



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tat-8 ta' Ottubru, 2014

Appell Civili Numru. 11/2014

Joseph Spiteri

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Joseph Spiteri tas-17 ta' Marzu 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Frar 2014 rigward PA 1774/12 'to sanction minor deviations in elevations and change of use from garage to a place to repair punctures and wheel alignment. Alternations to create a domestic store and WC and to fix a sign';

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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:

Illi l-appellant applika sabiex jissanzjona bidliet zghar fil-faccata u bdil fl-uzu ta' garage ghall-post biex isiru tiswijiet ta' punctures fuq tyres u wheel alignment ta' karazzi, f'fond li jinsab fi Triq il-Kbira, kantuniera ma Triq l-Ghoxrin ta' Lulju, fil-lokalita ta' Sannat, Ghawdex. L-applikazzjoni giet rifjutata mill-Kummissjoni ta' l-Ambjent u l-Ippjanar ghas-segweni ragunijiet:

"1. The proposed change of use is unacceptable in a residential area as it would have a deleterious impact on the amenity of the area and of existing adjoining uses by virtue of noise, vibration and operating times. It therefore constitutes bad neighbor development and so, conflicts with Structure Plan policy BEN 1 which seeks to protect the amenity of existing areas.

2. Proposal conflicts with Gozo and Comino Local Plan policy UCA General Provisions GZ-HOUS-1."

Ra l-appell tal-Perit Teddy Busuttil f'isem l-appellant li jaqra kif gej:-

"With reference to the refusal dated 10 October 2012, I would like to make an appeal against this decision.

In the DPA report, when the case officer consulted with the Local Plan Unit, it was advised that, 'although the matter is a bit subjective, proposal is not exactly a residential neighbour compatible activity but much would depend on the actual

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operations of the venture.' Thus, the reply from the Local Planning Unit is clearly subjective and not a straight foreword objection.

An engineer's report was submitted and as can be seen from this report the expected noise created by this activity is well below the existing background noise level of 38 dBA; so the activity would not create nuisance to neighbours as regards to noise and vibrations.

Policy UCA General Provisions GZ-URCO-1 in the Local Plan allows for the Class 11 business and light industry, provide that;

- 'The gross floor area of the premises does not exceed 50sqm'. I have submitted revised drawings proposing that the 50 sqm is not going to be exceed;
- 'The activity conducted within the premises does not use heavy duty and/or noisy electrical/mechanical equipment, and equipment which requires a 3 phase electricity supply'.

The engineer's report is confirming that the noise levels outside my client's site will be less than the existing background noise of 38 dBA;

- 'The activity conducted within the premises does not entail extensive and/or prolonged use of percussion hand tools.' Since my client will be working also on wheel alignment which entails noiseless electronic equipment, it is clear that during the working hours there will be moments when no noise will be created. Even when my client is going to fix punctures there will not be extensive use of percussion hand tools;
- 'The activity employs less than 5 people'. In this space of 50 sqm only one employee will be employed and it will be my client's son. It must be noted that all the adjacent properties are all owned by my client.
- 'The activity conducted within the premises does not inherently entail the generation of combustion chemical or particulate by products.' My client's activity will not entail such things as mentioned above.

Due to the nature of this small activity which will not be creating noise nuisance to the neighborhood as confirmed by the engineer's report, I am of the opinion that Structure Plan Policy BEN 1 will not be infringed. Since the new drawings are showing an area of 50 sqm, the proposal will require a one car parking space provision for which UIF contribution will be required.

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From the above one comes to the conclusion that this proposal will not conflict with the Gozo and Comino local Plan Policy UCA General Provisions GZ-URCO-I.

It must be noted that a similar change of use was approved in 20th August 2008 in PA01992/07. PAOS76/09 was approved in 11th February 2010 whereby an additional area at ground floor is to be used as Class 11 (for the preparation of food stuffs). Both these applications were approved in residential areas and both use equipment which requires a 3-phase electricity supply.

Regarding the other reason for refusal stating that, 'the proposed change of use is unacceptable in a residential area as it would have a deleterious impact on the amenity of the area and of existing adjoining uses by virtue of noise, vibration and operating times', I would like to point out that the engineer's report is a proof that the activity will not constitute bad neighbour development. Moreover I have submitted legal proof that the maisonette above the site and the adjacent buildings are all owned by my client."

Ra s-sottomissjonijiet tal-Awtorita' dwar l-appell li saru permezz ta' nota li giet ipprezentata lill-Tribunal fil-4 ta' Jannar, 2013, u li jaqraw kif gej:

"5.1.6 The Development under appeal consists of the conversion of part of garage into a place to repair punctures and wheel alignment and a domestic store. This Development lies within the Sannat UCA as per Gozo and Comino Local Plan Map14.11-A & Map14.11-F, in a street which is predominantly residential (as shown in the submitted photos); furthermore, a residential unit overlies this proposed change of use.

Residential Areas are used exclusively for residential purposes and related uses; they are distinct from the rest of the urban area because of their particular building design and building fabric. The creation of industrial uses in Residential Areas particularly Urban Conservation Areas can have serious negative impacts on the area's character and amenity. Therefore, the location of new industrial use is being prohibited to ensure that no bad neighbour developments are permitted. The use of a mechanic in a Residential Area causes nuisances to the neighbourhood, as also confirmed in a letter of objections Documents 29 & 30. This letter of objections was submitted during the course of the processing of the application.

The appellant argues that the proposed total area had been decreased to 50 sqm; therefore, due to the nature of this small activity, no noise nuisance would be

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created to the neighbourhood. The Tribunal may wish to note that the Authority is against the nature of this proposed development and not the proposed area. In fact Reason for Refusal 1 reads as follows:

The proposed change of use is unacceptable in a residential area as it would have a deleterious impact on the amenity of the area and of existing adjoining uses by virtue of noise, vibration and operating times. It therefore constitutes bad neighbour development and so conflicts with Structure Plan policy BEN 1 which seeks to protect the amenity of existing uses.

The appellant also argues in favour of this development by stating that the maisonette above the site under appeal and the adjacent buildings are all owned by himself. This does not hold any ground in view of the fact that by permitting such a development, one would be creating a precedent and a commitment on site which goes beyond ownership. A development permit is not linked to an individual/owner but rather to the site occupying the development.

Furthermore, the Authority may wish to note that Policy GZ –URCO-1 which is being quoted in the Appellant's letter of Appeal, never featured in the DPAR and was never a Reason for Refusal.

5.1.7 The Appellant quoted PA 1992/07 and PA 576/09 as being granted by the EPC Board. These quoted permits are as follows:

PA 1992/07: the proposal description read: to sanction whole building and to change of use of a garage into a place to manufacture ravioli.

PA 576/09: To sanction balconies, demolish garage and extension at ground floor; construct garage at basement and additional area at ground floor to be used as Class 11 (for the preparation of foodstuffs not to be sold from the premises).

The above two quoted permits are clearly permits involving the manufacture and preparation of foodstuffs, and NOT a place to repair punctures and wheel alignment!

5.2 Conclusively, the Authority states that whilst taking note of appellant's arguments in this request for appeal, the Authority notes that there are no sound

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planning justifications which could justify a breach to the above cited policies. Hence, reference is made to the reports as presented by the Directorate and to the EPC's decision which dismissed this request for development since the EPC Board had based their decision on the valid relevant policies applicable to this area. Reference is also made to the detailed reports as included in the file and to the submissions (verbal and written) which will be presented during the appeals sittings.

5.3 MEPA therefore reiterates that it acknowledges and confirms that the reasons for refusal can be justified on sound planning considerations which took into consideration all the relevant facts, planning policies, legislation and submissions and thus, respectfully requests that the Environment & Planning Review Tribunal to confirm the decision as issued with the refusal notice and to refuse this appeal. The Authority reserves the right to forward further submissions during the appeals process as necessary.”

Ra s-sottomisjoni ulterjuri ta' l-appellant tal-14 ta' Frar, 2013, u tal-1 ta' Jannar, 2014;

Ra n-nota ulterjuri ta' l-Awtorita' tal-15 ta' Mejju, 2013;

Ra l-policy BEN 1 tal-Pjan ta' Struttura;

Ra il-policy GZ-HOUS-1 (Residential Areas) tal-Gozo and Comino Local Plan;

Ra ukoll il-PA file bin-numru 1774/12, 1992/07 u 576/09;

Ra l-atti kollha ta' dan l-appell.

Ikkunsidra ulterjorment;

Illi l-mertu ta' dan l-appell jirrigwardja l-uzu ta' garage bhala post ghat-tiswija tal-punctures u wheel alignment tal-karozzi. L-applikazzjoni titlob ukoll l-issnar ta' xi tibdiliet esterni u ta' l-uzu propost li huwa kolpit b'Avviz biex Tieqaf u Twettiq, ECF26/12. Skont il-mapp 14.11-A tal-Pjan Lokali, is-sit jinsab gewwa l-erja ta'

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konservazzjoni urbana kif, u erja residenzjali u ghalhekk, tapplika il-Policy GZ-HOUS-1, tal-istess pjan lokali.

Illi z-zewgt ragunijiet tar-rifjut, huma relatati fis-sens li l-ewwel raguni hija marbuta mal-Policy BEN1 tal-Pjan ta' Struttura u jinnota illi l-proposta hija konfliggenti ma' l-inhawi residenzjali minhabba hsejjes, vibrazzjonijiet, traffiku u hinijiet ta' operat. Ghalhekk, l-uzu propost jista' jitqies illi jikkostitwixxi bad neighbourlines, u ghaldaqstant l-uzu propost mhux konsidrat bhala uzu kompatibli ma erja residenzjali kif elenkat fil-policy tal-pjan lokali, imsemmija supra.

Dan it-Tribunal jinnota illi il-proposta kif kunsidrata mill-Awtorita' tista' tikkwalifika taht Class 11 businesses and light industry ai termini ta' l-istess policy. Madanakollu it-Tribunal jinnota wkoll illi, f'din il-Policy hemm numru ta' kundizzjonijiet specifici ghall-istess Class 11, hekk kif gej:

- The gross floor area of the premises does not exceed 50sqm (including storage of materials and/or finished products);
- The activity conducted within the premises does not use heavy duty and/or noisy electrical/mechanical (including pneumatic) equipment, and equipment which requires a 3 phase electricity supply;
- The activity conducted within the premises does not entail extensive and/or prolonged use of percussion hand tools (e.g. hammers, mallets etc);
- The activity employs less than 5 people; and
- The activity conducted within the premises does not inherently entail the generation of combustion, chemical or particulate by products.

Rigward l-erja tas-sit, il-proposta kif amendata waqt il-process ta' l-applikazzjoni hija inqas minn 50 metru kwadru. L-anqas ma hemm oggezzjoni rigward l-ahhar zewg kriterji minn naha ta' l-Awtorita. Jidher li m'hemmx qbil dwar it-tieni u t-tielet kriterju fejn il-policy tirrikjedi certu kontrol fl-uzu ta' makkinarju u l-hsejjes li dawn jistghu jggeneraw.

F'dan ir-rigward, l-appellant ipprezenta a favur tieghu r-rapport dwar l-emmissjonijiet tal-hsejjes data 27 ta' Marzu 2012 li kien parti mid-dokumenti prezentati ma l-applikazzjoni odjerna. Minn ezami ta' dan ir-rapport, huwa evidenti li r-readings tal-hsejjes huma bbazati specifikament fuq 'two tyre change machines', 'a wheel balancing machine' u 'car hoist', li ttiehdu minn distanza ta' metru u tlett metri mill-apparat skont tabella fl-istess rapport.

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It-Tribunal huwa tal-fehma li dan ir-rapport ma jistax jitqies bhala prova sufficjenti biex jissodisfa l-kriterji elenkati fil-policy. Ir-rapport qed jelenka li l-makkinarju ndikat m'jiggenerax hsejjes eccessivi minn dak li huwa accettabli fl-ambjent abitat, imam l-appellant naqas milli jaghti spjegazzjoni ta' xhix ser jikkonsisti ix-xoghol fuq is-sit meta huwa fatt maghruf li fit-tissiwija ta' punctures jistghu jintuza għodda pneumatic sabiex jizzarmaw/jitwahhlu tyres fuq il-karozzi, filwaqt li ma saritx prova jekk dan l-apparat huwiex wiehed li ma jirrikjediex provista t'eletriku 3-phase. F'dan ir-rigward it-Tribunal jidhirlu li l-proposta ma tissodifax il-kriterji kollha tal-policy u għaldaqstant l-uzu mhux konsidrat idoneju f'erja strettament residenzjali.

Fl-appell tieghu, l-appellant għamel referenza għal precedenti fejn inghataw permessi għal uzi fi Class 11 f'zoni residenzjali, cioe, PA 1992/07 u 576/09. It-Tribunal jinnota illi l-uzu approvat f'dawn iz-zewg permessi huwa relatat mal-manifattura ta' ikel u għaldaqstant mhux simili għal dak l-uzu propost ta' l-appellant. L-appellant zied ukoll illi fiz-zewg kazijiet citati, jintuzaw għodda bi provista ta' elettriku 3-phase, għalkemm ma tresqet l-ebda prova sabiex jissostanza din l-asserzjoni.

Għal dawn il-motivi, il-Bord jichad l-appell u jikkonferma r-rifjut tal-permess għall-izvilupp.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal applika hazin il-provvedimenti tal-policy GZ-HOUS-1 (Residential Areas) tal-Gozo and Comino Local Plan meta sostna li t-tieni u tielet kriterju tal-istess policy ma gewx sodisfatti, u dan billi amalgama z-zewg kondizzjonijiet flimkien u mhux separatament kif trid il-policy. In oltre t-Tribunal ma spjegax kif l-izvilupp ser jikser it-tielet rekwizit. In kwantu għat-tieni rekwizit it-Tribunal strah fuq semplici assunzjonijiet mhux fatti ppruvati.

Din il-Qorti għa esprimiet il-fehma tagħha illi fl-interpretazzjoni li tinghata għal policies mill-Awtorita u t-Tribunal, il-Qorti ma tintromettix ruhha billi hafna drabi tali interpretazzjoni ma tkunx ibbazata fuq kwistjoni ta' natura legali izda aktar dwar wahda ta' ippjanar u teknika fejn l-Awtorita u t-Tribunal hu kompost minn persuni teknici li jistghu jassistuhom. Għalhekk il-

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Qorti hi riluttanti hafna li timtrometti ruhha fid-diskrezzjoni moghtija lil Awtorita u t-Tribunal. Pero kif qalet din il-Qorti kif komposta, id-diskrezzjoni mhix assoluta u trid tintuza b'mod kawt hafna fejn jidher li d-diskrezzjoni ma ssirx uzu arbitrarju ta' awtorita koncessa mill-ligi. Il-Qorti ghandha l-jedd li tissindaka din id-diskrezzjoni meta l-operat tat-Tribunal imur palesement kontra l-kliem espress tal-pjan jew policy jew interpretazzjoni ta' policy hi tant assurda jew applikata b'mod ingust li tikkreja pregudizzju manifest konsidrati l-fatti tal-kaz. Il-Qorti tissindaka d-diskrezzjoni wkoll meta t-Tribunal ikun ibbaza d-decizjoni tieghu fuq fatti zbaljati jew non ezistenti.

Dan il-kaz pprezenta dilemma lil Qorti. It-Tribunal irrikonoxxa zewg punti, l-ewwel li ghal kaz partikolari hu applikabbli l-policy GZ-HOUS-1 (Residential Areas) tal-Gozo and Comino Local Plan u li l-proposta ta' tiswija ta' punctures u wheel alignment ta' karozzi tikkwalifika taht Class 11 businesses and light industry ai termini tal-istess policy li tispecifica numru ta' kondizzjonijiet. Sa hawn ma hemm ebda konflitt jew agir sindakabbli mill-Qorti.

It-Tribunal ikkunsidra l-hames kriterju biex jigi approvat zvilupp simili u kkonkluda li t-tieni u t-tielet kriterji ma gewx sodisfatti. Billi dawn il-kriterji huma essenzjalment teknici kif jidher minn qari taghhom fid-decizjoni tat-Tribunal, din il-Qorti zgur li ma ghandhiex la l-jedd jew il-kompetenza teknika li tikkunsidrahom hi mill-gdid.

Pero l-Qorti ghandha l-jedd tikkonsidra l-gustifikazzjoni tat-Tribunal li fuqhom cahad l-applikazzjoni billi l-kriterji msemmija ma gewx sodisfatti skond l-istess Tribunal. It-Tribunal kellu proposta ta' zvilupp cara quddiemu cioe tiswija ta' punctures u wheel alignment. Kellu rapport ukoll ta' espert tekniku ex parte tal-applikant li ghamel verifika tal-hsejjes. Dawn il-fatti ma gewx kontradetti minn hadd.

Nonostante dan it-Tribunal qal li mhux sodisfatt mir-rapport. Hu jelenka dawn ir-ragunijiet. Jghid li l-appellant naqas li jispjega f'hiex ser jikkonsisti x-xoghol fuq is-sit u jzid li hu maghruf li jistghu jintuzaw ghodda pneumatic biex jizzarmaw/jitwahhlu tyres fuq il-karozzi. Din is-suppozizzjoni ta' fatt mhix prova li tohrog mill-atti. L-espert tekniku ex parte fir-rapport tieghu ezamina l-apparat ezistenti fil-lok fejn intalab l-izvilupp u ghalhekk it-Tribunal kien marbut b'dik il-prova la darba ma kienx hemm kontestazzjoni mill-Awtorita. Jekk it-Tribunal hass li

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ried aktar informazzjoni kellu kull dritt isaqsi ghalha waqt l-appell, izda mhux japplika assunzjoni jew suppozizzjoni ta' fatt li ma jezistix fl-atti izda li jinsab biss bhala kriterju (fin-negattiv) fir-rekwiziti ghal ghoti tal-permess. Il-prova tal-apparat li ser jintuza kienet dezumibbli mir-rapport ex parte u xejn ma kien josta lit-Tribunal li jakkorda, jekk jidhiru, il-permess bl-uzu biss tal-apparat imsemmi. Izda t-Tribunal ma setax, la darba gew imsemmija l-apparat ezistenti li fuqhom sar l-ezami mill-espert ex parte, jikkonkludi li l-applikant ser juza wkoll apparat iehor ghax hekk ipprezuma, u jichad il-permess. Bl-istess mod it-Tribunal talab prova negattiva mill-applikant dwar in-non uzu ta' provvista ta' elettriku three phase. Imkien ma issemma' li ser jintuza provvista three phase fl-atti u t-Tribunal ma setax jitlob il-prova negattiva mill-applikant meta l-applikant fl-ebda hin ma indika li ser juza jew ser ikollu bzonn juza l-provvista three phase. Seta' t-Tribunal staqsa specifikament ghal din l-affermazzjoni biex il-partijiet jirregolaw ruhhom fuq kwistjoni li ma qamitx hlief fl-istadju ta' appell jew jekk ried, jikkoncedi l-permess b'kundizzjoni cara li ma jintuzax il-provvista three phase.

Il-Qorti tikkonsidra illi t-Tribunal applika t-tieni kriterju tal-policy biex jirrifjuta l-applikazzjoni meta ma kellux a dispozizzjoni tieghu fatti accertati li jsostnu tali pozizzjoni u dan irendi l-gudikat ingust fil-konfront tal-partijiet u billi dan kien il-fattur determinanti li fuqu giet mibnija d-decizjoni mill-aspett tekniku legali, ghandha tigi revokata biex jerga' jinxtarr mill-gdid l-appell.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-appell ta' Joseph Spiteri, u tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-27 ta' Frar 2014, u in linea ma' dak deciz tirrinviya l-atti quddiem it-Tribunal biex l-appell jerga' jigi kunsidrat mill-gdid. Spejjez ghall-Awtorita.

< Sentenza Finali >

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