



QORTI TA' L-APPELL

**ONOR. IMHALLEF
MARK CHETCUTI**

Seduta tad-19 ta' Frar, 2014

Appell Civili Numru. 9/2013

**Is-socjeta "A. F. Ellis (Home Decor) Ltd."
VS**

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

Il-Qorti,

Rat ir-rikors tal-appell tas-socjeta A. F. Ellis (Home Decor) Ltd. tal-20 ta' Frar 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Jannar 2013 dwar applikazzjoni PA 4420/08 'amendments to permission PA 5008/05 by extending approved dwelling due to change in site configuration';

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;

Kopja Informali ta' Sentenza

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

B'applikazzjoni tal-10 ta' Settembru 2008 – Amended Development Permission – PA/4420/08 l-appellant, f' Site at, Triq il-Mithna, Rabat, Ghawdex, talab:

“Amendments to permission PA5008/05 by extending approved dwelling due to change in site configuration”

B'rifjut mahrug fl-1 ta' Gunju 2011 l-Kummissjoni dwar il-l-Ambjent u l-Ippjanar cahdet it-talba ghall-hrug tal-permess relativ ghar-ragunijiet segwenti:

“1 There is no planning justification to extend the building beyond the limits to development as defined by the Gozo and Comino Local Plan, particularly when considering that such extension will take place within a scheduled Area of Archaeological Importance. The proposed development therefore conflicts with Structure Plan Policies SET 11 and SET 12.

2 The proposed development (where it extends beyond the limits to development) would have an adverse impact on a scheduled Area of Archaeological Importance and would conflict with Structure Plan Policy ARC 3 and Gozo and Comino Local Plan Policy GZ-ARCO-1 which provide that such areas should be safeguarded and preserved.

3 Gozo and Comino Local Plan Policy GZ-RLCN-1 sets out that "apart from the normal restrictions on development in rural areas, there shall be a strong presumption against the creation of new built structures (including cultivation and animal husbandry related structures) in AHLs"; while Policy GZ-SETL-2 does not allow urban development within Strategic Open Space Gaps. The proposed extension encroaches within an Area of High Landscape Sensitivity (AHLs) and within a Strategic Open Space Gap. Thus, the proposal conflicts with these policies.

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4 The proposal would lead to the unnecessary pruning of a Carob tree, for which no environmental permission has been issued. The proposal thus conflicts with the provisions of Legal Notice 12 of 2001.”

Fl-appell tieghu l-Avukat Joseph Ellis ressaq l-aggravji tal-appellant kif gej:

“Qed nikteb ghan-nom ta' l-applikant, "AF. Ellis (Home Decor) Ltd. " ta' 16, Triq Ghajn Qatet, Victoria VCT 2100 sabiex nappella mid-decizjoni tal-Kummissjoni dwar l-Ambjent u l-Ippjanar tal-31 ta' Mejju 2011 dwar l-applikazzjoni in kwistjoni:

Ir-ragunijiet ghal dan l-appell huma dawn li gejjin :

1. Fir-rigward ta' l-ewwel raguni ghar-rifjut ta' dina l-applikazzjoni, tajjeb illi wiehed izomm f'mohhu illi l-Local Plans Interpretation Document jghid car u tond f'pagna 8 illi:

1.4 Depth of Plots in Gozo

Issue

Since PAPB time, it has been the practice to limit building depths on the edge-of development boundaries up to a maximum of 25 metres.

The approved Local Plan refers to this in Policy GZEDGE-3. However, since the building depth is not specified, what is the interpretation?

General Interpretation

The building depth is still 25m. In the case of Gozo, the plot depth is however taken to be 30 m. This factors in the traditional small backroom which is so prevalent in Gozo. The total plot depth has also been adopted in the DZ rationalisation where the 30 m depth is specified.

The 30 m is taken to include the 25m building depth, the 3m back garden and the 2m room at the back.

Id-Direttorat irrikonoxxa dan fir-rapport tieghu stess u sqarr : " The Local Planning Unit stated - minute 40 - that the GCLP (2006) considers plot depth as 25m to achieve a standard plot. Policy GZ-EDGE-3 may also consider another 5m for the development of a 2m back room. Policy GZ-EDGE-3 is also subject to environmental considerations. Still note that the screening of the existing blank wall with a standard plot and landscaped side garden is usually recommended in end plot cases. File referred to HPU re : environmental considerations. "

Inoltre, il-prassi applikata mill-MEPA kienet dejjem illi applikazzjoni tigi approvata anke meta l-izvilupp prospettat kien jaqbez il-linja ta' l-izvilupp. Jezistu bosta ezempji fejn tali prassi giet applikata fosthom PA 6489/04, PA 4279/05 u PA 377/06. Fil-kaz ta' l-ahhar zewg applikazzjonijiet, id-Direttorat irrakkomanda l-approvazzjoni tal-applikazzjoni minkejja illi parti sostanzjali tal-izvilupp propost kienet barra mil-linja ta' l-izvilupp. Dan kien speċjalment il-kaz fir-rigward ta' PA 4279/05 fejn jidher illi l-anqas il-faccata kollha ma kienet fiz-zona ta' l-izvilupp kif jitolbu l-policies relattivi imma xorta din l-applikazzjoni giet irrakkomandata għall-approvazzjoni, kif fil-fatt giet sussegwentement approvata.

L-applikant l-anqas jaqbel illi l-applikazzjoni tieghu tmur kontra l-policies tal-Pjan ta' Struttura SET 11 u SET 12. Dana peress illi z-zona ta' l-izvilupp hija diga kommessa u fi kwalunkwe kaz, SET 12 topera sabiex timmitiga l-effetti ta' SET 11. Inoltre, id-Direttorat ma talabx l-ikkummissjonar ta' stima ta' irnpatt ambjentali kif jitlob SET12 f'sitwazzjonijiet bhal dawk odjerni, probabilmment ukoll in vista tal-fatt illi l-izvilupp propost li kien ser jaqbez il-linja ta' l-izvilupp kull ma hu kamra ta' xi ghoxrin metru kwadru! Għaldaqstant, id-Direttorat ma jistax issa juza SET 12 biex jiggustifika r-rifjut ta' dina l-applikazzjoni.

Inoltre, tajjeb illi wiehed jirrelewa illi l-linja ta' zvilupp giet demarkata bl-aktar mod arbitrarju fuq il-Pjan Lokali

relattiv. Dan jidher mill-fatt illi fis-sit kontigwu ghas-sit tal-applikazzjoni odjerna, jista' jsir zvilupp sa fond ta' 30 metru. Inoltre, hemm 2 klawsole cari fuq il-mappi tal-Pjan Lokali li jghidu car u tond : " 1) Indicative Only .Not to be used for direct interpretation, 2) Maps to be used in conjunction with policy document". Ghaldaqstant, wiehed ghandu, flok joqghod jipprova ikejjel ezatt (u jaghmel direct interpretation) dwar il-pozizzjoni tal-linja kemm tmur lura (li ovvjament kif impingija ma taghmel l-ebda sens), japplika l-policy document u cioe paragrafu 1.4 tal-Local Plans Interpretation Document gja citat li titkellem car fuq il-25 u t-30 m allowable building depth.

Ghaldaqstant, m'hemm l-ebda raguni valida ghala l-applikazzjoni odjerna ma tigiex approvata speċjalment meta l-fond tal-bini m'huwiex ser jeccedi sbatax-il-metru.

2. Fir-rigward tat-tieni raguni ghar-rifjut ta' dina l-applikazzjoni, wiehed ma jifhiemx kif tali raguni tista' tigi kkunsidrata bis-serjeta meta kemm l-HPU kif ukoll is-Soprintendenza tal-Wirt Kulturali ma oggezzjonawx ghal dina l-applikazzjoni purke jittiehdu l-passi mehtiega sabiex jigi monitorat is-sit in kwistjoni taht sorveljanza arkeologika. Dan anke kif sar fir-rigward tal-applikazzjoni PA 5008/05 illi issa giet imgedda b'PA 4810/10 fejn l-applikant gie mitlub jiftah garanzija bankarja sabiex jaghmel tajjeb ghall-obbligu li jsir monitoragg arkeologiku. Fil-fatt, ir-rapport tad-Direttorat jghid "In reply to min 40 by the Local Planning Unit, the HPU stated in minute 43, that given the Local Plan Policy GZ-Edge-3 the proposed room is only a minor addition to what was previously proposed and for which the already recommended conditions for archeological monitoring and bank guarantee applies. HPU reiterated its recommendation in minute 70 (in reply to Legal Office) and stated that with reference to minutes 69, 40 & 43 proposed development is acceptable as it is within scheme, and despite also within AAI it does not "adversely affect the natural setting" since it is an end of scheme plot; it will partially mask a large 3rd party wall and is much smaller than adjacent plots within scheme which are larger and closer to Ta' Marziena site. Archeological monitoring conditions and

pro-rata bank guarantee as in PA 5008/05 for same plot apply." Dak li japplika ghal PA 5008/05 jew PA 4810/10 ghandu japplika ghall-applikazzjoni odjerna stante illi si tratta mill-istess sit bl-unika differenza illi hemm zieda ta' kamra zghira fl-applikazzjoni odjerna. M'humieq minnu illi l-izvilupp lil hinn mil-linja ta' l-izvilupp ser ikollu xi mpatt akbar minn dak approvat 'il gewwa mil-linja ta' l-izvilupp kif qed isostni l-avviz tar-rifjut.

Gjaladarba kemm l-HPU u l-Patrimonju Malti huma sodisfatti illi l-izvilupp propost jista' jsir sakemm jittiehdu l-prekawzjonijiet mehtiega, wiehed ma jifhiemx ghala r-rifjut ta' dina l-applikazzjoni jista' jigi gustifikat bil-pretest illi l-izvilupp ser ikollu mpatt negattiv fuq Zona Skedata ta' Importanza Arkeologika,

3. Illi fir-rigward tat-tielet raguni ghar-rifjut, dina ukoll m'hijjex gustifikata, il-proposta in kwistjoni ma taffetwax hazin il-Landscape Sensitivity u l-open space character taz-zona ghaliex hija parti minn zvilupp gia approvat u kontigwa ghal zvilupp li diga sar jew li ghad irid isir. Tant kemm hu hekk illi d-Direttorat ma kellux problema illi originarjament jirrakkomanda l-approvazzjoni tieghu, il-kamra propost m'hi ser taghmel xejn biex tnaqqas il-valur ekologiku tas-sit, sit li m'huwix jintuza ghal skopijiet agrikoli u difficli jintuza ghal tali skop.

4. Illi r-raba' raguni ghar-rifjut hija l-aktar wahda assurda ghax l-izvilupp propost bl-ebda mod m'hu ser imiss il-harruba li hemm fuq is-sit u ghaldaqstant, m'huwix minnu illi tali harruba ser tinzabar minghajr permess. Dan johrog car mill-pjanti u huwa inspjegabbli kif minkejja illi dan il-punt tqajjem diversi drabi, id-Direttorat baqa' jsostni illi l-izvilupp propost kien ser jaffetwa din il-harruba.

Ghal dawn ir-ragunijiet, u ghal ragunijiet ohra illi jistghu jitqanqlu fil-kors ta' dan l-appell, l-appellant bil-qima jitlob illi dan it-Tribunal jirrevoka d-decizjoni tal-Kummissjoni dwar l-Ambjent u l-Ippjanar tal-31 ta' Mejju 2011 dwar l-applikazzjoni in kwistjoni u japprova l-istess applikazzjoni peress illi tali approvazzjoni hija konsentita mill-"policies" u prattici vigenti."

Kopja Informali ta' Sentenza

Fir-rapport taghha l-Awtorita' kkummentat inter alia kif gej:

“5.0 COMMENTS ON APPELLANT'S ARGUMENTS & REFUSAL NOTICE

5.1 The following grounds are being raised to justify this appeal:

Re: Reason for Refusal 1 -

1 The general interpretation of the building depth is 25m, however in the case of Gozo, the plot depth is taken to be 30m. This factor is in the traditional backroom which is so prevalent in Gozo. The total plot depth has also been adopted in the Development Zone Rationalization where the 30m depth is specified.

2 In fact, MEPA always approved proposals where the development exceeded the depth limits from the scheme boundary. Examples of such permits are PA 6489/04; PA 4279/05 and PA 377/06.

Re: Reason for Refusal 2 -

1 There was no objection to the development from the Heritage Planning Unit or the Superintendent of Cultural Heritage since the necessary steps are being taken to monitor the works from an archaeological point of view.

Re: Reason for Refusal 3-

2 The proposal in concern does not create any negative impacts on the Landscape Sensitivity or the Open Space character of the area since the proposal is contiguous to the previously approved development.

Re: Reason for Refusal 4 -

3 The appellant is arguing that this reason for refusal is absurd since the existing carob tree on site will not be affected by the proposed development. This argument is

clearly backed by the plans of the requested development and although this point has been explained several times, it seems the issue has still not been settled.

5.2 The Directorate has the following comments to make:

5.2.1 Principle of Development

The principle of this development is to extend the footprint and floorspace of a residential unit approved in PA 5008/05 (and renewed in PA 4810/10), and the proposal is considered as an end-of-scheme development. In accordance with the Local Plan, the site is partially situated within the Residential Area (as per policy GZ-HOUS-1) and partially ODZ in an area designated as a Strategic Open Space Gap (policy GZ-SETL-2) and Area of Archaeological Importance (G.N. 417/97 & G.N. 290/98).

In previous permit PA 5008/05/14A the Authority had limited the permissible depth of the structure to approx. 9m in accordance with the development boundary. In this application the depth of the structure is being extended by nearly 75% of its original depth and is seeking to extend approx. 16.5m into the site.

On sites located on the edge of scheme where the development boundary runs approx. parallel to the street alignment, Local Plan policy GZ-EDGE-3 requires that the building depth is to be limited to 25m from the street alignment. Notwithstanding this, in this case where the development zone boundary is roughly perpendicular to the street, the development is to be contained within the limits of development. As explained above, a terraced house has already been approved on site in PA 5008/05 and there are no justified planning arguments as to why the extension should be permitted beyond the limits of development. As a result, the request to extend the approved dwelling unit runs counter to Structure Plan policies SET 11 and SET 12.

5.2.2 Sensitivity of Site vis-a-vis Proposal

The part of the site situated ODZ falls within a scheduled Area of Archaeological Importance and Area of High Landscape Sensitivity. Gozo and Comino Local Plan Policy GZ-RLCN-1 sets out that "Apart from the normal restrictions on development in rural areas, there shall be a strong presumption against the creation of new built structures (including cultivation and animal husbandry related structures) in AHLs". The proposal thus also conflicts with policies GZ-SETL-2 (which regards Strategic Open Space Gaps) and GZ-RLCN-1 of the Local Plan. Also, policies protecting scheduled archaeological areas also prevail over other policies.

Further to this, the part of the site falling outside the limits to development is designated as Land of Agricultural Value. As set out in Local Plan policy GZ-AGRI-1, the subdivision of the existing agricultural land is not acceptable. The construction of the proposed rubble wall is thus objectionable and conflicts with this policy.

5.2.3 Comparison between Proposal and other Permit Approvals

The basis of the appellant's argument on the first reason for refusal is by addressing that it is standard practice that the interpretation of permissible building depth is 25m, whilst in Gozo even depths of 30m are permitted since it is standard practice that beyond the back garden a small room is constructed.

To further extenuate his contention against the refusal, the appellant is quoting three development permits in PA 6489/04, PA 4279/05 and PA 377/06 as examples where similar development was permitted by MEPA. In the comments below the Authority will briefly examine the applications mentioned to determine whether the cases quoted merit comparison:

4 PA 6489/04: This application is situated approx. 5.2km from the site in concern at Nadur. The development proposal requested the construction of a garage and

house. The case was recommended for refusal by Planning Directorate due to depth of proposal, but overturned by DCC Board in August 2005. Notwithstanding this, the development was approved prior to the issue of the Local Plan and therefore the development cannot be used in comparison to the case in concern since the site was not designated as a Strategic Open Gap.

5 PA 4279/05: This application is situate approx. 1.7km from the site in concern at Xaghra. The development proposal requested the construction of a dwelling. This proposal was recommended for approval and granted by DCC Board in December 2005. However, the issue of site depth was not a considered matter in this application, and therefore there is no validity in comparing this case to the development in concern.

6 PA 377/06: This application is situated approx. 1.7km from the site in concern at Xaghra. The development proposal requested the erection of two houses, basement garage and pool. This proposal was also approved and granted by DCC Board in June 2006; and the issue of site depth was not a considered matter in the application. Therefore, there is no validity in comparing this case to the development in concern.

5.2.4 Other Comments

In accordance with consultations carried out with Environmental Planning Directorate during the processing stages of this application, it became evident that as a result of the proposal an existing carob tree present on site was to be pruned to accommodate the development. Since no environmental permission has been issued to remove the carob tree, the proposal conflicts with the provision of L.N. 12/01."

B' nota l-Avukat Joseph Ellis ressaq is-sottomissjonijiet tal-appellant kif gej:

“Illi r-ragunijiet migjuba mill-Awtorita appellata fin-nota taghha pprezentata seduta stante fis-seduta tat-13 t'Ottubru 2011 kontra r-revoka tad-decizjoni appellata huma ghal kollox infundati ujuru kemm kien gustifikat id-Direttorat illi originarjament kien irrakkomanda l-approvazzjoni ta' dina d-decizjoni. Sussegwentement, dina l-applikazzjoni marret quddiem bord tad-DCC ippresjedut mill-perit Elisabeth Ellul illi bl-akbar arroganza rrifjutat dina l-applikazzjoni minghajr ma tat smiegh xieraq lill-esponenti u wara giet rikunsidrata minn bord tal-EPC fejn l-istess Elisabeth Ellul kienet l-unika membru illi kienet favur u vvutat favur l-izvilupp propost! Tant ghall-konsistenza fil-process ta' ppjanar.

1. F'para. 5.2.1. tan-nota ta' l-Awtorita appellata, intqal:

On sites located on the edge of scheme where the development boundary runs approx. parallel to the street alignment. Local Plan policy GZ-EDGE-3 requires that the building depth is to be limited to 25m from the street alignment. Notwithstanding this, in this case where the development zone boundary is roughly perpendicular to the street, the development is to be contained within the limits of development...As a result, the request to extend the approved dwelling unit (to approx. 16.5 m into the site) runs counter to Structure Plan policies SET 11 and SET 12.

L-Awtorita appellata ma ccitat l-ebda policy sabiex tissostanzja dak li qalet fil-parti sottolineata. Inolte, iccitat hazin policy GZ-EDGE-3 illi anke jippermetti svilupp ta' 5 m oltre il-25 m. Fi kwalunkwe kaz, l-izvilupp propost ma jeccediex 16.5 m oil gewwa mil-linja tat-triq u ghalhekk jinkwadra fil-policies ezistenti nkluz GZ-EDGE-3 u para. 1.4 tal-Local Plans Interpretation Document. Inolte, SET 12 timmilita favur l-approvazzjoni ta' l-izvilupp propost u m'hux il-kontra.

Dan kif dejjem kien u ghadu jigi applikat mill-Awtorita appellata.

2. F'para. 5.2.2 tan-nota ta' l-Awtorita appellata, gew iccitati hafna policies illi qajla huma rilevanti ghal dan is-sit tassew ckejken. Fl-ewwel lok, dan is-sit m'huwiex jintuza ghal skopijiet agrikoli u ghalhekk, wiehed ma jifhiemx l-affermazzjoni illi "the subdivision of the existing agricultural land is not acceptable". Fi kwalunkwe kaz, diga hemm svilupp approvat fuq is-sit in kwistjoni illi gie approvat minghajr problema minkejja illi hija Area of High Landscape Sensitivity. Illi effettivament, l-isvilupp propost kull ma jaqbez il-linja ta' l-isvilupp huwa b'20 m.k. kif jidher mill-pjanta hawn allegata bhal Dok. A., qajla xi svilupp illi ser jirvina xi promontorju panoramiku! U dana minhabba l-arbitrarjeta tal-linja ta' svilupp ghax fil-fond attigwu, l-izvilupp jista' jidhol sa ta' l-anqas 25 m mil-linja tat-triq kif inhu ndikat fuq il-pjanta msemija.

Illi kwalunkwe oggezzjoni minhabba li s-sit jinsab f'zona ta' mportanza arkeologika hija ghal kollox fiergha stante illi kemm l-IHMU ta' l-Awtorita appellata u s-Supreintendenza approvaw l-isvilupp propost bl-imposizzjoni ta' l-obbligu ta' monitoragg. Ta' min isemmi ukoll illi s-sit in kwistjoni huwa ferm il-boghod mit-tempju ta' Marziena illi ghadu m'hux skavat u kien minhabba dan illi ma kien hemm l-ebda oggezzjoni mil-lat arkeologiku ghall-isvilupp propost jew ghal dak precedentement approvat.

3. Para. 5.2.3 tan-nota ta' l-Awtorita appellata.

Illi tajjeb illi wiehed jissotolinea illi l-Awtorita appellata fl-ebda ma ghamlet l-ebda referenza ghal para. 1.4 tal-Local Plans Interpretation Document fin-nota taghha imma peress illi ma tistax tmur kontra l-policy taghha stess fid-deher, pruvat tiskredita l-ezempji illi gab l-esponenti fejn il-policy f'para, 1.4 tal-Local Plans Interpretation Document giet applikata. Illi wiehed ikun karitatevoli jekk jghid illi l-Awtorita appellata m'hix korretta fl-esercizzju li wettqet ghax wiehed ma jifhiemx x'inhi r-rilevanza tad-distanza mill-hekk imsejjah "site in concern". Li hu rilevanti hu illi inti kellek applikazzjonijiet ghal zvilupp illi ma kienx jinkwadra totalment fiz-zona fabbrikabbli imma ciononostante, gew approvati in virtu tal-policy f'para, 1.4 tal-Local Plans Interpretation Document. Illi tghid illi

applikazzjoni partikolari, PA 6489/04 giet approvata qabell-approvazzjoni tal-Pjan Lokali u ghalhekk, m'hux ezempju tajjed hu ghal kollox skorrett ghaliex il-policy f'para, 1.4 tal-Local Plans Interpretation Document jaghmilha cara illi hemm kontinwita fl-applikazzjoni u interpretazzjoni tal-policy in kwistjoni.

Illi tghid illi f'PA 4279/05 u f'PA 377/06, il-fond ta' l-isvilupp propost ma giex kkunsidrat tfisser haga wahda : l-arbitrarjeta u l-inkonsistenza, u konsegwenti ngustizzja fl-iprocessar tal-applikazzjonijiet ghal svilupp mill-Awtorita appellata. Dana speċjalment fir-rigward ta' PA 4279/05 fejn l-anqas il-faccata taghha ma kienet taqa' kollha fiz-zona fabbrikabbli. U alla jbierek il-case-officer fdawn l-applikazzjonijiet l-anqas biss gibed l-attenzjoni tal-bord tad-DCC illi l-isvilupp propost ma jaqax kollu - jew qajla jaqa' - fiz-zona fabbrikabbli u ghalhekk, gie approvat. U ghaliex il-kwistjoni illi l-isvilupp propost ma kienx jaqa' kollu fizza fabbrikabbli ma ssemmiex fl-iprocessar ta' l-imsemmija applikazzjonijiet, allura m'humix rilevanti ghall-kaz odjern. Altru li huma rilevanti! Illi huwa rilevanti ghall-kaz odjern - u l-Awtorita appellata bl-ebda mod ma kkontradixxiet dan - hu illi applikazzjonijiet goal zvilupp gew approvati illi kienu jaqazu l-linja ta' l-isvilupp, f'kaz minnhom, l-anqas il-faccata kollha ma kienet taqa' fil-linja ta' l-isvilupp, u dana minhabba l-policy f'para. 1.4 tal-Local Plans Interpretation Document.

Illi tajjed illi wiehed isemmi ukoll applikazzjoni approvata ricentement fit-8 ta' Novembru 2011, PA 2819/10 fejn "The back part of the site falls outside the development zone". U "The (Heritage Advisory) Committee also noted that the building goes beyond the development boundary where the back elevation overlooks the valley." Illi f'dan il-kaz, id-Direttorat argumenta illi "The part of the building which is ODZ (according to scheme line interpretation) consists of the corners of two rooms. This is a very small part of the development and is more than compensated for by the setbacks from the same ODZ line in the open spaces behind the proposed dwellings."

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Illi anke fil-kaz odjern mill-pjanta kontestwalment allegata bhala Dok."A" jidher illi hemm "setbacks" ta' 27 m.k. li jikkompensaw ghall-intruzjoni ta' 20 m.k. lil hinn mil-linja ta' l-isvilupp u bl-istess mod bhal f'PA 2819/10, l-izvilupp propost bl-applikazzjoni odjerna kellu jigi approvat.

Dan kollu juri l-inkonsistenza fl-applikazzjoni tal-policies rilevanti fl-ipprocessar ta' l-applikazzjonijiet ghal svilupp mill-Awtorita appellata, liema nkonsistenzi mghandhomx jigu ttolerati u ghandhom jigu raddrizzati minn dan l-Onorabbli Tribunal.

Daqstant ghandhom l-esponenti x'jissottomettu ghas-savju u superjuri gudizzju ta' dan l-Onorabbli Tribunal."

Fit-Tieni Statement taghha l-Awtorita' kkummentat kif gej:

"1. The appellant submitted on 28th February 2012 a reply to the Authority's initial report to the Tribunal. The appellant is mainly arguing that the Authority

(1) did not substantiate its interpretation policy GZ-EDGE-3;

(2) in its reply failed to make reference to paragraph 1.4 of the Local Plans Interpretation Document;

(3) made reference to a number of inapplicable policies especially since only 20sq.m of the proposed development falls outside the limits of development; and

(4) analysed incorrectly the merits of the quoted precedents.

Furthermore, the appellant is making reference to another permit (PA2819/10) which allegedly permitted a development outside the development zone.

2. The Authority has the following comments to make:

2.1 Policy GZ-EDGE-3 of the Gozo and Comino Local Plan together with Paragraph 1.4 of the Local Plans

Interpretation Document is the policy which permits a building depth of 25m and a plot depth of 30m. However the wording of policy GZ-EDGE-3 is clear in that this applies in cases where the distance between a street frontage and the nearest Development Zone Boundary is more than 4,0m. It is clear in this case, that the distance between the street frontage and the nearest Development Zone Boundary is much less than 30m and therefore the development is to be contained within the limits of development.

The argument the Authority made on the issue of the development zone boundary being roughly perpendicular to the street frontage and that therefore it is to be contained fully within the limits of development stems from a practical application of the policy. Whenever the limits of development runs perpendicular to the street frontage; i.e. it is articulated and defined, then it stands to reason that it is illustrating where any proposed development has to be contained (unless it is more than 30m away, in which case the provisions of GZ-EDGE-3 applies). In most cases where the limits of development is articulated in this manner, the nearest distance between Development Zone Boundary and the street frontage is much less than 30m, as is the case in this appeal. Therefore it is obvious that the proposed development in the case of this appeal is to be contained fully within the articulated limits of development.

2.2 The reason for refusal based on the subdivision of land is pertinent, contrary to what the appellant has stated because the proposal involves the creation of a new rubble wall that divides the surrounding existing agricultural land.

2.3 The appellant's argument that a development on site has already been permitted notwithstanding the AHLS designation does not hold ground for the simple reason that the approved developed is fully contained within the limits of development and outside the AHLS designation.

2.4 The appellant's argument that only 20sq.m of the proposed development spills over the limits of development is rather simplistic and misleading. Apart from the fact that according to the Authority's calculation the area spilling over the ODZ amounts to 26sq.m, the proposal is for a 2-storey building meaning that the building proposed in the ODZ has a more significant impact than that alluded by the appellant.

2.5 The development zone boundary is not arbitrary as claimed by the appellant but it follows existing permissible development and commitments already granted by the Authority. In fact in this case, the limits of development follows the perimeter of the development already granted on site by way of PA 5008/05, which development the appellant is requesting to extend in this appeal.

2.6 Re: PA 6489/04

Notwithstanding the fact that there was no change in the 25m building depth rule at the edge of development before and after the enactment of the local plan as argued by the appellant, the Authority was correct to state that this permit is not comparable with the case in the current appeal as it has been issued prior to the local plan. The reason being that the site subject to this appeal is designated as a Strategic Open Gap and therefore specific policies apply here which did not exist at the time of PA6489/04. The policy regulating Strategic Open Gaps does not permit any residential development under any situation.

Re: PA377/06 and PA4279/05

The appellant has misunderstood the Authority's comment that the building depth in these cases was not a considered issue. The building depth in these cases was not a considered issue not because they were ignored but because they were found to be within (or almost) the limits of development.

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In the case of PA 377/06, the entire building is within the limits of development, whilst in the case of PA4279/05, most of the building fell within the limits of development. This latter case consisted of a site with a frontage of 8.75 metres, of which approximately 6 metres lie within the development boundary. Moreover the proposed development was limited to a building depth to approximately 8 metres, most of which is within the limits of development.

Re: PA2819/10

This case is also non-comparable in the sense the part of the development which exceeds the limits of development consist of two corners made up of just the masonry skin (i.e. no habitable part of the development overspill the limits of development). The total area which exceeds the limits of development is less than 4sq.m which is amply compensated for by other parts of the development.”

Fit-Tielet Statement taghha l-Awtorita' ressqet il-kummenti taghha kif gej:

“1. The appellant, during the last sitting at the Tribunal (held on 3rd July 2012), has forwarded a list of three permits which are allegedly for similar development to that being requested in this application subject to appeal.

2. The Authority has the following comments in relation to the referred permits:

PA 7079/07

PA 2734/04

PA 6655/06

This permit is absolutely not comparable to the application being considered in this appeal since it involves only the creation of a totally open backyard (within the ODZ) to an existing house and a retaining wall at the back to separate

the field at the back from the residence. This permit did not involve any extensions to the existing building per se.

On the contrary, the application subject of this appeal requests extending the approved building further into the ODZ; i.e. there is an increase in massing within the ODZ - a factor that is totally missing in PA7079/07.

This permit is also very different from the case in this appeal and thus cannot be compared. The development in PA 2734/04 was approved with a building depth of 25m from the street alignment because the limits of development at this site was circa 22m. In the application subject of this appeal, the limits of development ranges just between 9m to 12m fro 2734/04 was granted prior to the coming into force of the local plan and thus policy GZ-EDGE-3 which permits development with a building depth of 25m only if the limits of development is more than 30m away from the street alignment did not exist.

The approved development in PA6655/06 is also different than the case in this appeal in that its limits of development is also set at circa 22m from the street frontage. As explained in the preceding paragraph, the limits of development at the site subject to the appeal ranges just between 9m to 12m from the street.

It is pertinent to point out that these aforementioned permits are all adjacent to each other and situated at a particular stretch of coastal development at Marsalforn. The urban context of these permits is entirely different from that being considered in this appeal. Furthermore, and even more importantly, none of the sites in the above mentioned permits were subject to the environmental and archaeological constraints that exist on the site in this appeal. Given these constraints, it is even more imperative why the development should be contained within the limits of development without any spill over onto the ODZ.”

Ikkunsidra ulterjorment:

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Il-mertu ta' dan l-appell jirrigwarda t-talba segwenti:
"Amendments to permission PA5008/05 by extending approved dwelling due to change in site configuration"

Is-sit mertu ta' dan l-appell jinsab fi Triq il-Mithna, Rabat, Ghawdex.

Din l-applikazzjoni giet rifjutata peress li l-izvilupp propost imur kontra l-policies SET 11 u SET 12 tal-pjan ta' struttura, l-izvilupp propost sejjer ikollu impatt negattiv fuq zona ta' importanza arkeologika li jmur kontra l-policy ARC 3 tal-pjan ta' struttura u l-policy GZ-ARCO-1 tal-pjan lokali ghal Ghawdex u Kemmuna, li l-izvilupp propost imur kontra l-policy GZ-RLCN-1 tal-pjan lokali ghal Ghawdex u Kemmuna u GZ-SETL-2, u li l-proposta twassal ghat-tizbir ta' sigra tal-harrub fejn l-istess ma giex awtorizzat li ghalhekk imur kontra l-avviz legali 12 tal-2001.

L-argumenti li tqajmu mill-partijiet fil-kors tas-smiegh ta' dan l-appell jistghu jigu migburin fil-qosor kif gej:

L-appellant jissottometti li l-prassi applikata mill-MEPA hija li applikazzjoni tigi approvata anke meta l-izvilupp prospettat jaqbez il-linja ta' l-izvilupp, li tali prassi giet applikata f'PA 6489/04, PA 4279/05 u PA 377/06, li fl-ahhar zewg applikazzjonijiet id-Direttorat irrakkomanda l-approvazzjoni tal-applikazzjoni minkejja illi parti sostanzjali tal-izvilupp propost kienet barra mil-linja ta' l-izvilupp, li l-applikazzjoni ma tmurx kontra l-policies SET 11 u SET 12 peress illi z-zona ta' l-izvilupp hija diga kommissa l-policy SET 12 topera sabiex timmitiga l-effetti ta' SET 11, li d-Direttorat ma talabx l-ikkummissjonar ta' stima ta' impatt ambjentali kif titlob l-policy SET12 f'sitwazzjonijiet bhal dawk odjerni, li d-Direttorat ma jistax issa juza l-policy SET 12 biex jiggustifika r-rifjut ta' l-applikazzjoni, li l-HPU u l-Patrimonju Malti huma soddisfatti illi l-izvilupp propost jista' jsir sakemm jittiehdu l-prekawzzjonijiet mehtiega, li t-tielet raguni ghar-rifjut m'hijiex gustifikata - l-proposta in kwistjoni ma taffetwax hazin il-Landscape Sensitivity u l-open space character taz-zona ghaliex hija parti minn zvilupp gja approvat u kontigwa ghal zvilupp li diga sar jew li ghad irid isir, u li r-

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raba' raguni ghar-rifjut hija assurda ghaliex l-izvilupp propost bl-ebda mod m'hu ser imiss il-harruba li hemm fuq is-sit u ghaldaqstant m'huwiex minnu illi tali harruba ser tinzabar minghajr permess.

L-Awtorita' tissottometti li skond il-policy GZ-EDGE-3 il-fond tal-bini irid jkun limitat ghal 25m mill-allinjament tat-triq, li giet approvata terraced house fuq is-sit skond PA 5008/05 u li estensjoni barra mill-limiti tal-izvilupp mhijiex permessa in linea mal-policies SET 11 u SET 12, li l-izvilupp propost imur kontra l-policies GZ-SETL-2 u GZ-RLCN-1 tal-pjan lokali, li l-parti mis-sit li tinsab barra mill-limiti tal-izvilupp hija ta' valur agrikolu u li skond il-policy GZ-AGRI-1 tal-pjan lokali id-divizjoni tal-art agrikola ezistenti mhijiex accettabbli, li l-izvilupp tal-hajt tas-sejjeigh kif propost mhuwiex accettabbli u jmur kontra din l-istess policy, li ser tinzabar sagra tal-harrub minghajr awtorizzazzjoni u li l-permessi citati mill-appellant ma jistghux jigu paragonati mal-izvilupp propost.

Kif korrettement irrilevat l-Awtorita', l-Policy G2-EDGE-3 tal-Gozo and Comino Local Plan flimkien mal-paragrafu 1.4 tal-Local Plans Interpretation Document jippermettu zvilupp b'fond ta' 25m u floor ta' 30m, meta d-distanza bejn l-faccata tat-triq u l-konfini l-aktar vicin taz-zona ta' l-izvilupp tkun aktar minn 30m.

F'dan il-kaz billi din id-distanza hi ferm anqas, l-premess ma japplikax, u ghalhekk l-izvilupp ghandu jkun kollu fil-konfini taz-zona ta' l-izvilupp.

In oltre l-Policy SET 11 tal-Pjan ta' Struttura taghmilha cara li l-ebda forma ta' zvilupp urban m'ghandu jigi permess barra z-zona tal-izvilupp, b'eccezzjoni ta' dak permissibbli indikat fil-paragrafu 7.6.

Skond il-Policy SET 12, biex l-Awtorita' tikkonsidra sitwazzjoni li ma taqbilx mal-Policy SET 11; il-piz tali prova hu impost fuq l-applikant, li ghandu jiggustifika, mill-aspett ta' ippjanar li l-izvilupp propost jista' jsir barra z-zona tal-izvilupp, billi ma jstax isir f'zona tal-izvilupp.

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Fil-kaz in ezami irrizulta li l-art mertu ta' dan l-appell hi inparti fiz-zona ta' l-izvilupp, u in parti barra z-zona tal-izvilupp.

Fuq is-sit nghata permess fil-15 ta' Dicembru 2005, ghal bini ta' terraced house PA 5008/05.

Dan il-permess gie rinovat fil-31 ta' Mejju 2011. PA 4810/10.

L-appellant ghalhekk ghandu permess biex jizviluppa s-sit, kif konfermat mid-DokA, anness man-nota pprezentata fit-28 ta' Frar 2012, l-appellant qed jipproponi li fiz-zona tal-izvilupp izomm setback fuq il-genb tal-plot ta' 27m², mmarkat bil-blue, u jigi kkumpensat, b'area mmarkata bl-ahmar ta' 20m² barra z-zona tal-izvilupp; biex b'hekk l-izvilupp gia approvat jigi estiz b'20m², barra z-zona tal-izvilupp.

L-appellant ma jirrizultax li kkontesta l-konfini taz-zona tal-izvilupp meta hareg ghall-konsultazzjoni pubblika l-Pjan Lokali li gie approvat f'Lulju 2006.

L-anqas ma jirrizutla li pprezenta Planning Control (PC) application biex l-konfini taz-zona tal-izvilupp tigi emendata billi teskludi miz-zona tal-izvilupp l-area ta' 27 m² mmarkata bil-Blue fid-DokA fuq imsemmi, u tinkludi l-area ta' 20m² mmarkata bl-ahmar fuq l-istess document.

Effettivament ma nghatat l-ebda gustifikazzjoni mill-appellant fuq ragunijiet ta' ippjanar, ghalhiex zvilupp gia approvat ghandu jigi estiz b'area ta' 20m² li tinsab barra z-zona tal-izvilupp.

L-Awtorita' ikkummentat b'mod korrett u ezawrjenti dwar l-permessi citati mill-appellant; li effettivament m'humieux tant paragonabbli ghall-kaz in ezami.

Ezaminata fid-dettal l-proposta tal-appellant, u l-motivazzjonijiet tar-rifjut fil-kuntest tal-Policies ta' l-ippjanar rilevanti, l-appell ma jimmeritax konsiderazzjoni favorevoli, u r-rifjut jimmerita konferma.

It-Tribunal ghalhekk qed jiddisponi minn dan l-appell, billi jichad l-istess u jikkonferma r-rifjut tal-1 ta' Gunju 2011 ghall-applikazzjoni PA 4420/08.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Illi t-Tribunal applika hazin il-policy GZ-EDGE-3 tal-Gozo and Comino Local Plan flimkien mal-paragrafu 1.4 tal-Local Plans Interpretation Document billi l-policy ma timponi ebda restrizzjoni fis-sens illi l-izvilupp irid ikun kollu fiz-zona ta' zvilupp;
2. It-Tribunal canfar lil appellant ghax ma ghamilx rapprezentazzjonijiet fil-fazi ta' konsultazzjoni pubblika tal-pjan lokali. Jirrizulta li l-applikant lanqas kien proprjetarju tas-sit f'dak iz-zmien. In oltre t-Tribunal zied li lanqas saret PC application pero l-appellant isostni li linja ta' zvilupp ma tistax tinbidel b'PC application.

L-ewwel aggravju

L-appellanti jirreferi ghal policy GZ-EDGE-3 tal-Gozo and Comino Local Plan li jghid hekk:

GZ-EDGE-3: In cases where the distance (measured along the depth of a property) between a street frontage and the nearest Development Zone boundary is more than 30 m it may be permissible to have a structure within the back-garden, provided that the guidelines listed in APPENDIX 1 are adhered to. The provisions of this policy shall not be applicable to ridge edge areas indicated in policy GZ-EDGE-2 or where this would in the opinion of MEPA conflict with other factors, including environmental protection considerations.

L-artikolu 1.4 tal-Interpretation Document ighid hekk:

Since PAPB time, it has been the practice to limit building depths on the edge-of-development boundaries up to a maximum of 25 metres.

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The approved Local Plan refers to this in Policy GZ-EDGE-3. However, since the building depth is not specified, what is the interpretation?

General Interpretation

The building depth is still 25m. In the case of Gozo, the plot depth is however taken to be 30m. This factors in the traditional small backroom which is so prevalent in Gozo. The total plot depth has also been adopted in the DZ rationalisation where the 30m depth is specified.

The 30m is taken to include the 25m building depth, the 3m back garden and the 2m room at the back.

It-Tribunal fid-decizjoni tieghu jghid hekk:

Kif korrettement irrilevat l-Awtorita', l-Policy G2-EDGE-3 tal-Gozo and Comino Local Plan flimkien mal-paragrafu 1.4 tal-Local Plans Interpretation Document jippermettu zvilupp b'fond ta' 25m u floor ta' 30m, meta d-distanza bejn l-faccata tat-triq u l-konfini l-aktar vicin taz-zona ta' l-izvilupp tkun aktar minn 30m.

F'dan il-kaz billi din id-distanza hi ferm anqas, l-premess ma japplikax, u ghalhekk l-izvilupp ghandu jkun kollu fil-konfini taz-zona ta' l-izvilupp.

L-appellant qed isostni li dan il-gudikat hu applikazzjoni hazina tal-policy billi mkien ma tghid li l-izvilupp irid ikun kollu fiz-zona ta' zvilupp jekk id-distanza bejn il-faccata tat-triq li fuqu jaffacja s-sit u l-konfini l-aktar vicin tal-izvilupp ikun inqas minn 30 metru.

Il-Qorti ma tqis li din tikkostitwixxi applikazzjoni tal-ligi fejn il-Qorti ghandha dritt tissindaka l-gudizzju tat-Tribunal izda interpretazzjoni ta' policy fid-dawl ta' interpretation document. It-Tribunal bhal Awtorita qies il-policy GZ-EDGE-3 limitament mill-punto di vista tal-istruttura fil-back garden, tradizzjonali fi proprjetajiet Ghawdxin fejn il-fond ta-sit minn 25 metru kif inhu 'standard' hu fil-fatt ta' 25 metru piu tlett metri gnien u 2 metri mehuda ghall-kamra tradizzjonali retroposta u dan hu permess anki

f'zoni li jaqghu GZ-EDGE-3. It-Tribunal pero qies, bhal l-Awtorita, illi l-policy u l-interpretation document imkien ma jippermetti zviluppi barra z-zona ta' zvilupp u illi l-interpretation document kull ma jaghmel hu li jippermetti l-kamra retroposta ghal zvilupp fejn l-izvilupp innifsu jippermettuh u f'dan il-kaz skond ma jindika l-policy GZ-EDGE-3 fejn tali distanza ghal zona ta' zvilupp teccedi t-30 metri. Tant hu hekk illi l-istess Tribunal qies it-tibdil propost fil-permess 5008/05 li kien ser ikompli jinvadi b'30 metri kwadri f'zona fejn zvilupp mhux permess bi skambju ma parti mis-sit ta' 27 metri kwadri li qieghed fiz-zona ta' zvilupp.

Jista' jkun illi l-appellant ma jaqbilx ma' din l-interpretazzjoni izda hawn non si tratta ta' applikazzjoni hazina ta' policy izda interpretazzjoni tal-policy rilevanti abbinata mal-interpretation document fl-isfond ta' planning issues rigwardanti bini barra zona ta' zvilupp. Ma jistax jinghad illi l-interpretazzjoni hi wahda tant assurda li ma tirispekkjax il-kliem car tal-ligi jew l-ispirtu tal-policy fejn allura l-Qorti kien ikollha dritt tissindaka r-ragonevolezza tad-decizjoni fid-dawl tal-interpretazzjoni moghtija.

F'dan il-kaz in oltre irrizulta lit-Tribunal, u dwar dan ma sar ebda aggravju, illi l-proposta kienet tivvjola l-policy SET 11 fejn ebda forma ta' zvilupp urban ma jista' jsir barra z-zona ta' zvilupp hlief eccezzjonijiet msemmija mill-istess ligi, li mhux il-kaz in kwistjoni u hi vjolazzjoni ta' policy SET 12 fejn l-applikant ma pprovax fuq aspetti ta' ppjanar ghaliex l-izvilupp kellu jsir barra zona ta' zvilupp u mhux f'zona ta' zvilupp.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan lanqas jista' jitqies bhala aggravju billi l-kummenti tat-Tribunal bl-ebda mod ma kienu rilevanti ghas-sustanza tad-decizjoni tal-istess Tribunal fuq il-materja rilevanti ghas-suggett. Il-kummenti dwar Planning Contro application u l-konsultazzjoni pubblika kienu biss hsibijiet miktuba u ebda riflessjoni fuq il-mertu u ghalhekk dan l-

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aggravju hu ghal kollox estraneju ghal mertu proprju tal-vertenza u qed jigi michud. Dan kollu jinghad minghajr ma l-Qorti tidhol fil-mertu tal-aggravju billi ma gie ppruvat fl-ebda hin meta l-appellant sar sid is-sit u in ogni kaz ghal precizzjoni, artikolu 59(4) tal-Kap. 504, Planning Control Application tista' ssir ghal tibdil f'linja ta' zvilupp.

Dan l-aggravju qed jigi michud.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell tas-socjeta A. F. Ellis (Home Decor) Ltd. u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tal-31 ta' Jannar 2013. Bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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