council, please find hereunder our response which is divided in two, the first part dealing with Planning issues and the second part which was prepared by our sound Consultant, Mr Chris Calleja, dealing with the technical issues regarding noise,

It is however, also important to clear the air regarding the method of response used by Mr Morris as it is puts all the issues in one pot and presents important information either in an incomplete manner or not in the correct context which can be rather misleading and it is therefore necessary to channel the arguments back on the track.

First of all, by treating the two appeals together and putting them in one basket, there is the possibility that either could be effected by the comments directed towards a particular aspect of the other and this is not acceptable seeing that each involves heavy investments.

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A case in point would be, for example, the issue of the tented area approved in PA 3467/05 and which is not incorporated in PA 3459/03.

This difference also reflects on the only common denominator between the 2 permits, the issue of Sound pollution, as that generated under a tent need not necessarily be the same as that from the activities approved in PA 3459/03., ie a wavepool.

THE NOISE ISSUE

Which brings us to the first comment by Mr Morris when he states, or rather qualifies that condition No 9 in PA 3459/03, that noise levels should not exceed 85DBA, is erroneous:

May I remind the Tribunal that this condition was 'no rabbit pulled out of a hat' by the Board but was inherited from that established as Condition 3 in PA 2205/98 [Copy attached) for 'the operation of a gokart track' after it had been specifically approved by the then Planning Appeals Board in its decision of the 28th September 1999, after it had given the matter due consideration as clearly indicated in its concluding paragraph of that decision:

Mr Morris, on behalf on the Appellants, then passes on to accuse the Applicants of time delaying tactics to avoid the conclusion of these Appeals. This cannot be more distant from the truth as the Applicant has every interest to get to that result, but through serious and professional methods.

When one considers that the whole basis of the Appellants claims are a handful of readings with no organised pattern to create a correct statistical background for assessment, when these are confuted by at least a dozen reports drawn up by Court Experts following reports by the Appellants to the Police and supported reports drawn up by the Police called on site in tens of others, when an offer by the Applicants to finance a monitoring report to be drawn up by a local expert TOTALLY under THEIR terms and conditions was never

taken up, and when even a report which the Naxxar Local Council had drawn up by an Engineer they commissioned has never seen the light of the day, how can the Applicant be expected to embark on the engagement of foreign expertise, independently on the quality of their merits. The Appellants were free and had every right and possibility to do so, and they did not.

And, did it have to take 4 ½ years from the presentation of what Mr Morris is referring to as an offer, to prepare and present a final proposal?

The Applicants have, on the other hand, always contended and moved towards a full evaluation of what is happening exactly on site, not an evaluation, so as to be able to explore ways and means of mitigating whatever above the normal situations may occur or be expected to occur.

For this purpose, and within a year, we have not relied on an odd assortment of one time readings with no supporting information as to time, surrounding ambience at the time, activities being monitored, the presence or otherwise of normal levels of background noise (which have been proven to be of immense relativity), but have commissioned a valid Sound Engineer, Mr Chris Calleja, to monitor activity during the HIGH season when the park is in full swing so as to prepare a serious proposal for seeking solutions. This was why the report was delayed slightly more than a year.

We have declared and sustain that want to invest correctly in any measures that can be scientifically controlled and monitored in the respect of maintaining good neighbourliness. Mr Calleja's remarks and conclusions are included or attached either in this response and in his report.

TENTED STRUCTURE

Here, once again, Mr Morris is mixing issues , that of the allowable uses on site as established in Policy NA05 with

those of the erection of the tent itself. PA 3467/05, approved a tented structure for uses ancillary to the activity of the park. This cannot incorrectly be taken to imply that any activity that is carried out in it is, per force, unacceptable in terms of that Policy as it qualifies as INDOOR and, hence, NON OUTDOOR!!!!!!!!!!!!!!

The description of the uses submitted by the undersigned in our response of the 29/9/11 is written in clear English and refers to the facility for providing a cover and shelter to those activities normally carried outside in good weather or, else, for the provision of a shade against strong sunshine as is normal practice in hot climates like ours. If one had to stretch Mr Norris's arguments to ridiculous limits, could we ask whether any sunbather who decides to open an umbrella suddenly changes from an outdoor to an indoor activity?

In the world of sport and leisure indoor activities, as opposed to outdoor activities, do not rely on tented structures but on solid, permanent ones where the ambient is normally also under control; this difference is evident in ice skating or hockey but is also so in cycling, athletics and in all gymnasia.

If one had to take Mr Morris's arguments ad litteram, it is legitimate to ask what would be the use of having a tent therefore be then? a useless structure lying around, just simply occupying space?

We contend that the tent, being as per its own definition, a temporary structure, is simply a cover over those activities which would normally be carried out in the park, so much so that the erection of a specialised tent for a particular purpose, like that of a Circus as we have recently hosted, would require coverage by an appropriate DNO, also due to the fact that the location of our site is on a coastal zone.

Once we are on the issue of tented structures, we are also amazed that Mr Morris, being an expert in the field, could issue a generic, off the hip, statement like that in

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para No 1 of page 3 of his response whereby he contends that "the fabric walls of the tent do not attenuate sound !!!

While agreeing that they would not contain the sound, then it is legitimate to ask in generic language why would, then, all the places of entertainment 'keep their tents up', especially those within PRIORITY RESIDENTIAL as the ones cited, ie Villa Arrigo & Villa Bologna, not to add on Villa Madama and Villa Promontorio,? (vide pics of tents as applied for in permits and as seen on Google Earth). They are simply, like us, governed by Police permits controlling the time limit for the playing of music so as to contain disturbance within those periods covered by law, but otherwise carry on with their activity in a regular way.

Or is it perhaps because they define them as 'Marque' or Awning in the planning application, that they do not fall under the sort of scrutiny expected from ours

What would be the use of a tented structure be then, except for a useless structure lying around occupying valuable space?

TECHNICAL ISSUES

Please refer to the response drawn up by Chris Calleja and annexed

CONCLUSION

Finally, I refer to the concluding paragraph whereby the Appellants request the full withdrawal of these two permits. This is totally inadmissible as, once again, I cannot but remind the Tribunal that, unless the Appellant has proven, beyond any reasonable doubt, that the approved activities in each and every permit, as examined separately, do fall within the scopes both of the Local Plan Policies but also of the Contractual conditions of the lease of the land 'To operate a Leisure & Theme park', the Tribunal has to confirm those approvals.

If, on the other hand, the issue is simply one regarding a particular condition, ie, that of noise control, we contend that the Tribunal has to respect the decision, judiciously taken previously by the Planning Appeals Board in PAB 662/98, and use it as a parameter for its ruling. We have, on our part, carried out the necessary in-depth, scientifically correct studies and not relied on assumptions or emotive reactions to conclude a proposal which we are convinced is reasonable attainable and well within the scope of that first decision”

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda third party appeal kontra l-approvazzjoni tal-permess PA 3467/05. Skond l-appellanti:

- Dan l-impjant qed jikkrea storbju zejjed li qed johloq problemi serji ghan-nies li joqghodu fil-vicinanze u t-tinda li giet approvata b' dan il-permess ser izzid dan l-istorbju u ghalhekk din l-applikazzjoni tikser il-policy BEN 1 tal- Pjan ta' Struttura;
- Condition 9 f' dan il-permess hija difettuza (flawed) u dan peress li din il-kundizzjoni ma' tistax tigi implimentata stante li ma' tispecificax b' mod tekniku u skond standards internazzjonali kif ghandu jitkejjel in-noise level [85dB(A)] imsemmi fil-kundizzjoni;
- L-izvilupp li gie approvat jikser il-policy BEN 2 u dan peress li muhiex kompatibbli mal-ambjent taz-zona fejn ser jinbena;
- Skond TRA 2, TRA 4 u RDS 5 tal-Pjan ta' Struttura, suppost sar Traffic Impact Statement fl-ipprocessar ta' din l-applikazzjoni u dan ma' sarx. In-numru ta' parking spaces ezistenti mhux bizzzejjed, l-access ghall-impjant huwa dirett minn arterial road u l-izvilupp ser jiggenera parking fuq it-triq arterjali;
- Condition 11 tal-permess tikser il-policy NA 05 tas-Central Malta Local Plan peress li din il-kundizzjoni tippermetti ukoll li jsiru indoor activities fuq il-premises; u
- L-izvilupp imur kontra l-policy NA 05 tas-Central Malta Local Plan peress li, skond din il-policy, outdoor recreational activities kif deskritti f' Use Class 9 (d) biss huma permessi f' dan il-premises.

L-Awtorita' tirispondi billi :

- Tikkwota Condition 9 tal-permess;
- Tispjega li l-izvilupp mhux ser izzid il-footprint tal-impjant u ghalhekk il-parking provision originali hija adeqwata;
- Is-sit li ghandu area ta' 63, 540 metru kwadru inghata b' cens mill-Gvern biex jintuza bhala fun park u l-uzi li qed jintalbu b' dan l-izvilupp huma idoneji ma' dawk ta' fun park;
- Il-permess hareg skond Use Class 9 (d); u
- Il-landscaping li qed jigi propost huwa bizzejjed biex jimminimizza il-visual impacts li ser johloq dan l-izvilupp.

L-applikant jirrisponi billi jghid is-segwent:

- Mhux accettabbli li dawn it-tliet appelli qed jinstemghu flimkien peress li tnejn minn dawn l-appelli huma kontra l-permess PA 3459/03 waqt li l-iehor huwa kontra l-permess PA 3467/05. Waqt li veru li l-issue ta' sound pollution hija issue komuni ghat-tnejn, iz-zewg permessi qed japprovaw zviluppi differenti;
- Mhux veru li fuq is-sound pollution l-applikant qed juza delaying tactics. Il-fatt hu li l-appellanti qeghdin juzaw numru zghir ta' readings biex jippruvaw l-kas taghhom. L-applikant ried jaghmel studju fuq season shih biex jipproponi soluzzjoni serja;
- L-Awtorita' uzat kundizzjoni bhal Condition 9 f' permessi ohra;
- Peress li l-livell tas-sit in ezami fejn tinsab it-tinda huwa baxx izjed mill-livell tat-triq, din ma' tikkreax hard visual intrusion;
- Mhux korrett li wiehed jghid li, peress li l-pjan lokali jippermetti biss attivitajiet outdoor fis-sit in ezami, ebda attivita' ma' tista ssir gewwa t-tented structure approvata fil-permess PA 3467/05. It-tinda hija semplicement protezzjoni temporanja ghal attivitajiet li normalment isiru barra; u
- L-appellant irrid jipprova 'beyond reasonable doubt' li l-attivitajiet approvati fil-permessi mhumiex permissibbli kemm ai termini tal-pjan lokali u kif ukoll ghal kundizzjonijiet kontrattwali li saru fil-kirja tas-sit in ezami li kien 'To operate a Leisure & Theme park'.

Fil-kors tas-smigh ta' dan l-appell li sar fis-sena 2007, ADI Associates, bhala konsulenti tal-appellanti, kif ukoll Kevin Morris personalment, li huwa wiehed mill-appellanti f'dan l-appell, l-appellant fl-appell PA 346/05 u kif ukoll wiehed mid-Diretturi ta' ADI Associates, ghamlu numru ta' sottomissjonijiet li jkopru il-problema tal-istorbju fit-tliet appelli u kif ukoll il-kumpliment tal-aggravji li ghandhom l-appellanti f' dan l-appell. Dawn is-sottomissjonijiet huma strettament f' termini ta' ippjanar u huma dettaljati u ghalhekk huma l-izjed immirati lejn l-Awtorita' bhala dik il-parti li kienet responsabbli mill-ipprocessar tal-applikazzjoni PA 3467/05 f' termini ta' ippjanar.

L-Awtorita', apparti mir-rapport tas-7 ta' Settembru, 2007 u sottomissjoni tad-29 ta' Frar, 2012, fejn semplicement ikkonfermat li l-applikazzjoni PA 7022/04 (Splash and Fun park) ghada pending, ma' wiegbet qatt b' mod adegwat ghal dawn il-punti teknici li qajjmu l-appellanti biex isostnu l-aggravji taghhom.

Waqt li normalment l-Awtorita' taghmel risposti estensivi f' termini ta' ippjanar biex tiddefendi l-pozizzjoni taghha, f' dan il-kas, f' hames snin shah, kull ma' ghamlet huwa rapport superficjali ta' pagna wahda. Fl-opinjoni kunsidrata ta' dan it-Tribunal, dan il-fatt huwa indikazzjoni li l-Awtorita' m'ghandiex argumenti f' termini ta' ippjanar biex tiddefendi il-pozizzjoni taghha f' dawn l-appelli.

L-ewwel aggravju, li ukoll huwa komuni ghaz-zewg appelli l-ohra, huwa kontra it-test ta' kundizzjoni li ppreparat l-Awtorita' fil-permessi PA 3459/03 u PA 3467/05 u ghalhekk dan jindirizza direttament lill-Awtorita' izjed milli l-applikant. B' dana kollu l-Awtorita' fuq dan l-aggravji wiegbet biss billi regghet ikkwotat il-Condition 9.

Meta wiehed jirrifletti ftit fuq dan l-aggravju wiehed jikkonkludi mill-ewwel li kull min ghandu formazzjoni teknika bazika, u mhux necessarjament espert ta' kif jitkejjlu n-noise levels, kellu jirrealizza mill-ittra originali li baghat l-appellant biex jaghmel l-appell, li l-Condition 9 kienet deficienti u li kienet tmur kontra l-interessi kemm tal-appellant u kif ukoll tal-applikant. Dan imbaghad johrog

izjed car meta wiehed jaqra is-sottomissjonijiet li ghamlu kemm l-appellant u kif ukoll l-applikant.

L-appellant kien il-parti li kellu l-anqas x' jitlef minn kif inkitbet il-Condition 9 ghaliex kieku kella tigi applikata ad litteram din il-kundizzjoni kieku l-applikant ma' kienx ikun jista jopera l-impjant tieghu peress li kwazi kull hoss itella 85dB(A) jekk jitkejjel mill-vicin bizzejjed. L-applikant jista jkun li anticipa li, bhal ma' jigri f' hafna kazi bhal dawn, kundizzjonijiet ta' dan it-tip kwazi qatt ma' jigu enforzati u ghalhekk kien bizzejjed li l-permess ikollu kundizzjoni li timpresjona ghal jargon li bih inkitbet avolja fil-fatt teknikament ma' taghmilx sens. Fil-fehma kunsidrata ta' dan it-Tribunal l-Awtorita' ghandha dejjem tkun certa li dak li qed timponi permezz ta' kundizzjonijiet fil-permessi li tohrog tkun f' pozizzjoni li verament issegwihom.

Kif johrog mill-premess kemm l-appellant u kif ukoll l-applikant jaqblu li din il-kundizzjoni hija deficienti. L-Awtorita' kien imissa mill-ewwel irtirat din il-kundizzjoni u, anke bl-ghajnuna ta' esperti fil-materja, ppreparat wahda li tkun teknikament sostenibbli.

Mill-premess jirrizulta ukoll li l-aggravju tal-appellanti li dan l-impjant qed jikkrea storbu zejjed li qed johloq problemi serji ghan-nies li joqghodu fil-vicinanze u li ghalhekk t-tinda li giet approvata b' dan il-permess ser izzid dan l-istorbu u dan kontra il-policy BEN 1 tal-Pjan ta' Struttura, ma' jistax jigi ppruvat qabel ma' tittranga Condition 9. Ta' min jghid pero li jidher li l-appellanti kollha (izjed minn 150) qed jaqblu fuq dan l-aggravju. L-Awtorita' ma' qalet xejn fuq dan.

Fuq l-aggravju li l-access mill-karozzi ghall-impjant li huwa direttament fuq triq arterjali huwa ta' periklu, li l-parking provision mhux bizzejjed u li qed isir parking direttament fuq it-triq arterjali, l-Awtorita' tghid li peress li l-footprint tal-progett mhux ser jinbidel ma' kienx hemm bzonn ta' ebda tibdil f' dan is-sens. Fuq dan ghandu jigi kkunsidrat li:

- L-Awtorita' tuza l-istess policies li qed jikkwotaw l-appellanti biex regolarment tirrifjuta applikazzjonijiet biex jinfethu one-car garages ghal uzu domestiku f'djar

existenti f' triqat li huma kkunsidrati anki minimament traffikuzi; u

- Hafna drabi l-Awtorita' tiehu l-opportunita' biex tapplika l-policies vigenti biex tirranga difetti ta' ppjanar meta jsiru applikazzjonijiet ta' tibdil minimu f'progetti ezistenti.

Ghal dawn ir-ragunijiet jidher li l-Awtorita' f' dan il-kas mhix qed tkun konsistenti mal-pozizzjoni li normalment tiehu fuq dawn l-issues, u ghalhekk dan it-Tribunal huwa tal-fehma li l-pozizzjoni tal-Awtorita' fuq dan il-punt mhux sostenibbli.

Dwar l-aggravju fuq li Condition 11 tal-permess tikser il-policy NA 05 tas-Central Malta Local Plan peress li din il-kundizzjoni tippermetti ukoll li jsiru indoor activities fuq il-premises, l-Awtorita' semplicement tikkwota Condition 11 tal-permess u tghid li l-attivitajiet permessi huma konsistenti ma' fun park. Peress li ma' jingiebux argumenti fuq ghaliex dan huwa accettebbli vis-à-vis policy NA 05, it-Tribunal jikkonkludi li l-Awtorita' m'ghandiex argumenti biex tikkumbatti dan l-aggravju.

Fuq dan l-aggravju l-applikant isostni li mhux korrett li wiehed jghid li, peress li l-pjan lokali jippermetti biss attivitajiet outdoor fis-sit in ezami, ebda attivita' ma' tista ssir gewwa t-tented structure aprovata fil-permess PA 3467/05. It-tinda hija semplicement protezzjoni temporanja ghal attivitajiet li normalment isiru barra. L-applikant izid li l-appellant irrid jipprova 'beyond reasonable doubt' li l-attivitajiet approvati fil-permessi mhumiex permissibbli kemm ai termini tal-pjan lokali u kif ukoll ghal kundizzjonijiet kontrattwali li saru fil-kirja tas-sit in ezami li kien 'To operate a Leisure & Theme park'. Hawnhekk irid jigi iccarat li dan it-Tribunal jiddeciedi biss fuq issues ta' ippjanar u mhux fuq punti kuntrattwali jew legali.

Mill-premess jidher car ghalhekk li l-appellanti kienu gustifikati li jappellaw mill-permess PA 3467/05 peress li ebda wiehed mill-aggravji li resqu ma' gie ikkontestat b' success la mill-Awtorita' u l-anqas mill-applikant. In fatti, peress li dan l-appell jattakka il-metodu ta' kif giet ipprocessata f' termini ta' ippjanar l-applikazzjoni PA

3467/05 mill-Awtorita', meta beda jidher li l-Awtorita' ma' kelliex risposta cara ghall-dawn l-aggravji, dan l-appell kien imissu gie deciz u mhux, kif fil-fatt gara, jithalla jiggebbid ghal hames snin shah. Fl-opinjoni kunsidrata ta' dan it-Tribunal, biex ikun effettiv il-process tal-appelli minn decizjonijiet tal-ippjanar, ghandu jsir minn kollox biex dawn jigu decizi fl-iqsar zmien possibbli wara li jkun accertat li l-informazzjoni kollha necessarja biex tittiehed decizjoni ingabret u li l-partijiet ikunu nghataw cans li jipprezentaw il-kaz taghhom.

Fil-kors tas-smigh ta' dan l-appell, l-applikant f' izjed minn okkazzjoni wahda informa lit-Tribunal li qed jigi nnegozjat master plan biex ikopri il-progett (Splash and Fun Park). Dan ukoll gie ikkonfermat mill-Awtorita' fir-rapport taghha tad-29 ta' Frar 2012. Minn-naha l-ohra jidher li l-appellanti ghadhom ma' gewx involuti f' dan il-process.

Fil-konsiderazzjonijiet tieghu it-Tribunal ha konjizzjoni tas-segwenti, fosthom:

- Dan l-impjant huwa probabbilment l-ikbar impjant ta' rikreazzjoni gestit mill-privat f' Malta;
- Is-sit jinsab f' zona ta' importanza turistika u rikreattiva li fl-istess hin hija ambjentalment sensittiva;
- Fil-kors tas-smiegh ta' dan l-appell l-applikant wera' li huwa jinsab fil-policies li jipprepara master plan ghal-park;
- Hemm numru ta' residenzi fil-vicinazi tas-sit;
- In-numru ta' appellanti li qed joggezzjonaw ghal dan l-izvilupp huwa konsiderevoli; u
- Fl-appell taghhom, l-appellanti ma' jiddikjarawx x' rimedju qed jitolbu jekk jirrizulta li l-appell taghhom huwa fondat.

It-Tribunal ghalhekk in vista tal-konsiderazzjonijiet hawn fuq maghmula qieghed jilqa' dan l-appell limitatament b'dana illi jiddeciedi li dan il-permess (PA 3467/05) ghandu jibqa validu ghal perjodu ta' sena mid-data ta' din id-decizjoni u fil-frattemp qieghed jordna lill-Awtorita' biex:

- Tirtira immedjatament il-Condition 9 tal-permess PA 3467/05 u fi zmien xahar mid-data ta' din id-decizjoni tipprepara kundizzjoni gdida li tkun idonea ghac-cirkostanzi in ezami u li tkun teknikament sostenibbli. F'

dan il-process l-Awtorita' ghandha tiehu in konsiderazzjoni dak kollu li qalu kemm l-appellant u kemm l-applikant fis-sottomissjonijiet teknici taghhom;

- Flimkien mal-applikant, tiffinalizza il-master plan (Splash and Fun Park), kif ukoll l-istudji kollha li jirrizulta li huma necessarji biex fi zmien sitt xhur mid-data ta' din id-decizjoni dan jigi approvat formalment mill-Awtorita'. Dan il-process ghandu jsir b' konsultazzjoni shiha mal-appellanti;
- Wara li jitlesta il-master plan ghandu jigi ppreparat implementation plan ta' kif il-master plan ghandu jigi implimentat biex f' medda ragonevoli ta' zmien l-Splash and Fun Park jigi konformi mieghu.
- Jekk, fl-opinjoni tal-Awtorita', wara perjodu ta' sena l-applikant ikun ghamel bizzejjed progress fl-upgrading tal-park skond il-master plan, l-applikant ghandu jithalla japplika biex igedded dan il-permess ghal perjodu iehor ta' zmien li ghandu jigi deciz mill-Awtorita'; u
- Jekk il-permess (PA 3467/05) ma' jigix imgedded is-sit ghandu jigi ripristinat ghal dak li kien qabel ma' sar l-izvilupp a spejjez tal-applikant.

Ikkunsidrat

L-appellant ressaq diversi aggravji li fil-qosor huma s-segwenti:

1. It-Tribunal meta ordna revizjoni tal-kondizzjoni 9 fil-permess impona terminu ta' xahar fuq l-Awtorita mentri fl-applikazzjoni 3459/03 miexja kontestwalment ma' din l-applikazzjoni impona terminu ta' tlett xhur ghal revizjoni tal-istess kondizzjoni. Dan hu gudikat inkonsistenti u ma jaghtix l-istess trattament ghal-applikazzjonijiet simili fuq l-istess sit;
2. It-Tribunal agixxa ultra vires meta impona kondizzjonijiet fuq l-Awtorita rigwardanti l-master plan li hu soggett tal-applikazzjoni PA 7022/04 li ghadha pendenti meta l-appell ma kienx jirrigwarda dawn il-kwistjonijiet, u in oltre li jikkondizzjona l-validita tal-permess f'din l-applikazzjoni mertu tal-appell fuq li jsir il-master plan soggett ghall-applikazzjoni PA 7022/04 ;

3. L-appellati Bahar ic-Caghaq and Madliena Residents ma ghandhomx personalita guridika u ghalhekk id-decizjoni tat-Tribunal hi nulla;

4. Il-konsiderazzjonijiet dwar storbu kienu irrelevanti ghall-iskop tal-applikazzjoni;

5. It-Tribunal iddecieda hazin meta qal (a) li peress li l-Awtorita ma pprezentatx nota estensiva ghall-argumenti tal-appellati l-ohra ma kellhiex pozizzjoni x'tiddefendi, (b) li ssindika dwar il-parking provsion meta din giet trattata fil-koncessjoni originali, (c) li interpreta hazin policy CMLP Policy NA05 fil-konfront tal-kondizzjoni 11 approvata f'dan il-permess.

Konsiderazzjonijiet tal-Qorti

Il-Qorti tqis illi ghandha tiehu kont tat-tieni u t-tielet aggravju tal-appellanti li fil-fehma taghha jimmeritahom jigu kunsidrati l-ewwel.

In kwantu ghall-aggravju dwar in-nullita tad-decizjoni minhabba nuqqas ta' personalita guridika tal-Bahar ic-Caghaq and Madliena Residents jinghad semplicement li l-appellanti ma sabu ebda oggezzjoni ghal din l-entita jew organizzazzjoni jew ghaqda meta sar l-appell quddiem it-Tribunal u peress illi ma sar ebda lment f'dak l-istadju din il-Qorti hi prekluzza li tittratta kwistjoni legali procedurali li ma tqajmitx fl-istadju li fih kellha titqajjem cioe quddiem it-Tribunal. L-appellant ma sab ebda ostakolu jew impediment f'dik l-istanza u kwindi ma jistax isibu issa.

In kwantu ghall-aggravju dwar il-mod kif agixxa t-Tribunal fid-decizjoni tieghu, hu principju assodat illi t-Tribunal hu mekkanizmu ta' revizjoni ta' decizjoni tal-Awtorita, mekkanizmu li jidhol fis-sehh meta quddiemha jigi mfassal appell bl-aggravji kontra d-decizjoni tal-Awtorita. It-Tribunal hu marbut jiddeciedi dak li jigi migjub quddiemu bhala aggravji kontra d-decizjoni u jekk it-Tribunal jiddipartixxi minn dak li jigi mitlub jirrevedi jkun qed johrog barra mill-poteri moghtija lilu u jista' jimbekka ruhu fl-ultra jew extra petita. Mhux il-kompitu tat-Tribunal li jissostitwixxi l-poteri tal-Awtorita fl-ghoti jew cahda ta' permess izda li jirrevedi jekk l-ghoti jew c-cahda kienux

gustifikati jew le fil-parametri tal-appell migjub quddiemu u li jiddeciedi l-vertenza fil-limiti tal-appell.

F'dan il-kaz inhareg permess favur l-applikant b'diversi kondizjonijiet. Sar appell minn terzi quddiem it-Tribunal li huma riportati fil-konsiderazzjonijiet tat-Tribunal. Dawn kienu jikkoncernaw aggravji fuq id-disturb u livelli ta' hsejjes u senjatament il-formulazzjoni ta' klawsola 9 a rigward l-istess; l-inkompatibilita tal-applikazzjoni mal-ambjent, sistema u impatt ta' traffiku u parkeggjar fuq is-sit u t-torog tal-madwar; kondizzjoni 11 tal-permess rigward l-uzu li jsir u li jmur kontra policy NA05 ta' Central Malta Local Plan.

Kif jidher mill-atti s-sit kien gie kopert b'permess cioe PA 3459/03 u l-applikazzjoni in kwistjoni titratta emendi u estensjoni ta' amenitajiet. Tali applikazzjoni kienet timmerita trattament ad hoc b'referenza ghal dak gia approvat u dak permissibbli skond il-policies u pjanijiet vigenti. L-appell li sar wara l-hrug tal-permess in kwistjoni kien cirkoskritt kif fuq inghad. Kwindi l-obbligu tat-Tribunal kien li jezamina l-aggravju u jara kienux gustifikati fil-kuntest tal-permess moghti f'din l-applikazzjoni u jekk iqis gust li jaghti direttivi jew ordnijiet lill-Awtorita dwar dak li kellu jigi mibdul fil-permess jew addirittura jichad il-permess jekk jidhirlu li l-appell hu fondat il-principju.

Dak li pero ma ghandux dritt jaghmel it-Tribunal hu li jimponi kondizzjonijiet fuq il-partijiet jew l-Awtorita li jmorru lil hinn minn dak li t-Tribunal gie mitlub jissindika u jirrevedi. F'dan il-kaz it-Tribunal filwaqt li approva l-permess u dan b'sorpriza meta wiehed iqis li l-istess Tribunal sab ksur tal-policies kontra l-approvazzjoni tal-permess u assoggettah ghal hames kondizjonijiet li erbgha minnhom kienu ghal kollox estraneji ghal dak dibattut quddiemu jew li dwaru tressqu xi lmenti jew aggravji.

Filwaqt li t-Tribunal ordnat l-irtirar ta' kondizzjoni 9 kif ghamlet fil-permess PA 3459/03, imponiet terminu ta' xahar biex l-Awtorita tirrevediha mentri fl-applikazzjoni PA 3459/03 imponiet terminu ta' tlett xhur biex isir l-istess

ezercizzju. Dan hu inkonsistenza rizultat ta' zball li facilment jista' jigi korrett izda jinnecessita li t-Tribunal jerga' jirrevedi din id-decizjoni.

Dak li pero jinkwieta lil din il-Qorti hu illi l-erba' kondizjonijiet l-oħra marbuta ma' dan il-permess jirrigwardaw mhux din l-applikazzjoni izda l-hrug ta' master plan approvat mill-Awtorita fuq is-sit kollu fi zmien sena mid-data tad-decizjoni tat-Tribunal u fin-nuqqas dan il-permess jaqa' u kollox irid jirriverti għall-istat quo ante. Tali kondizjonijiet fid-decizjoni qatt ma setghu jigu inferiti mill-applikazzjoni infisha li kienet specifika u tirreferi għal revizjoni ta' permess ġia approvat u aktar u aktar ma setghetx tigi assunta mill-appell u l-kontenut tiegħu. Dawn il-kondizjonijiet huma katar idoneji li jigu diskussi fl-applikazzjoni msemmija fl-atti cioè PA 7022/04 li titratta pjan holistiku tas-sit izda mhix din l-applikazzjoni li kellha tintlaqa' jew tigi michuda fuq il-mertu preciz mitlub u mhux fuq kwistjonijiet li qatt ma tqajmu jew kienu previsti mill-partijiet.

Il-Qorti tqis illi t-Tribunal wara li tratta l-mertu tal-aggravji tal-appell, għalkemm il-Qorti tqis b'mod f'tit legger, imbarka fuq konkluzjoni li ma kienitx tirrispekkja dak mitlub mill-applikant u dak appellat u dan jirrendi d-decizjoni perikoluza għall-aħhar meta t-Tribunal jezercita poteri li mhux f'dati lilu.

Il-Qorti tqis illi fic-cirkostanzi ma għandhiex triq oħra h'ief li tannulla d-decizjoni tat-Tribunal billi d-decizjoni tiegħu tmur oltre l-parametri tal-appell interpost u oltre l-poteri tat-Tribunal li jiddeciedi. Il-Qorti ma tqis li għalhekk għandha tissindaka l-aggravji l-oħra tal-appellant billi d-decizjoni qed tigi annullata.

Decide

Il-Qorti għalhekk qed tilqa' l-appell ta' Leisure and Theme Park Limited fil-limitu ta' dak deciz aktar il-fuq u kwindi tannulla d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Settembru 2012, u tirrimetti lura l-atti lit-Tribunal biex jerga' jiddeciedi l-appell fuq l-atti li għandu

Kopja Informali ta' Sentenza

quddiemu in linea ma' dak migjub aktar il-fuq f'dan l-appell. Spejjez ghall-appellati bejniethom.

< Sentenza Finali >

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