



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta ta' l-4 ta' Dicembru, 2013

Appell Civili Numru. 178/2012

Jesmond Camilleri

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Jesmond Camilleri tas-27 ta' Novembru 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-8 ta' Novembru 2012 li cahdet ir-renova tal-permess PA 1070/03 permezz tal-applikazzjoni prezenti 2761/10;

Rat ir-risposta tal-Awtorita li sottomettiet 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 prezentata fis-17 ta' Gunju 2010 – renewal of development permission PA 2761/10 f'sit fi Triq Hanaq, Nadur, l-appellant talab :-

“renewal of permission PA 1070/03 – construction of four apartments and garages organized on two floors plus a semi-basement with washrooms at roof level.”

L-applikazzjoni giet michuda b'rifjut tal-11 ta' Jannar 2011 ghar-ragunijiet segwenti:-

"1. The height of the proposed building exceeds the maximum height limitation for this area of Nadur. It is therefore incompatible with the characteristics of the area and with Local Plan Policy GZ-HTLM-1 and with Map 14.7-C of the Gozo and Comino Local Plan. No semi-basements are permissible and the second floor needs to be setback from both the front and back elevations. No roof structures are permissible.

2. The permission PA1070/03 was issued on the wrong site and therefore the permission cannot be renewed."

Fl-appell tieghu, il-Perit Dr. Edwin Mintoff ghall-appellant issottometta li :-

"1. L-appellant qed jitlob 'renewal' tal-applikazzjoni fuq imsemmija minghajr ebda tibdiliet mill-pjanti approvati;

2. Access fuq is-sit jista' jikkonferma x-xoghol li gia sar mill-appellant skond il-permess approvat.

3. Mhux sewwa li l-appellant jigi mitlub jaghmel zvilupp differenti minn dak approvat bil-permess PA 1070/03 billi l-policies nbidlu meta fil-fatt ix-xogholijiet diga' bdew.

4. Dwar il-posizzjoni preciza tas-sit, saret applikazzjoni biex temenda l-istess billi din kienet giet erronjament indikata.”;

L-Awtorita' fir-rapport taghha kkumentat kif gej :-

“5.1.3 Reference is made to the assessment as carried out in the DPAR and which included:

-- Previous permission

Permission PA1070/03 was issued on 5th August 2005. Condition 1(a) of the permission – see document 1B – states that the permission is valid for a period of five years. Therefore the permission is valid till 5th August 2010. The renewal application was submitted on 17th June 2010.

-- New policies

Subsequent to the issue of permission PA1070/03, the current policies of that time, were superseded by the Local Plan and DC2007 and thus the proposal needs to be assessed against the new policies.

-- Height limitation

The height limitation for the area is 2 floors and a setback floor since the site is an Edge of Development Zone site. The previously approved drawings indicate a building height of three floors and roof structures. The Local Plan allows the construction of the second floor if it is set back by 4.25 metres both from the back and from the front. No roof structures are allowed. The height of three floors and roof structures as previously approved runs counter to the height limitation for the area. No semi-basements are permissible and the second floor needs to be setback from both the front and back elevations. No roof structures are permissible.

-- Wrong site

A copy of permission PA1070/03 is at document 1B to which is attached the approved site plan. It is evident that the permission PA1070/03 was issued on the wrong site (ie adjacent plot of land) since it is not the same site marked in the current application. Therefore the permission cannot be renewed and the current application must be refused.

5.1.4 As regards to the arguments of the appeal itself, the Authority disagrees with appellant's statement on various accounts and will be explained below.

5.1.5 The Tribunal is notified that this particular site is officially designated as a Residential Area in the Gozo and Comino Local Plan. The height limitation of the area is 2 floors and a setback floor according to Gozo and Comino Local Plan. The only works on applicant's site as mention by appellant only consist of excavations. (See photos red 6B). In view that these limited works, the site cannot in any way be considered to have had any sufficient commitment as to allow additional floors over and above that allowed by the Local Plan.

5.1.6 With regards to the exact location of the plot of land in question, it is to be noted that the official site plan of permit PA 1070/03 is actually showing the adjacent plot of land of the one which is now being stated as the correct plot of land. Such a discrepancy renders the excavation works as being without permit and thus, even subject to enforcement action. In this regard, a sanctioning application has first to be submitted so as to sanction the illegal excavations and then, could also propose the construction of residences with garages. Furthermore, in such a situation, the Authority reiterates that there are NO legal commitments on the site under appeal and hence, appellant's claim of a commitment is not legal and without any justification.

5.1.7 Without prejudice to the above, in view that it has now clearly resulted that on this particular plot of land for which this appeal was lodged there are illegal excavations for which its sanctioning is not being requested in this application under appeal, the Authority states that in line with Regulation 14 of LN 514 of 2010, no further assessment of any development can be conducted until such illegality is either first removed from site or an appropriate sanctioning application is submitted. In this particular case, a fresh, full development application must first be submitted to sanction the illegal development and

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on its approval, one could then request the construction of floors above.”

Fin-nota taghhom, il-konsulenti tal-appellant ikkonfermaw li l-applikazzjoni għall-‘correction of site’ giet ipprezentata fil-5 ta’ Awwissu 2010, PA 5553/10. L-applikazzjoni ghadha pendenti. Gie rilevat, għall-korrettezza, li s-sit gie originarjament indikat parti fuq is-sit korrett u parti fuq is-sit adjacents li gie zviluppat minn terzi.

Huma ddikjaraw li l-appellant hallas dak kollu li gie mitlub ihallas u m’ghandux jigi penalizzat minhabba zball tal-Perit.

Saru ‘excavations on site’ u l-applikazzjoni għal renewal giet ipprezentata meta ma setax isir aktar progress fuq is-sit.

Fl-istess nota gie dikjarat is-segwenti :-

“It is submitted that the new regulations bind the new sites or new applications but not those whose site was already granted and this irrespective of new conditions which could have been introduced. Once that a permit is issued, when it comes for renewal, it may not be circumscribed by new and additional regulations and conditions.

On the contrary new applications are regulated by the prevailing rules and regulations operative at the time of submission of application.

In this case the permit had not expired – it was still valid when the renewal was requested and thus it should be regulated by the conditions which were operative when it was originally granted.”;

Ikkunsidra ulterjorament :-

L-appellant b’din l-applikazzjoni PA 2761/10 qed jitlob renewal tal-permess PA1070/03. Is-sit jinsab in parti gewwa u in parti barra z-zona tal-izvilupp skond il-Mappa 14.7.A (Gozo).

L-applikazzjoni giet michuda billi l-gholi tal-izvilupp propost hu in excess tal-height limitation tal-area tan-Nadur. Il-proposta hi ghalhekk inkompatibbli mal-karatteristici tal-lokalita' u l-Local Plan Policy GZ-HTLM-1 u l-mappa 14.7-C tal-Gozo and Comino Local Plan; in oltre l-permess originali PA 1070/03 hareg fuq is-sit zbaljat u ghalhekk ma jistax isir tigidid ta' dan il-permess.

L-appellant issottometta li l-permess PA 1070/03 hareg fil-5 ta' Awwissu 2005 u kellu validita' ta' hames snin sal-5 ta' Awwissu 2010 u hu applika ghal renewal qabel ma skada l-permess billi applika fis-17 ta' Gunju 2010; ghalhekk billi applika ghal renewal qabel ma skada l-permess originali, l-applikazzjoni kellha tigi milqugha.

Pero' biex tali applikazzjoni tigi milqugha, jinhtieg apparti l-permess, li l-policies tal-lokalita' ma jinbidlux u jekk jinbidlu, l-izvilupp originarjament approvat jinhtieg li jkun gia' prattikament esegwit.

F'dan il-kas, irrizulta, li nbidlu l-policies, l-izvilupp esegwit kien limitat ghall-'excavations', li, in oltre, saru mhux fuq is-sit 'de quo' izda bi zball f'dak adjacents.

Dwar liema policies huma applikabbli, jekk daww 'in vigore' meta ssir l-applikazzjoni jew daww fis-sehh meta tigi determinata l-applikazzjoni, dan illum gie stabbilit minn diversi decizjonijiet tal-Qorti tal-Appell fosthom "Angelo Farrugia vs Chairman tal-Awtorita' tal-Ippjanar" deciza fl-24 ta' April 1996 u "Emanuel Mifsud vs il-Kummissjoni ghall-Kontroll tal-Izvilupp" deciza fil-31 ta' Mejju 1996 li kkonfermaw li ghandhom japplikaw il-policies 'in vigore' meta tigi determinate l-applikazzjoni.

L-aggravji ta' dan l-appell ghalhekk ma jirrizultawx fondati u l-motivazzjonijiet tar-rifjut jimmeritaw konferma.

It-Tribunal ghalhekk qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma r-rifjut tal-11 ta' Jannar 2011 ghall-applikazzjoni PA 2761/10.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal zbalja meta qies li renova ta' permess ma jsirx jekk l-izvilupp approvat ma jkunx gia prattikament esegwit kemm il-darba l-policies ikunu inbidlu fiz-zmien meta tintalab ir-renova. Il-ligi tghid biss illi l-fond ikun gia kommess b'kostruzzjoni u mhux li jkun lest. F'dan il-kaz l-iskavar kien kollu lest u anki l-pedament u parti zghira biss kienet infirxet fuq art adjacenti. In oltre l-izvilupp ma lahaqx sar kollu minhabba diffikultajiet imqajma mill-Awtorita u mhux b'nuqqas tas-sid;
2. Il-kwistjoni ta' applikazzjoni ta' policies vigenti tirrigwarda zvilupp gdid u mhux renova ghax il-permess jikkreja dritt vestit u l-bdil ta' policies ma jaffettwawhx.

L-ewwel u t-tieni aggravju

Jibda biex jinghad illi l-kwistjoni quddiem din il-Qorti posta f'dan l-appell hu dupplici, cioe fl-ewwel lok jekk permess jikkostitwix dritt kwezit u jibqax tali anki meta jiskadi bla ma jkun sar l-izvilupp kif permess jekk qabel l-iskadenza jintalab renova tal-istess permess skond il-ligi.

Din hi l-ewwel kwistjoni li trid tigi deciza. Hi l-fehma tal-Qorti illi l-ligi tistabilixxi hajja operativa ta' hames snin ghal permess ta' zvilupp sabiex tali zvilupp isir skond il-permess approvat. Dan johrog mill-artikolu 69 tal-Kap. 504 gia artikolu 33 tal-Kap. 356. il-kliem tal-ligi hu car u jaghti x'jifhem illi f'dak il-perjodu, l-applikant li jkun inhariglu permess ghandu dritt kwezit li jizviluppa in linea mal-permess akkordat anki jekk fil-fratemp ikun sar tibdil fil-ligijiet ta' ippjanar. Il-ligi pero izzid fl-istess artikolu li l-Awtorita tista' ittawwal il-permess tal-izvilupp ghal perjodu ulterjuri li tqis ragonevoli. Il-kliem sottolineati mill-Qorti juru illi d-dietentur tal-permess ghandu dritt jaghmel dak permess lilu fiz-zmien lilu moghti liema dritt hu limitat biz-zmien u prorogabbli biss wara li ssir talba lill-Awtorita li tista' u mhux ghandha tirrenova l-permess. L-iskop hu car billi l-ligijiet ta' ippjanar huma ta' ordni pubbliku fl-interess tal-pajjizu jinbidlu minn zmien ghal zmien u persuna li ghandha permess ma ghandhiex tabbuza jew tkun

negligenti billi thalli zmien indeterminat jghaddi biex tizviluppa minghajr ma taghti kaz li l-pjanijiet li jirregolaw l-izvilupp fiz-zona jistghu jkunu inbidlu bla ma tottempera ruhha mil-bdil u tikkonforma ruhha. Hu biss fil-perjodu ta' validita tal-permess li detentur ta' permess hu immuni minn tibdil ta' regoli ta' ppjanar izda mhux oltre. Jekk dak iz-zmien utili ta' validita ta' permess jiskadi, allura l-applikant li jixtieq ikompli bl-izvilupp irid jitlob permess biex ikompli bl-istess kondizzjonijiet tal-permess originali, li jista jinghata jew jigi rifjutat a bazi tal-intepretation document kif ghandha tigi regolata applikazzjoni ta' renova fejn irid isir bilanc bejn id-drittijiet tal-applikant u dak tas-socjeta in generali.

Fil-kaz in kwistjoni sar skavar u bini ta' pedament pero l-izvilupp ma giex zviluppat kif permess fit-totalita tieghu u kwindi l-applikant ma jistax jivvanta dritt kwezit aktar fuq l-izvilupp intier izda biss jista' jaghmel talba li jkompli bl-izvilupp kif kien originarjament permess. Din it-talba trid issir qabel ma l-permess originali jiskadi kif inhu dan il-kaz.

Dan iwassal ghat-tieni kwistjoni. X'ser jorbot lill-Awtorita fil-konsiderazzjoni taghha ghal renova ta' permess? Il-Local Plan Interpretation Document, li ghalkemm hu biss dokument ta' interpretazzjoni pero hu intiz biex l-Awtorita tuza diskrezzjoni ragonevoli bazata fuq kriterji uniformi ghal kulhadd ighid hekk fit-tielet sezzjoni hames paragrafu:

Where the applicant requests a renewal of the development permit within the validity period in accordance with the provisions 33(3) of the DPA and there is a firm commitment on site in that part of the development which may give rise to a conflict between the existing policies and the previous policies governing the original development permit the principle of the previous permit shall prevail. On the other, if the development has not reached this stage, the provisions of the Local Plan shall prevail.

Anki hawn il-kliem hu car. Jekk hemm 'firm commitment' fuq is-sit li parti mill-izvilupp jista' jkun f'konflitt ma policies

ezistenti u dawk originarjament applikabbli meta inhareg il-permess, allura jibqghu japplikaw il-policies fi zmien il-permess, u kwindi fil-fehma tal-Qorti r-renova ghandha tinhareg. Jekk dan il-‘firm commitment’ ma hux ezistenti ghandhom japplikaw il-policies ezistenti fiz-zmien tar-renova ghall-izvilupp u r-renova ghandha tohrog in linea ma dawn il-policies. Dan in omagg ghal principju regolatur li applikazzjoni ghandha tigi kunsidrata skond il-policies vigenti fiz-zmien tad-decizjoni u applikazzjoni ghal renova ma hi xejn hlief talba gdida ghal tigidid ta’ permess fuq l-istess termini ta’ permess approvat izda li illum tilef il-validita tieghu jekk ma jigix rinnovat.

Il-kwistjoni mertu tal-aggravju prezenti hu illi t-Tribunal meta kkunsidra t-tifsira ta’ ‘firm commitment’ qal li l-izvilupp approvat jinhtieg li jkun gia prattikament esegwit. Din hi kwistjoni ta’ interpretazzjoni ta’ kwistjoni ta’ ippjanar cioe x’jikkonstitwixxi ‘commitment’ f’sit bix-xogholijiet ta’ zvilupp intraprizi li jaghmulha difficli li jigu applikati l-policies vigenti fil-mument tal-konsiderazzjoni tar-renewal application. Tali mansjoni hi afdana f’idejn l-Awtorita u t-Tribunal u l-Qorti ma ghandhiex jedd tissindaka interpretazzjoni ta’ policy jew interpretation document sakemm ma tkunx palesement fallaci jew assurda jew ma tirrispekkjax il-kelma cara tad-dokument jew policy rilevanti. F’dan il-kaz ghalkemm hi l-fehma tal-Qorti illi l-interpretazzjoni tat-Tribunal ixxaqleb lejn hsieb dejjaq hafna ta’ x’ifisser ‘firm commitment’, il-Qorti tqis li ma ghandhiex il-jedd li timponi hi interpretazzjoni ohra meta mhix il-kompitu taghha li taghmel hekk. Ma jistax jinghad mill-kliem tal-interpretation document illi l-interpretazzjoni tat-Tribunal ta’ ‘firm commitment’ hi assurda jew fallaci. Il-fatt li wiehed jista’ jaqbel jew ma jaqbilx ma’ din l-interpretazzjoni mhix kaz ta’ zball fuq kwistjoni ta’ ligi izda aktar ottika differenti ta’ kif it-Tribunal jhares lejn il-kwistjoni mill-punto di vista fattwali tenut kont tal-ligijiet ta’ ippjanar. Din ma tirrendix id-decizjoni nulla kif qed jippretendi l-appellant.

Il-Qorti izzid illi t-Tribunal wasal ghal konkluzjoni illi l-policies vigenti setghu jigu applikati ghat-talba ta’ renova peress illi ikkonstata illi parti mix-xogholijiet li lahqu saru

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kienu ezegwiti fuq art mhix koperta bil-permess u illi x-xogholijiet infishom konsistenti fi skavar ma kienux tali li tenut kont tal-izvilupp li kien permess kienu tali li policies vigenti ma setghux jigu applikati ghal dak li kien lahaq sar jew li ser jigu kompromessi bih. Dawn ukoll huma kostatazzjonijiet fattwali li din il-Qorti mhix ser tissindaka ghax mhix fil-poteri taghha li taghmlu sakemm ma jirrizultax zball grossolan ta' fatt li kien il-fattur ewlieni jew determinanti ghad-decizjoni raggunta. Pero anki hawn, l-appellant naqas li jipproduci xi prova a rigward, kif naqas li jgib prova ghall-allegazzjoni li kien kostrett ma jkomplix bl-izvilupp ghal ragunijiet mhux imputabbli lilu.

Decide

Ghal dawn ir-ragunijiet il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Jesmond Camilleri u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-lppjanar tat-8 ta' Novembru 2012. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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