



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tas-27 ta' Novembru, 2014

Appell Civili Numru. 25/2014

Manuel Grixti

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Manuel Grixti tad-9 ta' Mejju 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' April 2014 rigward PA 1700/06 'to sanction bovine and sheep farm, proposed alternations, proposed manue clamp and cesspit. All buildings have been built prior to 1992';

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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, fis-16 ta' Mejju 2011, irrifjutat l-applikazzjoni ghall-permess tal-izvilupp PA 1700/06 – 'Demsey', Triq il-Qrendi, Zurrieq: To sanction bovine and sheep farm, proposed alterations, proposed manure clamp and cesspit. All buildings have been built prior 1992.

Ir-ragunijiet ghar-rifjut kienu s-segwenti:

"1. The proposed sanctioning of farm runs counter to policy 1.3A in Policy & Design Guidance for "Agriculture, Farm Diversification and Stables" which specifies that the proposed development which would have an unacceptable adverse impact on the surroundings will not be permitted. The proposed sanctioning runs counter to this policy in view of the following that the farm building is located on the north western edge of site and leaves no margin for landscaping on this part of site.

The proposal also runs counter to Structure Plan policy AHF 5 specifies that buildings essential to agriculture will be permitted provided that they blend with the rural landscape through the use of random rubble, or be hidden from views."

B. In-nota tal-Perit Anton Zammit ghall-Appellant, ipprezentata fil-15 ta' Gunju 2011, senjatament il-punti segwenti:

"The only reason for refusal is based on the lack of landscaping especially on the north western edge. This reason is totally unjustified since the latest drawings submitted to MEPA (red 46) indicate additional landscaping to that originally

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proposed. In addition the said edge was already proposed with and provided with ivy landscaping, and which landscaping was permitted in other farms such as PA 2138/09 and PA 6987/07. In the latter cases, such landscaping was permitted due to the restricted adjacent sides.

In this case, we had originally proposed ivy landscaping on this edge, and proof that the said ivy was already planted was submitted in red 45. Following the refusal in the reconsideration stage DPA report, we had argued and increased the type of landscaping by including olive trees in addition to the originally proposed ivy creepers.

Concluding, in view that the landscaping is sufficient, and more than that required by MEPA it is evident by the fact that permits PA 2138/09 and PA 69887/07 incorporate on certain edges ivy landscaping only, you are kindly requested to consider this appeal and to grant the said permit.”

C. In-nota responsiva ta' Darren Fava għall-Awtorita', ipprezentata fis-26 t' Awissu 2011, inter alia l-punti segwenti:

"5.2.1 History of Application

The request for sanctioning of the existing farm and additional ancillary measures were refused development permission by both the DCC Board (2010) and the Reconsideration Board (2011) due to fact that the landscaping scheme proposed were not considered adequate to mitigate the visual impacts of the building from the north-west views. At reconsideration stage, a second reason for refusal regarding a proposed restroom at first floor level was addressed and removed.

Notwithstanding this, the appellant failed to address the reason for refusal regarding landscaping until after the DPAR Report had been concluded. At such a late stage, only written submissions of additional information are accepted. The appellant had sufficient time to address the landscaping issue at reconsideration stage but did not take action against the reason for refusal. In fact, the appellant had plenty opportunities to address this issue during the processing stages of this development application. The first request for revised landscaping plans were requested by the Authority in September 2007. The appellant was informed that a denser landscaping scheme is necessary consisting of clumps of trees rather than linear landscaping. Although several revisions of the landscaping around the site were submitted to the Authority (Doc 44A dated 18th September, 2007; Doc 69D dated 19th July, 2010) the proposal was refused by DCC Board on 3rd August, 2010.

As mentioned above, reconsideration of the proposal was submitted soon after, and although the second reason for refusal (re. restroom at first floor level) was addressed and omitted, no attempt was made to address the landscaping. The plans submitted on 3rd May, 2011 as a response to the DPAR Report were not presented in a viable time frame to allow the Authority to re-consult with the necessary officers to assess the proposal vis-à-vis whether the visual impacts of the structures are being mitigated in an acceptable manner.

5.2.2 Principle behind Refusal

In comments submitted at Appeal Stage, the appellant is bringing to the attention of the Tribunal that revised drawings with additional proposed landscaping were submitted in Doc 46 in PA File which arrived at the Authority on 3rd May, 2011. Having said so, these plans were submitted following the completion of the DPA Reconsideration Report at a late stage in the processing stages of the application.

As addressed in para. 5.2.1 above the Authority had already correctly assessed several different landscaping options presented by the appellant within the proper timeframes during the assessment. The latest submission was presented at a very late stage in the processing stages when the appellant had already been informed that the case is on the agenda of the Board and was to be decided in only one week time (11th May, 2011). The appellant was also informed that fresh plans may not be presented after the DPAR Report was submitted; and the EPC Board correctly determined to refuse the proposed development on the basis of the information and plans available in light of the current planning policies."

D. In-nota ta' sottomissjonijiet tal-Perit Anton Zammit ghall-Appellant, ipprezentata fis-17 ta' Settembru 2012, precizament il-punti segwenti:

"It is kindly brought to the attention of this Tribunal that this application seeks to sanction an old farm which has been utilised for animal breeding for a considerable long period. In fact attached please a declaration (appendix 1) by Dr. D Chetcuti Ganado indicating that the farm was operation before October 1992. The attachment to this letter indicates a handwritte register which was kept by the Veterinary Officials.

During the inspection of the said MEPA file by the undersigned, it was noted that MEPA were not sure that the farm was operational in October 1992 and which is not the case. This is due to the fact that the records of the Department of

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Agriculture and the Food and Veterinary Regulation Division were not well recorded and upgraded, and thus the Department of Agriculture and the Food and Veterinary Regulation could not provide such information. It is definitely not the applicant who should suffer from such lack of good administrative practice.

I refer to the highlighted attachment (appendix 2) to this correspondence and which is an extract from the MEPA DPA report which states that a farm which was established pre October 1992 and which has no valid licence issued by the Department of Agriculture and the Food and Veterinary Regulation Division as having no development permit and thus illegal.

In the circumstance we have proved beyond reasonable doubt that the farm did have a license to operate issued by the Department of Agriculture and the Food and Veterinary Regulation Division, since the said officials from the said department were inspecting and certifying animals within the said farm. Thus the farm has been proved to have a legal license and thus should be considered as a legal development.

It is more than obvious that when the said farm was built, no one could foresee at the time new policies which would have required extensive landscaping etc. Similar cases have been brought up recently for farms operating before October 1992, and which did not have sufficient landscaping and which did not have adequate space for landscaping to be carried out since the building was built on the periphery of the farm. A case in point is PA 5455/02, and which involved the sanctioning of a farm established prior to October 1992, and which did not have sufficient space for landscaping purposes, and which was approved on the basis that it was a pre-existing farm, and no one can foresee future policies. The case in question in this application is similar and should be treated in a similar manner.”

E. In-nota second statement ta' Jonathan Borg għall-Awtorita', ipprezentata fil-11 ta' Frar 2013, inter alia l-punti segwenti:

“1. The appellant in his latest submission is arguing that his farm has been existing before 1992 and is covered by a valid agricultural license to operate. Therefore, according to the appellant, his farm is legally established as per policy 2.3E of the Policy and Design Guidance for Agriculture, Farm, Diversification and Stables (2007). The appellant is thus presenting the argument that he should not be penalised on the issue of landscaping since there were no policies when his farm when established that regulated landscaping.

2. The Authority notes that the appellant is contradicting himself. If the farm is a pre-1992 farm covered with the necessary licenses, then it is considered as a legally established farm and thus there is no need to sanction the farm as is according to policy 2.3E of the Policy and Design Guidance for Agriculture, Farm, Diversification and Stables (2007). Yet, the appellant is requesting the sanctioning of the farm, meaning that he is recognising that it is not legally established. If the farm is illegal, then it must abide according to the current policies since illegal development affords no vested rights.

3. The Authority was not forwarded any adequate evidence that the farm has been in existence since 1992 and covered with the necessary licences. The 1988 aerial photo show that the current structure already existed at the time. The Department of Veterinary Services stated that the applicant (now the appellant) has been registered as a ruminant breeder since 2004 and that it is only the appellant who is claiming that he started rearing layers sometime in 1990. The appellant was registered as a poultry producer in 1997.

On the other hand, a letter sent by appellant in PB 4744/86 (red 8A in the said file) states that the garage is required for the garaging of a bus or mini-bus and that his living depends on these vehicles. ECF 60/00 which is currently active on site refers to the erection of garage without permit.

An application had been sent in 1992 "to erect a garage". PA 4806/92 had been refused permission, and case had been appealed (PAB 31/94). During the appeal it was evident that this building is not used for farming purposes, but for garaging of vehicles and panel beating, spray painting, and silencer repairs. This was also confirmed an inspection by the Planning Appeals Board. It is thus clear the site was not used as a farm in 1992, hence the existing buildings are not considered legal as per policy 2.3E of the Policy & Design Guidance on Agriculture, Farm Diversification and Stables. In view of this, the existing farm is being assessed against policy 2.3C of this document, which is targeted to assess new livestock farms.

4. The above shows that the history of the site indicates that the current building was not used as a farm in 1992 but as a garage for vehicles and vehicle repair. This was the situation up until at least 1995. Therefore the existing farm cannot be considered as a legal pre-1992 farm in accordance to the current established policy. Indeed, albeit the appellant is now claiming that the farm is a pre-1992 farm covered with the necessary licences, the appellant is admitting the illegality of the farm when he is requesting the sanctioning of the farm as is. If the farm is legal, then no sanctioning would have been requested."

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F. Il-verbal tas-Seduta numru 38, mizmuma fl-4 ta' Gunju 2013., senjatament il-punti segwenti:

"Dr. De Gaetano jaghmel referenza ghal decizjoni tal-Bord tal-Ippjanar dwar Demsey Garage PAB 31/94."

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda proposta sabiex f' font li jinsab barra z-zona tal-izvilupp (ODZ) taz-Zurrieq, jigi ssanat razzett tal-baqar u tan-naghag li nbena qabel is-sena 1992, isiru xi modifiki, kif ukoll sabiex jinbnew demmiela u fossa.

Precedentement kienet giet inatvolata applikazzjoni (PA 4806/92) f' isem Anthony Grixti, sabiex jinbena garaxx izda din kienet giet rifjutata u r-rifjut ikkonfermat fil-fazi tal-appell. Madankollu, l-garaxx inbena xorta wahda u s-sit intlaqat b' avviz biew tieqaf u ta' twettieq ECF 60/00 li jaqra kif gej:

"Demsey Garage, Triq Il-Qrendi, Zurrieq: Ghandek garage mibni minghajr permess."

Ir-raguni ghar-rifjut jistrieħu fuq il-fatt li kif inbena r-razzett, m' ghadx baqa' spazju sabiex ikunu jistghu isiru xoghlijiet pajsaggistici (landscaping) bl-ghan li d-dehra tieghu tittaffa jew tinheba fil-kampanja. It-talba hi di konsegwenza in kontravvenzjoni tal-policies ANF 5 u 1.3A, rispettivament tal-Pjan ta' Struttura u tal-Policy and Design Guidance – Agriculture, Farm Diversification and Stables li ghandhom bhala ghan il-harsien tal-veduti tal-kampanja.

L-aggravji tal-Appellant huma bbazati fuq il-fatt li waqt li kienet qed tigi pprocessata l-applikazzjoni, kien ipprezenta pjan pajsaggistiku simili għall dak li l-Awtorita' kienet approvat f' applikazzjonijiet ta' terzi (bhalma huma per ezempju, PA 2138/09 u PA 6987/07). Madankollu anke meta affaccjat b' rifjut, fil-fazi tad-DPAR, kien ippropona li oltre l-edera (i.e. ivy creepers) li gja' kienet proposta, jzid sensiela ta' sigar taz-zebbug.

L-Awtorita' zammet ferm l-oggezzjoni tagħha u rilevat li l-kwistjoni tal-landscaping giet indirizzata mill-Appellant biss wara' li gie konkluz id-DPAR – u dan meta kien

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inghata bizzejjed zmien sabiex jirregola ruhhu waqt li kienet qeda tigi pprocessata l-applikazzjoni. Gja' permezz ta' korrisondenza li nbaghtet f' Settembru tas-sena 2007, l-Awtorita' kienet stiednit u jemenda d-disinn pajsaggistiku billi jinkludi roqghat ta' sigar folti (clumps of trees) minflok linear landscaping. Minflok pero' ghazel li jindirizza partijiet ohra tal-proposta (bhal per ezempju r-restrooms fl-ewwel sular) u l-kwistjoni tal-landscaping indirizza biss wara li d-DPAR tlesta – fil-fazi meta ma jistghux jigu ikkunsidrati pjanti godda.

FI-ahharnett, l-Appellant jirrileva li hawn si tratta minn razzett antik u li ilu jopera sa almenu mis-sena 1992. Konferma ta' dan hi sensiela ta' korrisondenza minn Ufficjal Veterinarju fi hdan id-Dipartiment ghar-Regolazzjoni tal-Biedja u s-Sajd (datat fit-13 ta' Frar 2012) li jaghtu x' jinftehem li jista jaghti l-kaz li r-razzett ilu stabbilit minn dak iz-zmien. Jiddikjara li dakinhar, ma kienitx il-prassi li jsir landscaping u f' kazijiet eccezzjonali bhal dawn, l-Awtorita' dejjem ghalqet ghanjeja. Ghal dan l-iskop saret riferenza ghall-applikazzjoni PA 5455/02 fejn razzett kien gie ssanat minghajr landscaping propju ghax kien ilu stabbilit.

Ezaminati fid-dettal is-sottomissjonijiet tal-partijiet jigi rilevat li l-unika prova li giet sottomessa bhakla prova li r-razzett hu wiehed qadim hi korrisondenza recenti minghad ufficjal vetrinarju (annessa mas-sottomissjoni tas-17 ta' Settembru 2012) li tispjega kif seta r-razzett ezista qabel is-17 ta' Settembru 1993 u li; "probably could state that it was operational approximately 1 year before this date."

Madankollu, sottomissjoni ohra mid-Direttorat tar-Regolazzjoni Veterinarja jikkonfermaw li l-Appellant ilu jrabbu baqar u naghag mis-sena 2004. FI-1997, huwa kien registrat biss sabiex irabbu t-tigieg.

Oltre minn hekk, l-Awtorita' tirrileva li minn korrisondenza fil-files tal-applikazzjoni citata supra, jidher car li l-istruttura mertu tal-appell odjern - li allegatament nbniat bhala razzett fis-sena 1992 (u li tidher fir-ritratti mill-ajru) - kienet almenu sa s-sena 1995, tintuza bhala garaxx ghal mini van, u tintuza ghall-xoghol ta' panel beating, spraying u silence repairs.

Minn dan isegwi li meta jittiehed kont tal-fattispecie li kkaratterizzaw din l-applikazzjoni; cjoe' li skond id-dokumenti sottomessi, almenu fis-sena 1997, f' dan ir-razzett kien jinzamm biss it-tiegieg u li l-baqar u n-naghag bdew jinzammu biss wara s-sena 2004, iqud dubbju serju kemm dan ir-razzett huwa verament legittimu (cjoe' pre-1992). Oltre minn hekk, il-fatt li ex admissis kien gie ddikjarat li l-post kien jintuza bhala garaxx ghall-minivan (li guarda caso, dakinhar kien l-unika ghejxien tal-Appellant), it-tezi li dan ir-razzett hu wiehed stabbilit minn zmien, hi ferm inqas attendibbli.

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Fl-ahharnett, jigu nutat li anke meta l-ufficjal veterinarju ikkumenta ghar-rigward tal-operat tar-razzett, intuzaw kliem b' sinifikat ampju, bhal per ezempju; "probably could state [...] approximately",

Dan ifisser li l-Awtorita' imxiet tajjed meta applikat il-policy 1.3A (u mhux il-policy 2.3E) tal-Policy and Design Guidance rilevat supra, u 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 1700/06 kif mahrug mill-Kummissjoni ghall-Kontroll tal-Ambjent u l-Ippjanar, fis-16 ta' Mejju 2011.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal applika u interpreta hazin il-policies. Ma hemmx dubju li s-sit hu razzett ghal animali u ghalhekk tiskatta l-ezenzjoni tal-policy 2.3E tal-Policy and Design Guidance for Agriculture, Farm Diversification and Stables. Fil-Qrendi hemm erbat irziezet u ghalhekk iz-zona hi kommissa. Ebda wiehed ma hu 'hidden from view jew mibnija b'random rubble walls' li kien l-argument tat-Tribunal ghan-nuqqas ta' landscaping fil-proposta u kwindi ser tkerrah l-ambjent u tohloq sfregju, kif qalet il-Kummissjoni. Din tirrendi c-cahda bhala kapriccuza;
2. L-argument tat-Tribunal li l-appellant li qabel mal-Kummissjoni li jhawwel liedna kien tardiv ghax sar fl-ahhar stadju qabel id-decisjoni quddiem il-Kummissjoni mhux wiehed gustifikabli. Din grat f'diversi drabi u wara kollox il-binja hi wahda legali u nbriet qabel l-1992 u ntuzat bhala razzett;
3. It-Tribunal mar ultra petita ghax l-appell kien dwar il-landscaping u saret referenza ghal permess li inhareg bla htiega ta' landscaping. Minflok it-Tribunal dahal fil-kwistjoni jekk il-binja kinitx wahda legali cioe jekk kinitx tintuza bhala razzett qabel l-1992. Jekk l-Awtorita ma qabltx mal-Kummissjoni tal-ippjanar dwar l-uzu tar-razzett qabel 1992 kellha tappella jew taghmel appell incidental mhux taghmel eccezzjoni fir-risposta tal-appell;

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4. It-Tribunal ma messux iddecieda l-appell meta kien hemm pjanat bdil ta' policies li ser jidhlu fis-sehh u jagevolaw lil appellant fosthom dwar sanzjoni ta' bini illegali u dwar landscaping.

L-ewwel aggravju

Dan l-aggravju ma fihx mertu. L-appellant qed jinsisti illi s-sit kien razzett ghal animali preezistenti l-1992. A bazi ta' dan l-argument isostni illi ma hux applikabbli l-policy 1.3 tal-Policy and Design Guidance for Agriculture Farm Diversification and Stables tal-2007 izda l-policy 2.3E li tikkreja ezenzjoni ghal landscaping billi ma kienx hemm policies a rigward meta l-farm gie stabbilit. Dak li jinsa l-appellant hu li l-applikazzjoni tieghu hi ghal sanzjoni tal-farm cioe li hemm sit uzat illegalment u qed jintalab is-sanzjonar tieghu. Allura kif jista' l-appellant fl-appell tieghu jargumenta li hu kellu farm pre ezistenti l-1992 u ghalhekk legali. Ma hemmx x'tissanzjona fi zvilupp legali pero l-applikazzjoni tal-appellant tindika l-kuntrarju. Ghalhekk l-argumenti tat-Tribunal rigward landscaping a bazi tal-policy 1.3 kienu pertinenti ghax kellu jevalwa l-ewwel jekk ir-razzett kienx pre ezistenti l-1992 u mbaghad japplika l-policy idonea ghal kaz.

It-tieni aggravju

Dan l-aggravju wkoll ma fihx mis-sewwa ghax ibbazat fuq punt ta' fatt mhux punt ta' ligi. It-Tribunal ghamel osservazzjonijet naxxenti mit-tardivita ta' proposti ta' landscaping mressqa mill-appellant biex itaffi r-rifjut fil-fazi tad-DPAR u wara li kien ilu jigi mistieden biex jirregola ruhu meta kienet ghadha qed tigi analizzta l-applikazzjoni. It-Tribunal osserva li tali proposti dwar landscaping saru fil-fazi wara li DPAR report tlesta meta mhux permess li jigu analizzati proposti godda.

It-tielet aggravju

Dan l-aggravju wkoll mhux misthoqq li jigi milqugh. Kien l-appellant stess li qajjem il-kwistjoni dwar l-uzu tar-razzett qabel l-1992 fl-istess appell biex jiggustifika li l-policy 1.3 kienet dik applikabbli ghalih u minn hemm tqajmu sottomissjonijiet mill-partijiet biex jirribattu l-

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argumenti ta' xulxin u fejn l-Awtorita sostniet l-applikabilita tal-policy 1.3 ghax ma kinitx saret prova li r-razzett kien tali qabel l-1992. It-Tribunal kien jonqos mid-dmir kieku ma indirizzax din il-kwistjoni dibattuta mill-partijiet mill-punt fattwali u legali altrimenti ma setax jasal ghal konkluzjoni li dan ir-razzett bhala prova fattwali ma ezistix qua razzett qabel l-1992 izda irrizultalu li l-uzu pre 1992 kien wiehed ta' panel beating, spraying u licence repairs. Apparti li fuq kwistjonijiet ta' fatt din il-Qorti ma tissindakax il-gudizzju maghmul b'reqqa mit-Tribunal, ma sar xejn ultra petita kif qed jigi allegat. Anzi t-Tribunal analizza l-kwistjoni fuq il-provi kollha migjuba u ta d-decizjoni tieghu a rigward. Daqstant iehor hu oggezzjonabbli s-sottomissjoni tal-appellant li t-Tribunal agixxa ta' gudikant u prosekutur meta l-atti juru li t-Tribunal qeda dmiru b'ezami akkurat tal-provi prodotti u s-sottomissjonijiet maghmula.

Ir-raba aggravju

Din il-Qorti hi perplessa b'dan l-aggravju. It-Tribunal mhux marbut jistenna bdil ta' policies. L-Avviz Legali 158 tal-2013 jorbot biss lil Awtorita li tissospendi decizjoni pendenti bdil ta' policies. It-Tribunal ma hux marbut bl-ebda mod u ghamel sew li ddecieda l-appell fuq il-pjanijiet, ligijiet u policies ezistenti fil-mument tad-decizjoni.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Manuel Grixti u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' April 2014, bl-ispejjez kontra l-appellant.

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