



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tal-11 ta' Dicembru, 2014

Appell Civili Numru. 176/2012

France Tonna

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' France Tonna tas-26 ta' Novembru 2012 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-8 ta' Novembru 2012 fejn cahdet l-applikazzjoni PA 513/04 'to sanction existing store';

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 tat-2 ta' Frar 2004 – Full Development Permission – PA 00513/04 l-appellant, f' Site at, Triq il-Buskett, Dingli, talab:

“To sanction existing store”

L-applikazzjoni giet michuda fit-3 ta' Settembru 2004 (Red 28) saret talba ghall-reconsideration u r-rifjut gie kkonfermat fit-23 ta' Settembru 2005 (red 36) ghar-ragunijiet segwenti:

“• The proposal is of an excessive scale, is of urban characteristics and takes up a significant amount of land within a Level 3 Area of Ecological Importance (GN 403/96, dated 25/6/1996). The proposal therefore runs counter to paragraph 15.39 of the Structure Plan Explanatory Memorandum, which may only consider small scale development within a Level 3 Area of Ecological Importance, provided it is consistent with other policies. The proposal is neither directly connected with or necessary to the management of the Special Area of Conservation as per Article 13.1 (a) and (b) of LN 257 of 2003. The proposal would thus run counter to the rural conservation and ecological objectives of the Structure Plan, particularly Policies RCO 2, RCO 10 and RCO 12 and, to the provisions of the Flora, Fauna and Natural Habitats Regulations L.N. 257/03.

• The proposal is not essential to the needs of agriculture in view that the applicant is not a registered full-time arable farmer. The applicant does not therefore satisfy the criteria set out in paragraph 11.4 of the Structure Plan Explanatory Memorandum and so the proposal runs counter to Structure Plan policies AHF 5 and SET 11 and to the Malta Environment and Planning Authority's Policy and Design Guidance: Farmhouses and Agricultural Buildings.

Kopja Informali ta' Sentenza

- The proposal is not essential to the operation and/or management of a farm unit and hence to the needs of agriculture. It does not, therefore, comply with the Structure Plan policy AHF 5 or with the Malta Environment and Planning Authority's Policy and Design Guidance: Farmhouses and Agricultural Buildings. Since the site is located outside development zone, the proposal, which is of urban characteristics, also runs counter to Structure Plan policy SET 11 and RCO 2.
- The proposed development conflicts with Structure Plan Policy SET 11, which does not permit urban development outside designated areas. The development does not fall into a category of non urban development which may be permitted outside designated areas in accordance with Paragraph 7.6 of the Structure Plan. The proposed development also therefore runs counter to policy BEN 5.
- There is no justification for the development of this site as required by Structure Plan policy SET 12. It is apparent that there are no reasons from a planning point of view why the proposed development can not be located in an area designated for development.
- The site lies outside the limits for development defined in the Temporary Provisions scheme for Dingli and so it is located in an area which it is proposed should remain undeveloped. The proposed development would run counter to this scheme and would represent unacceptable urban development, counter to Structure Plan policies BEN 5, SET 11 and RCO 2.
- The design, massing and height of the store create adverse negative visual impacts onto the surrounding Area of High Landscape Value in view of its urban characteristics. These impacts cannot be mitigated through landscaping or other interventional works and run counter to Structure Plan policy RCO 4.”

Fl-appell taghha l-avukat Joanne Vella Cuschieri resqet l-aggravji tal-applikant kif gej:

“Illi jigi sottomess illi s-seba ragunijiet li nghataw ghar-rifjut ta' din l-applikazzjoni ma jiehdwx a konjizzjoni r-realta tal-fatti koncernanti fejn jinsab l-istore in kwistjoni u ghalhekk ma japplikawx ghall-kaz odjern.

Kopja Informali ta' Sentenza

Illi dak hawn fuq suespost jista jigi facilment verifikat billi l-Bord ta' l-Appell joghgbu jaghmel access fuq il-post stante li l-istore in kwistjoni ilu mibni aktar minn ghoxrin sena u jinsab qalb bini iehor li llum il-gurnata jikkwalifika bhala hamlet. Huwa ghalhekk illi saret ukoll talba sabiex dan is-sit flimkien mad-dintorni jigi kkunsidrat bhala 'hamlet' da parti ta' l-Awtoritajiet koncernati.

Illi wkoll ssir referenza ghal diversi permessi li nhargu barra z-zona ta' zvilupp fuq stores da parti ta' l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar liema permessi ghalhekk iqajmu dubju serju jekk l-appellant hux qed jigi diskriminat fl-applikazzjoni tieghu. Bizejjed wiehed jghid illi permess partikolari hareg ezatt faccata tas-sit koncernat. Ghalhekk l-appellant qed jirriserva li jipprezenta lista ta' dawn il-permessi msemmija.”

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

“Various Structure Plan policies and Policy Papers related to development Outside Development Zone (ODZ) clearly indicate the acceptable forms of development that may be considered. The proposed development is not considered as an acceptable form of development ODZ.

The proposed structures to be sanctioned, which cover a total floor area of 132m², besides being unjustified on sound planning reasons, are undoubtedly excessive, and by far counter to the statutory maximum permitted limit of 15m². Moreover, the need for storage of fodder is not deemed justified since the applicant is not a registered full-time animal breeder. The domestic workshop and the residential-type layout of this building are an unnecessary and unjustified form of urban development outside designated areas, and thus counter to Structure Plan policies AHF 5, SET 11, SET 12 and RCO 2.

Moreover, MEPA notes that the location of the site within a Level 3 Area of Ecological Importance contravenes the objectives of paragraph 15.39 of the Structure Plan Explanatory Memorandum. The proposed sanctioning is thus counter to this criterion on two counts: its extensive land take-up and lack of justification. The proposal is not directly connected with or necessary to the management of the Special Area of Conservation as per Article 13.1(a) and (b) of LN 257 of 2003. The proposal clearly runs counter to the rural conservation and ecological objectives of the Structure Plan, particularly Policies RCO 10 and RCO 12 and, to the provisions of the Flora, Fauna and Natural Habitats Regulations L.N. 257/03.

Kopja Informali ta' Sentenza

MEPA also refers to a recent decision delivered by the Planning Appeals Board, Antoine Borg kontra l-Kummissjoni għall-Kontroll ta' l-Izvilupp, PAB 323/02 TSC (PA 4975/98), dated 23/07/2003, where the board noted the sensitivity of the area in question:

“Il-policies tal-Pjan ta' Struttura jimmilitaw kontra l-izvilupp barra miz-zona tal-bini u l-barra minn zoni konnessi u mibnija, partikolarment meta si tratta ta' zvilupp urban bhalma huwa dak propost, u l-policies SET 11 u SET 12 huma carissimi f'dan ir-rigward. Minn ezami tal-pjanta esibita mill-Awtorita, jidher illi saru numru ta' binjiet u kien sar tentattiv biex jigu sanzjonati izda kienu gew rifjutati u bicciet minnhom gew imnehlja permezz ta' "direct action". Għaldaqstant, ma jistax jinghad illi hemm xi "commitment" vicin is-sit li jista' b'xi mod jiggustifika l-izvilupp mertu ta' dan l-appell ...

Oltre dan, il-fatt illi s-sit illum jinsab gewwa zona skedata, anke jekk semplicement gewwa l-"buffer zone" ifisser illi għandu jsir kull tentattiv sabiex l-izvilupp f'din iz-zona ssir b'certa sensitività ...

Il-policies RCO 2 u RCO 4 li jitrattaw il-konservazzjoni ta' zoni rurali, bhalma huwa s-sit in ezami, huma cari meta jipprovdu illi l-ebda zvilupp ta' natura urbana m'għandu jigi permess fdawn iz-zoni u illi għandhom jigu kkunsidrati favorevolment biss dawk l-istrutturi jew facilitajiet li jkunu essenzjali għall-interessi agrikoli, ekoloġici jew mil-lat xeniku, u li ma jiksrux il-principji enuncjati fil-policy RCO 4.

Dan il-Bord jidhrilu illi l-izvilupp illi l-appellant qiegħed jittenta jissanzjona ma jinkwadrix ruhu taht ebda minn dawk il-kriterji stipulati f'dawn il-policies, peress illi l-uzu propost huwa essenzjalment urban u xejn iktar. Oltre dan jaffettwa l-integrità vizwali taz-zona peress illi jiddomina vizwalment din il-parti tal-Buskett u jhassar il-veduta ta' dan il-post li jimmerita kull mizura ta' konservazzjoni, filwaqt illi l-attività proposta tista' tkun ta' dannu ambjentali f'post tant sensitiv.”

The appellant argues that since the site was built more than twenty years ago and today forms part of an existing hamlet, its sanctioning is essentially justified on the basis of the existing commitment, whereas the decision notice does not reflect the current situation on site. MEPA refers to the attached plan and relative planning history of the area, which show the planning history of the area.

MEPA maintains that the proposed development cannot be justified on sound planning grounds and thus, runs counter to various Structure Plan Policies. For the

Kopja Informali ta' Sentenza

reasons mentioned above, the MEPA acknowledges and confirms that the reasons for refusal can be justified on sound planning considerations and took into consideration all the relevant facts, planning policies, legislation and submissions as required by article 33/1 of Chapter 356 of the Laws of Malta, and thus, respectfully requests the Planning Appeals Board to confirm the decision of the Development Control Commission and to refuse this appeal.”

Permezz tat-tieni rapport taghha l-Awtorita' kkummentat kif gej:

“2. Comments on Appellant's Submissions

The appellant's submissions mainly state that the Authority is not presenting the whole situation relevant to the appellant's cited precedent of PA 4742/05, which concerns a permit issued on the opposite side of the road from the site subject to appeal. The appellant claims that although MEPA is contending that the permit for PA 4742/05 was justified on the account of it being an 'infill' site, the appellant states that MEPA is not revealing to the Board the fact that it is surrounded by illegal development.

In reply to the appellant's arguments, reference is made to the attached DOC LV1 & LV2. As can be noted, the pocket of development adjacent to the site subject to appeal (Site M) all consists of illegal development (Sites E-M). On some sites, direct action was also carried out by MEPA to remove the illegal development.

In the case of the precedent cited by the appellant (Site C), MEPA confirms that permission on this site was appropriately issued as it was located between valid and legally existing residential development. Although enforcement action has been initiated on sites A & B through ECF 362/06 and ECF 364/06, these illegalities consist of additional development over-and-above the original permits issued on these sites. In the case of Site A, permission was issued through PB 3126/71 for the construction of a residence, while Site B is committed with the construction of a 150sq. feet store through PB 4710/84. In the case of Site D, which adjoins the other side of Site C, the permits issued for the construction of a dwelling were approved as the development would replace an existing residential building that was also dully covered by permit.

The details listed on the attached DOC LV1 & LV2 clearly illustrate the context under which permission was issued on sites C & D, and the different context which is applicable to the site under consideration (Site M). ”

Kopja Informali ta' Sentenza

L-avukat Joanne Vella Cuschieri ghall-appellant wiegbet kif gej:

“1. Illi bir-rispett kollu lejn l-Awtorita' li qed tipprova tghatti l-izbalji taghha stess, jigi sottomess li z-zewg siti adjacenti ghal dak tal-permess kkwotat mill-appellant li jgib in-numru PA 4742/05, cioe dawk indikati bl-ittra A u B, qatt ma kellhom permess bhala residenzi izda unikament bhala stores. Dan kollu huwa pruvat anki mis-semplici fatt li l-istess Awtorita' harget anki Avvizi ta' nfużar fuq dawn is-siti konsegwenza tal-bdil ta' uzu. Huwa ghalhekk li l- appellant umilment ma jistax jifhem ghalfejn l-Awtorita' qed tibqa tinsisti li l- permess bin-numru 4742/05 inhareg fuq il-bazi tal-precedent taz-zewg siti l- ohra. L-appellant umilment jistaqsi kif jistghu zewg permessi ghal stores jiggustifikaw l-hrug ta' permess ghal residenza kif gara fil-permess 4742/05. L-Awtorita' se mai kien ikollha ragun kieku approvat store izda zgur ma ghandhiex ragun la darba approvat residenza. Huwa ghal din ir-raguni li l-appellant isostni li bil-permess 47421/05 ghandu jservi bhala precedent a favur l-ghoti tal-permessi hawn appellati stante li huwa evidenti li l-Awtorita' ma ghandha l-ebda raguni valida fil-ligi sabiex tiggustifika l-permess 4742/05 ghir illi la darba taghtu allura trid timxi b'rnod ugwali ma kulhadd inkluz l-appellant;

2. Illi l-appellant jissorprendi ruhhu kif fl-istatement taghha l-Awtorita' zzomm lura milli temfasizza li l-avvizi ta' nfużar in kwistjoni jikkoncemaw bdil ta' uzu minn stores ghal residenzi, izda dan certament sar bi hsieb da parti ta' l-Awtorita' li huwa evidenti li qed tipprova tghatti l-precedent li kkreat permezz

tal-permess 4742/05;

3. Illi jigi wkoll sottomess li l-azzjonijiet ta' nfużar 'direct action' li ttiehdu fuq iz-zona partikolari u li tant qed jigu kkwotati b'fervur mill-Awtorita', ikoll ittiehdu qabel qabel ma nhareg il-permess 4742/05. L-appellant jissottometti li l-hrug tal-permess 4742/05 jindika b'mod car u inekwivoku tibdil fid-direzzjoni ta' l-Awtorita' koncernanti dan is-sit u la darba l-Awtorita' ghogobha taghti permess ghal residenza wara l-azzjonijiet li qed tikkwota, dawn ta' l-ahhar illum ma jistghux iservu bhala bazi ghall-argumenti ta' l-istess Awtorita';

4. Illi l-appellant ma jistax jaqbel mas-sottomissjonijiet li ghamlet l-Awtorita' fejn intqal illi dwar is-siti mmarkati C u D il-permess inhareg ghaliex kien hemm bini residenzjali gia ezistenti. Bir-rispett kollu, din is-sottomissjoni ma tirrizulta' minn ebda prova, anzi pjuttost jirrizulta bil-kontra mill-applikazzjonijiet kkwotati mill-istess awtorita' bin-numri PA 95/04 u 2321/00 fejn huwa evidenti li ezistenti kien hemm 'agricultural stores' u mhux residenzi; ”

Kopja Informali ta' Sentenza

Zamm access fuq is-sit fl-20 ta' Novembru 2008 fejn il-Bord seta' jara illi madwar 100-130 metru l' boghod hemm Villa Oriana li hija mibnija bil-permess.

Permezz ta' nota ta' sottomissjonijiet l-Avukat Joanne Vella Cuschieri irrilevat kif gej:

“1. Illi fl-ewwel lok naghmel referenza ghall-fatt li dan l-appell kien qed jinstema kontestwalment ma' l-appell bin-numru 262/04 f'isem Antoine Borg u dan stante li l-appelli jikkoncemaw siti vicini ta' xulxin fl-istess zona u ghalhekk jaqghu taht l-istess kriterji u l-appellant odjern jissottometti li jaghmel tieghu is-sottomissjonijiet kollha kontenuti fl-appell bin-numru 262/04 bhala sottomissjonijiet ukoll fi hdan dan l-appell u ghalhekk ghandhom jittellghu ghall-konsiderazzjoni u skrutinju tat-Tribunal anki fid-decizjoni ta' l-appell odjern;

2. Illi fit-tieni lok l-appellant jaghmel referenza ghas-sottomissjonijiet kollha kontenuti fil-korrispondenza- precedenti bejn il-partijiet kemm quddiem il-Kummissjoni qabel ir-rifjut, kif ukoll quddiem il-Bord u t- Tribunal nkluz:

A) L-ittri ta' l-appell;

B) B'mod specifiku ssir referenza ghall-ittri kontenuti fl-atti tal-applikazzjonijiet appellati u ndirizzati lie-Chairman ta' l-Awtorita' datati 28 ta' Gunju, 2004 li filhom gew ikkwotati ghadd ta' permessi ta' zvilupp li jaqghu taht l-istess kriterji tal-applikazzjoni tal-appellant;

C) L-ittra ta' l-appellant datata 15 ta' Marzu, 2007 fejn gew indikati permessi ohra ta' zvilupp li kienu nhargu aktar recenti fiz-zona;

D) Ir-risposta ulterjuri ta' l-appellant datata 17 ta' Ottubru,2007;

E) L-ittra tat-28 ta' Frar, 2008;

u l-appellant jaghmel tieghu dak kollu kontenut fl-istess u jitlob li dan it-Tribunal jiehu konjizzjoni taghhom fl-analizi ta' dawn l-appell kontestwalment u d-decizjonijiet;

3. Illi fit-tieni lok l-appellant jaghmel ukoll referenza ghall-verbali taz-zewg accessi li saru fuq il-post minn zewg Bordijiet diversi minn fejn irrizulta li dan il-bini huwa r-residenza ordinarja tal-appellant u l-familja tieghu u dan sa mill-bidu tas-snin tmenin (80), li huwa l-uniku residenza li ghandu fejn huwa jirrisjedi flimkien mal-familja tieghu, li dan il-bini jifforma parti minn bosta blokok ohra ta' bini (parcel of properties) li ghalkemm kienu originarjament proposti sabiex jigu rikonoxxuti bhala 'small rural settlement' jew 'hamlet' ghal xi raguni dan ma sarx b'rizultat li r-residenzi li jnsabu f'din iz-zona u li ilhom ezitenti sa mill-bidu tas-snin 80 ma nghatatilhomx il-protezzjoni li kien jixiriqilhom;

4. Illi fit-tielet lok l-appellant jaghmel referenza wkoll ghad-dokumenti prezentati li juru li sahsitra l-appellant ilu ghexieren ta' snin ihallas lill-istess Gvern ta' Malta licenzja ghall-uzu tal-'pool' imsemmija f'dawn il-procedura. Ghalhekk minn naha ghandek Dipartiment tal-Gvem li ilu li accetta il-legalita ta' din il-'pool' tant illi qed jipretendi hlas ta' licenzja fuqha, minn naha l-ohra ghandh l-istess Gvern tramite l-Awtorita' li qed tibqa insisti fuq l-illegalita' ta' din il-'pool'. Dan certament jilledi bi shih id-drittijiet ta' l-appellant u ghandu jittiehed in konsiderazzjoni minn dan it-Tribunal;

5. Illi fir-raba' lok l-appellant ifakkar ukoll anki b'referenza ghall-verbali tal-accessi li fil-vicinanze tas-sit inhargu bosta permessi ta' zvilupp lil terzi anki recenti izda ghal xi raguni l-Awtorita' b'rnod diskriminatorju ghall-ahhar baqghet ma ssanzjonatx irresidenza tal-appellant b'detriment ghad-drittijiet tieghu u tal-familja tieghu li jigu trattati b'mod ugwali bhal applikanti ohra.

Illi apparti l-kwistjoni tad-diskriminazzjoni l-istess permessi ta' zvilupp iwasslu wkoll ghall-kwistjoni tal-'commitment' li hemm fiz-zona ghall-permessi ta' zvilupp simili u ohrajn anki diversi izda lkoll ghal skopijiet ta' residenza jew sahsitra 'stores', liema 'commitment' ghandu jimmilita favur li jigu milqugha l-applikazzjonijiet tal-esponent.

Illi mill-lat ta' gurisprudenza ssir referenza ghad-decizjoni fl-ismijiet Joseph Gauci vs. Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar deciza mill-Qorti ta' l-Appell nhar il-25 ta' Frar, 2010 fejn f'dik id-decizjoni l-Qorti ddikjarat li applikazzjonijiet simili jirrikjedu trattament identiku u jirrikedju li jkunu konsistenti sabiex ma tigix krea ta diskriminazzjoni u inegwaljanza ma' l-appellant altrimenti l-Awtorita' jew it-Tribunal ikunu hatja ta' diskriminazzjoni ingjustifikata fil-konfront ta' l-appellant. Fil-fatt f'dak il-kaz il-Qorti annullat id-decizjoni u baghtet lura l-atti quddiem il-Bord.

Kopja Informali ta' Sentenza

Issir ukoll referenza ghad-decizjoni fl-ismijiet Joseph Muscat vs. l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar datata 15 ta' Mejju 2005 fejn ikkonfermat decizjoni ta' l-istess Bord ta' l-Appell li ddikjarat kif isegwi:

'Illi peress li l-izvilupp fis-sit adjacenti gie approvat, hu difficli ghal dan il-Bord li jasal ghall-konkluzjoni differenti.'

Sentenzi ohra fuq l-istess linja huma Anna D' Amato vs. Kummissjoni ghall-Kontroll tal-Izvilupp deciza nhar it-28 ta' Gunju, 2006 mill-Onorabbli Qorti ta' l-Appell, Dr. Garhan Busuttil vs. l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar decizja fit-28 ta' Frar, 2008 ukoll mill-Qorti ta' l-Appell, Marco Farrugia vs. Kummissjoni ghall-Kontroll ta' l-Izvilupp (10 ta' Dicembru, 2008, Appell), Christine Steege vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar (26 ta' Novembru, 2009, Appell), Kevin Azzopardi vs. l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar (26 ta' Novembru, 2009, Appell).

Jigi sottomess li sa minn quddiem il-Kummissjoni ghall-Kontroll ta' l-Izvilupp l-appellant dak iz-zmien l-applikant kie gia qed ihossu li qed jigi diskriminat tant illi qajjem dan il-punt fl-ittri tieghu fl-atti ta' kull applikazzjoni indirizzati lill-Kummissjoni u datati 28 ta' Gunju, 2004. Fl-istess ittri gew elenkati mill-anqas sittin (60) permess ta' zvilupp fl-akkwati tas-sit koncernat kif ukoll f'irhula fil-vicinanze u ohrajn le li lkoll kellhom l-istess kriterji, fosthom li kienu jinsabu barra z-zona ta' zvilupp IZDA LKOLL INHARGILHOM PERMESS MILL-AWTORITA'. Dawn il-permessi ta' zvilupp sahsitra ma kienux biss jikkoncernaw zvilupp residenzjali izda wkoll zvilupp kummercjali.

Illi l-istess preokkupazzjoni li kienet qed tigi mwettqa diskriminazzjoni fil-konfront ta' l-appellant tressqet bhala aggravji fl-appell tieghu u fl-ittri u sottomissjonijiet ulterjuri. Fil-mori tal-appelli regghu gew ikwotati permessi ta' zvilupp ohra li nonostante li kellhom l-istessi kriterji, u nonostante li l-applikazzjonijiet ta' l-applikant kienu gew rifjutati u kienu pendent i l-appell, dawn xorta wahda nghataw il-permess ta' zvilupp mill-Awtorita'. Jehtieg li l-Awtorita' u rapprezentanti taghha japplikaw il-'policies' u r-regolamenti applikabbli b'mod ugwali ghal kulhadd u mhux f'certu kazijiet jimxu b'mod rigidu magghom u jirrifjutaw l-applikazzjonijiet filwaqt li f'kazijiet ohra jinjorawhom b'mod assolut u jinhargu l-permessi. Jigi emfasizzat li la darba l-Awtorita' anki f'kaz wiehed biss (ghall-grazzja ta' l-argument) tinjora dawn il-'policies' u regolamenti u taghmel eccezzjoni ghall-istess, din l-eccezzjoni ghandha ssir fl-applikazzjonijiet kollha ohra simili altrimenti ma jkunx hemm trattament ugwali u tkun qed tigi kommessa diskriminazzjoni.

Illi fl-appelli odjerni tqajjmet ukoll il-kwistjoni tal-'commitment'. L-appellant jinsisti li dan il-'commitment' ma jstax jigi injorat mill-Awtorita' wisq anqas mit-Tribunal. Ma

Kopja Informali ta' Sentenza

jistax ikun, kif seta jigi verifikat mill-access, li kwazi faccata tas-sit talappellant inhargu permessi ta' zvilupp ghal residenzi filwaqt li gew michuda l-applikazzjonijiet tal-appellant u dan ghal bini li ilu ezistenti ghal aktar minn tletin sena. Dawn il-permessi ta' zvilupp huma pjuttost recenti u saret referenza ghalihom, kemm fl-appelli kif ukoll f'sottomissjonijiet ulterjuri. Sahansitra ssir referenza permess ta' zvilupp iehor faccata tas-sit involut f'dan l-appell bin-numru 04742/05 f'isem certu Marco Milli nonostante li kien jaqa taht ezattament l-istess kriterji ta' skrutinju bhal applikazzjoni odjema. Jirrizulta li f'korrispondenza ulterjuri li ghaddiet bejn l-Awtorita' u l-appellant quddiem dan it-Tribunal l-Awtorita' pruvat tahbi l- izbalji taghha billi ssottomettiet li dan il-permess partikolari inghata fuq sit fejn gia kien hemm residenza. Irrizulta izda li dan ma kienx minnu ghaliex l-uniku permess li kien hemm kien ghal 'store' (li xorta jikkostitwixxi precedent favur l-applikant stante li wahda mill-applikazzjonijiet tikkoncema s-sanzjonar ta' store) u meta saret ir-residenza l-Awtorita' l-ewwel harget Avviz ta' Nfuzzar u konsegwentement harget il-permess ghar-residenza. Fil-fatt jekk wiehed jara t-tieni 'statement' tal-Awtorita' datat 17 ta' Jannar, 2008 dan jikkonsisti biss fi skuza wara l-ohra ghalfejn fis-siti adjacenti nhargu l-permessi ta' zvilupp filwaqt li dawn ma nhargux lill-appellant. Attentat iddisprat biex l-Awtorita' tahbi li qieghda tagixxi b'kejl divers fuq applikazzjonijiet ugwali.

6. Illi dwar il-kwistjoni li z-zona kienet indikata sabiex tigi rikonoxxuta bhala 'small rural settlement' jigi sottomess li ghalkemm huwa minnu li finalment dan ma sehxx (ghalkemm wiehed ma jistax jifhem ghalfejn dan ma sarx in vista tan-numru kbir ta' bini, residenzi, stores fiz-zona u permessi ta' zvilupp) dan ma jfissirx li t-Tribunal ghandu jinjora ghal kollox dan il-fattur daqshekk importanti speċjalment in vista tattrapass taz-zmien minn meta nbdew dawn l-istrutturi. Ssir fdan l-istadju referenza ghall-artiklu 41 sub-artiklu 13 tal-Kap. 504 tal-Ligijiet ta' Malta fejn jinghad li f'kull appell minn decizjoni tal-Awtorita', it-Tribunal huwa obligat ukoll li jhares id-disposizzjoni tal-artiklu 69 tal-istess Kap. 504. Fil-fatt is-sub-artiklu 13 tal-Artiklu 41 jaqra kif isegwi:

'u t- Tribunal ghandu jizgura li jkun konformi mad-disposizzjonijiet tal-artiklu 69 meta jirrevedi d-decizjoni tal-Awtorita' .

Illi l-artiklu 69 sub-artiklu (2) jaqra kif isegwi:

'Fid-determinazzjoni taghha fuq applikazzjoni l-Awtorita' ghandha ukoll tqis:

(a) kull haga ohra ta' sustanza komprizi konsiderazzjoni ambjentali, estetici u sanitarji li l-Awtorita tikkunsidra rilevanti;'

Kopja Informali ta' Sentenza

L-appellant isostni li dan l-aggravju u l-fatti relatati mieghu fil-fatt jikwalifikaw bhala materja ohra ta' sustanza li ghandha tinghata d-debita konsiderazzjoni minn dan it-Tribunal u ghandha timmilita favur l-ghoti ta' dawn il-permessi ta' zvilupp.

7. Illi finalment issir referenza ghal dak li l-Awtorita' qieghda tinsisti fuq bhal raguni ta' rifjut cioe' li jekk jigi approvat dan l-izvilupp ser ikun hemm impatt vizwali u ekologiku fuq is-sit u d-dintorni. Jigi sottomess li dan assolutament mhux minnu kemm minhabba n-numru konsideravoli ta' binjiet ezistenti f'din iz-zona kif ukoll minhabba li fl-uniku kaz fejn l-Awtorita' f'din iz-zona waqqghet binja illegali is-sit partikolari thalla zdingat u ghadu hekk sal-lum. Dan seta jigi vverifikat mill-istess Bord ta' l-Appell waqt l-accessi.

Jigi wkoll emfasizzat il-punt li l-appellant ma jistax' jifhem kif fil-kaz ta' l-applikazzjonijiet tieghu l-Awtorita' qed tinsisti li z-zona hija ta' importanza vizwali u ekologika filwaqt li fil-kazijiet fejn inhargu l-permessi ta' zvilupp adjacenti u faccata s-sit ta' l-appellant dawn il-konsiderazzjoni lanqas biss issemew. Ma tridx tghid l-Awtorita' li l-valur ekologiku jieqaf mas-sit tal-appellant li fuq kollox huwa mibni u ilu hekk ghal aktar minn tletin sena! Anki minn dan il-lat johrog car id-diskriminazzjoni li qed tigi kommissa fil-konfront ta' l-appellent bir-rifjut ta' l-applikazzjoni de quo. ”

Permezz tat-tieni rapport taghha l-Awtorita' ikkummentat kif gej:

“1.0 COMMENTS ON APPELLANT'S ARGUMENTS

1.1 Following the submission of the second report by the Authority; the appellant replied in letter dated 30th May, 2012 by arguing (mainly) the following:

- The appellant has been residing in the same residence which is his only residence since 1980 and the building forms part of other clusters of dwellings which were previously recognized as a 'small rural settlement' which eventually was not established.
- The appellant has been paying his licence for the use of a 'pool'. This means that the Government has long since established the legality of the 'pool'.

Kopja Informali ta' Sentenza

- Several permits have been issued in the vicinity of the site to third parties. Hence, the appellant should have the same identical treatment.
- The nearby dwellings and stores imply that the area is committed with developments similar to the appellant's.
- Reference to examples of appeal decisions.
- The appellant had previously outlined a number of permits which were issued in the vicinity which are located outside the development zone.
- Permission PA4742/05 was issued on a site facing the appellant's residence which was assessed against the same criteria of the appellant's case.
- The appellant is referring to reasons for refusal concerning the impact on the environment to which he is stating that the area is already committed by development and the Authority had removed an illegal development and the site was left to the deteriorate.
- The discrimination is also apparent in the reason for refusals concerning the visual impact since the property adjacent to the appellant's and that in front were not assessed on their impacts on the environment.

1.2 The Authority has the following comments to make:

1.2.1 Repeat of Earlier Comments

At third statement most of the appellant's arguments are identical to the response to the Reconsideration report dated 9th June 2005, and to the first and second statements. Hence, the Authority retains the arguments made in para.5.2 - 5.7 of the initial report of PB 82/07.

1.2.2 Re: Issue of illegality

The appellant is trying to justify the construction of a new dwelling and its ancillary facilities through its long-term use as a residence. However, this fact alone does not present sound planning justification to regularize the building or entitle the proprietor to any rights on the use of his land. As long as the activity and development on site was carried out illegally, the enforcement actions taken on site are still active. This was confirmed in the Court of Appeal decision of 31st May 1996: Francis Mugliett vs. the Planning Authority, which confirmed the presence of illegal development on a site notwithstanding that the illegal development existed on site for more than 40 years, even if with the knowledge of the authorities and no action was taken by these authorities during these 40 years

The appellant is alleging that the Authority has issued permits for residential dwellings in the vicinity of the site. As already remarked in the previous statements, the street along which the development is located is characterized by a number of illegal developments all of which have either been refused or are currently being heard at appeals. The only permit cited by the appellant as applicable to this case is PA 4742/05. The Authority has already commented on this application in the initial report" points 5.3 and 5.4 of the original report to the Tribunal in PB 82/07. The permit issued in the case mentioned by the appellant was warranted since the site was an infill site between legally existing residential developments which although these sites were subject to development, the illegalities consisted of development which followed after the issuance of the original permits for the construction of dwellings.

In addition to the site's location (infill site) of PB 4742/05, the original permit issued on this site for residential development was granted prior to the enactment of the Local Plans. At the time of these permits, ODZ applications were determined on their own merits. In several instances, as in the case of the two permits cited by the appellant, residential development would be favourably considered on committed sites, sites adjacent to blank party walls, and/or on infill sites.

However the Local Plans recognized that further policy guidance was required to control development in such areas. The Local Plans recognized that some areas were more committed than others, and some merited greater environmental sensitivity. This exercise led to the designation of Rural Settlements (Category 1, 2 & 3), where only within these designated areas could a certain extent of residential development be considered as provided for in Policies NWRS 2 & NWRS 3. Within the areas falling outside the designated rural settlements, new residential development is no longer permitted, with the implementation of the Local Plan.

Kopja Informali ta' Sentenza

The site subject to appeal does not fall within a recognized rural settlement, and whether this area should have qualified as such cannot be contested in this development permission application. As already outlined in previous reports, the site falls within an earmarked Natura 2000 site within which no new dwellings are permissible. Therefore, the area cannot be termed a de facto hamlet just because the site is committed by dwellings, the majority of which have been illegally built as testified by the number of applications to sanction.

With regard to the legality of the swimming pool, this issue was raised in previous appeal applications lodged on site which are also being tackled in this report as a single appeal. The construction of the swimming pool was initially mentioned in PA 1266/00 also currently subject to appeal PB 85/04. In this application, the swimming pool was not yet constructed since it was assessed against Circular 1/100 for the construction of new swimming pools in ODZ. Therefore this appeal is null since the swimming pool was eventually constructed illegally and is now being sought for sanctioning through PA1847/02 which is currently subject to PB 144/09.

Nevertheless, in this appeal PB 82/07, the appellant is stating that he is in possession of a license issued by the Water Services Corporation on 22nd February 1999, to contest his entitlement for the swimming pool. The license in question concerns solely the use and operation of a fresh water swimming pool (doc.1 B in PA 1266/00) and by previous appeals the swimming pool is illegal and Circular PA 2/96 is still applicable.

1.2.3 Re: Issue of site sensitivity

The appellant is alleging that the scheduling of the surrounding area was not an issue in applications filed for development adjacent and facing his site. On the contrary, the planning history of these buildings indicates that the development has been carried out without a valid permit. The Buskett Roadhouse facing the appellant's site was subject to two appeals PB339/01 and PB 181/05 lodged against the refusal of PA 1098/01 both of which were eventually withdrawn by the applicant. PA 1098/01 and the preceding application PA 1408/94 were both refused solely on the incompatibility of the proposal with the area in view of its ecological value. On the same note, the building immediately adjacent to the appellant's site subject to application PA 5656/98 was also refused by the DCC since 'the construction of garages outside development zone is not considered as development essential for the need of agriculture, scenic or ecological interests.'

It is also telling to note that even had the site not been scheduled and assessed as a pre-local plan application it would have also been found to run counter to the

Kopja Informali ta' Sentenza

established policy. It would have had to be assessed according to the provisions of the PLP 20 which does not permit new dwellings in the ODZ except under the most stringent criteria which the proposal does not satisfy. Nevertheless, it is established policy that applications are always decided according to policies and legislation in vigore at the time of the decision.”

Ikkunsidra ulterjorment:

Il-mertu ta' dan l-appell jirrigwarda talba ghall-issanzjonar ta' store gja ezistenti.

Is-sit mertu ta' dan l-appell jinsab fi Triq il-Buskett, Dingli.

Din l-applikazzjoni giet rifjutata peress li l-proposta hija ta' skala eccessiva, ta' natura urbana u tkopri parti kbira t'art agrikola f'zona ta' importanza ekologika, li f'dan is-sens il-proposta tmur kontra l-paragrafu 15.39 tal-Structure Plan Explanatory Memorandum, tmur kontra l-objettivi tal-konservazzjoni rurali u ekoloġici tal-pjan ta' struttura partikolarment RCO 2, RCO 10 u RCO 12 kif ukoll il-provvedimenti tal-Flora, Fauna and Natural Habitats Regulations L.N. 257/03, li l-applikant mhuwiex bidwi ful-time registrat, l-proposta mhijiex wahda intiza ghal-skopijiet agrikoli u ghalhekk tmur kontra l-policy AHF 5 tal-pjan ta' struttura u l-Malta Environment and Planning Authority's Policy and Design Guidance: Farmhouses and Agricultural Buildings, u li tmur kontra l-policies SET 11, RCO 2, SET 12 u BEN 5, li s-sit jinsab barra l-limiti tal-izvilupp skond it-temporary provisions scheme ghal-Had Dingli, u li d-disinn kobor u l-gholi tal-istore jkerrhu z-zona, u li l-impatt kreat imur kontra l-policy RCO 4.

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

L-appellant jissottometti li r-ragunijiet li nghataw ghar-rifjut ta' din l-applikazzjoni ma jiehdux a konjizzjoni r-realta tal-fatti koncernanti fejn jinsab l-istore in kwistjoni u ghalhekk ma japplikawx ghall-kaz odjern, li dak hawn fuq suespost jista jigi facilment verifikat billi l-Bord ta' l-Appell joghgbu jaghmel access fuq il-post stante li l-istore in kwistjoni ilu mibni aktar minn ghoxrin sena u jinsab qalb bini iehor li llum il-gurnata jikkwalifika bhala hamlet, li saret ukoll talba sabiex dan is-sit flimkien mad-dintorni jigi kkunsidrat bhala 'hamlet' da parti ta' l-Awtoritajiet koncernati, li ssir referenza ghal diversi permessi li nhargu barra z-zona ta' zvilupp fuq stores da parti ta' l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar liema permessi ghalhekk iqajmu

Kopja Informali ta' Sentenza

dubju serju jekk l-appellant hux qed jigi diskriminat fl-applikazzjoni tieghu, u li permess partikolari hareg ezatt faccata tas-sit koncernat.

L-Awtorita' tissottometti li l-izvilupp propost mhuwiex kkunsidrat bhala zvilupp accettabbli barraa miz-zona fabbrikabbli, li l-izvilupp huwa eccessiv, li l-applikant mhuwiex bidwi registrat, li l-proposta tmur kontra l-policies AHF 5, SET 11, SET 12 u RCO 2 tal-pjan ta' struttura, li l-proposta tmur kontra l-paragrafu 15.39 tal-Structure Plan Explanatory Memorandum, tmur kontra l-artikolu 13.1(a) u (b) tal-avviz legali 257 tal-2003, tmur kontra l-objettivi ta' konservazzjoni rurali u ekologici tal-pjan ta' struttura partikolarment l-policies RCO 10 u RCO 12 u l-provvedimenti ta' Flora, Fauna and Natural Habitats Regulations L.N. 257/03, u li fis-sustanza l-issanzjonar propost mhuwiex gustifikat.

l) L-ewwel aggravvju tal-appellant hu fis-sens li ma ttiehidx kont tal-izvilupp li jezisti f'din il-lokalita' partikolari, li ilu li nbena snin ilu (fl-appell li gie pprezentat fit-2005 jinghad "aktar minn ghoxrin sena"). L-appellant in fatti talab li jsir access biex isiru d-debiti kostatazzjonijiet u verifiki, dwar l-izvilupp ezistenti, zvilupp li jkkwalifika bhala 'hamlet', u li saret talba biex jigi hekk konsidrat.

L-applikant qed jipproponi li jissanzjona agricultural store u domestic workshop li ghandu area ta' 132m². Lis-store hu msaqqaf fuq 11-il filata.

Is-sit jinsab f'area ta' konservazzjoni specjali t' Importanza Internazzjonali; area ta' High Landscape Value tal-Buskett, u area t' Importanza Ekologika Level 3.

Fuq l-istess sit saru s-segwenti applikazzjonijiet:

PB 1760/84 Construction of dwelling and garage. Refused.

PA 7747/94 To carry out minor additions at ground floor and construction of swimming pool. Michuda mid-DCC fis-16 ta' Frar 1996.

PA 1266/00 To sanction minor additions at ground floor and construction of swimming pool. Michuda mid-DCC fit-8 ta' April 2002. Reconsideration michuda fit-2 ta' Mejju 2004. Sar appell PAB 85/04.

Kopja Informali ta' Sentenza

PA 2289/00 To sanction store. Michuda mid-DCC fit-8 ta' April 2002.
Reconsideration michuda fis-16 ta' Settembru 2002.

PA 1847/02 To sanction swimming pool. Michuda fl-24 ta' Lulju 2002.

L-appellant jagħmel enfasi fuq il-fatt li l-istore mertu ta' din l-applikazzjoni ilu s-snin li nbena, u jinsab f'area fejn hemm diversi strutturi ohra. Dan hu fattwalment korrett; pero' irrizulta mid-dokument anness mar-rapport tal-Awtorita' pprezentat fit-12 ta' Jannar 2006 li l-bini li għalih qed jagħmel referenza l-appellant hu bini kollu illegali billi sar bla permess.

Irrizulta in fatti li propjetajiet vicin is-sit 'de quo', mmarkati A, B, C, D, E, F, G u H huma kollha illegali, u whud minnhom ittiehdet 'direct action' fuqhom. L-appellant għalhekk ma jistax jiggustifika l-izvilupp tieghu jew jippretendi li jibbenefika mill-fatt li fil-lokalita' jezisti bini iehor, billi dan il-bini irrizulta li hu illegali.

L-appellant iddikjara li saret talba mal-Awtoritajiet biex din l-area partikolari tigi kkonsidrata bhala Rural Settlement (Category 1, 2 & 3) fejn certu zvilupp, bcerti kondizzjonijiet jista' jigi approvat.

Pero' bil-pubblikazzjoni tal-Pjan Lokali f'Lulju 2006, din l-area ma gietx disinjata bhala Rural Settlement, izda bhala Special Area of Conservation of International Importance; Area of High Landscape Value; Level 3 Area of Ecological Importance, area ta' konservazzjoni rurali, barra miz-zona tal-izvilupp – area fejn l-izvilupp mertu ta' dan l-appell ma jistax jigi approvat.

II) L-appellant jallega diskriminazzjoni billi ngħataw permessi għall-stores barra z-zona tal-izvilupp "permess partikolari hareg ezatt faccata tas-sit koncernat" Dan mhux korrett għar-ragunijiet segwenti:

Għalkemm hux eskluż li ngħataw permessi barra z-zona tal-izvilupp, dan hu eccezzjonalment possibbli meta l-area tkun disinjata bhala Rural Settlement.

F'dan il-kaz, pero', billi s-sit ma jinsabx f'Rural Settlement l-anqas dak eccezzjonalment accettabbli f'Rural Settlement, ma jista' jigi accettat f'zona sensitiva fejn jinsab l-fond mertu ta' din l-applikazzjoni.

Il-permess citat mill-appellant mhux 'ezatt faccata' tas-sit mertu ta' dan l-appell. Dan hu kkonfermat mid-Doc 1 anness mar-rapport tal-Awtorita' tal-11 ta' Gunju 2007, fl-Appell 82/07 fejn is-sit mertu tal-appell hu indikat bl-ahmar bl-ittra 'J' mentri l-kaz citat hu mmarkat bil-blue bl-ittra 'A' fuq n-naha l-ohra tat-triq, u distanza konsiderevoli l boghod minnu. Is-sit mmarkat A jirreferi ghall-PA 4742/05. Dwar dan il-permess nghatat l-informazzjoni kollha fl-appelli l-ohra konessi fosthom 85/04 u 82/07. Il-permess kien hareg billi s-sit kien 'infill site' bejn zewg residenzi antiki mibnija bil-permess; kif konfermat mis-second statement tal-Awtorita' f'dan l-appell ipprezentata fit-18 ta' Lulju 2012.

Iz-zewg kazijiet m'humiex identici, u ghalhekk ma tirrizulta l-ebda diskriminazzjoni kontra l-appellant kif minnu allegat.

III) Dwar iz-zona mertu ta' dan l-appell kif ukoll dwar s-sottomissjonijiet ulterjuri tal-konsulent tal-appellant, issir referenza ghall-appell 85/04 fejn ntqal is-segwenti:

"Il-premess jikkonferma, mhux li l-appellant f'xi zmien kellu permess, izda li ilu ghall snin shah igawdi mill-illegalita' impurement. L-appellant kellu l-obbligu li japplika qabel jibni, u jibda jibni kemm-il darba jinghata l-permess. L-appellant applika ghall-permess fin-1984, ma nghatax permess u bena zvilupp urban estensiv f'area sensittiva daqs li kieku inghatalu l-permess.

L-appellant ghazel li jibni bla permess, u billi ilu snin jirrisjedi hemm jippretendi li l-izvilupp illegali jigi sanzjonat u l-area issir Rural Settlement. Il-process ta' ippjanar, partikolarment l-kontroll ta' l-izvilupp, issir b'mod tekniku u oggettiv biex jigi assigurat li certi areas li jimmeritaw protezzjoni jigu ppriservati a beneficju tal-komunita in generali, partikolarment ghall-generazzjonijiet futuri. Dan l-ezercizju idealment m'ghandux jigi influwenzat kondizzjonat jew addirittura dettat minn min jabbuza. B'dan il-mod dak kollu kkonsidrat u ippjanat li jimmerita preservazzjoni, jigi stultifikat, u fejn kien intiz li jibqa mhux zviluppat, jigi zviluppat. In-nuqqas ta' kontroll, u l-assoggettazzjoni ghall-abbuz tannulla kull tentattiv u ezercizju intiz biex jorganizza l-izvilupp biex dan ikun dejjiemi u sostenibbli."

"Fin-nota, ipprezentata fit-13 ta' April 2012, l-konsulent legali tal-appellant ssottomettiet li qed issir diskriminazzjoni kontra l-appellant, li nghataw diversi permessi ghar-residneza barra z-zona tal-izvilupp; li l-Awtorita' mhix konsistenti fid-decizjonijiet taghha billi applikazzjonijiet simili, barra z-zona tal-izvilupp gew approvati; li l-appellant ilu mis-snin tmenin juza l-fond ghar-residenzja; li fil-lokalita' hemm diversi binjiet ohra, u ghalhekk l-lokalita' kienet timmerita' li tigi

Kopja Informali ta' Sentenza

disinjata bhala Rural Settlement fejn certu zvilupp limitat jista' jigi approvat. Inter alia fl-imsemmija nota jinghad s-segwenti:

“Jigi enfasizzat li la darba l-Awtorita' anki f'kaz wiehed biss (ghall-grazzja tal-argument) tinjora dawn l-policies u regolamenti u taghmel eccezzjoni ghall-istess, din l-eccezzjoni ghandha ssir fl-applikazzjonijiet kollha ohra simili altriment ma jkunx hemm trattament ugwali u tkun qed tigi kommissa diskriminazzjoni.”

Il-premess jimmerita approfondiment fil-kuntest ta' konsiderazzjonijiet ta' ippanjar.

Dwar permessi fil-vicinanze tas-sit de quo, irrizulta fil-kors ta' smiegh ta' dan l-appell, li prattikament l-izviluppi kollha f'din il-lokalita' nbnew bla permess. Mhux sufficjenti li wiehed jirreferi ghall-izvilupp fil-lokalita', jinhtieg li dawn ikunu legittimi cjoe nbnew bil-permess. Kif irrizulta mill-pjanta pprezentata mill-Awtorita', l-lokalita' in kwistjoni hi karatterizzata bil-bini illegali.

Hemm permess fil-vicinanze, PA 4742/05, izda dan skond l-Awtorita' nghata billi kien infill site bejn zewg residenzi legittimi. Dan hu mmarkat 'C' fil-pjanta annessa mas-second statement tal-Awtorita' Dok LV1. Is-sit mertu ta' dan l-appell la hu infill site u l-anqas adjacenti blank party wall, li huma l-eccezzjonijiet li jiggustifikaw permess f'Rural Settlement.

Saret in fatti sottomissjoni fis-sens li dan il-'parcel of properties' kien jimmerita li jigi rikonoxxut bhala rural settlement. Izda jibqa' fatt, li bil-Pjan Lokali ppubblikat f'Lulju 2006, din il-lokaltia' ma gietx disinjata bhala Rural Settlement izda Area sensittiva ta' mportanza ekologika, u High Landscape Value of Buskett, u area ta' konservazzjoni rurali.”

“Hi sottomissjoni tal-appellant li jekk l-Awtorita' taghti permess kontra l-Policies, u taghmel eccezzjoni, din l-eccezzjoni ghandha tigi applikata fl-applikazzjonijiet kollha simili billi fin-nuqqas ikun hemm trattament mhux ugwwali u ssir diskriminazzjoni.

Indubbjament applikazzjonijiet simili jirrikjedu trattament identiku, pero' jinhtieg li jkun simili. L-appellant ghamel referenza ghall-permessi li nghataw barra z-zona tal-izvilupp, pero' ghad-differenza taz-zona fejn jinsab is-sit mertu ta' din l-applikazzjoni, applikazzjonijiet f'areas ODZ li huma Rural Settlement jistghu jigu accettati purche jissodisfaw certi kundizzjonijiet. L-area fejn jinsab is-sit mertu ta'

Kopja Informali ta' Sentenza

dan l-appell ma jinsabx f'Rural Settlement, u ghalhekk l-paragun ma jreggix; u fic-cirkostanzi ma jistax jigi allegat trattament diskriminatorju.

Konsiderazzjoni ohra doveruza hi li mhux kull permess jista' jigi citat bhala precedent; kif jippretendi l-appellant. Jista' jkun l-kaz li jinghata permess b'zball; jew in kontravvenzjoni ta' xi plans jew policy; dan ma jfissirx li l-'izball', ghandu jigi ripetut biex ma ssirx diskriminazzjoni ma' applikant susegwentu. Ezempju ta' dan hu l-Housing Estate tal-Mosta li wara snin mibni b'mod simetriku, gew milqugha xi applikazzjonijiet ghall-garages f'dak li originarjament gie approvat bhala front garden. Dawn huma permessi li ma kellhomx jinghataw, u l-fatt li inghataw ma jaghtu l-ebda dritt lill-haddiehor li jippretendi li jinghata l-permess semplicement ghax dan nghata lill-haddiehor. Ara Appell Numru 294/11 fl-ismijiet Jesmond Farrugia vs. MEPA deciz fis-7 ta' Frar 2012.

Finalment l-perit tal-appellant ilmenta mill-fatt li d-dewmien kien ta' pregudizzju ghad-drittijiet tal-appellant, billi l-applikazzjoni giet deciza skond l-Policies attwali li huma aktar rigoruzi.

Il-perit isemmi 'a 28 year old application'. Dan mhux korrett. Dan mhux kaz ta' applikazzjoni li damet 28 sena biex tigi determinata; izda kwistjoni pprokurata mill-istess agir tal-appellant li applika l-ewwel darba fin-1984; u bena nonostante li l-applikazzjoni giet michuda.

Dwar liema Policies huma ppplikabbli, cjoe jekk humiex daww fis-sehh f'zmien meta saret l-applikazzjoni, jew daww fis-sehh meta tigi determinata l-applikazzjoni; dan hu illum stabbilit minn sentenzi tal-Onorabbli Qorti ta' l-Appell fosthom "Angelo Farrugia vs Chairman tal-Awtorita' ta' l-Ippjanar deciza fl-24 ta' April 1996, u "Emanuel Mifsud vs il-Kummissjoni ghall-Kontroll ta' l-Izvilupp", deciza fil-31 ta' Mejju 1996."

Ezaminata l-applikazzjoni fil-kuntest tal-Policies ta' l-ippjanar rilevanti, il-motivazzjonijiet tar-rifjut jirrizultaw gustifikati, u l-appell ma jimmeritax konsiderazzjoni favorevoli.

It-Tribunal ghalhekk qed jiddisponi min dan l-Appell billi jichad l-istess u jikkonferma r-rifjut tat-23 ta' Settembru 2005, ghall-applikazzjoni PA 0513/04.

Ikkunsidrat

Kopja Informali ta' Sentenza

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal naqas li jikkonsidra s-sottomissjonijiet u provi tal-appellant u dan jikkostitwixxi ingustizzja manifesta fil-konfront tieghu bil-ksur tad-dritt audi alteram partem. L-appellant jirreferi ghas-sottomissjonijiet li ghamel fil-15 ta' Marzu 2007 u permessi hemm ikkwotati;
2. It-Tribunal ma applikax il-commitment li hemm fiz-zona ghal kaz u b'hekk iddiskrimina mal-appellant u kkommetta zball ta' ligi. Issir referenza specifika ghal permess PA 4742/05 ghal zvilupp li inghata permess faccata tas-sit tal-appellant fl-istess triq u fejn kienu japplikaw l-istess policies. Ebda wahda mill-izviluppi ma huma f'rural settlement kif issottometta t-Tribunal, pero irrifjuta l-applikazzjoni mertu tal-appell fuq il-bazi li l-izvilupp mhux gustifikat ghax mhix qeghda f'rural settlement. Il-paragun ma jreggix. In oltre t-Tribunal inkorra zball ta' ligi meta qal li l-permess PA 4742/05 kien gustifikat nonostante illi l-bini biswit is-sit in kwistjoni kienu illegali mentri invece l-izvilupp mertu tal-appell ma kienx gustifikat ezattament ghall-istess raguni;
3. It-Tribunal interpreta hazin il-kuncett ta' commitment meta qal illi mhux kull permess jista' jigi citat bhala precedent meta dan jinghata bi zball jew in kontravvenzjoni ta' pjan jew policy, dan igib fix-xejn il-principju li applikant ma ghandux jigi diskriminat fil-konfront ta' ohrajn, ghax bl-argument tat-Tribunal jista' jigi injorat il-commitment bhala principju;
4. It-Tribunal zbalja meta kkonkluda li l-appellant mhux qed jigi diskriminat ghax ma nghatawx permessi ta' zvilupp ohra fil-lokalita meta fil-fatt inhareg il-permess 4742/05 u fejn it-Tribunal sostna bhala argument li jinsabu f'partijiet diversi tat-triq.

L-ewwel aggravju

Dan l-aggravju hu bla bazi peress illi t-Tribunal ikkonsidra l-aggravji mressqa mill-appellant u l-argumenti mressqa u wara li ghamel il-kostatazzjonijiet tieghu wasal ghal konkluzzjonijiet li wasal. Il-fatt illi t-Tribunal ma jkunx semma' kull dokument jew argument jew sottomissjonijiet li tressqu mill-partijiet sa l-ahhar dettall ma jfissirx li jkun sar xi ingustizzja mal-partijiet. Jirrizulta minn qari tad-decizjoni illi l-aggravji tal-appellant kienu tnejn u t-tnejn gew trattati mit-Tribunal u d-decizjoni dwarhom kienet wahda kunsidrata u ittiehed konjizzjoni tal-argumenti fis-sustanza dwarhom. Apparti dan kollu l-appellant jaghmel referenza specifika ghall-ittra tal-15 ta' Marzu 2007 li skond hu, it-Tribunal ma semmiex fid-decizjoni tieghu. Din

Kopja Informali ta' Sentenza

L-ittra b'din id-data ma tinsabx f'dan il-process u anqas fit-tlett processi ohra konnessi cioe appelli 174/2012, 176/2012 u 177/2012. Anki kieku kienet tezisti, in-nuqqas li t-Tribunal isemmiha ma jirrendix perikoluz jew dubjuz il-gudikat peress li kif inghad, it-Tribunal ikkonsidra u iddelibera fuq l-aggravji mressqa cioe d-decizjoni li ittiehdet fin-nuqqas tal-prezenza tal-applikant u l-aggravju dwar il-commitment taz-zona, permessi simili li nhargu fl-istess inhawi u li partijiet mill-binja huma gia koperti b'permess. Dan kollu gie ezaminat mit-Tribunal.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

L-ewwel parti tal-aggravju jirrigwarda d-diskriminazzjoni li saret mill-appellant peress illi fil-konfront tieghu ma ittehidx kont tal-commitment fiz-zona u b'referenza partikolari ghal permess 4742/05 li hu allegat hu simili ghall-izvilupp in kwistjoni u jinsab faccata tas-sit in kwistjoni. Din il-kwistjoni giet ventilata mit-Tribunal b'mod dettaljat fejn it-Tribunal fl-ewwel lok sab illi l-izvilupp bil-permess 4742/05 mhuiex faccata tas-sit in kwistjoni izda f'certu distanza boghod. In oltre ma hemm ebda similitudni bejn iz-zewg fattispecie li jikkarakterizaw l-izviluppi. Fil-kaz tal-permess 4742/05, dan gie meqjus bhala infill site bejn zewg proprjetajiet legali u adjacenti blank party wall. L-applikazzjoni mertu ta' dan l-appell ma ghandhiex l-istess karatteristici anzi hi wahda minn sensiela ta' binjiet fl-istess zona mibnija illegalment u kolpiti b'enforcement notice. Il-Qorti in oltre tqis zbaljata s-sottomissjoni tal-appellant li z-zewg permessi kienu kolpiti bl-istess policies peress illi sottomissjoni tal-Awtorita, mhix ribadita mill-appellant, gie relevat illi s-sit fil-permess 4742/05 kellu gia permess ghal residenza qabel ma sar il-local plan fejn kien jinghata permess ghal zviluppi fuq il-mertu ta' kull kaz bhal kaz 4742/05 bil-fattispecie tieghu. Mid-dhul tal-pjan lokali eccezzjonijiet isiru biss f'rural settlements. Is-sit in kwistjoni ma jaqax f'din il-kategorija anzi hu desinjat bhala Area of Ecological Importance.

Kwinda hi l-fehma tal-Qorti li l-argument tad-diskriminazzjoni ibbazat fuq nuqqas ta' applikazzjoni ta' commitment hi errata fil-fatt.

Kopja Informali ta' Sentenza

In oltre kif già intqal mhix korretta l-allegazzjoni fit-tieni parti tal-aggravju illi t-Tribunal ghamel xi evalwazzjoni hazina ghax irrifjuta din l-applikazzjoni ghax mhix f'rural settlement. It-Tribunal anzi qal li ebda ecezzjoni ma setghet issir ghal dan l-izvilupp precizament ghax mhix f'rural settlement izda f'conservation area mertu ta' protezzjoni. L-istess jinghad ghall-argument zbaljat li z-zewg siti cioe dik in kwistjoni u dik bin-numru 4742/05 jinsabu biswit zviluppi illegali. Anzi inghad preciz bil-kontra mit-Tribunal u din kienet wahda mir-ragunijet ghaliex iz-zewg siti ma setghux jigu paragonati bl-istess mod. Dan kollu appartu l-konsiderazzjoni tat-Tribunal illi ma jistax jigi sanzjonat zvilupp meta tali zvilupp hu ancillari ghal zvilupp primarju cioe residenza li hi illegali qabel din tal-ahhar tigi sanzjonata kif inkorporat fir-regolament 14 tal-Avviz Legali 514/2010 precedentement ic-cirkolari PA 2/96.

Ghalhekk dan l-aggravju qed jigi kompletament michud.

It-tielet aggravju

Hi l-fehma tal-Qorti illi t-Tribunal ma ghamel ebda apprezzament hazin tal-kuncett ta' commitment. It-Tribunal mhux marbut bil-precedent ghalkemm ghandu jkun konsistenti fid-decizjonijiet tieghu biex jaghti certezza lil gudikati u sens ta' direzzjoni lil min irid jaghmel zvilupp. Appartu dan pero, it-Tribunal hu marbut primarjament li japplika l-ligijiet, pjanijiet u policies fil-mument tad-decizjoni bla ebda diskrezzjoni afdana lilu li jiddeciedi mod iehor. Ghandu l-obbligu li jqis kwistjonijiet ta' sustanza bhal ma huma permessi simili fiz-zona fejn qed jintalab il-permess, pero approvazzjoni ta' zvilupp ibbazat semplicement fuq permess simili minghajr kont li l-izviluppi huma identici u li jitqies li fil-fatt l-applikazzjoni in kwistjoni tkun konformi mal-ligijiet, pjanijiet u policies in vigore fil-mument tad-decizjoni ma jikkostitwix bazi ghal gustifikazzjoni tal-aggravju kif qed jippretendi b'mod akkamediku l-appellant. Dan jinghad ghaliex kif irrelevat il-Qorti, fuq bazi fattwali ma hemmx is-similitudni allegata mill-appellant li jpoggi fix-xejn kull argument dwar nuqqas ta' apprezzament korrett jew aplikazzjoni tal-kuncett ta' commitment fil-kaz in ezami.

Ghalhekk anki dan l-aggravju qed jigi michud u din il-Qorti taqbel mal-konsiderazzjonijiet li ghamel it-Tribunal fuq il-materja.

Kopja Informali ta' Sentenza

Ir-raba aggravju

Dan l-aggravju hu bla bazi ghax l-appellant kien selettiv fl-argument li uza bhala bazi tal-aggravju. It-Tribunal wasal ghal konklużjoni li l-appellant ma kellux raguni jsostni li ghandu jircevi trattament simili ghal permessi ohra mahruġa fiz-zona għaliex il-premess ikkwotat 4742/05 apparti li jinsab f'parti opposta tat-triq f'distanza mbegħda, zied illi dak il-permess inhareg ghax kien infill site bejn zewg proprjetajiet bil-permess u qabel ma inhareg il-pjan lokali. Invece l-izvilupp in kwistjoni kien jinsab fost diversi zviluppi bla permess f'zona li hi protetta sew mill-izvilupp skond l-istess pjan lokali. It-Tribunal iddecieda a bazi tal-pjanijiet u policies ezistenti fil-mument tad-decizjoni u la darba giet applikata l-ligi ma setax ikun hemm diskriminazzjoni ghax id-diskriminazzjoni tirrikjedi trattament differenti f'circostanzi identici. Dan kollu jingħad bla ebda pregudizzju għal fatt li strettament kwistjonijiet ta' diskriminazzjoni mhumiex fil-mansjoni tal-poteri ta' din il-Qorti li iddeciedihom fejn jirrigwarda appelli minn decizjonijiet tat-Tribunal.

Għalhekk l-aggravju qed jigi michud.

Decide

Għalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' France Tonna u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tat-8 ta' Novembru 2012. BI-ispejjez kontra l-appellant.

< Sentenza Finali >

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