



## **QORTI TA' L-APPELL**

**ONOR. IMHALLEF  
MARK CHETCUTI**

Seduta tad-19 ta' Frar, 2014

Appell Civili Numru. 2/2013

**BD Investments Limited**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell ta' BD Investments Limited tal-15 ta' Frar 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Jannar 2013 li kkonferma r-rifjut tal-applikazzjoni outline PA 5894/09 'construction of shipping complex gewwa by the Bastion Street, Victoria, Ghawdex';

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;

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

Dan huwa appell minn rifjut ta' l-Awtorita' ta' l-applikazzjoni, outline development application, PA 5894/09 'Construction of Shopping Complex', b' decizjoni tal-5 ta' Settembru, 2011.

Ir-ragunijiet li ghalihom l-Awtorita' irrifjutat l-applikazzjoni PA 5894/09 kienu s-segwenti:

"1. The site lies outside the limits for development defined in Map 14.9-A of the Local Plan for Gozo and Comino, 2006. The proposal is located in an area which should remain undeveloped and open and therefore it runs counter to Policy GZ-LMDZ-1 of the Local Plan since the development would represent unacceptable urban development in the countryside.

2. 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.

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

4. The proposed development would have an adverse impact on an important archaeological site or area and would conflict with Structure Plan policy ARC 3 which provides that such areas or sites should be safeguarded and preserved.

5. Structure Plan policy RCO 4 provides that, particularly within Rural Conservation Areas, areas of scenic value will be protected and enhanced. The area in which the site

is located is of considerable scenic value. The proposal would detract from this, and so it would conflict with Structure Plan policy RCO 4.

6. The proposal would infringe the Gozo and Comino Local Plan Policy GZ-RLCN-1 which do not allow inappropriate development in areas designated as Areas of High Landscape sensitivity."

Fl-appell tieghu ppresentat fl-4 ta' Ottubru, 2011, l-appellanti, permezz tal-Perit Farrugia, taghti r-ragunijiet taghha ghal dan l-appell billi tghid:

"I am hereby appealing from EPC decision of September 2011 regarding PA 5894/09

1----The description by the Case Officer of the site as an 'ODZ site' as if it were some kilometer or more from the Development Zone is incorrect. Consequently all the conclusions of the Case Officer that are built on this wrong premiss are wrong and therefore and accordingly for this reason only all the reasons for refusal brought by the Case Officer do not hold.

2-----Rather the Case Officer should have stated that the area in question touches certainly the existing built up area and moreover when considering the relatively small scale of the maps furnished by MEP A there is a strong probability that the site should be considered as falling within the limits of the Development Zone and even if this were not the case (which is highly doubtful) the benefit of the doubt should be given in favor of the applicant

3-----Moreover even if one considers the site as strictly just outside or in part outside the Development Zone still it at least touches the existing built up area and/or Development Zone and therefore an additional plot should be allowed for development. This 'additional plot' would be the site in question.

4-----Consequently the site should justly be considered as a building site and therefore the constraints of archeology

Kopja Informali ta' Sentenza

and of the Cittadella and any other constraints do not apply.

5-----Moreover as regards the commercial use of the site it should be observed that (a) in Victoria Gozo there are shops that do not fall within the Primary Retail Frontage and/or the Secondary Retail Frontage and (b) the policy of the Gozo Local Plan permits shops as per this policy and (c) the project is a relatively small project and (d) the site immediately adjacent to the site in question is allegedly used for the production of films and ancillary facilities and therefore is used commercially and ( e) accordingly there is commitment of the site in question both to status as building site as well as the commercial use of the site.

Reference should be made also to the following:

PA 4092/01 - Proposed video production studio and facilities – immediately adjacent

PA 829/00 - Buildings permitted outside development zone in by the Bastion Road

PA 1983/96 - Change of use of existing premises to ice-cream manufacture and confectionery [75 By the Bastion Road Victoria Gozo]

PA 2166/96 - Change to pub in New Street off by the Bastion Street, by the Bastion Street, Victoria, Gozo

PA 6605/95 - Change of use of garage to antiques furniture restorer - 77 by the Bastion Street Victoria Gozo

Moreover the site in question is a built up area where permits have been accorded to third parties even ODZ and to say the least the site in question is in a committed area:

Therefore with reference to the specific reasons of refusal as set forth by the EPC it is respectfully submitted that:

Kopja Informali ta' Sentenza

Reason of refusal number one should be quashed because the proposed development is not 'unacceptable urban development in the countryside'

Reason of refusal number two should be quashed because the proposed development does not conflict with SET 11 as in the least it definitely lies in a committed area where permits to third parties even ODZ were granted regularly and over a number of years.

Reason of refusal number three should be quashed because there are sufficient reasons to justify the development in the area in question and therefore SET 12 is not infringed - all this is clearly and definitely proven by the permits given to third parties including that for a video and audio facilities in the immediately adjacent site.

Reason of refusal number four should be quashed as reference to archaeology is totally out of place as permits in the same street, nay, even on the same side of the street were regularly given over the years, and just a few meters away; therefore the area should correctly be described as a committed area where permits should be issued as was done to third parties.

Reason of refusal number five should be quashed as the site lies in an urban committed area as already described and not in a Rural Conservation Area.

Reason of refusal number six should be quashed as the site lies in an urban committed area as already described and not in an Area of High Landscape Value

For these reasons and for other reasons that may be brought during the hearing of the appeal the Tribunal is respectfully requested to quash the unjust decision of the EPC and reverse the same decision by granting the relative permits to applicant so that justice will not only be done but also be manifestly seen to be done.

Whilst hoping that the above is to your satisfaction and whilst assuring you our best of intentions at all times I

remain, please do not hesitate to contact the undersigned should you need any further clarification.”

Fir-risposta tieghu tal-11 ta' Novembru, 2011, Darren Fava ghall-Awtorita' jaghti r-ragunijiet ghaliex fl-opinjoni ta' l-Awtorita dan l-appell ghandu jigi michud. Is-seguenti huma siltiet minn dan ir-rapport li t-Tribunal jhoss ghandhom jigu ssottolineati:

#### "5.2.1 Introduction and Overview of Comments

In accordance with Map 14.9-A of the Gozo and Comino Local Plan, the site in concern is situated outside development zone. Although the site is situated adjacent to the development scheme and is part of the UCA of Victoria, the site is not permissible for development. The appellant is attempting to use futile arguments to justify that perhaps the plot may be considered for development due to the proximity of the scheme or commitments in the area; but in accordance with the Gozo and Comino Local Plan this is clearly not the case.

Notwithstanding the fact that the arguments submitted by the appellant have already been thrashed during the processing stages of the application, the same frivolous allegations were presented at this stage to argue that the site should justly be considered as a building site. In addition, the appellant is implying that the constraints of archaeology and of the Cittadella do not apply since the site should be viable for urban development.

The Authority wishes to advise the appellant that even if the site could even remotely be considered as a building site, which it cannot; that all and any scheduling/archaeological sensitivity/high landscape value/etc. would still need to be considered by the Authority irrespective of commitments in the area. In fact, the Superintendent of Cultural Heritage highly objected to the proposed development (Doc 41A in PA File) not solely due to whether the site was within the development zone or not; but in view of the high level of importance in preserving the archeological sensitivity and landscape value of the site.

### 5.2.2 Principle of Development vis-à-vis Site Designation

The scale of the development proposed is not clear since on one hand the development application (Doc 19B in PA File) shows the proposal to include two floors above ground level and three basement levels; whilst the proposed elevation (Doc 1E in PA File) clearly shows three full floors plus basement above street level. In spite of this misconception; the proposed shopping complex is not within the limits to development as explained above.

The appellant is trying to hinder the true impact of the requested development by arguing that the proposal is a small scale project when in the development is proposing 1100m<sup>2</sup> of floorspace with over 660m<sup>2</sup> of commercial/retail use. Furthermore, the appellant is requesting to excavate three (3) basement levels in an area of archaeological sensitivity. Such a request is clearly not in the best interests of protecting the area as designated as explained in para. 2.4 of this report.

The proposal therefore goes against all the provisions of the Structure Plan and Local Plan to safeguard urban sprawl and urban development ODZ; and hence runs counter to SP policies SET 11, SET 12 and GCLP policy GZ-LMDZ-1 since there is no justification from a planning point of view as to why this development cannot be relocated to an area designated for such use. The proposal also runs counter to SP policy ARC 3 and GCLP policies GZ-ARCO-1, GZ-ARCO-2 in view of the impact of urban development to the scheduled archaeological sensitivity; and SP policy RCO 4 and GCLP policy GZ\_RLCN-1 in view of the scenic value and high landscape sensitivity.

In view of the above comments, this development is objectionable to the Authority in principle since the proposal is a total disregard to the archaeological importance and high landscape value of the area. As such, multiple issues such as details of the development (layout/ massing/ design/ landscaping/ services/ accessibility/ parking provision) were not assessed.

### 5.2.3 Claim of Cerimus Paribus

The appellant is commenting that the proposal in concern is similar to the development approved by MEPA in PA 4092/01; PA 829/00; PA 1983/96; PA 2166/96 and PA 6605/95. Since these cases were approved by MEPA in vicinity to the site in concern, commercial in use, and in some cases ODZ; the appellant is aiming this justification as an expectation to be treated accordingly. In the report below the Authority will examine the application mentioned in more detail to determine whether the case quoted merits such distinction:

PA 4092/01: This application involved the site adjacent to that in concern which is situated as the last building site within the development boundary. Proposal requested proposed video-production studio and facilities. This permit was refused by DCC Board on 2<sup>nd</sup> April, 2002 due to the requested increase in first floor level and the impact to the archaeological sensitivity of the area. Notwithstanding this, the proposal was permitted by Reconsideration Board on 3<sup>rd</sup> February, 2004 since it was established that the site was committed to development in PB 4521/87.

PA 829/00: This application is situated approx. 400m from the site in concern and is outside the development zone. The proposal requested the demolition of the existing building and erection of two garages for private cars at ground floor and two flats at first floor. This permit was refused by DCC Board on 23<sup>rd</sup> October, 2000 since the proposal exceeded the maximum permissible limitations of policy PLP 20. Notwithstanding this, the proposal was approved on 6<sup>th</sup> March, 2002 by Planning Appeals Board (PAB 473/00) since there was no objection to the demolition of the existing building, and the replacement building was reduced in depth due to a known archaeological feature.

PA 1983/96: This application is situated approx. 425m from the site in concern and is within the development boundary. The proposal requested the change of use of



existing premises to ice-cream manufacture and confectionary; and permit was issued on 8th January, 1997.

PA 2166/96 – This application is situated approx. 160m from the site in concern and is within the development boundary. The proposal requested the change of use from a ground floor garage to a pub and to place a sign; permit approval by DCC Board on 16th October, 1996.

PA 6605/95: This application is situated approx. 415m from the site in concern and is within the development boundary. The proposal requested the change of use of garage to antiques furniture restorer; permit approval by DCC Board on 10th April, 1996.

#### 5.2.3.1 Comments by Authority

In view of the merits of the case in concern, it is clear that there is no relation whatsoever between the quoted permit and the case in concern since the following obvious differences are present:

1. The case in concern is requesting the development of a vacant land outside the development zone. None of the other quoted cases dealt with undeveloped land ODZ.

1 The proposal is requesting three levels of underground basement in spite of the sensitivity in the area. None of the other quoted cases involved any excavation works.

2 PA 4092/01, PA 1983/96, PA 2166/96 and PA 6605/95 only involved the change of use of an existing structure and did not involve excavation and construction of virgin land.

3 PA 829/00 dealt with construction and commercial use ODZ but was only granted permit on the fact that the proposal was replacing a previously existing structure and that the site was already committed for development. This is clearly not the case in the site in concern.

4 The quoted developments were all approved prior to the completion of the Gozo and Comino Local Plan; and therefore the merits of these cases cannot be directly compared to that in concern since they were issued under different policy framework.

Therefore, in spite of the appellant's claims of *cerimus paribus*, the Authority has clearly examined that the quoted permit applications do not justify the request since the relation of the case is not similar to that at hand. Furthermore, the Authority wishes to underline the fact that arguments raised are frivolous and misleading; and therefore will not be divulged into further.

#### 5.2.4 Principle of Development vis-à-vis Local Plan

The appellant is seeking to justify the proposed construction of a shopping complex by illustrating that there are shops that have been issued in Victoria Gozo which do not fall within the Primary or Secondary Retail Frontage and that the proposal is a 'relatively small project' (in reality the development is approx. 1100m<sup>2</sup>). Notwithstanding this, the Authority is bringing to the attention of the Tribunal an Appeals Board decision – PAB161/07 where it was stated that: “Il-Pjan Lokali kien specifikament mahsub sabiex jaghti direzzjoni ta' kif zoni differenti ghandhom ikomplu jigu zviluppati. Kieku wiehed kellu jinjora l-pjan lokali u johrog permessi abbazi biss ta' xi tip ta' committment dan ikun ifisser illi l-ghanijiet tal-Pjan Lokali ma jkunu jistu qatt jintlahqu u l-ezercizzju kollu tal-pjanijiet lokali jkun sar ghal xejn” (PA5727/05).

#### 5.2.5 Principle of Development vis-à-vis Commitment

In arguments submitted, the appellant is also stating that in the case of the proposed development; the site is situated in an area where commercial use is situated. In this regard, MEPA highlights the importance of respecting the zoning designations in the local plan in order to ensure comprehensive planning. This position finds comfort in a recent decision given by the Planning Appeals Board (PA 5727/05; PAB 161/07) which stated that: Il-Pjan Lokali kien specifikament mahsub sabiex jaghti direzzjoni ta' kif z-zoni differenti ghandhom jkomplu jigu zviluppati. Kieku wiehed kellu jinjora l-pjan lokali u johrog permessi abbazi biss ta' xi tip ta' kommittment dan jkun jfisser illi l-ghanijiet tal-Pjan Lokali ma jkunu jistghu qatt jintlahqu u l-ezercizzju kollu tal-pjanijiet lokali jkun sar ghall-xejn. Therefore it is clear that whilst existing (legal)

commitment must be taken into account by the Authority when assessing and deciding a proposed development, respecting the local plan zoning designations is essential."

Il-punti li jitqajmu fin-nota tal-Avukat Dr Leslie Cuschieri, għall-appellanta ppresentata fit-3 ta' Settembru, 2012 huma s-segwenti:

"1. Fl-ewwel lok dwar da nil-kaz ir-rikorrent joghgbu jirriveva umilment li fl-opinjoni tieghu skont il-gustizzja il-linja tad-Development Zone kellha tkopri kompletament is-sit in kwisjtoni. Fil-fatt quddiem is-sit, u cjoe fin-nahha l-ohra tat-triq, l-linja tad-Development Zone tidher li giet indikata anki quddiem is-sit in kwistjoni fuq in-naha l-ohratat-triq, u dna kien jintitola lis-sit in kwisjtoni li hu ukoll jkun inkluz kollu kemm hu fid-Development Zone. Iktar u iktar meta l-area superficjali okkupata mis-sit in kwistjoni hi wahda relattivament ferm zghira. Izda sfortunatament ma garax hekk. Dan it-Tribunal m'ghandux ihalli tali diskrepanzi jibqghu ghaddejjin u joffri r-rimedju mehtieg – f'dan il-kaz bil-hrug tal-permessi relattivi.

2. Fit-tieni lok, anke is-sit immedjatament adjacenti u fuq l-istess naha tat-triq jidher li qieghed gewwa d-Development Zone tant li fuqu gie permess jinbena kumpless shih. Is-sit formanti oggett ta' dan l-appell jikkwalifika pjenament għall-istess zvilupp bhas-sit immedjatament adjacenti sew ghax qed jigi indikat li d-Development Zone testendi għal fuqu u kemm minhabba il-commitment kif ukoll id-duttrina ta' cerimus paribus.

3. Illi id-duttirini tal-commitment u c-cerimus paribus gew applikati mill-Qorti ta' l-Appell u japplikaw għal da nil-kaz li in virtu' taghhom ghandhom jinhargu l-permessi relattivi. Illi l-Qorti tal-Appell huwa organu li jinterpreta l-ligi li ghandha tigi applikata minn dan it-Tribunal, li hu tenut jsegwi d-dettami u decizjonijiet tal-istess Onorabbli Qorti t'Appell.

4. Dawn il-kunsiderazzjonijiet t'hawn fuq ilkoll qieghdin jinghadu bla ebda pregudizzju għal kunsiderazzjonijiet u sottomissjonijiet maghmulin qabel lill dan l-Onorabbli

Tribunal dwar Revizjoni w Ippjanar, u ghalhekk ghandhom jigu meqjusin bhala b'zieda ma' l-aggravji u sottomissjonijiet ga impressqa qabel: fejn dawn il-kunsiderazzjonijiet gew diga' accennati in toto jew in pari, l-prezentinota hi intiza biex tirraforza l-importanza assoluta u vitali ta' tali kunsiderazzjonijiet.

5. Illi l-Environment Planning Commissiion dehrilha li f'dan il-kaz tikkwota xi policies biex tpingi s-sit inkwisjtoni hala xi sit rurali, ambjentali u ma jsirx zvilupp fuqu. Dan meta l-istess Awtorita' Maltija ta' l-Ambjent u l-Ippjanar tat il-permessi kollha biex jinbena kumpless ezattament u immedjatament qasma ma' qasma mas-sit in kwistjoni.

6. Illi fl-umili opinjoni tal-esponenti din il-Kummissjoni kellha timxi ma' dak li ippermettiet l-Awtorita' Maltija ghall-Ambjent u l-Ippjanar fis-sit immedjatament adjacenti u hekk tirrakomanda din l-applikazzjoni ghall 'grant'. Mhux hekk sar anzi proprju sar bil-kontra, din ghalhekk hi ingustizzja li dan it-Tribunal dwar ir-Revizjoni tal-Ippjanar u Zvilupp ghandu jirrange.

7. Dan kollu li qed jinghad, jinghad bla pregudizzjoni ghal kazijiet l-oħra imsemmija fid-dintorni precedentement mill-appellant u li ghalihom inhargu il-permessi relattivi mill-Awtorita' Maltija ghall-Ambjent w Ippjanar.

8. Ghaldqstant, in vista ta' dan, l-appellant jehtieglu jgib izjed provi skond kif indikat fir-rikors ipprezentat kontestwalment.”

Ikkunsidra:

Il-mertu ta' dan l-appell jirrigwarda talba, outline development application, biex jinbena shopping complex b' footprint ta' 200 metru kwadru u floor space ta' 1100 metru kwadru. Il-proposta hija ghal bini fuq zewg sulari fuq it-triq u tliet livelli ta' basement.

Skond l-Awtorita' :

- Is-sit jinsab ODZ izda gewwa l-UCA ta' Victoria u qieghed fuq il-parti ta' isfel tal-gholja taflija li taghti ghac-Cittadella;

## Kopja Informali ta' Sentenza

- L-area kollha ta' Cittadella inkluz is-sit in ezami hija area ta' importanza arkeologika;
- Il-Gozo and Comino Local Plan jindika dan is-sit bhala 'Area of High Landscape Sensitivity' u 'Visual Integrity Buffer Zone'; u
- Fuq is-sit jenzistu numru ta' site constraints ta' Classes A, B u E li huma koperti kollha b' avvizi legali.

L-argumenti, fil-mertu, li tqajmu fid-diversi stadji ta' dan l-appell jistghu jigu elenkati fil-qosor kif gej:

Fl-appell tieghu, l-appellanti ssostni li l-Case Officer kellu zball meta ddeskriva s-sit bhala li qiegħed ODZ u li qiegħed kilometru l-boghod mill-linja tal-izvilupp u għalhekk il-konkluzjonijiet tieghu li kienu bbazati fuq din l-analizi huma hziena.

L-appellant jinsisti li:

- Is-sit in ezami jmiss iz-zona mibnijja u għalhekk il-probabilita hi li s-sit għandu jigi meqjus bhala li qiegħed gewwa z-zona tal-izvilupp;
- Anke jekk is-sit jinsab parzjalment barra jew inkella jmiss maz-zona tal-izvilupp dan għandu jitqies li qiegħed gewwa;
- Peress li s-sit għandu jitqies bhala wieħed fabrikabbli konsiderazzjonijiet ta' arkeologija u issues oħra dwar ic-Cittadella m' għandhomx japplikaw;
- Gewwa Victoria jenzistu hwienet li ma' jaqghux gewwa Primary jew Secondary Retail Areas u għalhekk anke peress il-proposta hija wahda zghira, dan il-progett għandu jigi approvat;
- Izjed minn hekk is-sit huwa adjacenti sit iehor kummercjali u għalhekk diga jenzisti commitment;
- Numru ta' permessi qed jissemmu li inghatw fil-vicinanze tas-sit anki ODZ u għalhekk is-sit in ezami hija diga committed.

L-Awtorita' rrespondiet li l-argumenti li qed iqajjem l-appellant diga gew ttrattati fil-fond waqt l-ipprocessar tal-applikazzjoni u cioe':

- Kif jirrizulta mill-Mappa 14.9-A tal-pjan lokali, għalkemm is-sit qiegħed gewwa il-UCA u adjacenti z-zona tal-izvilupp dan huwa ODZ u ma' jistax jinbena;

## Kopja Informali ta' Sentenza

- Anki kieku is-sit kellu jigi kkunsidrat biex jinbena, li hija ipotesi remota hafna, xorta kienu japplikaw il-vinkoli kola dwar ix-scheduling, l-arkeologia, ecc. In fatti is-Superintendent of Cultural Heritage oggezzjona bil-qawwi ghal din il-proposta;
- Il-proposta hija ambigwa hafna peress li l-pjanti pprezentati ma' jaqblux ma' xulxin; u
- L-izvilupp huwa ta' skala eccezziva u li jikser kull policy tal-pjan ta' struttura u tal-pjan lokali li jittrattaw il-firxa tal-izvilupp ODZ.

Dwar l-ezempji li jgib l-appellant dwar permessi li inghataw fil-vicinanzi l-Awtorita' tghid:

- Waqt li t-talba in ezami hija biex isir zvilupp fuq art vergni ODZ ebda wahda mill-applikazzjonijiet li jsemmi l-appellant ma' jinvolvi bini fuq art vergni ODZ;
- In fatti kollha imbarra wiehed kienu ghal zvilupp gewwa z-zona tal-izvilupp waqt li wiehed kien permess fuq sit ODZ fejn kien diga jezisti zvilupp;
- It-talba in ezami qed titlob li jigu skavati tliet livelli that it-triq waqt li ebda wiehed mill-permessi kkwotati ma' jitlob skavar;
- Erbgha mill-hames permessi citati kienu jinvolveu biss change of use u ebda kostruzzjoni; u
- Il-permessi citati kienu hargu kollha qabel ma' dahal fis-sehh il-pjan lokali.

Fin-nota tal-Avukat Dr Leslie Cuschieri huwa jerga jispjega numru ta' aggravji li diga kienu ttrattati mill-appellant fin-nota originali tieghu.

Wara li kkonsidra il-premess u minn ezami tal-pjanti, ritratti u dokumenti li hemm fil-files PAB 732/11 u PA 5894/09 it-Tribunal jikkumenta kif gej:

L-appellant jghid li huwa zball li dan is-sit qieghed jigi muri li qieghed fl-ODZ ghaliex is-sit kellu jkun fiz-zona tal-izvilupp. L-Awtorita' tispjega fid-dettal ghaliex dan is-sit huwa daqshekk sensitiv u li skond il-pjan lokali is-sit jaqa' ODZ pero fil-UCA ta' Victoria.

Fil-fehma kkunsidrata ta' dan it-Tribunal, wara li ezamina il-Mappa 14.9-A, tal-pjan lokali, ma' jista jkun hemm ebda dubju li s-sit jaqa' ODZ u li huwa ta' sensitivita' partikolari. Fi kwalunkwe kas l-appellant kien imissu oggezzjona fuq il-linja tal-izvilupp meta din kienet giet proposta jew inkella billi jaghmel PC Application biex ibiddilha jekk ma' jaqbilx maghha. Certament ma' jistax jaghmel dan permezz ta' dan l-appell u dan ghaliex dan it-Tribunal m' ghandux gurdizzjoni jew poteri li jippermettu li jissindika l-kontenut tal-pjanijiet lokali.

Fuq l-argument li jaghmel l-appellant li d-decizjoni ittiehdet fuq deskrezzjoni hazina tas-sit ghaliex is-sit gie impingi bhala li hu xi tezoz arkeologiku meta fil-madwar inghataw permessi lil applikanti ohra, l-Awtorita' korrettement tispjega li kull sit huwa differenti u ghandu kwalitajiet partikolari. L-appellant kien seta joggezzjona mix-scheduling meta dan kien gie propost jekk ma' qabilx mieghu. Certament, l-appellant ma' jistax jaghmel dan permezz ta' dan l-appell.

Fuq tezi ohra li pprova juza l-appellant u cioe li anki jekk is-sit in ezami jmiss mal-konfini tal-linja tal-izvilupp il-permess xorta seta' jinghata, it-Tribunal huwa tal-fehma li kieku kellu jacçetta din it-tezi ta' l-appellant ikun iffisser illi nispicaw fis-sitwazzjoni li wiehed wiehed jinbnew is-siti kollha u dawn il-gzejjer jintlew bl-izvilupp.

L-appellant isemmi l-issue ta' precedenti u ta' commitments numru ta' drabi fl-appell tieghu. It-Tribunal jaqbel ma' l-Awtorita' li biex taghmel konfront bejn kazi differenti kif ghamel l-appellant fil-kors tas-smieh ta' dan l-appell wiehed ghandu jikkonsidra:

- Iz-zmien meta tkun saret l-applikazzjoni peress li f'kull zmien dejjem japplika regime ta' plans and policies specifiku ghal dak iz-zmien;
- Il-lokalita' geografika tas-sit;
- Il-kuntest tas-sit;
- It-talbiet li jkunu saru fl-applikazzjoni; u
- L-istorja f' termini ta' zvilupp tas-sit.

L-appellant isostni li numru ta' terzi persuni inghatalhom permess biex jibnu madwar is-sit in ezami mentri fil-kas tal-appellant l-applikazzjoni giet rifjutata anki wara li gew imsemmijien dawn il-precedenti. Fuq dan l-Awtorita' tispjega ghalix il-kazi kollha li semma l-appellant huma differenti totalment f' termini ta' ppjanar u turi dan billi tispjega c-cirkostanzi ta' kull wiehed minn dawn il-permessi fid-dettal u fl-ambitu tal-punti msemmijien supra.

Ghalhekk it-Tribunal jaqbel ma' l-Awtorita' li f'kull wiehed mill-kazi kkwotati mill-appellant fil-kors tas-smieh ta' dan l-appell issib differenzi fundamentali f' termini ta' ppjanar mill-kaz in ezami.

Fuq l-issue ta' x' inhu commitment u kif japplika f' termini ta' ippjanar, l-Awtorita' tispjega li f' kasi eccezzjonali fejn per ezempju area li skond il-pjan lokali tkun zoned mod izda fir-realta tkun mimlija b'bini u zvilupp ta' tip differenti hlief ghal xi pocket zghir li fuqu jkun hemm applikazzjoni gdida dan jista japplika. It-Tribunal jaqbel ma' dan fis-sens li peress li l-iStructure Plan b' policies bhal BEN 1 u BEN 2 jipprevedi li f' sitwazzjonijiet bhal dawn ghandu jkun hemm konsistenza, allura dawn il-policies jistghu jiehu is-sopravent fuq policies ohra. Normalment, pero, dan jigri fis-sens oppost ghal dak li qed jahseb l-appellant fis-sens li it-tendenza hi li fl-ippjanar il-commitment normalment jintuza biex inaqqas l-impatt ta' xi proposta u dan huwa rifless bit-tibdil li sar fil-ligi l-gdida tal-ippjanar li dahlu fis-sehh fil bidu tas-sena 2011.

Fl-opinjoni kinsidrata ta' dan it-Tribunal u kif jirrizulta mill-premess, l-appellant naqas milli jittratta b'mod konvincenti imqar wiehed mis-sitt reasons for refusal mill-lat ta' ippjanar biex jikkonvinci li dan l-appell ghandu jigi milquh. Kif jirrizulta mill-premess, il-punti li jqajjem l-appellant fl-appell tieghu m'humix ta' natura strettament ta' ippjanar u hafna minnhom huma sahsitra bla bazi.

In konkluzjoni, kif jidher mill-fatti li hargu fil-kors tas-smieh ta' dan l-appell, billi jirrizulta li il-proposta in ezami tikser numru ta' policies tal-Pjan Strutturali, tal-Gozo and Comino Local Plan u tal- Policy and Design Guidance,



2007, dan l-appell ma jirrizultax fondat u ma jimmeritax kunsiderazzjoni favorevoli;

It-Tribunal, ghalhekk, qiegħed jichad dan l-appell u jikkonferma ir-rifjut mahrug mill-Awtorita' ta' l-applikazzjoni, PA 5894/09 'Construction of Shopping Complex', fil-5 ta' Settembru, 2011.

### **Ikkunsidrat**

L-aggravji tal-appellant huma s-segwenti:

1. Ksur tal-principju tal-audi alteram partem fis-sens li l-appellant gie injorat meta:
  - a. Ikkunsidra l-argumenti ta' naha wahda biss bhala tajbin;
  - b. Meta qal li l-appellant ma gabx prova kontra r-ragunijiet ta' rifjut;
  - c. Ma saret ebda site inspection biex jigi verifikat jekk hemmx sit fuq in-naha l-oħra tat-triq;
2. L-appellant gie diskriminat meta:
  - a. Inghad li s-sit hu ODZ meta nhargu permessi fis-sit adjacenti;
  - b. It-Tribunal semma' 'constraints' fuq is-sit meta ma tqajmux f'permessi mahruga lil terzi;
  - c. It-Tribunal jenfasizza biss in-negattiv fil-konfront tal-appellant;
  - d. Il-fatt li ngħataw permessi lil terzi u lill-applikant gie rifjutat;
3. It-Tribunal applika hazin il-ligi ghax:
  - a. F'end of scheme plot jinhargu permessi bhala extra plot;
  - b. F'kaz ta' dubju kemm qies mis-sit jinsab barra miz-zona ta' zvilupp, id-dubju kellu jmur favur l-applikant;
  - c. F'kazijiet oħra t-Tribunal hareg permess anki meta parti mill-plot kienet barra z-zona ta' zvilupp u anzi jimplimenta l-ispirtu tieghu;
  - d. Il-premessi tal-case officer u t-Tribunal li ddeskrivew is-sit qisu ODZ hu skorrett tant li jmiss ma' built up area;
  - e. Jekk is-sit jigi kunsidrat bhala building site, il-constraints tal-arkeologija u tac-cittadella ma japplikawx;
  - f. In kwantu għal uzu kummercjali tas-sit għandu jigi kunsidrat illi f'Victoria, Ghawdex hemm hwienet u

ghalhekk hemm commitment tas-sit in kwantu l-istat tieghu bhala building site u l-uzu kummercjali tieghu;

4. L-ghoti tal-permess ma jmurx kontra l-pjan lokali kif iddecieda t-Tribunal, ghax jimmerita li jkun fid-development zone, hu end of scheme plot, u l-permess ma jiddisturbax l-pjan lokali jew l-ispirtu tieghu;

5. It-Tribunal ma applikax ghal dan is-sit il-massima ta' cerimus paribus u commitment kif relevat b'diversi permessi ohra fl-istess triq. Ghalhemm mhix identici huma simili u ghalhekk kellu jinhareg il-permess anki fil-kaz tas-sit in kwistjoni.

### **L-ewwel aggravju**

Dan l-aggravju ma fih ebda fundament sostantiv. It-Tribunal ikkunsidra b'mod dettaljat is-sottomissjonijiet kollha tal-partijiet. Il-fatt illi ghazel bhala aktar attendibbli s-sottomissjonijiet tal-Awtorita ma jfissirx b'daqshekk li sar xi ksur. Kien ikun hemm ksur li kieku t-Tribunal injora dak li qal l-appellant mentri fil-fatt, qari tad-decizjoni hi konferma tal-apprezzament tal-argumenti tal-partijiet u l-konkluzjoni tat-Tribunal li ta aktar piz lil parti milli ta lil ohra. In oltre t-Tribunal ma qalx illi l-appellant ma gabx provi kontra r-ragunijet tar-rifjut izda li l-appellant naqas li jitratta b'mod konvincenti r-ragunijet ta' rifjut tal-Awtorita. Dan hu l-mansjoni u prerogativa tat-Tribunal, cioe li juza l-argumenti u a bazi tal-pjanijiet u policies vigenti u tenut kont ta' konsiderazzjonijiet li jressqu l-partijiet, jasal ghal konkluzzjoni tieghu. In kwantu ghas-site inspection, ma jirrizultax li dan kien xi obbligu mandatorju fuq it-Tribunal. In-natura tas-sit u l-izviluppi ezistenti gew konsidrati dettaljatament fid-decizjoni. Jekk issirx site inspection jew le hi fid-diskrezzjoni tat-Tribunal u ma jidhirx f'dan il-kaz li intalbet jew giet imwieghda u ma saritx. Lanqas ma jirrizulta li n-nuqqas ta' site inspection tista' b'xi mod tippregudika d-decizjoni raggunta.

### **It-tieni aggravju**

Dan l-aggravju wkoll ma jimmeritax kunsiderazzjoni favorevoli. Kwistjonijiet ta' diskriminazzjoni huma kwistjoni ta' fatt li fuqhom din il-Qorti ma ghandhiex poter tissindaka

(ara **Ted Mizzi vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar**, App Inf 20/01/2009). In fatti l-ilmenti specifici mressqa b'dan l-aggravju huma kollha ta' natura fattwali jew teknika u li del resto gew trattati mill-istess Tribunal.

### **It-tielet aggravju**

Dan l-aggravju jirrigwarda punti ta' ligi. L-appellant jilmenta li s-sit messu gie trattat qisu end of scheme plot, cioe bhala extra plot. L-argument tal-appellant hu fallaci peress illi s-sit, skond ma ddecieda t-Tribunal hu barra z-zona ta' zvilupp u kwindi hu l-fehma tal-Qorti li ebda end of scheme plot ma hi applikabli ghalih. L-appellant stess fl-appell tieghu lanqas hu konvint jekk is-sit jinsabx in parti jew kollu barra z-zona ta' zvilupp. Il-kwistjoni giet trattata mit-Tribunal u essendo kwistjoni teknika mhix fil-poter tal-Qorti li tiddisturbha hlief ghal cirkostanzi eccezzjonali bhal zball grossolan car li jidher mill-atti li mhux il-kaz. In oltre x'haseb jew x'kummenti ghmel il-case officer huma irrelevanti peress illi t-Tribunal ma qaghdx fuq il-case officer dwar il-kwalifika tas-sit izda investiga hu l-pjan lokali u ddecieda li kien car li s-sit intier kien barra z-zona ta' zvilupp, u kwindi japplikaw ghalih konsiderazzjonijiet ohra, cioe dawk applikati mill-Awtorita ghal kaz in ezami, inkluz il-fatt dwar is-sensitivita tas-sit fl-isfond taz-zona tac-Cittadella. Hu wkoll ghalhekk irrelevanti kull argument ibbazat fuq hwienet ohra f'Victoria, Ghawdex u l-uzu kummercjali propost tas-sit billi s-sit hu f'zona protetta, specjali, u ma taqax fil-parametri ta' zvilupp kif irid l-applikant. Kwindi dan l-aggravju hu futili.

### **Ir-raba aggravju**

Iktar milli aggravju dan hu xewqa tal-appellant peress illi la darba stabbilit illi s-sit jaqa' barra z-zona ta' zvilupp tmur kontra l-pjan lokali u hi l-fehma tal-Qorti illi t-Tribunal ma ghandu ebda diskrezzjoni li jmur kontra jew ibengel il-pjan lokali b'gudikat li l-ligi ma tippermettilux jasal ghalih. Din mhix kwistjoni ta' disturb tal-ispirtu tal-plan lokali, izda b'gudikat bazat fuq il-ligi, darba stabbilit li s-sit kien jaqa' kollu barra z-zona ta' zvilupp u f'zona protetta u ristretta kif inhu, idejn it-Tribunal kienu marbuta, hemm x'hemm fil-

Kopja Informali ta' Sentenza

vicinanze. Dan spjegah tajjeb it-Tribunal u ma ghandux jigi disturbat.

Ghalhekk dan l-aggravju qed jigi michud.

### **Il-hames aggravju**

Din il-Qorti gia esprimiet ruhha fis-sens illi draba aggravju bhal ma hu dak tal-commitment allegat jew trattament ugwali jigu ventilati, kunsidrati u decizi mit-Tribunal, ma hemmx lok li din il-Qorti terga' tikkunsidrahom mill-gdid. Il-Qorti tintervjeni biss meta l-illment ma jigix kunsidrat mit-Tribunal jew skartat bla ma tinghata raguni. Dan mhux il-kaz f'dan l-appell. Pero ghal kompletezza din il-Qorti tqis illi l-appellant hu zbaljat li jallacja dawn l-argumenti mal-fatti. Jirrizulta illi l-permessi minnu kwotati saru sottomissjonijiet dwarhom mill-Awtorita li t-Tribunal ikkunsidra. Jirrizulta li ebda permess ma jinghad li hu simili ghal dan in ezami billi f'kaz wiehed biss inghata permess fl-istess triq f'zona li kienet ODZ pero gie rilevati illi l-permess ma nghatax ghal art uncommitted kif inhi din izda fuqha kien gia hemm zvilupp u in oltre l-izvilupp propost b'din l-applikazzjoni jitlob skavar ta' tlett livelli taht l-art waqt li ebda permess iehor ma talab skavar. In oltre il-permessi kollha kienu nhargu qabel bdil fil-pjan lokali. Dawn il-kunsiderazzjonijiet waslu lit-Tribunal li jiskarta kull argument ta' similitudni jew commitment fiz-zona. Din il-Qorti taqbel perfettament mar-ragunament tat-Tribunal ghalkemm kif inghad, din il-Qorti lanqas kellha strettament tidhol fil-mertu tal-aggravju la darba kunsidrat u deciz b'mod car mit-Tribunal.

Ghalhekk dan l-aggravju qed jigi michud.

### **Decide**

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' BD Investments Limited u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ippjanar tal-31 ta' Jannar 2013. Bl-ispejjez kontra l-appellant.

Kopja Informali ta' Sentenza

**< Sentenza Finali >**

-----TMIEM-----