



MALTA

**QORTI TA' L-APPELL**

**ONOR. IMHALLEF**

**MARK CHETCUTI**

Seduta tat-12 ta' Novembru, 2014

Appell Civili Numru. 71/2013

**Anne Marie Agius**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell ta' Anne Marie Agius tas-6 ta' Dicembru 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-19 ta' Novembru 2013 fir-rigward ta' PA 1078/07 'to sanction construction of recessed floor in lieu of washrooms';

## 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 u semghet lid-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

B'applikazzjoni pprezentata fil-15 ta' Frar 2007, PA 1078/07 l-appellanti talbet fis-sit 75, Triq Sant'Antnin, Ghajnsielem "To sanction construction of recessed floor in lieu of washrooms."

L-applikazzjoni giet michuda b'rifjut tal-21 ta' Novembru 2007 (Red 39 PA 1078/07) ghar-ragunijiet segwenti:

"1. The proposed development is unacceptable since it does not comply with the height limitation of Map 14.2-C of the Gozo and Comino Local Plan. The height limitation for the site is being exceeded.

2. The proposal cannot be considered further unless the following illegal development is first sanctioned or removed and this in terms of policy Circulars 2/96 and 2/98. The illegal development consists of internal variations, use of aluminium apertures and metal railing on the balcony projection".

Il-Perit Joseph Falzon ghall-appellant ghamel s-sottomissjonijiet segwenti:

Ir-rapport tad-Direttorat fl-ipprocessar tal-applikazzjoni fih certi inkonsistenzi li jistghu jwasslu ghad-decizjoni zbaljata. Gew ikkunsidrati l-policies tad-Development and Control Guidance tat-2005 u mhux dawk tat-2007; giet misinterpretata ic-cirkolari 2/96.

Ghalkemm l-height limitation hi ta' zewg sulari, skond l-Pjan Lokali recentement approvat – jinhtieg li wiehed jara l-commitment fil-lokalita'. Il-bini fuq n-naha l-ohra tat-triq hu ta' tlett sulari, u washrooms fuqhom PA 411/02.

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Fl-applikazzjoni prezenti mhux qed jintalab sular addizzjonali izda s-sanzjonar ta' recessed floor minflok l-washrooms ga approvati; ghalhekk kull referenza fir-rifjut ghall-Policy 10.6 ta' DC 2005 hi superfluwa.

Billi fil-vicinanze hemm bini ta' tlett sulari, s-sit de quo jimmerita l-istess awtorizzazzjoni, ghalhekk ghandu jkun aktar accettabbli dak li qed jigi propost, zewg sulari, u recessed floor fuqhom.

Skond il-Policy 10.4 tal-Policy and Design Guidance 2007 jistghu jinbnew kmamar residenzjali fuq il-bejt ta' terraced houses and maisonette development. L-izvilupp propost hu konformi ma din l-Policy.

Inoltre skond il-Policy 10.5 tal-Policy and Design Guidance 2007, f'Urban Conservation Areas dan l-izvilupp hu permess purché' ikun recessed.

L-istrutturi fil-livell tal-bejt ghandhom jigu kkunsidrati bhala sular irtirat u mhux bhala penthouse.

Dwar l-illegalitajiet fuq is-sit l-Perit irrileva li l-appellant m'ghandux x'jaqsam mall-partijiet l-ohra ta' l-izvilupp – hu qed jitlob sanctioning tas-sular li hu propjeta' tieghu, u ghalhekk skond ic-Cirkolari 2/98 dawn l-illegalitajiet m'ghandhomx jipprejudikawh fl-applikazzjonijiet prezenti.

Il-Local Plan ghall-Ghawdex u Kemmuna jippermetti l-bini ta' sular rtirat f'Ghajnsielem skond l-Edge Policies – GZ-EDGE-1 Development Zone Edge Policy.

L-Awtorita' fir-rapport taghha ikkummentat kif gej:

-- Height limitation

The height limitation for Gozo (except Marsalforn and Xlendi) was set out in the Height Limitation Guidance, 1998 at two floors. In 1997 (GN459/97) the area, within which the site is located, was designated as an Urban Conservation Area, and therefore the Policy – Interim Review of Building Heights, Pending Local Plan Completion, 1993 did not apply to the site, maintaining the height limitation at two floors. This height limitation was confirmed by the Gozo and Comino Local Plan – Map 14.2C. Only washrooms, as allowed by Policy 10.1 of DC2007, are allowed above this height limitation. The proposed sanctioning of a recessed floor thus exceeds the height limitation for the area.

-- Setback floors

The roof level is accessible through a stairwell, common to 3 underlying apartments. Policy 10.4 of DC2007, therefore does not apply, as this is limited to terraced houses and maisonette development only. Policy 10.5 of DC2007, in turn, does not allow the proposed additional residential unit. This policy provides for the provision of additional living space for underlying residential units where these have a restricted floor area, which such additional space being internally linked to the

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underlying unit. Again the proposed sanctioning conflicts with such policy. Meanwhile, Gozo and Comino Local Plan Policy GZ-EDGE-1, also clearly states that "in cases where the edge of the development zone coincides with a UCA designation, the provisions of the UCA policies in terms of design and building height limitation for UCAs shall be applicable". Therefore, setback floors may not even be allowed under this policy.

### -- Commitments in the Area

In his request for appeal, the architect referred to permission PA0411/02. The site relative to this permission does not lie on the same side of the road as the site subject of the current application (PA1078/07), and therefore has no bearing on the streetscape on this side of the road. Without prejudice to the above, the Planning Appeals Board may wish to note that permission PA0411/02 was a renewal of permission PA0837/98 which in turn was the renewal of permission PA7885/95/DC01. At the time of such permission, the site was neither within an Urban Conservation Area, not affected by Local Plan provisions, and was thus allowable at the time. Nonetheless, the Planning Appeals Board may also wish to note that the Interim Review of Building Heights, Pending Local Plan Completion, 1993 provision on commitments was repealed on 23rd June, 2005 and therefore no amount of commitments may be used to depart from the height limitation set out in the Gozo and Comino Local Plan.

### -- Illegal development

Finally, from the submitted photos at document 1A and from the enforcement notice ECF55/05, it is evident that illegalities on site, other than the proposed setback floor, exist. Internal alterations, the use of aluminium apertures on the façade, and the replacement of the solid balcony parapet wall by aluminium railing do not seem to relate to applicant's property, the applicant has no control over such illegalities and allowing the proposed development would not hinder enforcement action from being taken. Thus the provisions of Circular PA2/98 apply to these illegalities. However, other illegalities exist, in parts of the building to which the applicant has a title. These consist in the dimensions of the stairwell, the position of the main door at ground floor at a higher level than that approved and the subsequent need for steps on the pavement, in conflict with condition 6 of permission PA5142/03. Thus the provisions of Circular PA2/96 apply, and the current application cannot be considered further until such illegalities are sanctioned."

L-Awtorita' fis-second statement taghha irrilevat li l-permessi citati mill-appellant kienu gew approvati qabel dahal fis-sehh l-Pjan Lokali; li wara l-pubblikazzjoni tal-Pjan Lokali, l-applikazzjoni jinhtieg li tigi kkunsidrata fil-kuntest tal-Local Plan u tal-Local Policies applikabbli ghas-sit in kwistjoni.

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Fl-okkazzjoni tal-access, saret l-kostatazzjoni fost ohrajn, li l-predominant height hi ta' zewg sulari.

Fin-nota taghhom tad-9 ta' April 2009, l-konsulenti tal-appellant ghamlu s-sottomissjonijiet segwenti:

Dwar l-illegalitajiet, billi dawn huma f'bini propjeta ta' terzi, japplika ghall-kaz l-punt 2.3 et seq tac-cirkolari PA 2/98 – u ghalhekk dawn l-illegalitajiet m'ghandhomx rilevanza ghall-applikazzjoni tal-appellant.

Dwar il-height limitation saret referenza ghall-Pjanta 14.2-D tal-Pjan Lokali ta' Ghawdex u Kemuna – fejn is-sit in kwistjoni hu indikat bhala "Development Zone Edge" u ghalhekk tapplika ghall-kaz l-Policy GZ-EDGE-1 li tippermetti l-bini tat-tielet sular, receded.

Ghalkemm is-sit hu f'Urban Conservation Area skond l-pjanta 14.2-F tal-Pjan Lokali ghal Ghawdex u Kemuna, l-izvilupp propost jista' jigi approvat, konformi mal-Policy GZ-EDGE-1 – pjanta 14.2-D.

L-Awtorita' kkummentat dwar dawn is-sottomissjonijiet fit-Tielet Statement taghha, fejn irrilevat is-segwenti:

### Illegalities on Site

The appellant claims that the illegalities on site pertain to third party properties, and hence concludes that under the provisions of PA Circular 2/98, the applicant should be exempted from the application of PA Circular 2/96. The latter requires that all illegalities on a site are first sanctioned prior to consideration to further development on a site. PA Circular 2/98 however clarifies that where part(s) of a site or building is illegal, permission for new development elsewhere on the site or building should not be refused solely because there are illegalities in the building when:

granting permission for the new development will not physically prevent, hinder or make difficult enforcement action (removal or rectification) against the illegal parts of the building; and the application does not include the 'illegal' part (s); and the applicant has no control over the 'illegal' part (s) and was not involved in the 'illegal' development

As indicated in MEPA's report of 14th February 2008, the site as a whole is subject to several illegalities under enforcement action in ECF 055/05. MEPA had also

indicated that some of the illegal parts of the building, mainly internal alterations, the use of aluminium apertures on the façade and the replacement of the solid balcony parapet wall by aluminium railings do not seem to relate to the applicant's property, and as such the applicant has no control over these illegalities. As the proposed development would not hinder enforcement action against these mentioned illegal elements, this application is partly exempted under PA Circular 2/98.

However, other illegalities also subject to ECF 55/05, are located within the common parts of the building, which falls under the applicant's ownership together with the other third party proprietors on site. These illegalities consist in the dimensions of the stairwell, the position of the main door at ground floor at a higher level than that approved and the subsequent need for steps encroaching onto the pavement. As these illegalities fall within the communal property of the applicant, the applicant has direct control over these illegalities, and may hence not be exempted under the provisions of PA Circular 2/98. Even if the applicant was not responsible for these illegalities, he is still obliged to sanction them prior to consideration of further development on site. This notion was also confirmed by the Planning Appeals Board in their decision of 14th October 2005 for Emmanuel Vassallo vs. MEPA (PA 6558/02, PAB 118/04). In view of this, the sanctioning of the recessed floor as proposed in this application may only be considered further after the sanctioning of the mentioned additional illegalities are sought.

### Proposed Recessed Floor & Conflict with Zoning Conditions

The appellant refers to Local Plan Policy GZ-EDGE-1, claiming that a recessed floor as proposed may be permitted under the provisions of this policy. On this point, the Authority would like to clarify the provisions of this policy, in that its content is divided into two aspects.

The first aspect of LP Policy GZ-EDGE-1 addresses the design treatment of buildings with a façade(s) overlooking ODZ areas. This policy requires that these are appropriately designed so as not to create any negative visual impacts, especially when viewed from distant and public open views. The second part of the policy addresses the building height that may be permitted within such areas. As a general principle, the height limitation within such areas is limited to two floors with a three-course basement. Where identified on the respective building height maps (and hence areas specifically marked as GZ-EDGE-1), an additional recessed floor may be permitted. The policy further states that where the GZ-EDGE-1 areas coincide with UCA designated areas, the provisions applicable to UCA areas in terms of design and building height shall prevail, which in the case of the latter, the height limitation within Gozo UCAs is limited to two floors.

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From the provisions of Policy GZ-EDGE-1, it is clear that as the site subject to appeal is located within the Urban Conservation Area, its designation as a Development Zone Edge on Map 14.2-D (Safeguarded Areas Urban Context) is included to illustrate the non-height limitation planning parameters that may be still be applicable in such areas, especially those interventions required on the external design treatment of the building due to its location overlooking an ODZ area.

With regard, to the permissible height limitation, Policy Map 14.2-C (Height Limitation & Main Development Boundaries) specifically indicates two floors as the height limitation and therefore a receded floor is not applicable to the site subject to appeal. Conversely, areas where an additional receded floor may be considered under policy GZ-EDGE-1 are specifically identified as such on this policy map, which zoning designations do not include the site subject to appeal. Hence the receded floor is not applicable to the site in question. This rationale was also confirmed by the Local Planning Unit in minute 28 of the PA file."

Il-konsulenti tal-appellant prezentaw nota ta' sottomissjonijiet fit-8 ta' Frar 2011. Anke f'din in-nota sar enfasi fuq l-fatt li l-appellant m'ghandha l-ebda kontroll fuq dik l-parti tal-izvilupp fejn saru l-illegalitajiet u ghalhekk skond ic-cirkolari 2/96 u 2/98 kif ukoll skond r-regolament 14(6) tal-Avviz Legali 514 ta' l-2010, dawn m'ghandhomx jincidu fuq l-ezitu tal-applikazzjoni tal-appellanti:

In oltre, billi kien hemm diversi compliance certificates li ma gewx revokati, l-appellant ma kienitx f'pozizzjoni li tkun taf b'irregolaritajiet fuq is-sit. Saret referenza ghas-sentenza tal-Qorti tal-Appell fil-kawza fl-ismijiet "Joseph Grima vs. L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar."

Dwar l-gholi, saret referenza ghall-Policy GZ-EDGE-1 li tippermetti l-bini tat-tielet sular receded. Il-fatt li s-sit jinsab f'zona ta' urban conservation area ma jippregudikax lill-appellant billi skond il-pjanta' 14-2-F tal-Pjan Lokali ghal Ghawdex u Kemuna s-sit hu klassifikat bhala Urban Conservation Area Category C.

L-Avukat Dottor Anthony De Gaetano ghall-Awtorita' fin-nota responsiva tieghu pprezentata fit-2 ta' Marzu 2011 ittratta l-kwistjoni dwar l-illegalitajiet fuq is-sit. Hu rrileva li r-regolament 14(6) tal-Avviz Legali 514 ta' l-2010, citat mill-appellant, jinhtieg li jigi kkunsidrat fl-intier tieghu – fis-sens li l-istess appellanti ma tistax tghid li m'ghandhiex kontroll fuq il-partijiet illegali – meta dawn huma partijiet komuni, cjoie' l-qisien u l-lay-out tat-tarag; l-bieb ta' barra tal-blokk li hu oghla minn dak approvat, turgien fuq il-bankina tal-blokk u l-front door tal-aluminium.

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Irrileva, in oltre, li l-compliance certificates li jkunu hargu, saru kif kien qed isir x-xoghol – u m'humiex relatati ma' xi final compliance certificate; u billi l-applikazzjoni ma tittentax tissana dawn l-illegalitajiet, l-applikazzjoni skond l-Artikolu 14(1) ta' l-istess Avviz Legali, ma tistax tigi approvata.

Ikkunsidra ulterjorment.

L-applikazzjoni PA 1078/07 giet michuda ghal zewg ragunijiet: 1 l-gholi propost; li jeccedi l-height limitation indikat fil-Pjan Lokali, u 2. Li l-proposta ma tistax tigi kkunsidrata favorevolment billi hemm xi illegalitajiet fuq is-sit.

### II-Height Limitation

Il-principju tat-trattament tal-izvilupp li jinsab fuq sies u jddemarka l-konfini taz-zona tal-izvilupp hu stabbilit fil-paragrafu 4.27 tal-Pjan Lokali għall-Għawdex u Kemuna u ppubblikat f'Lulju 2006 – li jghid hekk:

### Ridge Edge and Development Zone Edge Development

"The treatment of Development Zone boundary edges is very important since from an external view point, it represents the interface between the built settlement also conveys the first impressions of a settlement when viewed from an approach route or from the countryside."

L-izvilupp tal-lokalita' tas-sit 'de quo' hu regolat bil-Policy G2-EDGE-1 u l-pjanti hemm annessi. Dwar il-height limitation l-Policy 'inter alia' tghid hekk:

"Unless otherwise indicated on MAPs 14.2-C to 14.15-C Where applicable, the building height of Development Zone Edges shall be two floors with a three course basement."

Skond l-istess policy "an additional floor to the two floors may be permissible provided that all the following conditions are adhered to :



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the site does not qualify a ridge Edge Development; and

The additional floor shall comply with conditions for penthouses (except for criterion A and C) as indicated in Section 10.6 of DC 2005”.

Fil-Mappa 14.2F – UCA Categorisation – I-fond hu ndikat b’kulur li jiklassifikah bhala UCA Category C.

Fil-Mappa 14.2-D - Safeguarded Areas Urban Context s-sit hu ndikat b’kulur isfar car u klassifikat bhala Development Zone Rodge – GZ-EDGE-1 u mhux Ridge Edge Development li hu ndikat b’kulur mustard bil-budura hadra – GZ-EDGE-2.

Il-malintis jista’ jkun li nqala’ ghalhekk ghar-raguni li billi s-sit ma ikkwalifikax bhala Ridge Edge Development, purché’ jissodisfa kundizzjonijiet ohra dwar penthouses – jista’ jinghata permess ghal sular addizzjonali fuq iz-zewg sulari.

Pero’ dan d-disgwid hu ccarat soddisfacentement, bil-Mappa 14.2–C Height Limitation and Main Development Boundaries, fejn is-sit hu ndikat bil-kulur isfar car – specifikatament indikat bhala bini ta’ zewg sulari.

Fuq l-istess mappa bil-kulur mustard bil-burdura vjola – hu ndikat l-izvilupp regolat bil-Policy GZ-EDGE-1; kif ukoll bil-kulur mustard bil-burdura hadra hu ndikat zvilupp li hu regolat bil-Policy GZ-EDGE-2.

Billi l-fond jikkonfina maz-zona tal-izvilupp, il-kulur isfar ghandu burdura ta’ dotted line ahdar – izda dan hu l-indikazzjoni tad-Development Zone Boundary – mentri l-izvilupp regolat bil-Policy GZ-EDGE-1 – li skond l-appellant hu applikabbli ghall-kas odjern ghandu burdura hamranija, b’kulur isfar aktar skur.

Fl-istess Mappa hemm indikat bil-kulur kannella car l-izvilupp li jista’ jinbena fuq tlett sulari.

Ghalkemm jista’ wiehed gustament jargumenta li l-interpretazzjoni tal-mappa m’hijjex facli, jibqa’ l-fatt li s-sit de quo hu ndikat bl-isfar fejn huma permessi biss zewg sulari – u mhux zewg sulari u reseeded floor kif qed tipproponi l-appellant.

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Jirrizulta ghalhekk li l-izvilupp propost jeccedi l-height limitation stabbilita bhala '2 floors' fil-mappa 14.2 – C tal-Pjan Lokali ghal Ghawdex u Kemmuna.

### Illegalitajiet fuq is-sit

Mhux kontestat bhala fatt mill-appellant li jezistu xi illegalitajiet fuq is-sit; is-sottomissjoni taghha hi fis-sens li fuqhom hi ma ghandha l-ebda kontroll u ma ghamlithomx hi; ghalhekk tikkontendi li dawn m'humiex ta' pregudizzju ghall-applikazzjoni taghha fejn qed titlob li jigi sanzjonat l-izvilupp fit-tielet sular, konsistenti f'appartament rtirat (receded).

Hi doveruza ghalhekk id-distinzjoni bejn dawk l-illegalitajiet fuq is-sit li huma attriwbli lil xi sid jew sidien partikolari u dawk li jinsabu fil-common areas bhal tromba ta' tarag, komuni ghall-appartamenti kollha u l-bieb ta' barra mill-appartamenti.

Il-fatt li fil-kors tax-xogholijiet hargu xi compliance certificates, ikompli jikkomplikaw il-kwistjoni billi dawn jikkostitwixxu prova li ghal menu meta saru, l-izvilupp gie certifikat li hu konformi mal-permess. Pero' fuq is-sit hareg ukoll enforcement ECF 55/05 kontra Joseph Portelli fis-26 ta' Jannar 2005; ghalhekk jinhtieg li jigi vverifikat jekk l-izvilupp hux konformi mal-permess, konformement mal-compliance certificate jew alternattivament jekk hemm xi illegalitajiet fuq is-sit skond kif allegat fl-Avviz biex Tieqaf u ta' Twettieq.

Irrizulta mill-provi li certi illegalitajiet, l-appellant ma kellha l-ebda kontroll fuqhom u ghalhekk skond ic-Cirkolari 2/98 – dawn ma jippregudikawx l-applikazzjoni taghha – dawn jikkonsistu; f'tibdiliet interni, l-uzu ta' aperturi tal-aluminium fuq il-faccata u l-bdil tal-parapett tal-gallarija b'railings tal-aluminium.

Irrizulta pero li fuq is-sit hemm illegalitajiet ohra li jinsabu fil-common areas u bhala tali huma responsabilita' komuni tal-propjetarji kollha tal-appartamenti. Dawn jikkonsistu f'tibdil fil-qisien tat-tromba tat-tarag; il-bieb ta' barra tal-appartamenti jinsab fil-livell aktar gholi minn dak approvat u t-tarag li saru fuq il-bankina – li kellhom isiru propju ghax il-bieb hu f'livell oghla milli kif gie approvat.

Billi dawn jinsabu fil-common areas, l-appellanti ma tistax tinvoka a vantagg taghhac-citata Cirkolari PA 2/98. In oltre, anke jekk dawn ix-xogholijiet ma sarux fuq

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istruzzjonijiet taghha, xorta wahda jinhtieg li jigu sanzjonati qabel ma jista' jigi sanzjonat l-livell tal-bini, propjeta' taghha.

Skond l-Artiklu 14(1) tal-Avviz Legali 514 tal-2010 'meta zvilupp ezistenti fuq is-sit ikun ghal kollox jew biss f'aprti illegali, l-Awtorita' ghandha tirrifjuta applikazzjoni ghall-izvilupp li jkollha x'taqsam ma' zvilupp gdid fuq dak is-sit, kemm-il darba li l-izvilupp illegali ikun inkluz ghal sanzjonar u l-izvilupp illegali ikun konformi mal-policies attwali.

Skond is-sub-incipis (2) tal-istess Artiklu, l-izvilupp illegali jista' jigi regolarizzat b'applikazzjoni specifika; jew l-applikazzjoni ghall-izvilupp tkun tinkludi s-sanzjonar tal-izvilupp illegali, mal-proposti godda ghall-izvilupp.

Ghalkemm skond l-paragrafu (6) tal-istess Artiklu, l-esistenza ta' illegalitajiet fuq is-sit ma tipprekludhiex l-ghoti tal-permess, kemm-il darba jigu sodisfatti s-sub-incipisi (a), (b) u (c) tal-istess artiklu.

Is-sub-incipiz (c) jirreferi ghal sitwazzjonijiet fejn l-applikant m'ghandu l-ebda kontroll fuq il-partijiet illegali. Billi kif irrizulta hemm irregolaritajiet fil-common areas – in parti propjeta' tal-istess applikanti – din ma tistax tinvoka dan l-Artiklu b'success u japplika ghalha dak stabbilit fis-sub artikoli precedenti tal-Artiklu 14 li jirrikjedi li dawn jigu sanzjonati.

L-appellanti esebit l-kuntratt tal-akkwist taghha, kuntratt ippublikat minn Nutar Dr. Fiona Armeni tad-29 ta' Mejju 2006 li minnu jirrizulta li barra l-appartament xtrat "is-sehem indiviz, prorata mill-partijiet komunital-blokk li jinkludu l-bieb ta' barra, l-entrata, it-tarag, indana, tromba tat-tarag, drains, drenagg u shafts komuni u nkluza l-arja relattiva in pjena u assoluta propjeta' fuq l-imsemmi appartement".

Fl-applikazzjoni presenti mhux qed jintalab l-ebda sanzjonar tal-illegalitajiet fil-common areas tal-block.

Ra wkoll id-decizjoni ta' dan it-Tribunal diverzament ippresedut tat-28 ta' Lulju 2011;

Ra wkoll is-sentenza tal-Qorti ta' l-Appell tat-30 ta' Ottubru 2012 li hassret id-decizjoni tat-Tribunal tat-28 ta' Lulju 2011 u rremettiet l-atti lura li dan it-Tribunal sabiex l-appell jerga' jinstema' mill-gdid; f'dik is-sentenza l-Qorti tal-Appell iddecidiet

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li t-Tribunal ma kienx interpreta l-policies tal-ippjanar sew u in sostenn ta' dan hija kkwotat il-kazistika taghha stess fl-ismijiet ta' "George Sultana vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar (A.I.C. (RCP) 26 ta' Gunju 2012); apparti minn hekk il-Qorti tal-Appell irrinvijat l-atti lura lit-Tribunal peress li dan tal-ahhar injora l-valur legali ta' compliance certificate;

Obiter, dan it-Tribunal qed issib ruhu maqbud f'morsa ta' sentenzi konfliggjenti tal-istess Qorti tal-Appell. Il-Qorti tal-Appell, Kompetenza Superjuri Civili, dejjem irriteniet fil-giurisprudenza taghha illi l-gurisdizzjoni taghha kienet limitata ghal punt ta' dritt u mhux ghall-punt ta' fatt; il-Qorti tal-Appell, Kompetenza Inferjuri Civili, qed tirritjeni bil-kontra li hija ghandha s-setgha li tiddeciedi wkoll dwar punti ta' fatt u cjoe' dwar policies tal-ippjanar u l-interpretazzjoni taghhom. Bir-rispett dovut, meta dan it-Tribunal jigi rinfaccjat b'giurisprudenza konfliggjenti tal-istess Qorti tal-Appell – u sfortunatament dan mhux kaz wiehed izolat – dan it-Tribunal jippreferi jistrieħ fuq dak li ghalmet il-Qorti tal-Appell, Kompetenza Superjuri Civili, u jiskarta dak li ddecidiet – fil-fehma ta' dan it-Tribunal skorrettement – il-Qorti tal-Appell, Kompetenza Inferjuri Civili. Detto cio', madankollu, dan it-Tribunal m'ghandux is-setgha li jinjora sentenza, anke jekk fil-fehma tieghu zbaljata, tal-Qorti tal-Appell, Kompetenza Inferjuri Civili, u se jghaddi biex jaghmel dak li ddirigietu jaghmel dik il-Qorti;

Ra l-verbal tal-20 ta' Settembru 2013 li minnu jirrizulta illi l-appellant issottometta folder b'ritratti u b'lista ta' permessi;

Ra r-ritratti kontenuti fil-folder hawn fuq imsemmi;

Ra l-lista ta' permessi kif ukoll il-PA files relattivi;

Ra l-Fifth Statement tas-Sur Jonathan Borg ghall-Awtorita' tal-24 ta' Settembru 2013 tal-Awtorita' li jaqra' kif gej:-

“In his latest submission the appellant is mostly pointing out to the development covered by permit PA 1060/04 which is likewise within the UCA of Ghajnsielem. The appellant is asking why the policy GZ-EDGE-1 was not applied in this case (i.e. PA 1060/04) and why it was permitted with a height of more than 2 floors with a total height of 9.6m. Reference was also made to the fact that the appellant owns the a 2-car garage within the same building block and thus arguing that Policy 10.7 of the DC 2005 does not apply. According to the appellant any illegalities on site belong to third parties.

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The Authority notes that these comments have already been raised in the past and that they all have been addressed by the Authority in its previous submissions. Nevertheless it has the following comments to make :-

2.1 The Authority cannot understand the reference of the various permit numbers referred to by the appellant in the block plan indicating the area. The appellant did not explain the relevance of these permits except for two (related to the same site) which will be explained further hereunder. Furthermore it is noted that these permits have all been decided prior to the coming into force of the Local Plans.

2.2 PA 411/02 and PA 1060/04 refer to the same building block opposite the site in question. First of all it has no bearing on the streetscape on this side of the road. However, more importantly the Tribunal may wish to note that permit PA 411/02 was a renewal of permit PA0837/98 which in turn was the renewal of permission PA7885/95/DC01. This permit was for a building consisting of 2 floors and a semi-basement. At the time of such permission, the site was neither within an Urban Conservation Area, not affected by Local Plan provisions, and was thus allowable at the time. Moreover, this building block does not involve any apartments at roof level but consists only of washrooms. Therefore, the Authority notes that this building is not relevant in any way to the current appeal, since the nature of the proposal, i.e. recessed apartment at roof level, does not even feature in the permits (i.e. PA 411/02 and PA 1060/04) quoted.

2.3 Regarding illegalities, the Authority has already demonstrated that not all illegalities belong to third parties as there are others, in parts of the building to which the applicant has a title. These consist in the dimensions of the stairwell, the position of the main door at ground floor at a higher level than that approved and the subsequent need for steps on the pavement, in conflict with condition 6 of permission PA5142/03.

2.4 The argument made in reference to Policy 10.7 of the DC 2005 is not understood since this was never a reason for refusal.”;

Ra s-sentenza tal-Qorti tal-Appell illi sahqet li l-compliance certificate ghadu validu sal-lum in kwantu ma giex irtirat mill-Awtorita’;

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Ra l-PA files PA 1060/04, PA 1078/07, PA 1060/04, 583/01, 5052/05, 2066/04, 4575/05, 411/02, 2107/04, 5978/06, 3100/05, 2327/00, 5708/06, 2327/00, 5025/00, 4302/01, 2562/01;

Innota li hafna mill-files citati hawn fuq ma jinsabux fl-istess kantuniera u fil-vicinanze immedjati tas-sit mertu ta' dan l-appell izda ferm 'il boghod anke jekk fl-istess triq li nzertat li hija triq twila hafna. Fil-fatt, il-permessi li huwa fil-vicinanze immedjati tas-sit mertu ta' dan l-appell huma: 411/02; 1064/04, 2107/04 u 5978/06 izda dwar dawn l-erba' permessi jirrizulta wkoll li dawn huma sitwati fuq in-naha l-oħra tat-triq tas-sit mertu ta' dan l-appell u ghalhekk il-paragun ma jreggix peress li wiehed mhux qed iqabbel like with like. Jekk wiehed japplika dan l-argument tal-appellant allura l-policy tal-commitment tista' tigi applikat ghal kull forma ta' zvilupp li sar f'Ghawdex u mhux necessarjament fil-vicinanze immedjati tas-sit mertu ta' dan l-appell;

Jinghad mill-appellant illi 'the recessed floor in question is not visible from street level' izda dan jiddependi minn fejn wiehed ikun qed ihares lejha. Mir-ritratti r-recessed floor jidher sew u ghalhekk hemm numru ta' angoli minn fejn ir-recessed floor jista' facilment jidher. Terga', meta wiehed jipparaguna l-permess PA 411/02, PA 1060/04 u PA 837/98 ma' dak mertu ta' dan l-appell, wiehed jinnota li l-ebda wiehed minn dawn it-tlett permessi ghandu approvat fih apartament fil-livell tal-bejt peress dak li hemm approvat fuq il-bejt mhux appartament izda kmamar tal-bejt (washrooms) li min-natura taghhom huma ferm izghar fic-cokon minn apartament. Dan appartament li meta nhargu dawn il-permessi, l-area in kwistjoni ma kinitx ghadha desinjata bhala UCA u lanqas koperta mill-Pjan Lokali ta' Ghawdex;

Ghal dawn il-motivi, it-Tribunal jikkonferma r-rifjut tal-permess għall-izvilupp mahrug mill-Kummissjoni għall-Kontroll tal-Izvilupp u jichad l-appell.

## Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal applika hazin il-Gozo and Comino Local Plan 2006 GZ-EDGE 1 ghax lanqas applikaha fejn jista' jsir zvilupp irtirat fuq it-tielet sular konfermat mill-pjanta 14.2-D safeguarded area urban context u dan sakemm ma jirrizultax xorta oħra mill-pjanti 14.2-C sa 14.15-C. It-Tribunal qal li l-gholi hu ristrett mill-lokalita cioe urban conservation area grade C. Din il-kategorija fil-pjanti 14.2-F ma timpingix fuq GZ-EDGE 1. Iz-zewg policies ma jeskludux

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lil xulxin. In oltre inhargu permessi simili qabel iz-zona giet kwalifikata bhala UCA u ghalhekk kellha tigi applikata eccezzjoni;

2. It-Tribunal injora l-effetti legali u drittijiet kweziti bil-compliance certificates fuq is-sit li jinkludu l-partijiet komuni, u rrifjutat u ghall-izvilupp illegali fil-partijiet komuni meta gha inhargu permessi ghal residenti fl-istess blokk. In oltre t-Tribunal naqas li jiddistingwi bejn proprjeta privata soggetta ghal izvilupp in kwistjoni u condominium milqut b'enforcement notice u dan b'referenza ghal dak li jistipulaw ic-cirkolarijiet 2/96 u 2/98. L-appellant ma jistax jiehu decizjonijiet liberi fil-partijiet komuni ghax ma jiddependux minnu biss. It-Tribunal qies il-partijiet komuni u l-izvilupp privat bhala haga wahda. It-Tribunal ukoll ma hax in konsiderazzjoni illi inhargu permessi lil residenti ohra tal-blokka u ghalhekk l-appellant kien qed jinghata trattament differenti;

3. Ghalkemm it-Tribunal qal illi fuq illegalitajiet fil-condominium l-appellant ma kellux kontroll ghax jiddependi minn haddiehor, fl-istess hin qal li l-izvilupp tal-penthouse kien soggett ghall-illegalitajiet fil-komun. Avviz Legali 514/2014 u cirkolarijiet 2/96 u 2/98 ma kellhomx jigu applikati ghax ma jikkoncernawx l-istess sit tal-applikazzjoni processata kif iridu l-istess cirkolarijiet;

4. It-Tribunal ghalkemm irrikonoxxa l-commitment fiz-zona pero qies li l-bini fuq in-naha l-ohra tat-triq ma setax jigi pparagunat bhala like with like. Anki jekk il-policy vigenti tillimita l-gholi tal-izvilupp ghal zewg sulari, kellu jigi kkunsidrat il-commitemnt fl-inhawi u mhux japplika l-policy b'mod rigoruz.

Din il-Qorti qabel titratta l-aggravji tirrileva illi din id-decizjoni appellata saret in segwitu ghal sentenza tal-Qorti tal-Appell Inferjuri diversament komposta li kienet revokat l-ewwel decizjoni tat-Tribunal fuq din l-applikazzjoni. Din is-sentenza tat-30 ta' Ottubru 2012 kienet ikkunsidrat zewg aggravji u laqghethom. L-ewwel aggravju kien l-interpretazzjoni hazina moghtija mill-ewwel Tribunal fid-decizjoni tieghu tat-28 ta' Lulju 2011 rigward l-interpretazzjoni moghtija tal-policy GZ-EDGE-1 mit-Tribunal dwar is-sit tenut kont li mhux ridge edge development. Il-Qorti qieset li la darba mhux ridge edge development allura l-applikazzjoni ghandha tigi konsiderata minn dan l-aspett fl-applikazzjoni tal-Policy GZ-EDGE-1. In oltre l-Qorti laqghet l-aggravju illi t-Tribunal kellu jivvaluta sew l-portata tal-compliance certificates li qatt ma gew irtirati mill-Awtorita u kwindi ghadhom validi u jridu jittiehdu minn dan l-aspett ghal valutazzjoni tal-applikazzjoni.

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Dawn huma l-aspetti li t-Tribunal kif rikompost kellu jikkunsidra fil-valutazzjoni mill-gdid tal-aggravji tal-appell.

It-Tribunal ghalkemm ma qabilx mas-sentenza tal-Qorti li l-kwistjonijiet trattati mill-Qorti ma kienux ta' natura fattwali izda ta' applikazzjoni ta' ligijiet jew policies irrileva li kien ser jikkonsidra l-appell kif idderigieta l-Qorti. Pero qari tad-decizjoni tat-Tribunal wiehed isib illi fil-fatt it-Tribunal wara li, fil-parti 'ikkunsidra ulterjorment' gie rifless verbatim id-decizjoni tal-ewwel Tribunal fol 7 et seq. ta' dik id-decizjoni, fil-'konsiderazzjoni' tat-tieni Tribunal li tibda minn pagna 10 tad-decizjoni llimita ruhu biss ghal aspetti singolari tal-appell u dawk li l-Qorti bil-gudikat taghha idderigiet li jikkonsidra bazati fuq dak li qalet l-istess Qorti ma kkonsidrahomx bl-ebda mod.

### **L-ewwel aggravju**

Tenut kont ta' dak premiss minn din il-Qorti qabel qed jigu trattati l-aggravji, hu wisq logiku li dan l-aggravju ghandu jigi milqugh mhjix ghax dak li qed jigi sottomess hu fis-sew izda ghax l-aggravju fih innifsu jikkomporta konsiderazzjoni tal-policy GZ-EDGE-1 fid-dawl tal-applikazzjoni maghmula u billi t-Tribunal ma semma' xejn dwar dan din il-Qorti ma tistax tinjora dan in-nuqqas pero fl-istess waqt anqas ghandha tissostitwixxi ruhha ghal mansjoni tat-Tribunal li jiddeciedi l-aggravji kif maghmula.

Ghalhekk il-Qorti qed tilqa dan l-aggravju fis-sens illi tordna lit-Tribunal li jikkunsidra l-aggravju fl-ottika tas-sentenza tal-Qorti tal-Appell u jasal ghal konkluzzjonijiet tieghu.

### **It-tieni aggravju**

Japplika ghal dan l-aggravju ezattament dak li ntqal fl-ewwel aggravju u qed jilqghu fl-istess sens li ntlaga' l-ewwel wiehed.



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### **It-tielet aggravju**

Japplika ghal dan l-aggravju ezattament dak li ntqal fl-ewwel aggravju u qed jilqghu fl-istess sens li ntlaha' l-ewwel wiehed.

### **Ir-raba aggravju**

Dan l-aggravju ghandu jigi michud ghal zewg ragunijiet. Fl-ewwel lok il-kwistjoni tal-commitment gie trattat u deciz mit-Tribunal b'mod sostantiv u din il-Qorti ma tqis li ghandha jedd tissindaka dan l-operat. La darba aggravju jigi deciz b'mod konkret ma ghandux jaghti lok ghal appell ghax l-appellant ma jaqbilx mar-ragunament li wassal ghar-rifjut tal-aggravju. Fit-tieni lok kif gia qalet din il-Qorti ebda kwistjoni ta' sustanza, kemm jekk hi commitment jew trattament ugwali ma qatt jistghu jiehu s-sopravent fuq l-applikazzjoni rigoruza ta' ligi, pjan jew policy jekk dan il-fattur ma jistax jigi dezunt mill-istess ligi, pjan jew policy jew fejn l-istess ligi, pjan jew policy huma siekta fuq xi kwistjoni partikolari u allura l-Awtorita u t-Tribunal ghandha certa diskrezzjoni fl-operat taghha. F'dan il-kaz jekk hemm policy cara trid tigi applikata rigorosament bla ebda eccezzjoni. Kwistjonijiet ohra li bihom l-appellant jista' jhossu li gie pregudikat ghandhom jittiehdu quddiem il-forum opportun.

Ghalhekk dan l-aggravju qed jigi michud.

### **Decide**

Ghal dawn ir-ragunijiet il-Qorti taqta' u tiddeciedi billi in linea ma' dak deciz tilqa' l-appell, u tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-19 ta' Novembru 2013, u tirrinviija l-atti lura lit-Tribunal biex jiddeciedi l-appell skond il-ligi. Spejjez ghall-Awtorita.

**< Sentenza Finali >**

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