



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tas-7 ta' Mejju, 2014

Appell Civili Numru. 43/2013

Anthony Cohen personalment kif ukoll ghan-nom u in rapprezentanza ta' Ernesto sive Ernie Muscat u ta' Maria Assunta Buhagiar, Lautu Cohen,

Bice Micallef, Esther Portelli, Amleto Muscat u Silvio Muscat, u

Agostino Xuereb illi qieghed jidher fuq il-prezenti ghan-nom u in rapprezentanza ta' uliedu Jason, guvni u Rosemary mart Malcolm Micallef, Nicole Jane Borg, Jodie Lea Goodard, Carmel Andrew Borg, Helen Muscat, Angela Crawford, John Borg, Maria Dolores sive Marie Mason, Sylvia Sciberras u Josephine Hall, Frank Muscat, Paul Peter Muscat, John Muscat,

Louie Muscat, Alfred Muscat, Rita Margaret Silva, Maria Dolores Buhagiar, Mario Muscat, Emanuel Muscat, Joseph Muscat, Victor Joseph Vella

vs

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

Kopja Informali ta' Sentenza

Il-Qorti,

Rat ir-rikors tal-appell ta' Anthony Cohen u ohrajn tat-13 ta' Gunju 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-31 ta' Jannar 2013 li laqgħet applikazzjoni PA 3782/10 magħmula minn Alfred Muscat għall-Lotto Recievers Co-Operative għal relocation and redesign lotto booth fi Triq Dun Karm, Bkara; continuation of PA 316/09;

Rat ir-risposta tal-Awtorita li preliminarjament eccepjet illi l-appell gie intavolat fuori termine billi sar fit-13 ta' Gunju 2013. Saru eccezzjonijiet ohra ta' natura preliminari pero l-appell gie differit għas-sentenza fuq din l-eccezzjoni biss;

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:-

B'applikazzjoni prezentata fil-15 ta' Lulju 2010, Full Development Permission, PA3782/10, l-appellant, dwar Lotto Booth fi Triq Dun Karm By-Pass, B'Kara talab :-

“to relocate and redesign Lotto Booth in Triq Dun Karm, B'Kara; continuation of PA316/09”.

B'ittra tas-17 ta' Frar 2011, Red 21a, Dr. Samuel Gauci għall-Lotteries and Gaming Authority iddikjara illi ma kien hemm l-ebda oggezzjoni għall-proposta.

B'ittra tal-1 ta' Marzu 2011, David Sutton għat-Transport Malta, Red 22a, iddikjara illi fil-principju ma kienx hemm opposizzjoni għall-proposta pero' irrakkomanda li jinzamm passagg ta' 2.5 metres bejn l-izvilupp propost u l-bankina biex ikun hemm access għall-vetturi f'kas ta' xi emergenza.

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L-applikazzjoni giet michuda b'rifjut tas-27 ta' Gunju 2011 ghar-ragunijiet segwenti:-

“1. The proposal runs counter to structure plan Policy BEN 2 and Central Malta Local Plan Map BKM3 since it would constitute a visual obstruction in a space intended to be left open and free of structures.

2. The proposal runs counter to Structure Plan Policy BEN 2 since it would adversely effect the visual integrity of the area.

3. The proposal does not comply with sanitary laws and regulations in that the internal height of booth room is not at least 2.75 metres high.”

Fl-appell tieghu, il-Perit Ronald Muscat Azzopardi ghall-appellant issottometta s-segwenti:-

“Following to EPC sitting and the refusal of the above mentioned file we would now like to submit an appeal against the decision taken.

First and foremost please note that we were not present for this EPC meeting, since the EPC Board saw this file before the calculated time. When we arrived the Board had already seen the file and decided negatively without us being present. We were item 11 on the Agenda and normally it is estimated that the file will be seen between 11.30 and 12.30 based on 4 sittings an hour. If one calculates the maximum of 8 sittings per hour as stated in their letter then the file should be seen approximately between 10.30 am and 11.30 am.

We were present at 10.40 am and they had already seen our file following three others. We believe that we were not treated fairly

Following the reasons for refusal and points raised in the DPAR our comments are as follows:

- Please note that our proposals were based on communication with the Board members of the previous Board at MEPA who had seen this file several times since 2009.

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- The proposal has also been discussed with architects at TM and several times with the current case officer who had never brought up any of the issues listed in the previous report before his final telecom conversation prior to sending the DPAR. We had always discussed this as being favourably considered from his end.
- The reason why PA 316/09 was withdrawn was because the changes in proposal were too much to be accepted under reconsideration although that is what we were guided to do in the first hearing.
- Once we withdrew the application we submitted a new application based on guidance given by the ex-Board members and as discussed with the Lands Department and Perit Vassallo at ADT at the time.

The location chosen now is the best location within the area since:

- It is well designed with the bus stop,
- The new proposed area is a safer location for both clients and employee.
- Existing parking spaces already exist.
- It is in a dead end road so no additional traffic will be encountered than existing.
- It is in walking distance from the nearby residential and commercial area of Swatar and Birkirkara.
- It will not affect any residents or buildings in the area.

As a lotto booth it will deem beneficiary because:

- It has a new and modern design,
- The affect of steel or aluminium would not detract from the visual integrity of the area since it is in the same lines of the existing bus stop.
- We were never requested by SEO to increase the height of the booth to 2.75m. We had followed the height of the existing bus stop to have a more conformed view.
- However, with regards to sanitary regulations please note that the booth will be constantly open to customers hence the slight difference in height would not effect the employees. If necessary we would have had no objection to amend drawings accordingly.
- The booth will be equipped with a wc which is according to EU regulations and although a large window opening will be constantly open the booth will still be equipped with a cooling and heating device.
- The employees' health is always safeguarded.

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In response to the refusal:

1. The proposal would not constitute a visual obstruction since it compliments the bus stop and the same bus stop already exists on site, hence it is not free of structures. The booth would not obstruct anything in particular beyond it. If need be we can widen the opening for the structure to contain lesser glass facades.
2. The visual integrity of the area would remain intact since the style is a modern design complimenting the new contemporary developmetns in the area. The by-pass would not encounter any additional traffic and there will be no affect on the area.
3. The internal height of the lotto booth was based on the existing bus stop. We were never requested to alter this height neither by the SEO nor by the case officer who was in constant contact. In this regard we can always propose to lower part of the kerb to allow an extra 15cm in height to be acceptable by SEO.”

L-Awtorita', fir-risposta taghha eccepjet l-inkompetenza ta' dan it-Tribunal, in vista tal-fatt li wahda mir-ragunijiet tar-rifjut tirreferi ghall-kontravvenzjoni tal-ligijiet sanitarji. Ir-risposta tghid hekk :-

"On a preliminary point, this Board does not have jurisdiction to hear and decide the refusal of this appeal, for the following reason:

The proposed development has been refused, amongst other reasons, on the grounds of infringing Sanitary Laws & Regulations (Reason for Refusal 3). This decision is based on the refusal issued by the Sanitary Engineering Officer as per minute 28 in PA file PA 3782/10. The development as proposed does not comply with Sanitary Laws and Regulations in view that the internal height of the booth room is not at least 2.75m high. Consequently unless this issue is settled, this Board cannot enter into the other reasons for refusal.

As regards this reason of refusal, this Board does not have any jurisdiction, since this is within the remit of the General Services Board, as upheld on various occasions by this same Planning Appeals Board and also as confirmed by the Court of Appeal in its decision of the 5th. of October, 2001 in the names of "Pater Holding Co. Ltd. vs Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp";

Consequently, this appeal should be dismissed for the above reason.

Without prejudice to the above, the Authority reserves its right to reply on the merits of the appeal, if it would become necessary, after the decision of this Board on the above preliminary point."

L-Avukat Dr. Antoine Naudi ghall-appellant, b'zieda ma' dak sottomess mill-Perit Ronald Muscat Azzopardi ddikjara s-segwenti :-

"i. According to a letter dated 20thMay 2011 sent to our client by the EPC Secretariat, it was stated that "This application shall be decided at Environment and Plannign Commission A at the meeting of 17 June 2011. Sitting will be held from 9.30 am onwards and this application is item 11 on the agenda". On the same letter, our client was informed that: "The EPC shall decide applications in order of item number on agenda and not on a first come basis. It is envisaged that four (4) files to eight (8) files per hour shall be presented and discussed at the Board".

ii. Due to the fact that the EPC had informed our client that a maximum of eight (8) files wer to be discussed per hour and considering that our client's application was number eleven (11) on the list, our client and his architect attended the hearing at 10.40 am --- in accordance with the EPC's guidelines --- only to be informed that the case had already been discussed and decided upon in their absence.

iii. With respect, the decision taken by the EPC, apart from being arbitrary and contrary to our client's legitimate expectations, violated our client's right to a fair hearing.

iv. Assuming that the EPC was well ahead of schedule on the day --- which still implies that it went against its own guidelines given to our client --- one questions why the case couldn't have been postponed even by a few minutes to 10.45am to ensure that, at the very least, the EPC would have been in line with its own guidelines. For the record, the EPC was already discussing case number fifteen (15) when our client arrived for his case. Without prejudice to point (iii) above, the unreasonableness and unpractical approach adopted by the learned members of the EPC Board, make a laughing stock of the entire process of adjudication and frankly defeat the scope of including guidelines on any future correspondence which the EPC may wish to send in the future."

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B'verbal registrat fis-seduta tat-28 ta' Frar 2012, dan it-Tribunal rrinvija l-kas lill-EPC billi l-perit tal-appellant kien prezenti skond kif kien gie lilu indikat b'ittra tal-20 ta' Mejju 2011, izda meta mar hemm sab li l-kas kien diga' deciz. L-EPC fil-laqgħa tad-29 ta' Mejju 2012 itratta l-kas u rregistra l-minuta numru 59.

Billi l-oggezzjoni dwar is-sanita' giet rtirata, l-Awtorita', fis-seduta tat-3 ta' Lulju 2012, dwar il-mertu, għamlet referenza għad-DPA report.

Fl-imsemmi rapport, id-Direttorat kkumenta kif geġ :-

"4.7 DISCUSSION

-- Proposed use

The proposed lotto booth lies between an arterial road (the Birkirkara Bypass/Triq Dun Karm Psaila) and a residential area, but site itself has not been assigned a particular zoning. The site is however identified on map BKM3 of the central Malta Local Plan as falling within the scope of policy BK11 of the CMLP which seeks to maximise safety along the Birkirkara Bypass and to allow for the eventual construction of bicycle lanes.

Transport Malta, which was consulted with regard to the proposed lotto booth, did not object to the proposal, and it is therefore understood that the lotto booth should pose no threat to the safety of the bypass. The lotto booth should also not provide any greater obstacle to the eventual construction of a bicycle lane than the existing bus shelter does. It was also taken into consideration that the lotto booth will be placed on Triq it-Torri, which is a dead end, such that its potential to constitute a traffic hazard would be minimal.

-- Height limitation and Design

The proposed single storey kiosk structure is 2.6m high, which falls below the maximum allowable height of 4.75m single storey buildings as specified by policy 2.1 Building Heights of the Policy and Design Guidance (2007).

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The site is not subject to a maximum height limitation by the Central Malta Local Plan, and its height is therefore to be assessed with regard to its impact on its surroundings.

In this case, it is being argued that since the lotto booth is as high as a nearby bus shelter, the two will complement each other. While it is true that, were a lotto kiosk to be approved, it should definitely not be higher than the nearby bus shelter, it cannot be stated that both these structures' impact on the surrounding environment will be the same. The principal reason for this is the fact that the bus stop is primarily made of glass, not aluminium or steel which are only used to construct one wall and a strip along the bus stop's base. The lotto kiosk on the other hand is constructed entirely of aluminium and steel, except for its apertures, such that it may be interpreted as a much more solid structure.

In this respect, the kiosk cannot be recommended favourably since it would constitute an intrusive structure at a location which is not intended to be developed (that is, on a traffic strip along the bypass).

A further reason for concern is the design of the structure itself which appears to be better suited to a temporary service structure than a permanent retail kiosk. While it is understood that the kiosk is no less attractive than conventional lotto booths, it should also be stated that those structures should not be used as benchmarks of aesthetic acceptability with regard to new construction for this use.

-- Car parking

No parking spaces were provided for the lotto kiosk in PB1623/91 which, as already stated, was not constructed as approved. The new proposal suggests that no additional parking is required in view of the existent public parking spaces and because there should be no increase in activity on site.

Nevertheless, current parking standard requirements require that retail outlets require one car parking space for every 50sqm of space. In this case, even though the area is considerably smaller than that, the fact that consumers are expected to remain outside the shop, and because the kiosk's location on a bypass may lead to customers arriving by car, a certain degree of parking requirement should be catered for.

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Since the directorate is constrained by the interim car parking standards in PA Circular 3/93, the 4.5sqm of lettable commercial space would only require the provision of one parking space. The lack of sufficient car parking spaces must therefore be mitigated through an UIF contribution of €1,164.69 per parking space, as required by Policy 4.18 of the Policy and Design Guidance (2007). This would enable the proposal to satisfy the car parking requirements specified by the Structure Plan policy TRA4 and PA Circular 3/93."

Ikkunsidra ulterjorament :-

Il-proposta tal-appellant hi li l-Banka tal-Lottu ezistenti fi Triq Dun Karm tigi rilokata u ridisinjata.

Il-motivazzjonijiet tar-rifjut huma li l-izvilupp propost jikkostitwixxi awtorizzazzjoni fi spazju li kien intis biex jibqa' liberu minn kull strutturi; li l-proposta hi in kontravvenzjoni tal-iStructure Plan Policy BEN2 billi tippregudika l-'visual integrity' tal-lokalita'; u li l-proposta hi in kontravvenzjoni tal-Ligijiet sanitarji billi l-Banka tal-Lottu proposta m'ghandhiex gholi intern ta' 2.75m.

B'ittra tat-28 ta' Mejju 2012, il-Perit Ronald Muscat Azzopardi ghall-appellant ipprezenta pjanti emendati li juru tibdil fl-gholi biex il-proposta tkun konformi mal-ligijiet sanitarji. It-tielet motivazzjoni tar-rifjut ghalhekk m'ghadhiex aktar applikabbli.

Dwar l-oggezzjoni li l-izvilupp propost jikkonsistiwixxi 'a visual obstruction' jigi rilevat li fil-vicin diga hemm bus stop u l-banka tal-lottu proposta tista' tkun kompatibbli mal-istruttura tal-bus stop ezistenti, kemm dwar id-disinn kif ukoll dwar il-materjali.

Is-sit propost hu definitivament ahjar mis-sit originali, billi ma jinsabx fuq il- By-Pass, fejn it-traffiku hu voluminuz u ghalhekk jista' jikkostitwixxi periklu ghall-klijenti tal-banka tal-lottu; izda f' 'dead end road' fejn ma jezisti l-ebda periklu ta' traffiku.

Billi l-Banka tal-Lottu proposta tinsab vicin l-area residenzjali tas-Swatar u Birkirkara, din ser tattira principalment, klijenti li jirrisjedu f'dik il-lokalita u jmorru bil-mixi. Il-proposta, aktar minn inkonvenjent ghar-residenti, ser tipprovdi servizz ghalihom u ghalkemm vicin is-sit originali, fejn qed tigi proposta illum, m'hemm

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assolutament l-ebda periklu, b'differenza tas-sit originali li kien perikoluz minhabba l-vicinanza ghat-traffiku voluminous.

Ir-rakkomandazzjoni tat-Transpost Malta, li jinzamm passagg ta' circa 2.5m bejn l-izvilupp propost u l-bankina ezistenti, ghandha tigi imposta bhala kundizzjoni; billi f'kas ta' emergenza jinhtieg access ghall-vetturi.

Ezaminata fid-dettal il-proposta tal-appellant, fil-kuntest tal-ippjanar rilevanti u tal-motivazzjonijiet tar-rifjut, bl-imposizzjoni ta' certi kundizzjonijiet, l-appell jimmerita kunsiderazzjoni favorevoli.

It-Tribunal ghalhekk qed jiddisponi minn dan l-appell billi jilqa' l-istess, jirrevoka r-rifjut tas-27 ta' Gunju 2011 ghall-applikazzjoni PA 3782/10 u jordna li l-appellant jinghata l-permess kif minnu mitlub b'zieda tas-segwenti kundizzjonijiet ma' dawk normalment impost f'applikazzjonijiet simili cioe; li l-permess ghandu jkollu validita' ta' 10 snin b'dan li jekk qabel 10 snin issir xi modifika fil-konfigurazzjoni tat-toroq, pjazez u banikini fil-vicinanzi immedjati tas-sit, il-permess ma jibqax validu u l-proposta tigi kkunsidrata fil-kuntest ta' dan il-Pjan ghall-Lokalita'; li d-disinn u l-materjali tal-Banka tal-Lottu proposta ghandhom jkunu kompatibbli mal-bus stop ezistenti fil-vicin; li jinzamm il-passagg liberu kif suggerit mit-Trasport Malta biex ma jkun hemm l-ebda diffikulta' ghall-vetturi fl-eventwalita' ta' xi emergenza, ghandhom jigu prezentati pjanti mill-appellant li jinkorporaw il-premess fi zmien xahar li ghandhom jigu approvati mill-Awtorita' u kkonfermati minn dan it-Tribunal.

Ikkunsidrat

Din hi decizjoni dwar jekk l-appellanti pprezentawx l-appell entro t-terminu preskritt fil-ligi. Id-decizjoni tat-Tribunal ittiehdet fil-31 ta' Jannar 2013. Hu pacifiku li d-decizjoni hi wahda finali fejn l-izvilupp gie approvat soggett ghal certu kondizzjonijiet mahruga fil-permess.

L-artikolu 41(6) tal-Kap. 504 jistupula li t-terminu biex jigi prezentat appell minn decizjoni tat-Tribunal hu ta' ghoxrin jum mid-data tad-decizjoni.

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L-appell gie prezentat aktar minn erba' xhur wara li nghatat id-decizjoni cioe fit-13 ta' Gunju 2013 u kwindi hu fuori termine. Dan it-terminu hu wiehed perentorju u hu ta' ordni pubbliku u kwindi ebda eccezzjoni jew skuzanti ma hi premessa.

L-appellant jargumenta illi d-decizjoni tal-31 ta' Jannar 2013 ma kinitx decizjoni ghaliex fil-parti decisiva t-Tribunal ordna li jigu prezentati pjanti godda kif jirrizulta mill-kundizzjonijiet imposti u li dawn il-pjanti kellhom jigu prezentati fi zmien xahar u approvati mill-Awtorita u konfermati mit-Tribunal.

Il-Qorti ma tqis li dak li ghamel it-Tribunal fil-31 ta' Jannar 2013 kien jikkostitwixxi xi haga ohra ghajr decizjoni b'ordni li biex l-applikant juzufriuxxi ruhu mill-permess mahrug taht kundizzjonijiet specifici kellu jipprezenta pjanti li jirrispekkjaw d-decizjoni tat-Tribunal. L-appell ma jsirx mill-prezentata tal-pjanti jew l-approvazzjoni taghom jew mid-data tal-hrug tal-permess izda mid-data tad-decizjoni li fih ikun intlaqghet jew giet rifjutata applikazzjoni cioe f'dan il-kaz mill-31 ta' Jannar 2013.

Hu l-hrug tal-permess li hu dipendenti mill-applikant billi jottempera ruhu mad-decizjoni tat-Tribunal bil-prezentata tal-pjanti approvati skond kif impost fid-decizjoni. Pero b'daqshekk ma jfissirx li t-Tribunal ma hax decizjoni. Anzi jirrizulta l-kuntrarju u argumenti kuntrarju ma jaghmilx sens logiku jew legali. L-artikoli 41(1) u 41(6) u 41(14) tal-Kap. 504 huma cari u kategorici u jikkonfermaw dak li qed tghid din il-Qorti.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-eccezzjoni tal-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar li l-appell giet intavolat fuori termine u kwindi hu irritu u null ghall-effetti kollha tal-ligi. Spejjez ghall-appellanti.

< Sentenza Finali >

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