



**QORTI TA' L-APPELL**

**ONOR. IMHALLEF  
MARK CHETCUTI**

Seduta tad-19 ta' Frar, 2014

Appell Civili Numru. 7/2013

**Audrey Anne Bonnici  
vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell ta' Audrey Anne Bonnici tal-20 ta' Frar 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Jannar 2013 li kkonfermat u cahdet l-applikazzjoni PA 230/10 'to demolish existing building and to construct one residential dwelling';

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

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

B'applikazzjoni tat-12 ta' Marzu 2010 – Full Development Permission – PA/00230/10 fejn l-appellant, fi 12A Triq ir-Ramla/ Triq id-Dahla Ta' San Tumas, Zejtun talab:

“To demolish existing building and to construct one residential dwelling“

Permezz ta' rifjut taz-17 ta' Awwissu 2011, l-Awtorita' cahdet it-talba ghall-hrug tal-permess kif mitlub ghar-ragunijiet segwenti:

"1. The proposed development conflicts with Structure Plan Policy SET 11, which does not permit urban development outside existing and committed built-up areas. The development does not fall into a category of non urban development which may be permitted outside existing or committed built-up areas in accordance with Paragraph 7.6 of the Structure Plan. The proposed development also therefore runs counter to policy BEN 5.

2. 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 can not be located in an area designated for development or in an existing built up area.

3. 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.

4. 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. The proposal is not essential to, nor does it enhance agricultural, ecological, or scenic interests.

5. That part of the site which lies within the Category 2 Settlement has a building which is less than 50m<sup>2</sup> (as seen in the 1967 aerial photos) and hence runs counter to policy SMSE 07 of the South Malta Local Plan which requires that the area of the existing building which can be redeveloped needs to have an external footprint of not less than 50m<sup>2</sup>. Moreover the site does not qualify as uncommitted land as indicated in points 1,2, and 3 of policy SMSE 07 of the Local Plan."

Il-Perit Saliba ressaq l-aggravji tal-appellant kif gejj:

"1. As noted in the first assertion made in the Original Decision Notice, the proposed development was said to conflict with Structure Plan Policy SET 11, which does not permit urban development outside existing and committed built-up areas. It was also emphasized that the development does not lie in a category of non urban development that can be permitted outside existing or committed built-up areas in accordance with Paragraph 7.6 of the Structure Plan.

The above statements do not withstand since the existing building under consideration is clearly marked in the Inset map RS6 of the South Malta Local Plan as a Category 2 Large Rural Settlement as per policy SMSE 07, and is thus eligible for redevelopment in line with the latter policy.

Furthermore, the present existing building under consideration measures an external footprint of approximately 63m<sup>2</sup>, and can also be traced in the MEPA 1967 aerial photograph (part of photo no. 2501). Hence, it is also in line with the South Malta Local Plan (July 2006, p14) which states that:

For the purpose of this policy an existing building includes only any building with an external footprint of not less than 50m<sup>2</sup> which is covered by a valid development permission or else has been existing prior to 1968 and can be identified in the MEPA 1967 aerial photographs.

Additionally, the proposed unit also satisfies all the criteria and conditions mentioned in the South Malta Local Plan SMSE 07 (July 2006 p. 14) for the development of new units.

2. In the original Decision Notice, it has also been noted that there is no justification for the development of the site as required by the structure plan policy SET 12.

As one can clearly see in the proposed drawings, the development being considered is in line with the proposed uses for the designated area in the South Malta Local Plan SMSE 07, thus for residential use. In view of this, SET 12 does not withstand. Thus in accordance with the SMSE 07 Large Rural Settlements policy, the existing premises should be favourably considered for redevelopment.

3. The DCC Board has also suggested that the site lies in a rural Conservation Area and that the proposal does not comply with Structure Plan Policy RCO2 which clearly states that no form urban development will be permitted within rural conservation areas. It was said that the proposal does not fall within one of the categories of development namely structures or facilities essential to agriculture, 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 RCO4. It is not essential to, nor does it enhance agricultural, ecological, or scenic interests.

Notwithstanding the argument highlighted above, one must primarily note that policy RCO 2 is intended for proposals which are in Rural Conservation Areas, whereas the existing building to be developed is also situated in a Category 2 Large Rural Settlement. Moreover, all of the footprint area of the existing building, which approximates 63m<sup>2</sup>, is included in the specific boundaries which the Planning Authority has outlined in the Inset Map RS6 as a category 2 Large Rural Settlement. This continues to favour the approval for redevelopment as specified in SMSE 07.

4. Finally, it has been maintained that part of site which lies within the category 2 Settlement has a building which is less than 50m<sup>2</sup> (as seen in the 1967 aerial photos) and hence runs counter to policy SMSE 07 of the South Malta Local Plan which requires that the area of the existing building which can be redeveloped needs to have an external footprint of not less than 50m<sup>2</sup>. Moreover the site does not qualify as uncommitted land as indicted in points 1, 2 and 3 of policy SMSE 07 of the Local Plan.

The site clearly consists of committed land since the existing building which has been marked for re development can be clearly traced in the 1967 MEPA aerial photographs, and the total area of the existing building amounts to approximately 63m<sup>2</sup>, as one can see in the endorsed aerial photograph. This has also been noted in the PDAT Meeting 75, dated 26th November 2010, whereby it was declared that:

The eligibility of the building has been checked on the 1967 photos and it was confirmed that the buildings were on site on this date (Development Permit Application Report, part of 3, Notes to Committee 3.1.1.”

Permezz tar-rapport taghha l-Awtorita' ressqet il-kummenti taghha inter alia kif gej:

"5.2 The Authority has the following comments to make:

5.2.1 Policy SMSE 07 of the local plan permits the redevelopment of existing buildings in Category 2 Settlements if the existing building is more than 50sq.m.

5.2.2 Moreover paragraph 7.6 of the Local Plan Interpretation Document permits development in Category 2 Settlement up to a depth of 25m from the street even if this extends beyond the boundary of the rural settlement.

5.2.3 However in order to qualify for the 25m depth development as specified in paragraph 7.6 of the Local Plan Interpretation Document, it is obvious that one must first respects the criteria of eligibility listed in policy SMSE07 (see para. 5.2.1 above).

5.2.4 It is true, that the existing building in this case is more than 50sq.m. However it is clear that the part of the existing building which dates to before 1967, and thus legal, is less than 50sq.m (actually around 33sq.m). The rest of the building is not covered by permit and thus cannot be taken into consideration.

5.2.5 When analyzing the 1967 aerial photographs it emerges that the part of the current building did not exist in 1967 consisted, back then, of open space surrounded by a high wall; possible a small garden. This means that the structures which took place in this space since then are illegal because they are post-1967 and not covered by a development permit. Hence they cannot be taken into consideration.

5.2.6 Given the above arguments, the site cannot be developed into a dwelling because the part of the existing building which is legal is less than 50sq.m and thus runs counter to policy SMSE 07 of the local plan. Subsequently, since the proposal does not meet the eligibility criteria as set in policy SMSE 07, there is no justification for the proposed development to take place especially since a large part of the proposal is located ODZ – beyond the Category 2 Settlement limits. Hence the reasons for refusal given on the basis of the Structure Plan apply."

Il-Perit Saliba ressaq il-kummenti responsivi tieghu kif gej:  
"Issue of Existing Building Pre 1967

- The existing building which is present to date, and which is also evidenced in the 1967 MEPA aerial photograph, has been marked as a Category 2 Large Rural Settlement in Inset Map RS6 of the South Malta Local Plan (Refer to AP1.2), and it respects all criteria and conditions necessary for development, as per SMSE 07 of the SMLP, 2006.

- In the Notification of MEPA's report ,dated 19th November 2011, it is being argued that only part of the presently existing building is evidenced in the 1967

photos, and this amounts to 33 sq.m. Doubt is being casted on the existence of the rest of the building, which in the 1967 aerial photograph, appear to have vegetation on its roof, as seen in AP 1.3. In the same report, the Malta Environment and Planning Authority has also claimed that such part of the building had still not yet been built and '... consisted, back then, of open spaces surrounded by a high wall; possible a small garden' (MEPA's report, November 2011)

This allegation can be here proven as incorrect, since the attached aerial photograph (refer to AP1.4) dating back to 1957, and thus ten years before the requested date to be approved as a legal structure, part of the same building, which is being claimed to have been an 'open space' or possibly 'high wall' is clearly evidenced, and thus had already been built. This fact alone proves that, unlike what is being alleged by the Malta Environment and Planning Authority, the building as seen in the 1967 aerial photograph, and which is still existent to the present date, is neither an open space nor a small garden, and is thus considered as legal.

- The attached 3D Shadow Simulation on sheet AP 1.5, also throws light on how the shadows casted off by a roofed building would have looked, in contrast to an open space surrounded by a high wall. Indeed, in the first diagram showing a roofed building with vegetation on top, the only shadows seen are those casted off by the roof itself onto the surrounding property, as is likewise evidenced in the 1967 aerial photograph. Contrasting, the second diagram illustrates how the shadows casted by an 'open space surrounded by a high wall', as have been alleged, would have looked in the absence of a roof. This model further sustains that all of the existing building had already been built before 1967.

- Additionally, the report compiled by Prof. J. Buhagiar following a site inspection, continues to counter any arguments of having had an open space surrounded by high walls or a small garden, as alleged. This document has been attached herewith for your perusal.

- The above comments should also be given considerable weight particularly since these refer to, and are based on evidence, as opposed to the assumptions being made in the Notification report (dated November 2011) where arguments are simply being justified on possibilities rather than facts. Furthermore, the comments beign made by the appellant, mainly that all of the buildings which are existing to the present date, had already been built prior to 1967, are also in line with the decision taken throughout the MEPA PDAT Meeting on the 26th November, 2010, where it was maintained that the 'eligibility of the buildings has been checked on the made in the 1967 photos it was confirmed that the buildings were on site on this date" (DPA report, part of 3 Notes to Committee 3.).

#### Issue of Category 2 Settlement Limits

- There is no justification for mentioning that the large part of the proposal is located ODZ and beyond the Category 2 Settlement limits, when all of the proposed building lies within the 25 metres depth from the street, as specified in para 7.6 of the Local Plan Interpretation Document (attached). This is further explained in AP 1.6, that has also been attached herewith. Furthermore, the proposed dwelling respects all of the conditions outlined as per SMSE 07 (refer to AP1.6).

#### Further Comments

The case being appealed should also be favourably considered particularly when two other permits were readily approved by the same authority, as per same policies SMSE 07 for Category 2 Large Rural Settlements, and Inset Map RS6 of the SMLP. In both cases, the existing buildings proposed for development were much less evidenced in the MEPA 1967 aerial photograph, than the case being appealed. Reference is here made to PA 3996/08 and PA 1213/09, both of which are situated c.250 metres away from the site in question (Refer to AP 1.7). As regards both permits, the appellant would like to formally request the files of both applications to be attached with this document.



- PA 3996/08 approves alterations to an existing garage and the construction of a terraced house. When analyzing MEPA 1967 aerial photograph (See AP1.8), it emerges that the existing garage on which the application was submitted is not clearly evidenced. The new development has a total site area of c.323 sq.m., including building and garden (Refer to AP 1.9.)
- PA 1213/09 covers the division of an existing terraced house into two separate dwellings, one of which had only a small part of the building that was included as part of the Category 2 Settlement shown in Inset Map RS 6 (SMLP). The rest of the building which was not marked within the Category 2 boundary, used to form part of the back garden, as seen in MEPA 2004 and 1967 Aerial Photos (Refer to AP1.7 and AP1.8 respectively). From MEPA 1967 Aerial Photos, it is also noted that the two buildings which were present at that time, differ in both shape and footprint area as from the buildings evidenced in the MEPA 2004 Aerial Photo. Furthermore, part of the same structures/buildings evidenced in the 1967 Aerial Photo are not clearly defined. Presently, the total site area of the approved development incorporates a total area of c.2287 sq.m., including building and garden.

Given the above comments, the appellant would like to sustain that in view of the fresh evidence submitted re existence of appealed building before 1967, as well as by the fact that other approved permits in the same area did not have existing structures that were as clearly evidenced in the MEPA 1967 aerial photo, as in the case being appealed, it is here emphasized that consistency should be maintained by the same authority, and any benefit of doubt should be given in favour of the applicant, as have been made in the case of the permits quoted above. Accordingly, this case should be favourably considered, particularly since it respects all criteria and policies outlined as per SMSE 07 of the SMLP, and has also been marked in Inset Map RS6 of the SMLP. The appellant would also like to reserve the right to submit further information if necessary.”

Permezz tat-Tieni Statement taghha l-Awtorita' irrilevat inter alia kif gej:

"1.2 The Authority notes that the appellant's justification hinges primarily on the issue of the pre-1967 building extent. However, this issue accounts for only one reason for refusal from a list of five which are based on the issue that the proposal will lead to the unnecessary intensification of urban development in the ODZ.

#### 1.2.1 Re: Issue of 25m depth permissible development

The Authority has already commented that in order to qualify for the 25m depth development as specified in paragraph 7.6 of the Local Plan Interpretation Document, it is obvious that one must first respects the criteria of eligibility listed in policy SMSE 07.

Furthermore it is important to note that the 25m depth according to this policy is worked out on the assumption that the frontage is circa 6m wide. In this case the proposed development has a frontage of about 12.5m and a depth reaching 15m. The policy also limits the footprint to 150sq.m. Therefore with a 12.5m frontage, it is possible to limit the depth of the proposal to just circa 12m and thus there is not need to encroach further into the ODZ as the appellant is requesting. Considering that (1) the boundary of the Category 2 Settlements is quite restricted in this area and (2) the proposal encroaches more than is absolutely necessary, the proposal cannot be justified. This tantamount to the creation of urban development ODZ and unnecessary visual impact and thus runs counter to Structure Plan policies SET 11, SET 12, RCO 2 and RCO 4.

#### 1.2.2 Other issues

The proposal is to take place mostly in the ODZ and therefore any such development is to be strongly justified if permitted. In this case there is no particular blank party wall that requires to be screened and thus there is no real justification for the proposed development to encroach so deeply into the ODZ.

On the other hand, the proposal will actually create a 15m deep blank party wall on 2 floors since the adjacent plot is vacant; the application for the development on the adjacent site has been refused. This contrasts sharply with the existing building which is just 12 courses high and 5m deep.

## 2.0 CONCLUSION

2.1 For the above-mentioned reasons, the Malta Environment & Planning Authority respectfully requests the Environmental and Planning Review Tribunal to confirm the decision of the EPC and to refuse this appeal for development permission."

Ikkunsidra ulterjorment:

Wara li kkonsidra il-premess u minn ezami tal-pjanti, ritratti u dokumenti li hemm fil-files PAB 710/11 u PA 0230/10, it-Tribunal jikkumenta kif gej:

Il-mertu ta' dan l-appell jirrigwarda talba, full development application, biex jitwaqqa bini ezistenti u tinbena residenza wahda.

Skond l-Awtorita', is-sit mertu ta' dan l-appell ghandu area ta' circa 330 metri kwadri li minnhom, skond il-mappa RS-6 tal-pjan lokali, parti minnu jinsab gewwa l-konfini ta' Category 2 Settlement waqt li l-bqijja tas-sit huwa barra il-Category 2 Settlement u ODZ fil-limiti taz-Zejtun.

Din l-applikazzjoni giet rifjutata peress li:

- Is-sit jinsab, fil-bicca l-kbira tieghu, barra mil-konfini tal-Category 2 Rural Settlement. In fatti l-bini li kien jezisiti kif jidher fl-aerial photos tas-sena 1967 u li huwa fil-konfini tal-Category 2 Settlement, jidher li kien inqas minn 50 metru kwadru u ghalhekk ma' jikkwalifikax biex jigi zviluppat skond il-policy SMSE 07 tas-South Malta Local Plan;
- Il-proposta ma' tikkwalifikax bhala uncommitted land skond il-kriterji 1, 2 u 3 tal-policy SMSE 07;
- Il-proposta tikser il-policies SET 11, SET 12 u BEN 5 tal-iStructure Plan; u

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- Peress li s-sit in ezami jinsab gewwa Rural Conservation Area u l-izvilupp propost huwa urbanizzanti dan jikser il-policies RCO 2 u RCO 4 ta' l-iStructure Plan .

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

L-appellanti tissottometti li:

- Ir-residenza proposta tinsab gewwa Category 2 Settlement u fuq art li tista tigi zviluppata skond il-policy SMSE 07 tal-pjan lokali;
- Il-bini ezistenti, li kien jidher ukoll fl-aerial photos tas-sena 1967, ghandu footprint ta' 63 metru kwadru u ghalhekk jista jigi zviluppata skond il-policy SMSE 07; u
- Il-policies RCO 2, SET 11 u SET 12 tal-pjan ta' struttura ma' japplikawx stante li s-sit jinsab gewwa category settlement u mhux gewwa Rural Conservation Area.

Fir-risposta taghha l-Awtorita' tirrepeti ir-reasons for refusal u telabora izjed fuqhom billi zzid li:

- Il-policy SMSE 07 tista tintuza biss meta il-bini ezistenti huwa ta' 50 metru kwadru jew aktar;
- Waqt li illum il-bini ezistenti ghandu footprint ta' madwar 63 metru kwadru, mill-aerial photos jidher car li dik il-parti li kienet tezisti fis-sena 1967 kellha footprint ta' madwar 33 metru kwadru. Il-parti l-ohra jidher li kienet gnien imdawwar b' hitan gholjin u ghalhekk din il-parti illum hija bla permess u illegali; u
- Waqt li vera li Para 7.6 tal-Interpretation Document jippermetti li jsir bini b'fond massimu ta' 25 metru anke meta il-linja tal-25 metru taqa' barra l-konfini, logikament dan japplika biss purche l-proposta tkun tirrispetta l-kriterji tal-policy SMSE 07.

F'nota sussegwenti l-appellanti, inter alia, tanalizza fil-fond l-aerial photos tas-snin 1967 u 1957 li juru s-sit in ezami biex turi li kontra ghal dak li qed tghid l-Awtorita', il-bini kollu li jezisti illum fuq is-sit kien diga jezisti dak iz-zmien. Biex issostni dan l-appellanti tissottometti rapport minn Dr Joe Buhagiar mill-Universita' li jikkonkludi li l-probabilita' hi li dak li qed jidher fl-aerial photos mhux gnien imma bini imsaqqaf b' corrugated sheeting antik. Huwa jiddikjara

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wkoll li skond hu il-hamrija taht dan il-bini mhix tajba bizzzejjed u ghalhekk diffiqli li din kienet tiffirma parti minn gnien. L-appellanti tkompli billi tikkwota u tanalizza zewg permessi li kienu inghataw ghall-bini ta' residenzi fuq siti vicini li kontra ghal bhal fil-kas in ezami ma kienux jidhru cari fl-aerial photos.

L-Awtorita' tirrispondi li r-rifjut inghata a bazi ta' hames reasons for refusal u ghalhekk apparti l-issue tal-aerial photos hemm ukoll problemi ohra f' din il-proposta bhall-fatt li l-proposta hija li l-izvilupp ser isir fil-bicca l-kbira tieghu barra l-konfini tal-category settlement u dan meta dan l-izvilupp ser johloq bini urbanizzanti b' hajt tal appogg twil 15 il metru u zewg sulari gholi mentri bhal issa jezisti hajt ta' bini rurali li huwa 5 metri fond u twil 12 il-filata.

Peress li, skond is-South Malta Local Plan, dan is-sit jinsab gewwa Category 2 Rural Settlement ghandha tigi applikata l-Policy SMSE 07 biex jigi determinat jekk hux permissibli li jinbena' dan is-sit u jekk fl-affermattiv x'tip ta' bini huwa possibli.

Fl-opinjoni kunsidrata ta' dan it-Tribunal, l-iskop tal-policy SMSE 07 huwa li kull bini permess f' dawn iz-zoni ghandu jtejjeb il-kuntest tas-sit li jkun qed jigi kkunsidrat. Il-punt krucjali huwa li l-ghan principali ta' din il-policy huwa li tippermetti li sit f'dawn is-settlements, li huma ODZ, jinbena biss meta jkun jista jsir planning gain.

L-appellanti qed tibbaza l-argument taghha biex tiggustifika li din l-applikazzjoni tissodisfa din il-policy fuq il-fatt li l-firxa ta' bini li tezisti illum fuq is-sit, li ghandha footprint ta' 63 metru kwadru, kienet tezisti kollha qabel is-sena 1967. Biex taghmel dan hija tidhol f' dettal kbir fl-analizi tal-aerial photos tas-snin 1967 u 1957 u tissottometti wkoll rapport ippreparat minn espert fuq il-pjanti u sigar mill-universita'.

Meta it-Tribunal ezamina dawn l-aerial photos billi hares lejhom bir-reqqa kollha, ikkonkluda li l-aerial photo tas-sena 1967 juri li dak li jidher huwa bini 'normali' li kien

izghar minn dak li hemm illum, waqt li mill-partijiet ingranditi tal-aerial photo tas-sena 1957 li ikkwotat l-appellanti ma' jidher xejn car.

It-test tal-aerial photos huwa wiehed semplici u m'ghandhux jiggebbid ghax meta taghmel hekk tista tohloq hafna teoriji li difficli tippruvhom. L-aerial photos saru biex jintuzaw fil-forma originali taghhom u mhux biex wiehed iggebbidhom b' tali mod li jgihom juru dak li ma' jistghux juru. Jekk jirrizulta xi dubju, li f' dan il-kas ma' jidhirx li jzisti, allura fl-opinjoni ta' dan it-Tribunal, il-benefit of the doubt f' kazi ta' proposti ta' bini ODZ ghandu jmur kontra izvilupp urbanizzanti u dan ghax wiehed mill-oggettivi fundmantali tal-pjan ta' struttura huwa li fl-ODZ m'ghandu qatt isir zvilupp urbanizzanti.

Ir-rapport tal-espert huwa interessanti pero, bir-rispett kollu lejha, dan huwa espert tal-pjanti u mhux espert fl-interpretazzjoni xjentifika tar-ritratti.

Dan it-Tribunal jaqbel ma' l-appellanti li mill-argumenti li ghamlet qed tippredendi li din il-policy ghandha tigi applikata skond ic-cirkostanzi ta' kull kas partikolari ghaliex l-importanti huwa li wiehed jifhem x'hinu l-ghan li qed tipprova tilhaq il-policy u mbaghad japplika din il-policy b'mod li jkun lejali ghal dawn l-ghanijiet. F'dan il-kas din il-policy qed tipprova issewwi il-griehi koroh li inholqu matul is-snin meta inbena, fl-ODZ, tip ta' bini li normalment jinbena fl-ibliet u centri urbani ohra jigifieri terraced buildings f'postijiet li mhux ippjanat ghal dan it-tip ta' bini u li ghalhekk tispicca biex ikollok bini, fejn qabel kien hemm ghelieqi, mibni l-hawn u l-hemm b'hitan tal-appogg fuq kull naha mikxufin u bla prospett li qatt jitghattew.

Wiehed mill-ghanijiet tal-policy SMSE 07 huwa appuntu dan; cioe li jinbnew biss dawk is-siti vojta (uncommitted) li jkunu bejn bini b'appogg mikxuf biex jittaffew dawn il-griehi. Ghan iehor hu biex jergghu jinbnew dawk is-siti li jkunu diga mibnijien u li jkunu bla valur b' mod li l-bini gidid jigi jaqbel mal-kuntest rurali ta' rural settlement. Zgur li din

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il-policy ma' kienitx intiza biex wiehed igebbidha kemm jiflah biex jipprova jiggustifika bini urbanizzanti fl-ODZ.

Fil-qosor, ghalhekk, meta din il-policy tintuza fi spirtu ta' planning gain ghandha tigi applikata b'mod flessibbli.

Bhal ma' intqal f' numru ta' decizjonijiet ohra ta' dan it-Tribunal, il-policies tal-ippjanar ghandhom jigu applikati b' mod flessibbli u dan biex dejjem jintlahaq l-ispitu ahhari li jkun hemm warajhom. Irrid jigi enfasizzat il-punt li l-flessibilita' tal-policies tal-ippjanar ma' tfissirx li iggebbidhom b' tali mod li l-applikant jiehu dak li jrid a kost ta' kollox anki jekk dan ikun imur kontra l-ispirtu tal-policy in kwistjoni. Il-flessibilita' ghandha dejjem tigi applikata fis-sens li l-oggettivi tal-pjan ta' struttura jintlahqu ghax din hija l-ligi suprema tal-ippjanar.

Jirrizulta li kieku dan is-sit kellu jigi zviluppat kif tixtieq l-appellanti, tinholoq is-sitwazzjoni opposta minn dik li hija l-intenzjoni ta' din il-policy peress li jinholoq 'blank party wall' (hajt tal-appogg gholi kwazi zewg sulari). Il-hajt ezistenti huwa hajt tal-genb ta' kamra rurali mhux hajt tal-appogg u ghalhekk kieku kella tigi accattata din l-applikazzjoni tmur kontra l-ispirtu li ghalija giet ikkreatu il-policy SMSE 07.

Ghalhekk din il-proposta mhux biss tikser il-policies ta' l-iStructure Plan izda tohloq precedent kontra l-applikazzjoni tal-policies tal-pjani lokali.

Fuq iz-zewg kazi li jsemmi l-appellant, l-Awtorita' ma' tikkumentax.

Hija hasra li l-Awtorita' spiss issib ruhha darha mal-hajt ghaliex ma' tkunx tista tiddefendi certi permessi li inghataw fil-passat. Anki kieku kien jirrizulta li kien gustifikat li jissemma xi permess simili ghal din it-talba, dan it-Tribunal ihoss li dan m'ghandux jitqies bhala precedent sufficienti ghas-sempli raguni li fi kwalunqwe kas l-Awtorita' tista iggib numru kbir ta' ezempji ta' applikazzjonijiet biex isir zvilupp simili li gew rifjutati u kull wiehed minn dawn jikkostitwixxi precedent il-kontra.

Ghalhekk, fil-fehma kunsidrata ta' dan it-Tribunal, il-pozizzjoni tal-Awtorita' f'termini ta' ppjanar f' dan il-kas hija konfermata mill-policies vigenti li jtkellmu car fuq meta jista' jigi permiss l-izvilupp f' Category 2 Rural Settlement. Ikun perikoluz hafna li wiehed jipprova igebbed izjed dawn il-policies ghaliex b' hekk ikun qed jinfetah il-bieb ghal numru kbir ta' talbiet simili li jistghu jwasslu ghad-distruzzjoni totali tal-kampanja f' numru ta' zoni f' dawn il-gzejjer u dan kontra wiehed mill-principji fondmantali tal-iStructure Plan.

Ghalhekk jirrizulta mill-premess li peress li l-proposta ta' l-appellanti tikser il-policy SMSE 07 tas-South Malta Local Plan, u numru ta' policies tal-iStructure Plan, dan l-appell ma jirrizultax fondat u ma jimmeritax kunsiderazzjoni favorevoli.

It-Tribunal, ghalhekk, qieghed jichad dan l-appell u jikkonferma ir-rifjut tal-applikazzjoni PA/00230/10, "To demolish existing building and to construct one residential dwelling", taz-17 ta' Awwissu 2011

### **Ikkunsidrat**

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal naqas li jiddeciedi l-aggravji l-ohra tal-appellant izda ssofferma ruhu fuq l-aggravju li s-sit hu sitwat f'category 2 rural settlement ODZ u ma ddeciedix li la darba dan kien il-kaz hu regolat mill-policy SMSE 07 u r-ragunijiet l-ohra ta' rifjut tal-Awtorita' ma kienux ghalhekk applikabbli;
2. It-Tribunal ma setghax jistabilixxi kriterji bhal 'planning gain' ghall-izvilupp in kwistjoni meta kien obligat li jimxi biss mar-rekwiziti tal-policy SMSE 07 li tirregola l-izvilupp in kwistjoni. Il-planning gain hu gia stabbilit fil-kriterji tal-policy biex sit ikun suxxettibbli ghal zvilupp. L-appellant jilmenta li t-Tribunal ghazel li jaghti kredibilita ta' dubju mqajjem mill-Awtorita' dwar l-estent tal-bini fuq is-sit li jaqa' fil-category 2 rural settlement milli joqghod fuq provi dokumentarji mressqa;



3. It-Tribunal applika kriterji mill-policy mhux applikabbli ghal kaz billi dan mhux kaz ta' sit vojti (uncommitted) izda li jitwaqqa' bini bla valur u sostitwit b'wiehed kompatibbli mas-settlement, u ghalhekk mhux kaz ta' urbanizzazzjoni ta' sit vojti uncommitted kif stqarr it-Tribunal;
4. It-Tribunal naqas li jikkunsidra li l-izvilupp kien konformi mal-policy SMSE 07 kif l-istess direttorat kien ikkonferma fir-rapport tieghu tal-Awtorita u l-interpretazzjoni tal-policy f'zewg kazi simili. It-Tribunal qal biss li dan ma jistax jitqies bhala precedent ghax l-Awtorita setghet gabet ezempji ohra ta' rifjut pero bhala fatt l-Awtorita ma qalet xejn. L-argument tat-Tribunal kien pregudizjevoli ghax naqqas ic-certezza tad-dritt dwar kif tigi applikata l-policy u jaghti legitimate expectation lic-cittadin;
5. It-Tribunal zbalja fil-fatt li assumu li bl-izvilupp kien qed jinholoq blank party wall ta' kwazi zewg sulari gholi meta l-pjanti juru li l-izvilupp propost hu ta' sular wiehed. In oltre t-Tribunal f'dan il-kaz qed japplika kriterju intiz ghal uncommitted land li mhix il-kaz f'dan l-izvilupp.

### **L-ewwel u t-tieni aggravji**

Dan hu kaz fejn it-Tribunal, mitlub li jikkunsidra argumenti specifici mressqa mill-appellant naqas li jaghmlu b'mod preciz, dettaljat u specifiku. Minflok, it-Tribunal ghamel apprezzament teoretiku ta' dak li ghandu jew ma ghandux jitqies bhala zvilupp permissibbli f'category rural settlements ODZ minghajr ma ddelibera kif imiss u ddecieda l-ewwel u qabel kollox liema policy jew policies kienu effettivament japplikaw ghall-izvilupp in kwistjoni.

Il-Qorti tqis illi l-punt principali li l-ewwel kellu jigi deciz qabel kull kunsiderazzjoni ohra hu jekk is-sit setghax jigi zviluppat in konformita mal-policy SMSE 07 specifikament ghas-South Malta Local Plan. Minn din id-determinazzjoni ta' fatt purament tekniku, it-Tribunal imbaghad seta' jizvolgi l-argumenti tieghu f'kaz jekk kienx applikabbli l-policy SMSE 07 u r-rekwiziti ghal success ta' applikazzjoni ta' zvilupp u jekk mhux applikabbli, allura kienux validi l-oggezzjonijiet l-ohra kollha tal-Awtorita kontra l-izvilupp, kif attackati mill-appellant.

## Kopja Informali ta' Sentenza

Jidher li l-applikabilita o meno tal-policy SMSE 07 kienet ticcentra fuq il-kobor tas-sit fl-1967 billi dan kien punt krucjali sabiex il-proposta tkun eligibbli ghal zvilupp skond l-imsemmija policy.

Dwar din il-kwistjoni tressqu diversi argumenti u provi pero sfortunatament it-Tribunal f'erba' paragrafi f'pagna 10 tad-decizjoni tieghu jghid hekk:

L-appellanti qed tibbaza l-argument taghha biex tiggustifika li din l-applikazzjoni tissodisfa din il-policy fuq il-fatt li l-firxa ta' bini li tezisti illum fuq is-sit, li ghandha footprint ta' 63 metru kwadru, kienet tezisti kollha qabel is-sena 1967. Biex taghmel dan hija tidhol f' dettal kbir fl-analizi tal-aerial photos tas-snin 1967 u 1957 u tissottometti wkoll rapport ippreparat minn espert fuq il-pjanti u sigar mill-universita'.

Meta it-Tribunal ezamina dawn l-aerial photos billi haresh lejhom bir-reqqa kollha, ikkonkluda li l-aerial photo tas-sena 1967 juri li dak li jidher huwa bini 'normali' li kien izghar minn dak li hemm illum, waqt li mill-partijiet ingranditi tal-aerial photo tas-sena 1957 li ikkwotat l-appellanti ma' jidher xejn car.

It-test tal-aerial photos huwa wiehed semplici u m'ghandhux jiggebbid ghax meta taghmel hekk tista tohloq hafna teoriji li difficili tippruvhom. L-aerial photos saru biex jintuzaw fil-forma originali taghhom u mhux biex wiehed iggebbidhom b' tali mod li jgihom juru dak li ma' jistghux juru. Jekk jirrizulta xi dubju, li f' dan il-kas ma' jidhirx li jezisti, allura fl-opinjoni ta' dan it-Tribunal, il-benefit of the doubt f' kazi ta' proposti ta' bini ODZ ghandu jmur kontra izvilupp urbanizzanti u dan ghax wiehed mill-oggettivi fundmantali tal-pjan ta' struttura huwa li fl-ODZ m'ghandu qatt isir zvilupp urbanizzanti.

Ir-rapport tal-espert huwa interessanti pero, bir-rispett kollu lejha, dan huwa espert tal-pjanti u mhux espert fl-interpretazzjoni xjentifika tar-ritratti.

Din il-parti tad-decizjoni tidher li taghti kredibilita lit-tezi li s-sit ma kienx tal-qies li jippermetti l-applikazzjoni tal-policy

SMSE 07 pero hi nieqsa mic-certezza necessarja dwar kif it-Tribunal ikkonkluda fil-fatt x'kien il-qies tas-sit pre 1967. Kull ma jikkonkludi hu li l-aerial photos ghandhom jintuzaw fil-forma originali taghhom u li jidher li s-sit kien izghar milli hu llum fl-1967. pero fl-ebda hin ma jiddikjara x-inhu l-qies u jekk hux applikabbli l-policy jew le.

Aktar minn hekk pero l-Qorti hi aktar perplessa peress li t-tribunal ezatt qabel l-imsemmija erba' paragrafi jghid hekk: Peress li, skond is-South Malta Local Plan, dan is-sit jinsab gewwa Category 2 Rural Settlement ghandha tigi applikata l-Policy SMSE 07 biex jigi determinat jekk hux permissibli li jinbena' dan is-sit u jekk fl-affermattiv x'tip ta' bini huwa possibli.

Fl-opinjoni kunsidrata ta' dan it-Tribunal, l-iskop tal-policy SMSE 07 huwa li kull bini permess f' dawn iz-zoni ghandu jtejjeb il-kuntast tas-sit li jkun qed jigi kkunsidrat. Il-punt krucjali huwa li l-ghan principali ta' din il-policy huwa li tippermetti li sit f'dawn is-settlements, li huma ODZ, jinbena biss meta jkun jista jsir planning gain.

Jidher prima facie illi t-Tribunal kien gia kkonkluda li l-policy SMSE 07 ghandha tigi applikata qabel ma jaghti x'jifhem li qed ibiddel fehmtu zewg paragrafi l-isfel fl-istess decizjoni kif fuq muri.

In oltre l-Qorti hi perplessa bl-argument tat-Tribunal illi l-permess jinghata biss meta jkun ser isir planning gain. Dan hu argument legalment zbaljat kif jirrileva l-appellant billi jekk it-Tribunal isib li policy partikolari hi applikabbli ghall-izvilupp u l-kriterji kollha jigu sodisfatti, allura hu fl-obbligu li jikkunsidra favorevolment l-izvilupp ghax il-planning gain hu implicitu fl-adezjoni tal-proposta ta' zvilupp ma' dak li jridu l-awtoritajiet skond il-policies li maghhom hu marbut l-izvilupp.

Il-Qorti tqis li la darba t-Tribunal naqas li jiddeciedi b'mod car u cert jekk il-policy SMSE 07 kinitx applikabbli ma setghax ikompli jizviluppa argumenti relatati mal-istess policy biex jiggustifika fit-teorija u mhux fil-prattika c-cahda ghall-izvilupp u wisq anqas jikkunsidra policies ohra

msemmija mill-Awtorita li jtilfu skop ta' applikabilita jekk qed tigi applikata b'success il-policy SMSE 07.

Dan l-aggravju jisthoqqlu jigi milqugh u billi t-Tribunal naqas li jikkonsidra dan il-punt kardinali kif imiss u jaccetta jew jeskludi l-applikabilita tal-policy SMSE 07 ghal kaz, ma hux il-kaz li jigu investigati t-tielet u l-hames aggravji billi huma bazati fuq kwistjonijet ta' fatti teknici li jiddependu mill-ezitu tat-Tribunal dwar l-applikabilita tal-policy SMSE 07.

### **Ir-raba aggravju**

Dan l-aggravju qed jigi kunsidrat mill-Qorti ghax it-Tribunal naqas li jikkunsidra ghaliex zviluppi f'permessi simili msemmija mill-appellant ma kienux rilevanti ghas-soluzzjoni tal-kaz in kwistjoni. Hu minnnu illi t-Tribunal mhux marbut ma ebda principju ta' precedent ghalkemm ic-certezza tad-dritt hi mixtieqa biex ic-cittadin ikun jista' jara jekk zvilupp in linea generali hux possibli li jigi approvat tenut kont tal-linja ta' hsieb kostanti mehuda mill-Awtorita u li tali linja ta' hsieb ser taghti aspettativa legittima lil applikant li f'kaz identiku ser jinghata l-istess risposta. Madankollu t-Tribunal irid jikkunsidra l-ilment kif maghmul u mhux jdur madwaru kif ghamel. Mhux accettabbli li t-Tribunal ighid biss illi l-Awtorita ma kkumentatx dwar il-permessi msemmija mill-appellant u illi setghu gew kwotati cahdiet ta' permessi minghajr ma jsir ebda referenza specifika mit-Tribunal u minghajr ma jikkunsidra l-aggravju fl-isfond tal-applikazzjoni prezenti. Dan hu dak li hu oggezzjonabbli ghal Qorti u tqis l-ilment tal-appellant gustifikat f'dan is-sens.

### **Decide**

Ghalhekk in linea ma' dak kunsidrat, il-Qorti qed tilqa' l-appell ta' Audrey Anne Bonnici, tirrevoka u thassar id-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tal-31 ta' Jannar 2013, u tirrimetti l-atti lura lit-Tribunal biex jerga' jiddeciedi mill-gdid l-appell. Spejjez ghall-Awtorita.

Kopja Informali ta' Sentenza

**< Sentenza Finali >**

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