



MALTA

**QORTI TA' L-APPELL**

**ONOR. IMHALLEF**

**MARK CHETCUTI**

Seduta tat-8 ta' Ottubru, 2014

Appell Civili Numru. 159/2012

**Joe Bartolo**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell ta' Joe Bartolo tas-16 ta' Ottubru 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Settembru 2012 li cahdet l-applikazzjoni PA 254/10 'internal alterations and additions at second floor and penthouse levels';

## Kopja Informali ta' Sentenza

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

Rat l-atti kollha;

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

B'applikazzjoni tat-22 ta' Jannar 2010 – Full Development Permission – PA/254/10 fejn l-appellant, f' Nri 18, 19, 46, 46I, 46J, 46K, Triq Dun Frangisk Zahra/ Triq il-Kbira, Mellieha talab:

“internal alterations and additions at second floor and penthouse levels.”

L-applikazzjoni giet michuda b'rifjut tal-1 ta' Lulju 2010; saret talba ghal reconsideration u r-rifjut gie kkonfermat mill-EPC fis-6 ta' April 2011 ghar-ragunijiet segwenti :-

“The proposed development does not comply with policy 2.3 of Development Control Policy & Design Guidance 2007 which requires that on sloping street frontages, buildings are stepped from the point on the frontage at which the basement exceeds 1.4 metres in height above street level. Part of the resulting building exceeds the area's height limitation and thus also runs counter to the North West Local Plan.”

Il-Perit Anthony Fenech Vella ressaq l-aggravji tal-appellant kif gej:

“Although there are several slight adjustments included with this application. the main issue has been the extension to the penthouse level on the elevation on Triq Frances Zahra and which MEPA are maintaining is not in line with DCG Policy 2.3 which deals specifically with such situations.

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We maintain that Policy 2.3 was designed to create a general principle that the skyline should reflect the lie of the street gradients and whilst it is inconceivable that they would be similarly sloped, the idea is that they are gradual and relate also to the building to make it readable. For the sake of being simply technically precise, the effect would create too intensive stepping which is unsightly so, in fact, it indicates that facade should be of a consistent nature before application of a step is put in.

In fact, Policy 2.3 the X measurement is not tied to a max of 1.4m but is to be judiciously applied so much so that the policy states that it has to be at least 7.2m long before any stepping is considered, even if the X measurement of 1.4m. is exceeded .. This is exactly what we are proposing

We have referred to several other permits issued in the area with our type of basement heights and namely :-

PA3552/04, PA 5858/04, PA 3009/05, PA4003/05, PA 7204/07, PA3173/08, PA3629/09, and PA4069/09.”

Fir-rapport taghha l-Awtorita' ressqet il-kummenti taghha kif gej:

### “5.0 COMMENTS ON APPELLANT'S ARGUMENTS & REFUSAL NOTICE

5.1 As justification for appeal the appellant is arguing (in brief) that the proposal is in line with DC2007 Policy 2.3, which states that the stepping of a building along a slope with a basement can take place at the point where the height of the basement can exceed 1.4 metres and that the length of the facade has only to be at least 7.4 metres (i.e it can be even longer). The appellant has also quoted a number of permits which according to him are similar and sustain his arguments.

5.2 The Directorate has the following comments to make:

The proposed extension to the second floor apartment overlooking Triq Frangisk Zahra runs counter to DC 2007 Policy 2.3, which regulates the height of buildings on sloping street frontages. The policy requires that from the point on the frontage at which the basement exceeds 1.4 metres in height above street level onwards,

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the building shall be stepped in accordance with the site topography such that the building conforms to the height limitation and that each stepped frontage is at least 7.4m.

It is true that measurement X is explained in drawing 2.3A accompanying Policy 2.3 in DC 2007 that it can be more than 1Am when the stepping occurs subject that the higher facade is at least 7.4m (as well as the remaining length of the lower facade). However contrary to what the appellant is implying, this does not mean that the point where the stepping occurs is to be arbitrary. What this drawing means is that there should be no stepping of the building yet at the point where the basement level is already 1.4m above street level but the facade is not yet 7.4m in length.

The original development, approved by way of outline permit PA5235/06, is in line with this policy. Actually it was only upon submission of drawings conforming to this policy was PA 5235/06 approved.

Therefore in view of the above, the proposed extension runs counter to DC2007 Policy 2.3 and part of the building would exceed the area's height limitation of three floors. Thus the proposal cannot be favourably recommended.

The height limitation for the area is 3 floors and 3 courses as defined in Map 28 of the North West Local Plan. With the proposed extension part of the building will have a height of four floors. The height limitation is being exceeded.”

Permezz tat-Tieni statement taghha l-Awtorita' ressqet il-kummenti taghha kif gej:

### “1.0 COMMENTS ON APPELLANT'S ARGUMENTS

The Authority has noted arguments, the submitted site plan, photos which includes PA numbers of other buildings in this area. The Authority has noted these applications and states:

PA 5858/04: To erect basement garage, ground floor and first floor maisonettes at Mellieha. Recommended by Planning Directorate and DCC approved 10/5/05 (in line with this DC 2000 policy 2.3 Building Height on Sites with Sloping Street Frontage-All Buildings except Detached and Semi Detached Dwellings)

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PA 3009/05: Construction of additional receded floor over existing development. Permit issued on 16/3/06. (DCC 9203305 held on 05th September 2005 -Approved since proposal is in line with DC 2005 policy 2.5) (in line with this DC2005 policy 2.3)

PA 7534/05: Demolition of existing dwelling and garage and construction of basement garages and overlying flats. DCC approved on 21/2/06. This application is not applicable since this is Outline Development Permit. PA 4003/05: Amendments to all floors, additions to second floor level and construction of penthouse instead of washrooms. DCC approved on 28/3/06 (in line with policy 2.3)

PA 4663/06: To demolish existing garage and erect basement garages and overlying maisonettes, flats and penthouses. Recommended by Planning Directorate and DCC approved on 3/5/07 (in line with DC 2005 policies)

PA 7018/06: Amend plans at levels (third floor, penthouse and roof plans) to diminish set back at penthouse level. Recommended by Planning Directorate and DCC approved on 12/3/07 (in line with DC 2005 policies) &

Previous permit PA 6797/05: To erect basement garages, ground floor garages & flats and first, second, third floor flats & penthouses. Recommended by Planning Directorate and DCC approved on 28/6/06. (in line with DC 2005 policies)

PA 1892/07: Construction of basement garages, overlying flats and penthouse (5 no garages, 5 apartment units, 1 penthouse) Recommended by Planning Directorate and DCC approved on 11/10/07 (in line with Policy and Design Guidance 2007 Policy 2.3)

PA 2858/07: Demolition of existing premises and construction of 13 basement garages, 14 apartments at ground/first/second and 2 apartments at penthouse level. Recommended by Planning Directorate and DCC approved on 30/10/07 (in line with DC 2007 policies)

PA 6257/07: To excavate site and construct five reservoirs at level under basement, five garages at basement level, one maisonette at ground floor level, one flat at first

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floor, one flat at second floor and penthouse on top. Recommended by Planning Directorate and DCC approved on 29/4/08 (in line with DC 2007 policies) &

Previous permit PA 5282/04: To excavate site and construct reservoirs at level under basement, 5 garages at basement level, 1 maisonette at ground floor, 1 flat at first floor, 1 flat at second floor and 2 washrooms at roof level. Recommended by Planning Directorate and DCC approved on 14/3/05 (in line with DC 2000 policies)

PA 7204107: Proposed basement garage, class 4 shop and overlying flats. Recommended by Planning Directorate and DCC approved 1916108. (In line with DC 2007 policies) & PA 3016106: To demolish existing premises & re-erect basement garage, class IV shop & overlying maisonette. DCC approved on 24/4/07. (In line with DC2005 policies)

PA 3173/08: Alterations to existing first floor and addition of second floor and penthouse level. DCC approved on 3/12/08 (in line with DC 2007 policy 2.3)

PA 2535/09: To erect basement garages, three overlying residential units and penthouse. Recommended by Planning Directorate and DCC approved 12/4/10 (in line with DC 2007 policies) &

Previous permit PA 7091/07: To demolish existing garage and dwellings and erect basement garages and six overlying residential units. Recommended by Planning Directorate and DCC approved on 28/7/08. (in line with DC 2007 policies)

PA 2952/09; Demolition of existing and construction of shop, apartments overlying garages DCC approved on 30/6/10 (in line with DCC 2007 policy 2.3) &

Previous permit PA 3552/04:: Demolition of existing and construction of shop and apartments and one duplex overlying and five garages. Appeal upheld on 18/1/08 (in line with DC 2000 policy 2.3)

PA 3629/09: the sanctioning of the excavation of an additional basement level in which three stores are proposed and external and internal alterations to the existing building. Recommended by Planning Directorate and DCC approved on 15/2/10 (in line with DC 2007 policies)

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PA 4069/09: Change of use of ground floor level, accessible from the side of Triq il-Kappillan Magri, from garage to apartment; alterations on total facade on Triq il-kappil/an Magri and construction of internal walls for proposed apartment. DCC approved on 1/7/10 (in line with DC 2007 policies)

PA 1042/10: To sanction additions and alterations to existing holiday flats from originally approved in PA4489/88. DCC approved on 29/7/10 (In line with DC 2007 policy 2.3)

PA 3279/10: To create new flat at ground floor level. DCC approved 16/2/11 (Approved 5- o - Approved provided that perit shall within 5 days submit fresh plans to SEO which address the said matters related to SEO. Any other alterations not so related shall not be considered and shall not be construed as approved. Standard conditions to apply. Reason for overturning: The fresh elevation plans have addressed the problem and building now appears as 3 floors).

Previous permit PA 5086109: To extend apartment to connect basement level to adjoining building and minor alterations. Recommended by Planning Directorate and DCC approved on 18/5/10. (in line with DC 2005 policies.) Previous permit PA 1576107: Intermediate floor at basement level and minor amendments (demolition and re-erection of garages/fiats. DCC approved on 25/2/08 (in line with DC 2007 policies)

Previous permit PA 1962/05: Demolition of existing dwellings and construction of garages and flats. DCC approved on 10/4/06 (in line with DC 2005 policy 2.3)

On the other hand the case under appeal runs counter to DC 2007 Policy 2.3 Building Height on Sites with Sloping Street Frontage-All Buildings except Detached and Semi Detached Dwellings and thus resulting that part of the building would exceed the area's height of three floors and 3 courses basement as defined in Map 28 of the North West Local Plan.

Moreover this issue of existing buildings vis-a-vis higher buildings is also supported by the argument with regards to the new law. Section 69 (2) (i) of the new law clearly specify that any reference to existing buildings within the area with a higher height is no longer relevant since such 'commitments' are no longer to be considered if the proposed (as well as any sanctioning) resultant height is not permissible.

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Whist the Board is invited to take note of the above short comments on each file, the Authority reiterates that none of the above cited cases had identical planning considerations to the case under appeal as can be verified through the files themselves in the light of their location, surrounds, policies applicable at the time of those decisions and any other particular planning considerations which had resulted in a positive conclusion. In this respect, reference is made to the Authority previous reports and respectfully asks the Tribunal to confirm the DCC's decision.”

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba ghal alterazzjonijiet u addizzjonijiet fit-tieni sular u s-sular tal-penthouse.

Is-sit mertu ta' dan l-appell jinsab fl-indirizz Nri 18, 19, 46, 46I, 46J, 46K, Triq Dun Frangisk Zahra/ Triq il-Kbira, Mellieha.

Din l-applikazzjoni giet rifjutata peress li l-izvilupp propost mhuwiex konsistenti mal-policy 2.3 ta' Development Control Policy & Design Guidance 2007 li tirrikjedi li fuq sloping street frontages, il-bini jkun imtarrag mill-punt tal-faccata fejn il-basement jeccedi l-gholi ta' 1.4 metri fuq il-livell tat-triq. Parti mill-bini jeccedi l-limitazzjonijiet tal-gholi taz-zona u ghalhekk imur kontra l-pjan lokali.

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

L-appellant jissottometti li l-iskop tal-policy 2.3 huwa sabiex jigi stabbilit principju generali li l-iskyline tirrefletti il-gradient tat-triq, Skond l-istess appellant il-faccata tal-binja relattiva ghandha jkollha natura konsistenti qabel tiddahhal targa, u li jezistu diversi zviluppi tal-istess tip fiz-zona.

L-Awtorita' tissottometti li l-izvilupp propost imur kontra DC 2007 Policy 2.3, u li kuntrarjament ghal dak allegat mill-appellant fil-fatt ma ghandhux ikun hemm stepping tal-bini fejn il-basement huwa di gja 1.4m fuq il-livell tat-triq izda l-faccata mghandiex 7.4m tul. F'dan is-sens il-proposta tmur kontra l-policy 2.3 u parti mill-bini sejjer jeccedi l-limitazzjoni ta' tlett sulari – parti mill-bini ser ikolli l-gholi ta' erba sulari.



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Applikazzjonijiet għall-izvilupp, skond l-Artikolu 69 tal-Att X ta' 2010 Kap 504 jigi kkonsidrati u determinati principalment skond l-Plans u l-Policies; u tinghata importanza wkoll għall-kunsiderazzjonijiet materjali fosthom dawk ambjentali, estetici u sanitari li l-Awtorita' jista jidhrilha li huma rilevanti.

Fil-kaz in ezami irrizulta li l-proposta tal-appellant hi inkontravvenzjoni tal-Policy 2.4 tal-Policy and Design Guidance 2007 li tirregola zviluppi f"“sloping streets”.

Effettivament fl-eventwalita li l-applikazzjoni għall-estenzjoni tigi milqugħa l-izvilupp ikollu għoli ta' (4) erba' sulari. Skond l-Map 28 ta' North West Local Plan l-height limitation għal din l-lokalita' hi ta' (3) tlett sulari u (3) tlett filati basement. Dan iffisser li l-bini propost jeccedi l-height limitation kif stabbilita fil-Local Plan.

Il-Perit tal-Appellant għamel referenza għal diversi permessi li fil-fehma tiegħu huma simili għal kaz in ezami.

L-Awtorita', fis-second statement tagħha kkummentat kull kaz individwalment, u tat spjegazzjoni sufficjenti għalhiex dawn m'humiex perfettament analogi għall-appell prezenti.

F'kwalunkwe kaz, skond l-Artikolu 69(2)(i) provisio tal-Kap 504 l-ebda zvilupp fil-vicinanze ma għandu jigi interpretat jew uzat biex tghola l-height limitation sabbilita fil-pjan.

Billi l-bini propost jeccedi l-height limitation indikat fin-North West Local Plan, l-appell ma jistax jinghata kunsiderazzjoni favorevoli.

It-Tribunal għalhekk qed jiddisponi minn dan l-Appell billi jichad l-istess u jikkonferma r-rifjut tas-6 ta' April 2011 għall-Aplikazzjoni PA 0254/10.

## Ikkunsidrat

L-aggravji tal-appellant huma s-segwent:

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1. It-Tribunal ghamel interpretazzjoni zbaljata tal-policy 2.3 tad-Development Control Policy and Design Guidance 2007 dwar bini fi gradient u dan peress li f'permessi ohra fil-vicinanze inghataw permessi identici u dan juri kif f'dan il-kaz l-interpretazzjoni tat-Tribunal hi hazina, iktar u iktar meta l-istess Tribunal allacjah b'mod superficjali mal-argument illi skond l-artikolu 69(2)(i) tal-Kap. 504 li ebda zvilupp fil-vicinanze ma ghandu jigi interpretat bhala rilassament tal-height limitation stabbilit fil-pjan lokali;

2. It-Tribunal messu kkonsidra s-sottomissjoni tal-appellant dwar il-commitment fiz-zona u jekk gustifikat jilqa' l-applikazzjoni anki fejn l-applikant qed jitlob rilassament tal-height limitation. Dan jiggustifika l-ugwaljanza fit-trattament ta' applikazzjonijiet u nuqqas ta' diskriminazzjoni fil-konfront tal-applikant.

### **It-tieni aggravju**

Il-Qorti ser tibda b'dan l-aggravju. L-appellant qed jissottometti li f'din l-applikazzjoni tqajmet il-kwistjoni tal-commitment u ma gietx trattata. Din il-Qorti ma taqbilx. It-Tribunal fil-kunsiderazzjonijiet tieghu irrefera ghal permessi elenkati mill-appellant biex jiggustifika s-somiljanza mal-applikazzjoni tieghu u ghalhekk il-hrug tal-permess. Din il-Qorti li rat il-process pero kull ma sabet hu illi l-perit tal-appellant elenka biss sensiela ta' permessi fejn pero ma ggustifikax bl-ebda mod kif dawn huma 'identici', kif jallega l-appellant f'dan l-appell, mal-izvilupp tieghu. L-Awtorita dahlet f'kull permess kwotat mill-appellant u spjegat ghaliex kienu inhargu l-permessi u kif dawn ma kienux identici jew simili ghal kaz in kwistjoni. L-appellant ma irribadiex ghal dawn is-sottomissjonijiet. It-Tribunal ighid li l-ispegazzjoni tal-Awtorita kienet sufficjenti biex turi li mhux perfettament analoga ghall-appell prezenti. Kwindi ma jistax jinghad kif qed jigi allegat, illi t-Tribunal ma kkunsidrax il-kwistjoni. Pero ovvjament it-Tribunal hu marbut bil-provi prodotti u jrid juza dawn il-provi skond ix-xejra moghtija lilhom mill-partijiet. F'dan il-kaz it-Tribunal kellu principalment sottomissjoni dettaljata tal-Awtorita fuq il-kwistjoni ta' commitment rigward permessi simili jew identici u ghazel, kif ghandu kull dritt, li jakkolji l-ispegazzjoni tal-Awtorita mhux tal-appellant li lanqas giet sostanzjata fid-dettal izda biss ressaq elenku ta' numri ta' permessi minghajr kjarifika ulterjuri.

Kwindi dan l-aggravju kif maghmul mhux gustifikat.

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Il-Qorti pero ma tiegafx hawn ghaliex it-Tribunal wasal ghad-decizjoni primarja tieghu fuq il-fatt illi l-izvilupp kif propost kien jivvjola l-height limitation impost f'North West Local Plan skond Map 28. Dwar dan l-appellant ighid biss illi l-commitment semmai ghandu jipprevali fuq applikazzjoni stretta tal-height limitation. Din il-Qorti kif preseduta ma taqbilx kif gia diversi drabi esprimiet ruhha fuq din il-kwistjoni u kif it-Tribunal ukoll qed jimxi bl-istess kejl. Fejn il-ligi, pjan jew policy hi cara allura ma hemmx lok ghal ebda kunsiderazzjoni ohra li tista' xxejjen dak li jrid il-legislatur. Jekk saru zbalji jew abbuzi amministrattivi f'kazijiet ohra, din hi kwistjoni li mhix fil-kompetenza ta' din il-Qorti. Din il-Qorti tiggudika biss il-fattispeci tal-kaz quddiemha in linea mal-ligi, pjanijiet u policies applikabbli fiz-zmien tad-decizjoni. Hu minnu illi l-ligi stess tghid li fil-valutazzjoni jridu jigu kunsidrati kwistjoni ta' sustanza izda dawn qatt ma jistghu jwasslu biex jigu injorati l-ligijiet, pjanijiet u policies relatati mal-ippjanar sakemm ma tinghatax kejl ta' diskrezzjoni li tohrog mill-istess ligijiet, pjanijiet u policies. F'dan il-kuntest it-Tribunal irrefera ghall-artikolu 69(2)(i) tal-Kap. 504 li ebda zvilupp fil-vicinanze ma ghandu jigi interpretat jew uzat biex joghola l-height limitation tal-pjan. Din hi konkluzjoni specifika u cara maghmula fil-ligi biex teskludi tali argument bhala kwistjoni ta' sustanza li ghandha tigi kunsidrata mit-Tribunal.

## L-ewwel aggravju

Dan l-aggravju ma hu xejn hlief talba tal-Qorti biex tissindaka interpretazzjoni ta' policy. Hemm differenza bejn applikazzjoni hazina ta' policy li l-Qorti ghandha obbligu tinvestiga u interpretazzjoni ta' policy fejn il-Qorti hi prekluzza milli tikkunsidra sakemm tali interpretazzjoni ma tmurx kontra l-kliem espress tal-listess jew l-interpretazzjoni hi tant assurda li tkun perikoluza li tithalla ghax tikkreja ingustizzja manifesta mal-parti u tkun ta' skoll ghal applikazzjonijiet futuri. F'dan il-kaz l-appellant qed jitlob lil Qorti tidhol fl-aspett purament tekniku tal-policy 2.3 biex tasal hi dwar l-interpretazzjoni li ghandha tinghata cioe jekk hux dak li tat l-Awtorita jew dak sottomess mill-perit tal-appellant. Ma hemm ebda kwistjoni ta' applikazzjoni hazina tal-ligi ghal kaz, izda biss nuqqas ta' qbil dwar kif mill-aspett purament tekniku ghandha tinghata l-policy li zgur ma hux il-kompitu tal-Qorti li tikkunsidra. In kwantu ghal permessi simili li skond l-appellant jissostanzjaw l-interpretazzjoni hazina moghtija u r-rilassament ta' policy jew ligi din il-Qorti gia esprimiet ruhha fuq il-kwistjoni fl-aggravju precedenti.

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Ghalhekk dan l-aggravju qed jigi michud.

**Decide**

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Joe Bartolo u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Settembru 2012. Bi ispejjez kontra l-appellant.

**< Sentenza Finali >**

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