



MALTA

**QORTI TA' L-APPELL**

**ONOR. IMHALLEF**

**MARK CHETCUTI**

Seduta ta' l-14 ta' Jannar, 2015

Appell Civili Numru. 41/2014

**George Muscat**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell ta' George Muscat tat-30 ta' Lulju 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-17 ta' Lulju 2014;

## 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:

Illi l-appellanta applikat sabiex tbiddel l-uzu ta' garage li jinsab fi Triq Frank Ghio, fiz-Zejtun.

Illi l-Kummissjoni ta' l-Ambjent u l-Ippjanar rrifjutat l-proposta ghal din ir-raguni segwenti :-

1. The proposed development will remove the existing parking spaces for the building and so it would conflict with Structure Plan policy TRA 4 and PA circular 3/93 which seek to ensure that appropriate provision is made for off-street parking.

Ra l-appell tal-Perit Daniel Cordina f'isem l-appellanti li jaqra' kif gej:-

"Please refer to the application in caption, to the attached correspondence dated 6th August and to the decision published on the 17th August.

On behalf of my client we would like to submit an appeal against the decision for our proposal.

Please find attached payment voucher 259004 with this submission.

We would like to point out the following point which will be then amplified during the hearings:

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Reason for refusal 1 states that the proposed change of use will further reduce the existing parking spaces for the building and so it would conflict with Structure Plan policy TRA 4 and PA circular 3/93 which seek to ensure that appropriate provision is made for off-street parking. The main argument for this refusal is that this proposal 'will result in the loss of parking in relation to the overlying apartment block'. We would like to point out that the developer of the apartment block overlying the premises in question is owned by third parties. Also, when MEPA was considering the application of this apartment block in PA7536/07, the 2 car spaces which may be housed in the garage owned by my client were considered as part of the same block and therefore the developer was granted and the permit was issued on condition that a UIF for the shortfall of one car is paid.

One should assume that should MEPA always enforce the Structure Plan policy TRA 4 and the PA circular 3/93, like it enforced in PA 262/10 (our proposal), it should have enforced the same in the application for the overlying apartment building (PA 7536/10) and refuse it. Given that MEPA in PA 7536/10 granted the permit as it was decided that these should be waived on condition of a payment of UIF, it reasonably stands out that it could waive this refusal on condition of a payment of UIF.

My client has 2 sons, one of them unemployed and wants to set up this shop so that his son starts up a business and not be a burden on the society. He is prepared to invest in this shop and also pay the UIF, even though the shortfall of parking spaces should have been shouldered by the developer of the overlying apartment block.

For these reasons we respectfully request the Planning Review Tribunal to overturn the decision of the EPDC and grant the appeal for development permission.”;

Ra s-sottomissjonijiet tal-Awtorita' dwar l-appell li saru permezz ta' nota li giet ipprezentata lit-Tribunal fit-18 ta' Novembru, 2013, u li jaqraw kif gej:

5.2 The Authority has the following comments to make:

5.2.1 Merits of the Refusal

According to the permit PA7536/07, the building on site consists of five dwellings and a 2-bedroom penthouse, requiring a minimum provision of 7 parking spaces.

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The garage under consideration was considered as a two-car garage in relation to the penthouse, and a UIF for the resulting shortfall of 1 car-space was imposed.

The proposed change of use of the garage into a shop will result in the further loss of parking provision, hence a total shortfall of 3 spaces. Reference is being made to the Policy Paper for Parking Provision (1997), particularly para. 4.2, which specifies that the change of use of a garage can only be permitted if the remaining parking provision within the building is enough to cater for the other uses. Therefore, the proposal runs counter to Structure Plan policy TRA 4.

5.2.2 Re: Argument that the overlying apartments and garage in question are owned by different persons.

The appellant is arguing that the overlying dwellings approved by way of PA 7536/07 belong to third parties and that his garage is not related in any way to this development. Hence, the Authority should stop refusing the proposal arguing that it would lead to the loss of existing on-site parking required for the above dwellings.

The Authority does not agree since on-site parking requirements is always calculated on the number of apartments (or any other uses for that matter) existing or proposed in that particular block, irrespective of the ownership. Parking provision is not intended to be used necessarily exclusively by the overlying apartments; rather its calculation is intended to provide the immediate urban area a suitable amount of off-street car parking spaces that is proportionate to the needs of the number and sizes of activities carried within the particular site. This methodology ensures that the area in which the particular site is located is furnished with an acceptable amount of off-street parking which provides an essential amenity to the area.

In view of the above argument and in view that the proposed development will eliminate the existing private parking provision associated with (although not necessarily used by) the overlying development, the proposal is deemed unacceptable as it reduces an important residential amenity and thus runs counter to Structure Plan policy TRA 4.

5.2.3 Re: Argument that the UIF mechanism was employed in the granting of permission to develop the overlying apartment in permit PA 7536/07 and thus the same mechanism can be used in this case.

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Structure Plan policy TRA 4 requires that each and every development is suitably catered for in terms of off-street parking provision. It does contemplate the possibility of mitigating shortfall in off-street parking in those projects where it is not essential to meet the full car parking standards by making a monetary contribution.

This contribution mechanism is explained in policy 4.18 of the DC2007 which however makes it most clear that [t]his policy does not apply where the proposed development will result in the removal of parking available on site.

The Authority notes that the UIF mechanism was appropriate in PA 7536/07 in that the proposed development in PA 7536/07 did not result in any loss of parking. It did create a shortfall one car parking space, however in planning terms there is a difference between the creation of a shortfall in parking and the loss in parking provision.

The UIF mechanism cannot be utilized in the appeal de quo because it results in loss of parking. In other words, given that in this case the proposal consists of change of use from an existing garage to a shop and therefore it involves loss of parking, the shortfall in parking created in this application cannot be compensated for by a contribution towards the UIF as per policy 4.18 of the DC 2007.

### 5.2.4 Permits quoted by the appellant

PA 1753/12

This permit regards also the change of use from a garage to a class 4 shop. This permission was granted subject to the payment towards the UIF, because albeit it did lead to loss of parking, the layout and size of the existing garage, together with its proximity to the corner, the existing structure could not be adequately used as a garage.

PAB 63/12

The Tribunal had upheld PAB 63/12 (PA 1832/11 – Change of use from garage to class 4 shop) on the basis that:

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☒ 'Off-street parking space indipendenti wiehed biss ser jintilef jekk tigi accettata din il-proposta;

☒ Minn, naha l-ohra, jekk tintlaqa' din il-proposta, l-ispazju quddiem is-sit jista jintuza bhala on-street parking space;

☒ It-Tribunal huwa tal-fehma soda li parking space fuq it-triq (on-street) huwa ta' valur hafna akbar minn garage ta' karozza wahda u dan ghaliex dan ta' l-ahhar awtomatikament jelimina on-street parking space fil-waqt li jintuza biss mis-sid li jhalli l-garage vojta kull meta johrog. Minn-naha l-ohra on-street parking space jista' jigi okkupat minn kullhadd f' kull hin u ghalhekk ghandu valur hafna akbar;

Thus it is immediately apparent that the Tribunal's decision was based entirely on the fact the loss of parking amounts to just a single car parking space and that this could be compensated because a single car parking space could be provided in front of the garage (now turned into a shop).

Obviously this reasoning is not applicable to the appeal de quo in that the garage proposed to be changed into a shop is a two-car garage and it is physically impossible to permit the parking of two cars in front of the garage opening.

Therefore, from the above analysis, it is manifestly clear that the two permits referred to by the appellant do not represent the same situation as that applicable to the appeal in concern. Hence the decisions in PA 1753/12 and in PAB 63/12 are in no way pertinent to this appeal and can in no way be used to justify the appellant's request.”;

Ra l-Policy TRA 4 tal-Pjan ta' Struttura;

Ra l-PA Circular 3/93, u s-Supplementary Guidance, Parking for Local Shops, 1997.

Ra c-cirkulari tal-MEPA numru 3/14 tal-5 ta' Mejju 2014;

Ra ukoll il-PA files bin-numri 262/10 u 7536/07;

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

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Ikkunsidra ulterjorment:

Illi l-ilment principli mressaq mill-appellanta rigward ir-raguni tar-rifjut huwa marbut mal-kalkolu ta' parkegg fil-permess għall-izvilupp fuq is-sit, bin-numru PA 7536/07, li jikkonsisti fi zvilupp mill-gdid ta' twaqqiegh ta' dar residenzjali, għajr għal zewg garages fil-pjan terran u minflok jinbena garage fil-pjan sotterran, b'diversi apartamenti sovrastanti. Illi l-garage mertu ta' dan l-appell jinsab fil-livell terran sottostanti l-apartamenti approvati b'dan il-permess sucitat.

Illi fil-kaz odjern, l-Awtorita' bbazat r-raguni tar-rifjut a bazi tal-principju li ser ikun hemm tnaqqis ta' parkegg (off-street), għall-izvilupp li hemm fuq l-istess sit. Il-kuncett ta' ppjanar baziku li johrog mill-Pjan ta' Struttura, Policy TRA 4 u gwidi supplementari (PA circular 3/93, u l-linja gwida Parking Provision for Local Shops, Offices and Catering Establishments, tas-sena 1997) jirrigwarda l-bzonn li kull zvilupp jipprovdi l-parkegg fuq is-sit biex jilqa għal-impatt ta' traffiku li ser jiggenera, u għaldaqstant għandu jigi mhares dan il-parkegg milli jitnaqqas bi zvilupp għal bdil fl-uzu.

Illi l-appellant qieghed jinsisti li l-izvilupp tal-apartamenti sovrastanti jappartjenu lil terzi, u l-applikant fil-permess PA 7536/07 gie ezentat milli jhallas għan-nuqqas kollu ta' parkegg peress li kien hemm ezistenti dawn il-garages, inkluz il-garage mertu ta' dan l-appell.

Illi minn ezami tal-permess PA 7536/07, ma hemm ebda ndikazzjoni fl-applikazzjoni li l-garages ezistenti huma ta' terzi, għalkemm dawn gew eskluzi mill-pjanta tal-pjan terran. Fil-pjanta tal-faccata dawn il-garages gew indikati li ser jinzammu, u għaldaqstant l-Awtorita' ikkunsidrat dawn il-garage mal-kumplement tal-proposta ta' garages li qed jipprovdu parti mill-parkegg mehtieg għall-izvilupp ta' apartamenti.

Illi f'diversi decizjoni precedenti, dan it-Tribunal ikkumenta dwar l-importanza li kull zvilupp gdid ma johloqx impatti addizzjonali fiz-zona, li f'dan il-kaz ser ikun in-nuqqas ta' parkegg f'zona residenzjali. Għaldaqstant, il-kwistjoni f'dan il-kaz hija dwar il-bzonn li jigi protett l-garages ezistenti fis-sit, u mhux jizjed l-uzu kummercjali jew uzu iehor li per konsegwenza ser inaqqas il-parkegg.

Illi dan it-Tribunal ma jarax li hemm relevanza mal-permessi citati mill-appellanta, meta fil-kaz tal-PA 1753/12, l-Awtorita' qieset li l-garage kif gie permess originarjament ma kienx jilhaq l-istandards adegwati għal-funzjoni ta' garage, li kien

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jinsab f'kantuniera u b'diffikultajiet ghad-dhul u hrug tal-vettura. Fil-kaz tal-garage inezami mertu ta' dan l-appell, dan jista jakkomoda parkegg ta' karozza bla xkiel. Fil-kaz deciz mit-Tribunal diversament kompost, bl-ismijiet Emanuel Buttigieg vs MEPA, tat-30 ta' Lulju, 2013 (app. 63/12, PA 1832/11), it-Tribunal ikkunsidra l-fatt li l-parkegg fi triq, quddiem il-hanut propost, ser ikun iktar utli mill-parkegg fil-garage. Dan wara kollox kien possibli billi l-wesa' tal-garage ta' madwar 4.8 metri kien bizzzejjed biex jakkomoda parkegg ta' karozza li jilhaq l-istandard applikabbli. Certament dan mhux il-kaz tal-garage mertu ta' dan l-appell, b'wesa ta' madwar 4 metri, ghaldaqstnat ma jistax jigu applikati l-istess kunsiderazzjonijiet li ghamel t-Tribunal diversament kompost.

Illi f'dan il-kaz, dan it-Tribunal ezamina wkoll ic-cirkolari tal-Awtorita' bin-numru 3/14 mahruqa fil-5 ta' Mejju 2005 fejn fil-paragrafu 3.5 tal-istess dokument l-Awtorita' provdjet direzzjoni dwar proposti ta' zvilupp ghal-bdil ta' garages ghall-uzu ta' officini jew hwienet zghar, fejn qed tikkonsidra eccezzjoni ghal-bdil ta' uzu ta' garage ghall-uzu kummercjali ta' mhux aktar minn 50 metru kwadru marbuta ma dar wahda u mhux garage li jaghmel parti minn block t'apartamenti bhal fil-kaz mertu ta' dan l-appell. Ghaldaqstant din l-eccezzjoni kif deskritta fic-cirkolari ma tapplikax ghal kaz inezami.

Ghal dawn il-motivi premissi, u wara li gew ikkunsidrat bir-reqqa l-fattispeci tal-kaz, dan it-Tribunal qieghed jichad l-appell u jikkonferma r-rifjut.

### Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. Il-garage mertu tal-applikazzjoni qatt ma kellu jservi bhala mezz ta' parkegg minn terzi biex jigi approvat zvilupp u dan minghajr il-kunsens ta' sid il-garage. It-Tribunal naqas li jindirizza d-dritt kwezit tal-appellant li ma jistax jigi mnehhi jew varjat b'azzjoni ta' terzi b'limitazzjoni tad-dritt tal-proprjeta tal-appellant. Il-garage ma kienx marbut mal-abitazzjoni meta inxtara u ebda permess sussegwenti ghax-xiri ma seta' jvarja dan l-istat ta' fatt;
2. It-Tribunal applika hazin ic-cirkolari 3/14 li dahlet fis-sehh f'Mejju 2014 wara d-decizjoni tal-Awtorita. Cirkolari hi biss interpretazzjoni ta' policy li mhix materja ta' ordni pubbliku u ma tistax tintuza mit-Tribunal biex tirrifjuta appell minn decizjoni li ittiehdet mill-Awtorita qabel l-introduzzjoni tac-cirkolari.



## **L-ewwel aggravju**

Dan l-aggravju hu identiku ghal iehor mqajjim f'cirkostanzi simili fl-appell **Davina Anne Borg vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar** (App 22/14, 08/10/2014) fejn il-Qorti qalet hekk:

Il-kwezit mressaq bl-aggravju kien fl-ewwel lok jekk qatt irrizulta l-kunsens tal-appellant li l-garage taghha jintuzaw minn terz biex johrog permess ghal zvilupp sovrastanti, fejn l-istess garages ikunu qed jigu indikati li jintuzaw bhala parking spaces biex jaghmlu tajjeb ghall-izvilupp ikkrejat. Din hi kwistjoni li trid tigi mistharga l-ewwel nett billi jigu esposti l-fatti kollha rilevanti b'mod dettaljat li minn qari tad-decizjoni dan ma jirrizultax. Fit-tieni lok, darba esposti l-fatti t-Tribunal kellu jevaluwa l-kwistjoni purament legali jekk il-fatti jwasslux lit-Tribunal jiddeciedi li l-appellant tat il-kunsens esplicitu taghha biex il-garage jintuza ghal finijiet ta' permess ta' zvilupp ta' terzi biex jinhareg il-permess, jew jekk dan il-kunsens esplicitu ma jeztix, hemmx ir-rewiziti gurisprudenzjali stabbiliti ghal prova tal-kunsens implicitu tal-appellant li tfisser rinunzja ta' drittijiet tal-proprietarju li juza l-propjeta tieghu kif irid u jixtieq, bid-dritt li japplika ghal kull zvilupp permissibbli skond il-ligijiet ta' ippjanar vigenti. F'kaz li l-Qorti ma ssibx il-kunsens moghti esplicitament jew implicitament allura tinsorgi l-konsiderazzjoni dwar id-dritt tal-appellant li tinghata permess ghal dak mitlub skond il-ligijiet ta' ippjanar vigenti minghajr ebda referenza jew rabta ma' permessi gia moghtija lil terzi. It-Tribunal naqas li jindirizza l-problema anki minn dan l-aspett. Il-Qorti mhix ser tindirizza l-kwistjoni hi peress li l-ewwel irid isir l-apprezzament ta' dan kollu mit-Tribunal biex ma jintilifx id-dritt tad-doppioezami.

L-aggravju f'dan l-appell ipoggi l-istess konsiderazzjonijiet peress illi t-Tribunal tratta biss l-aspett tal-parkegg necessarju meta ssir binja b'diversi sulari intizi ghal abitazzjoni. Din il-Qorti ma taqbilx mal-Awtorita li tissottometti li dan l-aggravju ma tqajjimx quddiem it-Tribunal, tant li l-Awtorita fir-risposta taghha quddiem it-tribunal tindirizza din il-kwistjoni. It-Tribunal kellu jaghmel accertamenti biex jistabilixxi jekk fil-fatt l-applikant qattx ta l-kunsens tieghu ghall-applikazzjoni ta' terzi bil-mod li saret wara li jkun ikkonsidra jekk l-appellant kienx gia s-sid tal-garage qabel saret l-applikazzjoni ta' terzi. Il-konsegwenzi legali li johorgu minn tali accertamenti tressqu lit-Tribunal biex jiddeciedi fuq il-mertu tal-applikazzjoni. It-Tribunal hu kompletament sieket fuq dan u l-aggravju li hu wiehed li jista' jinfluixxi l-ezitu tal-vertenza jisthoqq jigi milqugh.

## **It-tieni aggravju**

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Dan hu aggravju rilevanti hafna ghaliex l-Awtorita irrifjutat l-applikazzjoni fuq il-PA cirkulari 3/93 fost ragunijiet ohra. Hu minnu li c-cirkulari imsemmija mit-Tribunal dahlet fis-sehh fil-mori tal-appell. Kif qalet din il-Qorti f'okkazjoni ohra cirkolari ma ghandhiex l-effett ta' pjan jew policy li japplikaw f'kull hin qua ligi sal-mument tad-decizjoni finali. Cirkolari hi mezz interpretattiv mahrug mill-Awtorita ghall-Awtorita biex jiggwida lill-istess Awtorita f'interpretazzjoni ta' policy biex ikun hemm aktar certezza u trasparenza kif ukoll uniformita fid-decizjonijiet. Cirkulari, kuntrarjament ghal ligi, pjan jew policy ma jorbtux lit-Tribunal li japplikaha fil-mument tad-decizjoni finali tieghu u ghalhekk decizjoni li ittiehdet mill-Awtorita a bazi ta' cirkolari ezistenti fil-mument ta' dik id-decizjoni ma ghandhiex tigi skartata mit-Tribunal ghax fil-mori tal-appell dahlet cirkolari ohra li tapplika in principju biss bhala mezz ta' interpretazzjoni ta' policy ghad-determinazzjoni ta' applikazzjoni mill-Awtorita fil-mument li hi qed tiddeterminah. Darba determinat, it-Tribunal ghandu juza' l-istess riga fil-konfront tal-applikant li uzat l-Awtorita u jindirizza l-kwistjoni mill-ottika tac-cirkoalri vigenti meta l-Awtorita hadet id-decizjoni. Jekk l-Awtorita f'mument ulterjuri kellha indikazzjoni mod iehor kif ghandha tinterepreta u tiddetermina cirkostanzi partikolari fl-ottika ta' policies partikolari ma ghandhomx jinfluixxu fuq dak gia deciz. Dan jinghad ghax ic-cirkolari ma tikkreja ebda vinkolu legali fuq it-Tribunal. It-Tribunal jista' jirreferi u japplika cirkolari in vigore fil-mument li inghatat decizjoni mill-Awtorita izda ma ghandux jipprejudika jew jagevola xi parti fil-mori ta' appell bl-introduzzjoni ta' cirkolari gdida li hi biss mod ta' interpretazzjoni ta' policy li ghandha tibda tigi adoperata mill-Awtorita mid-dhul taghha fis-sehh ghal dawk l-applikazzjonijiet li ma tkunx ghadha iddecidiet. Multo magis it-Tribunal ma ghandux jipprejudika xi parti billi juzaha hu ghal finijiet tad-determinazzjoni tal-applikazzjoni. Hu differenti fejn si tratta ta' ligi, pjan jew policy fejn allura l-kwistjoni issir wahda ta' ordni pubbliku li ghandha tigi applikata indiskriminatament fil-mument ta' decizjoni finali.

Ghalhekk il-Qorti tqis li l-aggravju ghandu jigi milqugh fis-sens deciz.

### **Decide**

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-appell ta' George Muscat u tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-17 ta' Lulju 2014, u tirrorvija l-atti lura lit-Tribunal biex l-appell jerga jigi deciz mill-gdid. Spejjez ghall-Awtorita.

**< Sentenza Finali >**

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