



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tat-8 ta' Ottubru, 2014

Appell Civili Numru. 56/2013

Michael Fenech bhala mandatarju ta' Glenn Ace Fenech

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Glenn Ace Fenech tad-19 ta' Awwissu 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-30 ta' Lulju 2013 li cahdet l-applikazzjoni PA 2746/10 ghal zvilupp ta' blokk konsistenti f'semi basement garage, maisonette, apartments u overlying penthouse;

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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, fil-21 ta' Marzu 2011, irrifjutat l-applikazzjoni outline development permission PA 2746/10 – Site at Triq Tonin Attard, Marsaxlokk: To erect semi-basement garage, maisonette, apartments plus overlying penthouse.

L-unika raguni ghar-rifjut kienet is-segwent:

“1. The proposed development does not have a frontage on a schemed road and fails to comply with the criteria of policy 3.8 of Development Control Policy & Design Guidance 2007 in terms of design and layout, access, outlook and provision of open space.”

B. In-nota tal-Perit Ian Cutajar ghall-Appellant, ipprezentata fit-30 ta' Marzu 2011, senjatament il-punti segwenti:

“[...] the refusal has been motivated with the claim that proposed development does not have a façade on schemed road. In fact it has a development on a private pedestrian access that was already recognised by MEPA in the approval PA 679/08. this permit includes for residential units with façade on this private access, which units cannot be accessed from anywhere else.

The site is wholly owned by applicant and it also enjoys right of passage through the part of the private access that fronts third party property. Although the access is a private one, it is shared by all owners of plots facing this private drive – leading to a buffer zone around the old church in the area – and this should be considered as justification for the refusal of the said permit application.”

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C. In-nota responsiva ta' Edward Borg ghall-Awtorita', ipprezentata fl-4 ta' Lulju 2011, inter alia l-punti segwenti:

"5.1.3 At the outset it has to be noted that the adjacent development approved in PA 679/08 has frontages on two streets (front and rear) and was approved with a self-imposed setback from the official building alignment in order to obtain a wider frontage. In this case, the site does not have a frontage on a schemed road and the only access is through the setback approved on the adjacent third-party site (despite Cert. of Ownership A).

The site under consideration can only be developed as internal residential development (no frontage on a public street - see DC 2007 Glossary) and therefore DC 2007 Policy 3.8 applies. This policy requires that such development should normally take place as comprehensive development, with suitable access for vehicles and pedestrians, with proper outlook and privacy, with the provision of public open space, and without creating exposed party-walls.

The proposed development fails to meet the criteria of DC 2007 policy 3.8 in that it is not being designed as a comprehensive development, there will be no outlook except for a 5m separation between the façade and the exposed party-wall on the opposite site, vehicular access will be in conflict with the pedestrian access on the adjacent plot, emergency/servicing vehicles cannot reach the site; and an extensive exposed party-wall will be created.

As regards to the arguments of the appeal itself, the Authority disagrees with appellant's statement on various accounts and will be explained below.

The Tribunal is notified that the site lies within a part of residential area but not fronting a schemed road of Marsaxlokk Local Plan. Appellant submitted a copy of a contract (docs. 11a-11b) showing that the site is owned by the applicant and it also enjoys right of passage. In addition appellant also argues that the adjacent site has been granted a development permit (PA 679/08) on a private pedestrian access. However it is to be noted that the quoted permit PA 679/08 has two frontages, with one of them facing a schemed road and the other one fronting a self-imposed setback in order to obtain a wider frontage. With regards to the quoted contract submitted by appellant, the legal office stated that 'the contract at red 11 indicates that there are rights of passage over various plots. As such this plot may be accessible to a private passage. This still confirms that the plot in question does not have a frontage on a schemed road' (min. 24).

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Furthermore the DCC board (minute 18) requested architect to liaise regarding possibility of submitting a PC application for the creation of a road in front of the premises up to Triq iz-Zejtun. However the appellant does not agree with the creation of a new road through a PC application since the access is through a private road which is shared by all owners of plots facing this road (doc. 23a)

The Tribunal may wish to note that the proposed development cannot be considered as to qualify under the criteria of Policy and Design Guidance 2007 policy 3.8 unless it is designed as comprehensive development covering the whole site. (and not individual plots). The residential units should be designed with a proper outlook onto a central public open space and where third-party walls are not left exposed; no new exposed party-walls are created, where pedestrian and vehicular access are adequate and separate; and where emergency/service vehicles can reach/exit the site. The way the site is being proposed for development is similar to that of a site with a frontage on a schemed road, the only difference is that there is no schemed road and applicant is not willing to apply to include an official road through a PC application (doc 23a).”

D. In-nota ta' sottomissjonijiet tal-Avukat Dott. Richard Camilleri ghall-Appellant, ipprezentata waqt is-Seduta numru 56 mizmuma fil-21 ta' Lulju 2011, precizament il-punti segwenti:

“2. In terms of the DC 2007 Glossary ‘internal development means residential development which takes place on backland, land without a frontage on an existing public street or with only a narrow frontage onto a public street

3. Without prejudice to any other arguments made by the appellant, it is submitted that, contrary to the conclusions of the Authority, the site in question does in have a frontage on a street over which the public has a right of access and transit and that consequently policy 3.8 of DC

2007 is not applicable.

3. It should be noted at the outset that, in terms of Maltese law and a long line of Maltese Court judgments, a road or a street can be open to the public and the public has a right of access and transit through that street even though the land over which it passes is private property. The judgments are quoted below.

Definitions

5. The DC 2007 Glossary defines the word 'street' by reference to the word 'road'. It states 'road means any street or highway used by vehicular traffic (and has the same meaning as in the Development Planning Act). The terms road, street and highway are used interchangeably in this policy document and all have the same meaning.'

6. Article 2 of both the Development Planning Act (Cap. 356) and the Environment and Development Planning Act (Cap. 504) define 'road' as 'any highway or road, whether public or private, and includes any street, square, court, alley, lane, bridge, footway, passage or quay, whether thoroughfare or not.'

Court Judgements

7. In the Court of Appeal (Criminal Jurisdiction) decision "Il-Pulizija vs Vincenzo Cauchi" (1110111941), the Court held:

'Il-proprjetarju ta' triq privata li tkun infethet ghall-pubbliku ma jistax jaghlaqha, Jew ifixkel il-passagg tal-pubbliku minnha. Ghax la darba dak il-proprjetarju jkun ippermetta jew ittollera l-passagg tal-pubbliku, ghalkemm huwa jikkonserva d-drittijiet tieghu ta' proprjetarjufuq it-triq, "si et quatenus", dik: it-triq issir pubblika kwantu ghall-uzu taghha, u tinholoq servitu' ta' transitu.'

8 In another Court of Appeal (Criminal Jurisdiction) decision 'La Polizia vs Giovanni Desira,' (12/0111924), it was held:

'La legge considera che il privato, contribuendo il proprio suolo alla formazione di una strada che egli apre al pubblico, voglia assoggettarla alla servitu' di transito pubblico, e conservandone la proprieta', ne ritiene gli oneri.'

9. In the Court of Appeal (Civil Jurisdiction) decision 'Anna vedova Fava vs Giuseppe Portelli' (1211211919), the Court held:

'Che le strade vicinali costruite dal privato sopra suolo proprio ed aperte all 'uso pubblico sia per destinazione o per tolleranza di coloro che l 'avessero formate, sono pubbliche soltanto quanto all 'uso perche ' ognuno puo ' transitarvi, e sono

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sottoposte alia vigilanza dell 'autorita' pubblica per assicurarne la nettezza e che non siano di pericolo ai passanti.'

Conclusion

10. The facts show that the street over which the proposed development has a frontage, although it has not been transferred to the authorities and is still private property has been opened to the public and there are rights of public access and public transit.

11. In the light of the foregoing, the proposed development does not constitute internal development and policy 3.8 of DC 2007 is not applicable."

E. In-nota ta' sottomissjonijiet tal-Perit Ian Cutajar ghall-Appellant, ipprezentata fit-12 ta' Settembru 2011, precizament il-punti segwenti:

"The issue raised in this plea regards the access to the site owned by applicant. Contrary to what the planning directorate is stating, the common area exists by virtue of the deed of division of a larger area into the three plots, viz plot developed as per PA 679/08, applicant's plot and remaining plot belongings to a third party. Copy of this deed was submitted to the Directorate and is in file of PA 2746/10.

Although the site of PA 679/08 has two frontages, a cursory look at the approved plans shows that developments on each frontage are separated by backyards above basement level and therefore the frontage on the common area was treated as a normal street frontage. Moreover it is not true that PA 679/08 was approved with a self imposed front setback so as to create a larger elevation. This does not result in any way from the processing of this application and owner applied for development of his plot with frontage in line with existing street frontage to respect his obligation as per above mentioned deed and for no other reason.

In practice there is no other way how to develop applicant's site than as applied – a proposal that makes full use of the blank party wall approved in PA 679/08. This is evident from the attached block plan.

As regards the quoted policy on internal residential development (3.8 of DCC 2007) this same policy says that this should normally take place as a comprehensive

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development. The word normally signifies the acknowledgment of the possibility of situations where a comprehensive development is not required, and is submit that in this particular circumstance the need for a comprehensive development does not arise and is superfluous.”

F. In-nota second statement ta' Mario Scicluna ghall-Awtorita', ipprezentata fis-7 ta' Novembru 2011, inter alia l-punti segwenti:

“The Authority reiterates that the site in question does not have a frontage on a schemed road and this to what is stated to the latest two submissions in which it is claimed that this is not the case. The Tribunal is invited to assess the site plans and the other documentation and plans related to this issued and decide on which road the new building (i.e. not the adjacent one which is cited several times as PA 679/08) since the only way it would be access is through the formation of a new road which has, on its own account be separately applied for through a formal PC application so that the Authority could assess (along with consulting the relevant other authorities) whether the proposed road (which is claimed to be also used in future by the adjacent plot – which is 3rd party property) is according to present standards as regards width, turning circles, alignments, etc. In the absence of such a schemed road, this access to individual plots can only be considered as an internal development, which, on its own account does not allow piecemeal development but has to be assessed as a comprehensive development so as to assess its necessary width, turning circle etc.

Architect's argument that 'there is no other way how to develop applicant's site' is not adequate justification since: a plot of land which is within scheme does not automatically create a right for its development without fully abiding with ALL the necessary policies and constraints, and , if applicant's land along with the adjacent 3rd party plot of land (which is claimed to be development sometime in the future so as to screen the resulting 4.5 storey high blank party wall) would both form part of an 'integral and holistic' planning proposal for the Authority's consideration, then, a solution could be sought which would enable this piece of land which is not fronting any schemed road could be developed. On the other hand, such piecemeal development is not good planning practice but only serves to create a precedent on adjacent plots to also be development even without adhering totally with present polices which other applicants have to adhere.

G. Il-verbal tal-access fuq il-post li hejja dan it-Tribunal waqt is-Seduta numru 81, mizmuma fit-30 ta' Novembru 2012, senjatament il-punti segwenti.

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“L-appellant qed jipproponi illi jibni semi-basement garage, maisonette u apartments u overlying penthouse fi Triq Tonin Attard, M'Xlokk. L-izvilupp propost huwa adjacenti ghal zvilupp gia ezistenti li skond il-perit Denise Martin ghall-Awtorita', dan l-izvilupp inghata permess billi ghandu faccata fuq zewg toroq u allura m'hemmx problema li m'ghandux frontage fuq schemed road. Il-proposta prezenti giet michuda propju ghax m'ghandhiex frontage fuq schemed road.

It-Tribunal bil-mixi acceda fuq is-sit in kwistjoni u seta' jikkonstata illi l-passagg quddiem is-sit, huwa fil-fatt ta' xi 20 pied u cioe' aktar minn 4.1 metres. Fuq il-kwistjoni jekk tistax issir planning control application, il-perit Cutajar ddikjara li diga' tkellem mal-ufficjali inkarigati fl-Awtorita' pero' qal, li hemm xi diffikulta billi wiehed irid jipprovdi turning circle kif ukoll illi difficli biex jottjeni il-permess ta' propjetarji ohrajn fil-lokalita' biex issir l-applikazzjoni.”

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba ghal outline development permission sabiex fuq font b' access minn cul-de-sac privat li jinsab fiz-zona residenzjali ta' Marsaxlokk, jinbnew garaxx semi-basement, maisonette, appartamenti u penthouse.

Ir-raguni ghar-rifjut jistrieu fuq il-fatt li peress li l-font m' ghandux faccata fuq triq skemata, it-talba hi in kontravvenzjoni tal-policy 3.8 tal-Development Control Policy and Design Guidance (DC 2007).

L-aggravji tal-Appellant jistrieu fuq il-premessa li l-access ghall-font in ezami hu minn passagg bir-rigel privat, li gja' kienet giet approvata mill-Awtorita' bil-hrug tal-permess ghall-izvilupp fuq font ta' terzi biswit dan in ezami, cjoe' PA 679/08. Jiddikjara li ghalkemm dan il cul-de-sac hu wiehed privat, hu jgawdi minn dritt t'access minn fuqu. (Ghal dan ir-rigward gie anke pprezentat kuntratt ta' bejgh bejn il-partijiet).

In oltre jispjega li fil-fatt, skond l-istess policies citati fir-raguni ghar-rifjut, kif ukoll skond id-definizzjoni ta' 'triq' skond l-Att X tal-2010 (Kap. 504), ma ssir l-ebda distinzjoni bejn triq, kemm jekk din tkun triq arterjali, veikolari, trejqa, passagg jew sqaq, pubblika jew privata. Jirrileva wkoll li skond diversi sentenzi tal-Qorti, kemm il-darba triq privata tinfetah ghall-pubbliku ma tistax tinghalaq. Ghandu jsegwi ghalhekk, li peress li l-cul-de-sac privat mertu tal-appell odjern illum hu miftuh ghall-

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pubbliku, allura l-Awtorita' ma tistax tibqa' tinsisti li hawn si tratta minn zvilupp minghajr frontage jew li ma jharisx fuq triq skemata.

Fid-dettal, il-permess PA 679/08 citat mill-Appellant bhala ir-raguni ghaliex infetah dan il cul-de-sac, jaqra' kif gej:

“To erect garages at semi-basement level, apartments at semi-basement, ground, first and second floor (seventeen units) and penthouses (five units).”

L-Awtorita' zammet ferm l-oggezzjoni taghha ghal-proposta odjerna u rilevat li s-sit kopert bil-permess sucitat, apparti l-faccata li ghandha access mill cul-de-sac, ghandu faccata li thares fuq triq skemata. Kien propju ghalhekk li l-permess kien gie approvat. Fil-kaz in ezami pero', l-unika access hu mill cul-de-sac. In oltre, mhux ser ikun hemm bizzejjed outlook, u l-access veikolari ghall-font odjern ser jincidi fuq il-pedoni li jkunu ghaddejjin mill cul-de-sac.

L-Appellant jikkontendi li ghalkemm il-permess PA 679/08 inhareg fuq font li ghandu faccata fuq triq skemata (Triq Cicerun, kif ukoll faccata fuq l-isqaq in kwistjoni), madankollu il-font bhal inqasam fi tnejn bil-btiehi fin-nofs biex b' hekk parti bhal ghandha access minn Triq Cicerun u l-ohra mill-isqaq privat.

Ezaminati fid-dettal is-sottomissjonijiet tal-partijiet, johrog car li l-argument principali li wassal ghar-rifjut odjern hu l-fatt li l-font in ezami m' ghandux access minn triq skemata; u anke jekk ghal-grazzja tal-argument jigu sorvolati il-kwistjonijiet ta' turning circle u vehicular-pedestrian access li f' ic-cirkostanzi, skond il-policy 3.8 tad-DC 2007 jirrizultaw insufficjenti; jibqa l-fatt li l-izvilupp kemm fuq dan il-font kif ukoll fuq dak adjacenti, kopert bil-permess PA 679/08, qed isir piecemeal.

Irid jigi osservat li l-policies ma jeskludux li font bhal dan jista' jigi zviluppat bhala internal development (glossarju tad-DC 2007), madankollu l-policy 3.8 citata bhala raguni ghar-rijut tistabilixxi numru ta' parametri li jirrigwardaw l-accessibilita' u l-open spaces quddiem il-bini li f' dan il-kaz huma karenti

Kien jinhtieg ghalhekk li kieku minflok, giet intavolata applikazzjoni ghal-comprehensive development, li jinkludi kemm is-sit li illum inbena skond il-permess PA 679/08 kif ukoll dan in ezami. Setghet saret planning control (PC) application sabiex issir triq li tghaddi minn quddiem il-font approvat bil-permess PA 679/08, dan in ezami, u diversi plots ohra li jmissu ezattament maghom – u dan sabiex il-koll

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ikollhom access minn din it-triq gdida. Minflok pero', sar biss il cul-de-sac approvat bil-permess PA 679/08. Fil-fatt, fis-sottomissjonijiet taghha, l-Awtorita' tirrileva li skond il-minuta 18 fil-file tal-applikazzjoni de quo, kien gie suggerit lill-Appellant sabiex tigi intavolata PC application, izda dan kien naqas li jaghmel dan.

Dan ifisser li kif tajjeb rilevat l-Awtorita', it-talba prezenti timplika tip ta' zvilupp li bhallikieku jhares fuq triq skemata, bid-differenza pero', li t-'triq' hi dan l-istess cul-de-sac li ma jiffurmax parti minn schemed road. Di konsegwenza dan l-appell ma jimmeritax li jigi milqugh.

Ghalhekk, in vista tal-konsiderazzjonijiet 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 ghall-PA 2746/10 kif mahrug mill-Kummissjoni ghall-Kontroll tal-Ambjent u l-Ippjanar, fil-21 ta' Marzu 2011.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal ghamel applikazzjoni u interpretazzjoni skorretta tad-definizzjoni ta' triq pubblika u n-natura tat-triq li taghti access ghas-sit, billi fi-decizjoni tieghu t-Tribunal qal li l-izvilupp ma ghandux frontage fuq schemed road. Il-Policy and Design Guidance tal-2007 ma titkellimx fuq schemed road izda public road fejn fil-glossary internal development ifisser residential development li ma ghandux frontage fuq public street jew ghandha access dejjaq fuq public street. Street u road ghandhom l-istess tifsira skond il-glossary. In oltre Kap. 504 tal-Ligijiet ta' Malta jiddefinixxi triq bhala 'kull triq principali jew triq, sew pubblika sew privata, u tinkludi kull triq, pjazza, bitha, sqaq, sqajjaq, pont, passagg bir-rigel, passagg jew moll, sew jekk jghaddi t-traffiku minnhom sew jekk le';

2. It-Tribunal naqas li jikkonsidra l-aggravju li biswit il-plot tal-appellant inhareg il-permess PA 679/08 fuq il-premessa li dan l-izvilupp ghandu access minn zewg toroq minghajr ma vverifika jekk dan kienx minnu billi l-appellant ssottometta l-kuntrarju. Anki jekk ta piz lil verzonjoni tax-xhud tal-Awtorita, it-Tribunal naqas li jaghti r-ragunijiet ghaliex kien qed jaghmel hekk.

L-ewwel aggravju

Dan l-aggravju hu kjament punt ta' ligi li tpogga bhala aggravju quddiem it-Tribunal cioe t-tifsira ta' triq pubblika kif irid il-policy DC 2007 b'referenza ghall-izvilupp konsidrat bhala internal development. It-Tribunal ippersista li l-izvilupp ma kienx accettabbli ghax ma kellux access minn 'schemed road' pero mbaghad naqas li jispjega fid-decizjoni tieghu ghalfejn kien qed jintuza l-espressjoni 'schemed road' meta l-kwistjoni ta' zvilupp qua internal development kif kien qed jaraha t-Tribunal tirrikjedi nuqqas ta' access ghal triq pubblika. It-Tribunal kellu jiddefinixxi l-kuncett ta' triq pubblika u kif din tekwiwali ghal schemed road b'definizzjoni ta' schemed road u b'referenza ghal kaz partikolari, ghaliex dak li t-Tribunal isejjah bhala cul de sac bhala l-access ghal izvilupp ma setghax jigi kunsidrat bhala triq pubblika u kwindi l-izvilupp seta' jigi kunsidrat biss bhala internal development fejn allura jidhlu fatturi relatati mal-policy DC 2007 3.8, li fuqhom l-izvilupp ma kienx dikjarat accettabbli. Sfortunatament it-Tribunal assuma li triq pubblika tfisser schemed road u billi ma rrizultalux li l-cul de sac hi schemed road, l-izvilupp ma kellux access adegwat tali li ma jigix trattat bhala internal development.

Il-Qorti tqis illi r-ragunament tat-Tribunal kien nieqes mill-approfondiment necessarju biex jaghti raguni fondata fil-ligi ghaliex l-aggravju tal-appellant ma fihx mertu, u kwindi zbalja fil-ligi meta ma qies x'wasslu biex jiddeciedi li triq pubblika u schemed road kienu haga wahda u illi l-passagg, trejqa jew cul de sac ezistenti ma setghax jitqies bhala wahda jew l-ohra.

Ghal din ir-raguni l-Qorti tqis li l-aggravju hu misthoqq fit-termini deciz minn din il-Qorti.

It-tieni aggravju

Dan l-aggravju wkoll hu meritat billi l-appellant ikkontenda illi l-izvilupp li jikkontendi hu simili ghal dan in kwistjoni PA 679/08 ma ghandux frontage kollu fuq triq pubblika ohra izda in parti ghandu frontage biss fuq dan il-cul de sac. Din il-kontenzjoni giet ventilata u argumentata mill-partijiet quddiem it-Tribunal u bhala kwistjoni ta' sustanza t-Tribunal kellu jikkunsidraha bid-debita serjeta u jaghti r-ragunijiet tieghu dwar din il-kwistjoni b'tali mod li jew jirrifjuta l-

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aggravju bhala infondat fil-fatt u jekk le, ghaliex xorta wahda z-zewg zviluppi ma setghux jigu kunsidrati bl-istess mod.

It-Tribunal palesement naqas li jaghmel dan l-apprezzament rikjest minnu ghax kienet kwistjoni materjali u ta' sustanza li seta' kellha effett fuq l-ezitu tal-kwistjoni.

Ghalhekk dan l-aggravju wkoll qed jigi milqugh.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-appell ta' Glenn Ace Fenech, tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-30 ta' Lulju 2013, u tirrorvija l-atti lura lit-Tribunal biex jerga' jiddeciedi l-appell fit-termini ta' dak deciz f'dan l-appell. Spejjez ghall-Awtorita.

< Sentenza Finali >

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