



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-4 ta' Dicembru, 2013

Appell Civili Numru. 25/2011

Joseph C. Grech

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Joseph C. Grech tat-13 ta' Lulju 2011 mid-decizjoni tal-Bord tal-Appell dwar l-Ippjanar tat-30 ta' Gunju 2011 fejn giet michuda l-applikazzjoni tieghu PA 1252/96;

Rat ir-risposta tal-Awtorita li ssottmettiet li d-decizjoni ghandha tigi konfermata;

Rat l-atti u semghet lid-difensuri partijiet;

Rat id-decizjoni tal-Bord li tghid hekk:

Ikkunsidra:

Illi s-sentenza tas-7 ta' April 2003 annullat d-decizjoni ta' dan il-Bord diversament presedut tas-7 ta' Ottubru 1998 essenzjalment ghaliex ghar-ragunijiet elenkati fdik is-sentenza, il-Bord kien agixxa 'ultra vires' fosthom ghaliex iddecieda materja li l-appellant stess ried li jithallew ghal 'full permit' u ghaliex ma ddecidiex fug il-pjanti li l-appellant resag ma' l-applikazzjoni tieghu.

Illi l-Awtorita cahhdet il-hrug tal-permess ghas-segwent i ragunijiet:

"1. The site lies outside the limits for development defined in the Temporary Provisions Scheme number 13 for Madliena and so it is located in an area which is proposed to remain undeveloped and open.

2. The proposed development would run counter to this scheme and as it would represent unacceptable urban development outside the limits to development as defined by such Scheme. The boundaries, the layout and other provisions of the Temporary Provisions Schemes are endorsed by Structure Plan Policy SET 8, and therefore the proposal would be in conflict with this Policy.

3. There is no justification for the development of this site as required by Structure Plan policy SET 12. It is apparent that there are no reasons, from a planning point of view, why the proposed development cannot be located in an area designated for development or in an existing built-up area.

4. The site lies in a Rural Conservation Area (as designated by the Structure Plan and indicated on the Key Diagram). The proposal does not comply with Structure Plan Policy RCO 2 which clearly states that no form of urban development will be permitted within Rural Conservation Areas.

5. The proposal does not fall within one of the categories of development, namely structures or facilities essential to

agricultural, ecological or scenic interests, which may be permitted in Rural Conservation Areas where they meet the principles and criteria set out in Structure Plan policy RCO 4.

6. Structure Plan Policy RCO 4 provides that, particularly within Rural Conservation Areas, areas of scenic value will be protected and enhanced. The area in which the site is located is of considerable scenic value. The proposal would detract from this, and so it would conflict with Structure Plan Policy RCO 4.

7. The site is located on the side of a valley and the proposed development does not fall into one of those categories of development permitted in this type of location. It would therefore run counter to Structure Plan Policy RCO 29, which prohibit new physical development on the sides of valleys.

8. The site is located in an Area of Ecological Value and Site of Scientific Importance, in accordance with Structure Plan Policies RCO 10 and RCO 11, where further human intervention, particularly in the form proposed, is not desirable. The proposal would therefore adversely affect the area, hinder its protection, and run counter to the rural conservation and ecological objectives of the Structure Plan.

9. Development of this site would constitute an extension to the boundary of the limits to development as defined by the Temporary Provisions Schemes. The Planning Authority may review the boundary for development, if necessary, through the Local Plan process as proposed in Structure Plan Policies SET 8 and BEN 4. Piecemeal amendments to this boundary are not appropriate and, since the Local Plan for the area has not been prepared, the proposal is considered to be premature and therefore counter to Structure Plan Policies SET 8 and BEN 4.

10. The design of the proposal is unacceptable and it is considered to be inappropriate to the area in which it is proposed to be located. The development is unlikely to

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maintain the visual integrity of the area and it is therefore counter to Structure Plan Policies BEN 1 and BEN 2, which do not permit development that would create a visual intrusion and which is incompatible with the environmental characteristics of the area.

11. The proposal runs counter to Structure Plan policy SOC 20 as it is not located in the vicinity of health centres, social centres, shops and public transport.";

Illi l-appellant sostna fl-appell tieghu illi:

"My client is appealing from this decision as the reasons therein stated for the refusal are generally unsound and do not reflect a proper assessment of the circumstance of the applicant application. It is submitted that a proper assessment of the policies mentioned in the refusal were applicable to my client's site should have brought the DCC to a conclusion of granting the permit and not refusing it. These grounds for refusal will be dealt with in detail in the course of the hearing of the appeal. The appellant however submits that the grounds as stated there are generally unsound and do not reflect the position of the site and the circumstances of the development and its protected views. The appellant submit that the sitc in question is ideal for the projected development and especially when one considers the development that has been allowed to take place in the area even in areas specifically designated as outside development scheme is not apparent while the proposal of the appellant should be refused as it has been done by the DCC.";

Il-Bord ha konjizzjoni ta' numru ta' letters of objection, fosthom dik tal-Kunsill Lokali Swieqi.

Ikkunsidra ulterjorment:

Illi l-applikazzjoni de quo, ghal outline development permission, hija dik ghall-kostruzzjoni ta' high class retirement residence, murija fuq sitt livelli 'terraced' ghal

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go wied id-Dies l/o Gharghur, b'zewg livelli l-fuq mill-livell tat-triq u erba' livelli that il-livell tat-triq.

L-Awtorita gustament tikkontendi illi:

"The Directorate notes that the proposed development is not a form of urban development that is generally permitted outside the limits to development, in accordance with Paragraph 7.6 of the Structure Plan. The development is therefore in clear infringement of SP Policy SET 11, which does not permit urban development outside the limits to development.

The Planning Appeals Board has, in previous decisions noted that in order to consider granting a permit ODZ the main objective of the proposal has to be to improve on the environmental characteristics and not to create a negative impact. The present natural beauty of Wied id-Dis does not need any urbanisation such as being proposed to enhance its beauty. (176/93KA) In addition the obligation is on the appellant to justify the infringement of SET 11 as required in SET 12 and why his proposal cannot be located within designated areas. (7/93RR) Open countryside in particular valleys should be protected. (232/94KA)

Moreover, there are no justified reasons, based on sound planning grounds, why the proposed home for the elderly should be located outside the limits to development. The development is therefore also in conflict with SP Policy SET 12. Indeed policy SOC 12 indicates that such sites should be located near social centers, shops and public transport. In addition any new sites should be the subject of the Local Plans SOC 18.

It is noted that development on this site would extend the boundaries of the limits to development. It should be noted that, in accordance with SP Policy SET 8, the boundaries of the TPSs will only be changed, if necessary, as the result of a comprehensive SP Review which takes place after the approval of the related Local Plan. Therefore piecemeal reviewing of the boundaries of

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the TPSs should not be considered. In these terms, the proposal is also in conflict with SP Policy SET 8.

The site on which the proposed development is to be located is within a Rural Conservation Area and the design of the development is considered to detract from the scenic beauty of the valley in which it is to be located. The development would therefore detract from the achievements of SP Policies CO 2 and RCO 4, which prohibit development in rural conservation areas, particularly if it would have an adverse visual impact.

The proposed site is located on the side of a valley of considerable scenic importance. SP Policy RCO 29 provides that no new physical development should be permitted on the sides of valleys and therefore the proposal infringes this policy .

The design of the development is not considered to be appropriate to the area in which it is proposed to be located. Even though the building is terraced, it would still be perceived as a 6 storey building which is unacceptable in such sensitive areas. In these terms the proposal infringes SP Policies BEN 1 and BEN 2, since it would create a visual intrusion and it is incompatible with the environmental characteristics of the area.

It is also considered that the valley, on the side of which the proposal is to be located, is of considerable ecological importance, and the sides of the valley themselves have appreciable scientific importance due to their geomorphology. The development is therefore in conflict with SP Policies RCO 10 and RCO 11, which identify, establish and safeguard Areas of Ecological and Sites of Scientific Importance.";

Korrettament ukoll l-Awtorita bin-nota taghha tal-15 ta' Marzu 2006, tinnota:

"Illi kif qed jargumenta l-per it, qed jinsisti li jinghata decizjoni ghall-appell tieghu minghajr ma l-Bord

jikkonsidra is-sitting u dan meta hu stess wera' fejn qed japplika hu stess.

Donnu jrid biss decizjoni fuq il-principju jekk jista' jkollu x'irnkien f'Malta old peoples' home bid-disinji li gew sottomessi. Izda anki hawn il-Bord jista' jikkonsidra tali zvilupp fil-limiti ta' l-Istructure Plan li taht SOC 18 dawn iridu jsegwu il-procedura hemm msemija w cjoie "The Planning Authority will co-operate with the Secretariat for the Care of the Elderly and with voluntary organizations to identify in the various Local Plans new sites and building suitable for conversion to accommodate day care centers, sheltered homes, and other required facilities", jigifieri s-siti jridu jigu identifikati fil-Local Plans.

Ghaldaqstant minhabba li l-area in kwistjoni ilium ghadha tikkwalifika bhala ODZ, tant hu hekk li giet identifikata mill-Bord precedenti bhala li qieghed f'zona barra l-izvilupp izda adjacenti ma' zona fejn l-izvilupp huwa permess, l-istess ma jistax hlief jinghata rifjut qabel ma jigu identifikati tali zoni, ghax f'din proposta hija barra z-zona ta' l-izvilupp u mhux inkluz bhala tali zvilupp permissibbli f'ODZ skond policy BEN 4 para. 7.6 "The term 'urbanisation' means the creation of new built-up areas containing all or most urban uses: houses, shops, offices, factories, and all the built support facilities which these accumulate. In seeking to prohibit urbanization of existing non urban areas it is not the intention to prohibit built structures of various kinds which are normal and legitimate inclusions in the non urban scene - farmhouses and other genuine agricultural buildings, reservoirs, picnic area toilets and car parks, and control buildings and walls/fences at archaeological and ecological sites. Nevertheless, the provision of such structures must be controlled in order to preserve and enhance the environmental quality of the countryside";

L-argument u l-aggravji mressqa mill-appellant ma jirrizultawx sodisfacement imressqa u ma jikkonvincux lil dan il-Bord jasal ghal decizjoni favur il-hrug ta' outline permit f'area ODZ sensitiva bhal dik. Jibqa' l-fatt illi l-area de quo qeghda f'ODZ u dan il-Bord interessat illi jippreserva l-kwalita ambjentali li fadal f'dawk l-inhawi.

Il-paragrafu 9.6 tal-Istructure Plan tant kkwotat mill-appellant ma jaghtix xi dritt kwezit lill-appellant fuq is-sit tieghu ghall-hrug ta' permess, anke jekk outline, kif propost. Di fatti lanqas ma jirrizulta illi s-sit gie iddentifikat mill-MEPA bhala sit idoneju ghal tali zvilupp. Anzi, minn dan mhux talli ma jirrizulta xejn, talli s-sit giet skedata.

Il-Bord ikkunsidra ukoll d-decizjoni tieghu stess tal-lum istanti fl-appell 268/04 ISB, fejn gie kkonfermat l-iskedar tas-sit de quo.

Ghaldaqstant, tenut kont dan kollu u ghar-ragunijiet hawn fuq elenkati dan il-Bord qed jghaddi biex jichad l-appell u jikkonferma d-decizjoni appellata

Ikkunsidrat

L-aggravji tal-appellant huma tnejn cioe li l-Bord ddiskrimina mieghu u d-decizjoni kienet irragonevoli. Hu sottometta li kienet diskriminatorja ghax inghata permess beix issir giebja f'art li giet dikjarata ta' ekologija li ma ghandekx tmissha u lanqas hi art agrikola li tinnecessita tisqija. Inoltre ma' genb l-art in kwistjoni hemm vilel barra z-zona ta' zvilupp bhala kaz in kwistjoni u li kontrihom ma ttiehdet ebda azzjoni.

Rigward l-irragonevolezza tad-decizjoni gie sottomess li hemm permess ta' bini fuq iz-zewg nahat tat-triq u nonostante dan qed jigi dikjarat illi s-sit hu ta' 'scientific importance' u 'intokkabli'. Siti ohra tal-istess natura bhal fil-Balluta thalla li jsir zvilupp. F'parti aktar sensittiva u cioe f'Wied il-Ghasel inhareg outline permit ghal dar tal-anzjani u wara inbiddu u saru flats.

Diskriminazzjoni

L-appellant qed jallega diskriminazzjoni mieghu fir-rifjut meta kien hemm okkazzjonijiet ohra f'sitwazzjonijiet simili (art ta' importanza ekologika) meta permess inhareg. Il-kwistjoni jekk saritx diskriminazzjoni mill-appellant mhix punt ta' ligi dibattut u deciz li minnu l-appellant jista'

jinterponi appell quddiem il-Qorti tal-Appell skond il-poteri restrittiv li ghandha din il-Qorti minn appelli tal-Bord tal-Appell dwar l-Ippjanar.

Din il-qorti tikkondividi l-gurisprudenza ta' din il-Qorti diversament presjeduta u l-Qorti tal-Appell fuq din il-kwistjoni. Ara f'dan is-sens **Guido Falzon et vs Kummissjoni ghal Kontroll tal-Izvilupp**, App 10/11/1999, fejn il-Qorti anki dahlet fl-aspett kostituzzjonali ta' diskriminazzjoni. Fl-appell **Ted Mizzi vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar** decieza fid-29 ta' Jannar 2009:

Illi dwar l-aggravju fejn l-appellant qed jallega li saret diskriminazzjoni mieghu jinghad li l-aggravju dwar diskriminazzjoni huwa punt ta' fatt li ma huwiex kompetenza ta' din il-Qorti u hawn issir riferenza ghal dak li nghad f'diversi decizjonijiet fosthom dawk fl-ismijiet **"Jason Zammit vs Il-Kummissjoni ghal-Kontroll ta' l-Izvilupp"** (A.I.C. (RCP) 28 ta' Ottubru 2002) u **"Joseph Muscat vs. Awtorita' ta' l-Ippjanar"** (A.I.C. (RCP) 27 ta' Ottubru 2003) fejn inghad li:-

"Dwar l-allegazzjoni tal-appellant li d-decizjoni tal-Bord tippekka minhabba diskriminazzjoni u arbitrarjeta', ma tistghax tigi ezaminata u deciza f'dana l-appell, billi tezorbata mill-gurisdizzjoni konferita mil-ligi lil din il-Qorti, fil-kuntest tal-appelli intavolati taht l-istess ligi, ghalkemm l-appellant jista' jkun li ghandu rimedji ohra disponibbli ghalih quddiem anke dawn il-Qrati, pero' mhux fl-ambitu ta' dawn il-proceduri quddiem din il-Qorti tal-Appell bhala Qorti tal-Appell minn decizjonijiet tal-Bord tal-Appell tal-Ippjanar fuq punt ta' dritt deciz mill-Bord skont l-artikolu 15 (2) tal-Att I tal-1992 fuq citat".

Illi jinghad ukoll li fil-kawza fl-ismijiet **"Joseph Bezzina vs Kummissjoni ghal-Kontroll ta' l-Izvilupp"** deciza fil-11 ta' Gunju 2001 mill-Onorabbli Qorti ta' l-Appell inghad ukoll li:-

"Huwa evidenti li dana l-aggravju baziku ta' l-appellant ma jista' qatt jinkwadra ruhu fil-parametri strettissimi mposti mil-ligi fil-frazi "punti ta' ligi decizi mill-Bord", liema frazi

tistabilixxi b'mod definit il-gurisdizzjoni ta' din il-Qorti taht l-imsemmi Att ta' l-1992 dwar l-Ippjanar ta' l-Izvilupp. Hekk ukoll kien gie deciz minn din il-Qorti fil-31 ta' Mejju 1996, fil-kawza fl-ismijiet "Anthony Grixti vs. L-Awtorita' ta' l-Ippjanar".

Illi dan huwa konformi ma' dak li nghad fil-kawza fl-ismijiet "**Joseph Attard vs Kummissjoni ghall-Kontroll ta' l-Izvilupp**" (A.I.C. 28 ta' Ottubru 2002 - App. Nru: 13/01/RCP) fejn giet ikkwotata s-sentenza "**Joseph Mifsud vs Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp**" (App. Nru: 31A/96 – 30 ta' Mejju 1997) fejn intqal issegwenti:-

"... l-allegazzjoni ta' l-appellant li d-decizjoni tal-Bord tippekka minhabba diskriminazzjoni u arbitrarjeta', ma tistax tigi ezaminata u deciza f'dan l-appell, billi tezorbita mill-gurisdizzjoni konferita mill-ligi lil din il-Qorti, fil-kuntest ta' l-appelli intavolati taht l-istess ligi".

"Illi din il-Qorti tkompli tghid illi decizjonijiet tal-Bord ta' l-Appell dwar l-Ippjanar jistghu jigi mpunjati quddiem il-Qrati Ordinarji, fil-kazijiet kongruwi, per ezempju, fl-ipotezi li l-Bord wettaq xi ngustizzja manifesta billi jkun naqas li josserva xi principju tal-gustizzja naturali. Kwistjonijiet bhal dawn, pero', ma jidhlux fil-gurisdizzjoni ta' din il-Qorti skont l-imsemmija dispozizzjoni."

Illi l-istess inghad fis-sentenza "**Joseph Difesa vs l-Awtorita' ta' l-Ippjanar**" (App.Nru: 181/97 – A.C. 12 ta' Gunju 1998) fejn inghad:-

"L-allegazzjoni ta' diskriminazzjoni maghmula millappellant, certament bl-ebda tigidid ta' l-immaginazzjoni ma tista' tikkwalifika bhala li tikkoncerna 'punt ta' ligi deciz mill-Bord'... .. isegwi, ghalhekk li l-allegazzjoni dwar diskriminazzjoni msemija ta' l-appellant ma tistax tigi ezaminata jew deciza f'dan l-appell."

Illi kif inghad fis-sentenza "**Joseph Bezzina vs Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp**" (A.I.C. (RCP)

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– 30 ta' Marzu 2006) ovvjament l-istess appellant jista' jkun li ghandu rimedji ohra bhal dawk ta' sharrig amministrattiv, izda certament mhux a bazi ta' l-artikolu 15 (2) tal-Kap 356 u ghalhekk anke dan l-aggravju qed jigi rigettat u michud stante li nfondat legalment.

Ghalhekk dan l-aggravju qed jigi michud.

Irragonevolezza

L-appellant qed jallega wkoll illi d-decizjoni tal-Board kienet irragonevoli. Hu qed jibbaza din l-allegazzjoni fuq permessi ghal binjiet ohra fil-vicinanze u binjiet f'partijiet differenti tal-gzira li huma wkoll ta' importanza ekologika.

Dak li qed jitlob l-appellant u li qed jistieden lil Qorti terga' taghmel hu apprezzament ta' fatti u tara hi, fid-diskrezzjoni taghha, jekk fid-dawl tal-fatti, id-decizjoni tal-Bord kinitx ragonevoli jew le. L-appellant mhux qed jattakka l-policies li mexa fuqhom il-Bord biex wasal ghad-decizjoni tieghu u lanqas qed jallega li gie applikat xi ligi, pjan jew policy hazin.

Din il-Qorti hi tal-fehma illi dan ma jikkostitwix punt ta' ligi deciz mill-Bord. Il-Qorti ma tistax tissindaka jekk fl-applikazzjoni u implimentazzjoni korretta tar-regolamenti ezistenti kif jidher f'dan il-kaz il-Bord hux irragonevoli ghax hemm zviluppi ohra ezistenti, li fil-konfront taghhom ma introducewx l-istess mizuri jew intuza l-istess kejl. Dan jista' jressaqhom u jittanta jiehu rimedju izda mhux tramite din il-Qorti f'dawn ic-cirkustanzi limitati ta' revizjoni ta' decizjoni tal-Bord tal-Appell fuq punt ta' ligi biss.

Decide

Ghalhekk il-Qorti qed taqta' u tiddeciedi billi tichad l-appell u tikkonferma d-decizjoni tal-Bord tal-Appell tat-30 ta' Gunju 2011. Bl-ispejjez kontra l-appellant.

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< Sentenza Finali >

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