



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tas-7 ta' Mejju, 2014

Appell Civili Numru. 160/2012

Anthony sive Tony Cassar

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Anthony sive Tony Cassar tas-16 ta' Ottubru 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Settembru 2012 dwar PA 1438/10 'to construct two semi detached dwellings within a bungalow development';

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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:

A. Il-Kummissjoni ghall-Kontroll tal-Ambjent u l-Ippjanar, fis-27 ta' Gunju 2011, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 1438/10 - Site at Triq D.H. Smith c/w Triq Birguma, Naxxar: Construction of two semi-detached dwellings within a bungalow.

Ir-ragunijiet ghar-rifjut kienu s-segwenti:

"1. The proposed development involving two dwellings will increase the density within a site which can only accommodate a single dwelling bungalow, given that the site is almost 25% smaller than required. Such development as proposed by the architect will lead to overdevelopment and will not be in the interest of the amenity of the area and thus the proposal runs counter to Structure Plan Policy BEN 1.

2. The proposal runs counter to Policy 3.2 of the Policy and Design Guidance 2007 which only allows 2 semi-detached bungalows on a single site provided that the required minimum site area, indicated in this policy, is met."

B. In-nota tal-Perit Kenneth Zammit Endrich ghall-Appellant, ipprezentata fit-12 t'Awissu 2011, senjatament il-punti segwenti:

"The site area involved is a residual site which though smaller than the surrounding sites effectively does not disturb the intended number of dwellings and density in the development area. As a matter of fact it is being considered for development based on these exceptional circumstances as there is nothing considered abusive or contrary to policy. It is our opinion that once the principle of 'exception' is established and considered acceptable for the submission of a development

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proposal than the same policies governing the development profile of sites within the area should be implemented.

Furthermore we would point out:

1. The 30% site area coverage dictated in Policy 3.2 (table) is respected in the proposal. This has effectively only resulted in smaller residences within the site boundaries which are proportionate to the same site, 70% of which remains open. Both residences being proposed are within the policy stipulated minimum dwelling areas.

2. Being a corner site (partially facing a three storey development) the proposal is designed with a good outlook with respect to the surrounding areas in that it keeps well within all the policy stipulated distances from surrounding sites. Moreover, the main elevation is setback more than the statutory minimum allowable distance (three metres) from the front garden boundary wall.

3. There is certainly not a case of overdevelopment or increase in density since the number of dwellings per site in the development zone is retained. If this residual site was in accordance to the minimum site area (+20%) the same two dwelling would have been developed, albeit larger than those being proposed.

4. The collective area of all the plots making up the whole villas block bordered by Triq D.H. Smith and Triq Birguma [...] totals circa 10,500 sq.m. Based on Table 3.2 values for minimum site area this zone would have accommodate nine (9) villas, ie. 18(eighteen) semi-detached villas. Should this development request be endorsed there would only be 7 (seven) villas in this same footprint area, possibly catering for 14(fourteen) semi-detached. The proposal does not alter the present situation wherein there effectively is a lesser density of dwelling numbers in the area than that recommended in Table 3.2, Design Guidance 2007.

5. Their design outlook is such that there is continuity in the elevation of both dwellings in conformity with Policy 3.2 [...]. The modest sizes of the units should not affect the overall area outlook which is conducive to the area since the proposed architectural treatment of the whole building reads as one homogenous building.

6. The proposal considers the construction of two residential dwellings as is the case with the surrounding development. All aspects of the proposed development

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were discussed at length as can be verified from the number of revisions carried out as discussions with the directorate progressed. Based on these same discussions and the points above, the proposal should have never been considered a threat to the amenity of the area and to the principle of good design and BEN 1.

7. The development proposal lies well within the parameters set in Policy 3.1, General Design Concepts for Dwellings and Policy 3.4 Detached and Semi-Detached dwellings of Policy & Design Guidance 2007 in that as a new development it 'follows the pattern set by the existing development.' Moreover, the development is in line with policy 3.3 of the same design guidelines in that it is compatible and maintains the character of the area respecting building heights, setbacks and number of dwellings.

8. The developed area directly opposite this development zone (zoned for one floor and basement) is designated for two floors and semi-basement on smaller plots. This neighbouring zone designation is what brings about the density issue rather than the development of two semi-detached villas that are marginally smaller than what would have normally been allowed. It is also pertinent to note that the adjacent villa development has been constructed on a site area of approximately 1750 sq.m, i.e. 1.5 tomna.

9. The overall height of the proposed development is lower than both adjacent dwellings and it lies on sloping corner site terrain and all other aspects are in conforming to all policies governing such development.”

C. In-nota risponsiva ta' Mario Scicluna għall-Awtorita', ipprezentata waqt is-Seduta numru 72, mizmuma fil-11 t' Ottubru 2011, inter alia z-zewg punti segwenti:

“5.1.5 The Authority disagrees that since this is the last site to be developed in this area, this should be treated as a special case and be allowed to breach Policy 3.2 of PDG 2007. The case history [...] shows that although the site does not have the minimum 1124sq.m. area to be developed into a bungalow, this site has already been granted one bungalow through permit PA 6685/96 and later, further amendments through permit PA 1131/04. Hence, this residual site could have still be developed for a residential unit and there is no planning justification for an additional unit when the plot is not even large enough for one dwelling by present standards.

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5.1.6 Additionally, Structure Plan as well as Policy Guidance 2007 aim primarily at achieving a better quality of life and thus, such overdevelopment has no planning justification for an approval of two dwellings when the site is not even large enough by present policies to justify one dwelling.”

D. Il-verbal tas-Seduta numru 17, mizmuma fit-23 ta' Frar 2012, senjatament il-punt segwenti:

“L-Avukat [Dott. Kenneth] Grima ghamel referenza ghall-appell PAB 354/98 KA, deciz fit-3 ta' Novembru 2000.”

E. In-nota ulterjuri tal-Avukat Dott. Edward DeBono ghall-Appellant, ipprezentata fis-17 t' April 2012, inter alia l-punti segwenti.

“In the circumstances the said proposed development conforms with the parameters of the Policy [3.2] and consequently the said application was vetted accordingly by the Directorate as it has realised that this was an infill site and therefore, unsightly if it were to be left undeveloped. Also, if one were to consider the whole villa area developed along Triq D.H. Smith corner with Triq Birguma, Birguma, then the density of the said area is much lower than that set within the said policies.

Moreover, the proposed development has been receded with a self-imposed set-back of an average of 7.5m from the official building line, in the interest of aesthetics and this despite the fact that the Policy stipulates a minimum set back of 3m.

We also refer to policy number 3.4 which tallies with the matter in caption, as the site in question is a residual site, where the shape of the proposed construction is designed to fit the site whilst maintaining the character of the area, thus enhancing the overall aesthetic value of the area in question.”

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda proposta sabiex jinbnew zewg residenzi semi-detached minflok bungalow (wiehed) fl-arja residenzjali tax-Naxxar.

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Precedentement kienu diga' gew intavolati xi applikazzjonijiet fuq dan is-sit. L-ewwel wahda (PA 6685/96) kienet intiza sabiex jinbena bungalow. Din giet milqugha allavolja l-art hi izghar minn tumolo kif rikjest mill-policies. Sussegwentement giet intavolata applikazzjoni ohra (PA 1134/04) sabiex isiru xi emendi fil-permess originali, li wkoll giet approvata. Imbaghad saret applikazzjoni gdida (PA 1959/06) ghal zewg semi-detached dwellings, li pero' giet rifjutata.

Ir-raguni ghar-rifjut odjern jistrieu fuq il-fatt li peress qed jigu proposti zewg residenzi fuq sit li jista' jakkomoda biss bungalow wiehed - u dan nonostante l-fatt li kif inhu, s-sit diga' hu zghir wisq sabiex jigi akkomodat il-bungalow (bejn 20 u 25% izghar minn norma) - il-proposta ser tirrizulta f' l-intensifikazzjoni ulterjuri tal-izvilupp, u ghalhekk hi in kontravvenzjoni tal-policy BEN 1 tal-Pjan ta' Struttura.

In oltre, skond il-policy 3.2 tal-Policy and Design Guidance (DC 2007) jistghu jigu permessi zewg residenzi semi-detached fuq bungalow site biss kemm il-darba l-minimum site area jigi rispettata.

L-aggravji tal-Appellant huma bbazati fuq il-premessa li hawn si tratta minn residual site u li ghalhekk dan hu kaz sui generis li jimmerita' kunsiderazzjoni differenti minn kif normalment isir. Nonostante dan, jargumenta li galadarba jigi rikonoxxut dan il-fatt, il-proposta tieghu (ovjament) mhux ser tikser l-ebda wahda mill-policies citati mill-Awtorita'.

L-Appellant jirrileva li s-site coverage hu konformi ma' arja ta' 30% kif rikjest mill-policy 3.2 tad-DC 2007. Fil-fatt, il-proposta tieghu ser tirrizulta f' zewg residenzi li huma ftit izghar minn norma – izda li l-minimum site coverage ser jigi rispettata. Ser tigi rispettata anke l-istess policy in kwantu l-faccati ser jinqraw daqslikieku huma bungalow wiehed, u sahsitra l-faccata principali ser tkun hafna izjed irtirata mit-tlett metri front garden li jistipulaw il-polcies. Fl-istess waqt, ser jigi provdut outlook sufficjenti, tant, li kieku s-sit kien ftit ikbar – kif rikjet mill-policies – kieku kienu facilment jigu ddisinjati zewg residenzi b' spazju utili li jirrizulta hafna ikbar minn dan li qed jigi propost.

Fl-ahharnett, l-Appellant jirrileva li l-izvilupp li qed jipproponi hu perfettament konformi mal-policies 3.1, 3.3 u 3.4 tal-istess DC 2007, ghax qed jigi rispettata il-karattru tal-bqijja tal-izvilupp li jezisti fil-madwar, inkluzi setbacks, sloping terrain, etc. Jirrileva wkoll li ghalkemm din iz-zona hi ntiza ghal-zvilupp fuq fuq sular wiehed inkluz semi-basement, iz-zona li tinsab precizament faccata ta' dan il-font hi ntiza sabiex jinbnew zewg sulari u semi-basement (cjoe' sular iktar minn dak

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permissibbli fiz-zona in ezami). Di pju, il-plots ta' faccata huma ferm izghar minn dawn taz-zona in kwistjoni u semmaj allura, l-kwistjoni ta' intensifikazzjoni fl-izvilupp ghandha tkun kunsiderazzjoni f' dik iz-zona ta' faccata, u mhux hawnhekk.

Tajjeb li tigi osservata pekularita' fil-policies tal-ippjanra nostrani; cjoe' li f' certa cirkostanzi, bungalow jista' jinqasam u jsir zewg semi-detached bungalows, cjoe' zewg residenzi li jmissu ma' xulxin u li jibqaw jinqraw bhallikieku bungalow wiehed. In oltre, kif diga' gie rilevat supra, bungalow jista' llum jinbena b' semi-basement. Din hi stramberija tassew, ghax b' 'bungalow' wiehed jifehm bini kompletament izolat, mibni esklussivament fuq bicca art catta u fuq sular wiehed - cjoe' minghajr l-ebda sottinterrat. Ghalhekk li bungalow jista' 'jinqasam' fi tnejn diga' hu contradiction in terms, ahseb u ara li jista' jinbena semi-basement, u wisq iktar li wiehed isejjah l-izvilupp li jirrizulta wara din l-operazzjoni ta' zmembrament bhala zewg semi-detached bungalows.

Madankollu dawn huma l-policies u tenut kont ta' din l-anomalija, kull meta ser jintuza t-terminu 'residenza' tkun qed issir riferenza ghal semi-detached bungalow b'semi-basement kif qed jintalab mill-Appellant de quo.

Ezaminati s-sottomissjonijiet tal-partijiet il-kaz odjern jittratta zvilupp kumpatt fuq font li ghal xi raguni jew ohra, jirrizulta bejn ghoxrin u hamsa w ghoxrin fil-mijja izghar minn daww permessi fiz-zona in ezami. F' cirkostanzi normali, l-Awotorita' kienet bi ftiit negozjar tista' tasal sabiex tapprova zvilupp ghal-bungalow sabiex ikun konformi mal-bqijja tal-izvilupp fiz-zona. Madankollu, din hi talba sabiex jirdoppja n-numru ta' residenzi li dan is-sit jista' jakkomoda skond il-polcies – talba li kieku tista' facilment tigi milqugha, kemm il-darba jkun hemm inter alia site coverage sufficienti. Billi jirrizulta li l-plot size hawnhekk hu ferm izgha minn norma, mhux qed jinkiser rekvizit essenzjali sabiex font bhal dan jista' jinqasam.

Il-fatt li l-policy tispecifica tali minimum site coverage huwa sabiex ma' jinbeniex zvilupp li ma' jkunx jirrispekkja dak ta' madwaru. Ikun inutile li jigi argumentat li d-disinn propost hu wiehed gradevoli, kompatt, etc., ghax propju din il-'kompattezza' li taghmlu differenti mill-bqijja tal-izvilupp li wiehed jippretendi fl-area in ezami. In oltre, il-fatt li l-istandard size ta' spazju utili ta' residenzi aktar ma jghaddi z-zmien jickien m'ghandux jigi accettat bhala gustifikazzjoni ghat-talba odjerna. Wiehed jippretendi li jsib residenzi kumpatti f' zoni li huma aktar iffollati bl-izvilupp (p.ez. town centre, etc.), izda f' areas ixxamplati bhal dawn, wiehed jistenna spazji u volumi li huma hafna ikbar.

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Dan hu l-ispirtu tal-good (urban) design, etc., kif stipulat permezz tal-policies BEN 1 et seq. tal-Pjan ta' Struttura; u tenet kont ta' dawn il-principji, dan l-appell ma' jimmeritax kunsiderazzjoni favorevoli.

In oltre, f' ir-rigward tal-permess PA 7919/94 (PAB 354/98 KA – Simon Camilleri vs. Il-Kummissjoni għall-Kontroll ta' l-Izvilupp) citat mill-Appellant; f' dak il-kaz, il-Bord ta' l-Appell dwar l-Ippjanar kien bghat lura l-file lill-Kummissjoni "sabiex titlob lill-appellant li jissottometti pjanti godda li huma konformi mal-minimum site area u cjoe' sabiex il-bungalows jinghaqdu f' wiehed."

Il-mertu ta' dak l-appell kien jikkonsisti minn talba għal zewg residenzi fuq zewg plots zghar u meta l-Bord ikkunsidra l-fatt li dawn setghu jinghaqdu f' residenza wahda fuq plot wiehed li jkun konformi mal-minimum site area, laqgħa t-talba.

Il-kaz in ezami hu ferm differenti. Qabel xejn irid jinghad li diga' nhareg permess għal residenza wahda fuq font li mghandux minimum site area bhal dak citat. In oltre, it-talba in ezami hi għal zvilupp fuq plot wiehed, meta dik citata kienet tirrigwarda zewg plots. F' dak il-kaz il-permess inhareg għal-bungalow (wiehed) fuq zewg plots zghir (pero' li flimkien kienu jsarfu almenu daqs plot normali), mentre ghawnhekk si tratta minn talba għal zewg bungalows zghar fuq plot daqstant zghir.

Għalhekk, in vista tal-kunsiderazzjonijiet kollha hawn fuq maghmula, u fuq kollox sabiex ikun konformi mal-policies tal-ippjanar vigenti, dan il-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma ir-rifjut għall-PA 1438/10 mahrug mill-Kummissjoni għall-Kontroll tal-Ambjent u l-Ippjanar, fis-27 ta' Gunju 2011.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. In-nullita tad-decizjoni billi t-Tribunal naqas li jiddekreta talba għal sospensjoni tal-prolazzjoni tad-decizjoni u minflok inghatat id-decizjoni;
2. It-Tribunal zbalja meta ddecieda li dan l-izvilupp imur kontra l-interess tal-komunita meta l-proprjeta ma kinitx ser izzid id-densita tan-nies jew overdevelopment;
3. It-Tribunal zbalja meta kkunsidra bhala raguni ta' rifjut li l-proposta tmur kontra l-policy 3.2 tal-Policy and Design Guidance 2007 billi policy mhix ligi izda direzzjoni fejn wiehed jista'

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jiddipartixxi minnha ghal ragunijiet validi u ragonevoli kif inhu dan il-kaz li hu infill site u l-unika plot li ghadha ma gietx zviluppata u ghadha ghalqa minn kwartieri shah.

L-ewwel aggravju

Hu minnu li tlett ijiem qabel id-data appuntata ghad-decizjoni, l-appellant talab lit-Tribunal jissospendi l-prolazzjoni tad-decizjoni. Ir-raguni moghtija hi li l-appellant ried jissottometti pjanti godda li jbidel materjalment il-proposta minn zewg semi detached dwelling ghal single unit.

It-Tribunal ghadda ghad-decizjoni fis-27 ta' Settembru 2012 ba ma cahad din it-talba. Il-Qorti tqis illi l-qari tad-decizjoni fiha nfisha hi cahda tat-talba ghalkemm kien ikun aktar korrett it-Tribunal li kieku cahad ir-rikors qabel ippronuncia d-decizjoni. Dan ma jwassal ghal ebda nullita billi l-ligi ma tistipula ebda nullita. Pero l-Qorti tqis illi l-talba tar-rikorrentii kienet biex tinbidel materjalment il-proposta li fuqu gie msejjes l-appell, u kwindi ma tqis illi tali talba setghet b'xi mod ippregudikat it-termini tal-appell li fuqhom giet deciza l-applikazzjoni. Del resto tali bdil ta' proposta setghet saret f'kull zmien u mhux tlett ijiem qabel l-ghoti tad-decizjoni li jwassal lil Qorti tissuspetta illi dan ir-rikors kien biss delaying tactic.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju mhux ammissibbli bhala punt ta' ligi deciz mit-Tribunal billi dak li qed jittenta jaghmel l-appellant hu illi jstieden lil Qorti taghmel riapprezzament tal-fatti tal-kaz u aspetti ta' planning trattati u decizi mit-Tribunal. Dan ma jaqax fil-mansjonijiet ta' din il-Qorti li tissindakahom. Il-Qorti issib sostenn f'dan mid-decizjoni **Michael Gatt vs Awtorita tal-Ippjanar**, App Civ 19/11/2001, fejn il-Qorti tal-Appell qalet hekk:

Din il-Qorit (Qorti tal-Appell) tista' tirrevedi u tissindika biss dawk id-decizjonijiet tal-Bord li jkun jinvolve punt ta' dritt li jkun gie deciz mill-Bord. Dan ifisser li l-ligi ma

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taghti l-ebda dritt ta' appell minn decizjonijiet tal-Bord dwar kwistjonijiet ta' fatt, fuq kwistjonijiet ta' apprezzament ta' provi u fuq kwistjonijiet tal-ippjanar li jkunu jnvolvju semplicement aspetti teknici. Lanqas ma hemm dritt ta' appell fuq punti ta' ligi sakemm dawn ma jkunux gew decizi fid-decizjoni appellata tal-Bord.

F'dan is-sens ukoll interpretazzjoni ta' ligi pjan jew policy lanqas ma hu appellabbli quddiem din il-Qorti sakemm it-Tribunal ma jkunx mar kontra l-kliem espress tal-istess ligi, pjan jew policy jew l-interpretazzjoni hi tant assurda li tista' tipregudika applikazzjonijiet futuri jekk segwita.

F'kull kaz, thares mnejn thares lejn dan l-aggravju, il-Qorti mhix munita bil-poter li tissindikah u kwindi qed tichdu.

It-tielet aggravju

Dan l-aggravju ma fihx mis-sewwa. L-artikolu 69 tal-Kap. 504 u b'applikazzjoni tal-artikolu 41(13) fejn jitkellem dwar it-Tribunal, ghandhom jigu applikati l-pjanijiet u policies u dan b'mod mandatarju u din hi impozizzjoni diretta maghmula mill-ligi cioe l-Kapitolu 504. L-istess dispozizzjoni kienet gia tezisti bl-artikolu 33 tal-Kap. 356 illum abrogat kwazi totalment. Id-diskrezzjoni li tinghata lil Awtorita u t-Tribunal li jiddipartixxi minn pjan jew policy trid tkun wahda li tohrog car mill-istess pjan jew policy ghalkemm mhix necessarjament b'mod esplicitu. Anki jekk ghal grazzja tal-argument din id-diskrezzjoni tezisti f'dan il-kaz, tali diskrezzjoni mhix sindakabbli speċjalment meta bazata fuq konsiderazzjonijiet ta' planning jew dawk teknici.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Anthony sive Tony Cassar u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Settembru 2012. Bl-ispejjez kontra l-appellant.

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