



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta ta' l-14 ta' Jannar, 2015

Appell Civili Numru. 31/2014

Martin Manduca

vs

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

l-kjamat in kawza Camille Scerri

Il-Qorti,

Rat ir-rikors tal-appell ta' Martin Manduca tal-4 ta' Gunju 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-15 ta' Mejju 2014 li laqghet l-applikazzjoni PA 1065/08 '11 Triq San Nikola c/w Triq l-Imhazen, Mdina, to sanction conversion of car port approved

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by virtue of PA 1065/08 into a garage and extend part of the existing building partially changing the use into a class 7 (tourist attraction) with ancillary class 6 (food and drink);

Rat ir-risposta tal-Awtorita u Camille Scerri li opponew ghall-appell u talbu li d-decizjoni tat-Tribunal tigi konfermata;

Rat l-atti kollha u semghet lid-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

Illi dan huwa appell minn terzi persuni ghar-revoka tal-permess bin-numru PA 1065/08 mahrug favur l-applikanta Camille Scerri wara li dan kien gie approvat mill-Kummissjoni tal-Ambjent u l-Ippjanar fit-30 t'Ottubru 2012, rigward il-fond li jinsab bejn Triq l-Imhazen u Triq San Nikola gewwa l-Imdina.

Ra r-ragunijiet ta' l-appell prezentat mill-Perit Gaston Camilleri li gew prezentati fis-sottomissjoni tat-13 ta' Meju 2013, hekk kif gej:

"This is an appeal against the granting of the development application in caption, PA 01065/08 handed down by the Environment and Planning Commission on 30th January 2013.

We submit preliminary comments for the consideration of the tribunal.

It has to be clarified that the site cannot be described as being located in Triq San Nikola, comer with Triq l-Imhazen. The site actually lies between two parallel streets. We consider this an error on the face of the document, and MEPA usually takes a very stern view of such errors.

The application includes the sanctioning of the conversion of the car-port to a garage. However, it is not clear that the car-port was actually approved in

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PAI06308/01. In fact, the DPAR reports as much in paragraph 6.6, on page 6. Has it been established whether PAI06308/01 has been breached or not?

The consent given by the EPC is based on Local Plan Policy NWMD 02; this policy stipulates that:

Only part, and not all, of Triq L-Imhazen can accommodate the proposed business use;

No New Class 4 or Class 6 outlets are permitted, unless they are ancillary to visitor attractions or tourist accommodation;

In the case of extensions to existing legal outlets, any development should not result in more than 25% increase from the original floor space

In the case of proviso A, we request the Tribunal to establish whether the development in question lies inside that part of Triq L-imhazen which allows the proposed business use.

In the case of proviso B, we submit that there is no doubt that this is a new Class 6 outlet and that it cannot be considered as being ancillary to a Class 7 outlet. The DPAR puts it very well where it states (page 2) that "it is a rather feeble attempt at producing a weak museum to obtain a permit for a class 6 out/et ... n If anything it is the class 7 use which is ancillary to the class 6 use, judging by the drawings.

In addition there are TWO entrances or accesses; one from Triq L-Imhazen and the other from Triq San Nikola, which is not an allowed business zone. Not only that, but in a letter dated 27th July 2012 from the Chairman KNPD, Mr. Joseph Camilleri, to the applicant's architect, it is expressly stated that the applicant must adopt the Triq San Nikola as the main entrance. We have thereby established that the site in question has TWO accesses, and that the main one is on Triq San Nikola, which is not a business area, and therefore goes against Policy NWMD 02.

We now come to the area which is allowed for class 6 ancillary use (Proviso C). From the permit drawings it seems that the table area and the food preparation area exceed the permitted 25% of the total available area.

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Moreover, we submit, what is to prevent the operator from- utilising the so-called garage level to accommodate even more tables? And is the Tribunal absolutely certain that no tables will be placed in the Class 7 area?

We submit that when the reasons, justifying the overturning of the Directorate's recommendation, are thoroughly examined, one finds that the justification is very flimsy, especially in the context of the Local Plan Policies and aims.”;

Ra r-risposta tal-Awtorita' li giet prezentata fl-14 t'Awissu 2013 li taqra' kif gej;

“5.2 The Authority has the following comments to make:

5.2.1 Preamble

The Authority respectfully remarks that the appellant cannot base his appeal on a series of questions made to the Authority and the Tribunal expecting either to answer. Definitely, it is not the Tribunal's role to answer the appellant's questions during the process of an appeal. Nevertheless, the Authority will address the appellant's concern were necessary.

5.2.2 Re: Allegedly wrong address

The application form indicates the address of the site as Triq San Nikola c/w Triq l-Imhazen. In reality, Triq San Nikola and Triq l-Imhazen are not corner to each other but parallel.

The site in question is in fact located between these two streets. The appellant is arguing that since the application form indicated these two streets as corner to each other when they are in fact parallel, tantamount to error at the face of the record and implies that the permit should thus be declared null.

The Authority disagrees with this interpretation. For a start, according to current legislation, error at face of the record does not immediately invoke nullity but it permits a situation where the error (if exists and once established) is corrected, if the error once corrected does not run counter to any policy or regulation.

Moreover, if the error is such that it has no material bearing on the issue of the permit than no modification may even be required.

In accordance to Article 77(2) of Act X of 2010 (Environment and Development Planning Act) it is unequivocally stated that the Authority shall not revoke or modify a license or development permission on the basis of fraud where the fraudulent information did not have a material bearing on the issue of the license or development permission, and therefore the permit approval issued in April 2011 is to be retained by the Tribunal.

In this case, both street names were clearly indicated on the application form and the site was correctly indicated on the site plan. The reference to the streets as being at a corner to each other had no impact whatsoever on the assessment of the application.

5.2.3 Re: Car port in PA 6308/01

The appellant is questioning whether a car-port was indeed approved in PA 6308/01 and thus if this permit was breached or not.

The Authority confirms that a car-port was indeed approved in PA 6308/01.

On the other hand, regarding whether PA 6308/01 was breached or not, the Authority notes that the answer to this question is obvious given that this appeal regards a permit that involves sanctioning of a garage in lieu of the approved open air car-port.

5.2.4 Re: Policy NWMD 2 of the local plan

5.2.4.1 Re: Location of site in relation to the Consolidation of Business Activity Area

The Authority, once again, notes that it is not correct for the appellant not to make the necessary research and then asks the Tribunal to determine whether the site is located within that part of Triq l-Imhazen which allows the type of activity that has been approved.

However, in order not to stretch the matter to far, the Authority confirms that the site is located along the part of Triq l-Imhazen that is indicated as part of the area designated as Consolidation of Business Activity in Map 61 of the Local Plan.

5.2.4.2 Re: The proposed Class 7 activity

The appellant is claiming that that the approved tourist attraction is just an excuse for the Class 6 activity and that the Authority itself stated that the proposed museum is a weak one.

The Authority notes that the appellant is quoting from the original DPAR. This referred to a different proposal and which was actually refused by the DCC. Following this initial proposal, the applicant had presented new drawings and proposal to be reconsidered by the Authority. Indeed a new assessment was affected following the reconsideration process.

It is important to note that the Reconsideration DPAR does not report the statement referred to by the appellant. The museum proposal is deemed satisfactory and the plans indicate that the Class 6 activity is ancillary to the museum / tourist attraction. Moreover the permit was granted subject to a condition that does not permit the separation of the two activities at any moment.

5.2.4.3 Re: Issue of the main entrance

The appellant is claiming that the main entrance is from Triq San Nikola and this means that the site is not located in Consolidation of Business Activity Area.

The Authority disagrees with this interpretation. The premises are not only located in between Triq l-Imhazen and Triq San Nikola but have two fully fledged entrances, one from each street.

The KNPD only required that signage is placed indicating that the entrance on Triq San Nikola is indicated as the main one as this is the only entrance that can offer access for all. However, this does not render the entrance on Triq l-Imhazen as inaccessible. From a planning point of view the premises have a frontage and access onto Triq l-Imhazen and thus it is deemed to be located along the Consolidation of Business Activity Area.

5.2.4.4 Re: Size of the approved Class 6 activity

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According to the appellant, the approved Class 6 activity exceeds the permitted 25% of the total available area stipulated in policy NWMD 2.

The Authority notes that the appellant has interpreted the policy wrongly. Policy NWMD 2 of the local plan does not state that Class 6 activities should be limited to 25% of the total available area.

The policy states that no new Class 6 uses will be permitted unless they constitute an ancillary facility, without an independent street access, to tourist attractions or tourism accommodation. This policy does not stipulate any quantifying measurement. In this case, the proposed Class 6 use is ancillary to the visitor attraction and thus in line with the policy.

The 25% benchmark referred to, but interpreted wrongly, by the appellant refers to the maximum expansion permitted to existing Class 6 establishments. The appellant got this policy entirely wrong when he stated that Class 6 activities are limited to 25% of the total available area, when in reality the policy states that any extension to existing Class 6 uses shall not exceed 25% of the original floorspace; i.e. the extension is limited to 25% of the existing operation.

5.2.5 Re: Expansion of approved activity

The appellant is querying what is there to prevent the operator from expanding the Class 6 use in the garage and the Class area by placing tables and chairs in these areas.

The answer is simple; the approved drawings and conditions make it clear that no tables and chairs are permissible in the areas identified by the appellant. Should this take place without permit, then the activity would be illegal and subject to enforcement notice.”;

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

Ikkunsidra ulterjorment;

Illi l-ilment principali tal-appellant huwa li l-proposta fl-applikazzjoni bin-numru PA1065/08 ma tissodisfax il-kriterji stabbiliti fil-policy NWMD 02 fin-North West

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Local Plan, hawn iktar l-isfel fid-decizjoni referut bhala l-pjan lokali. Illi l-aggravvji mressqa mill-appellant jistghu jingabbru hekk kif gej:

1. Illi preliminarjament, l-appellant qed jikkontendi li s-sit ma jinsabx kantuniera bejn Triq l-Imhazen u Triq San Nikola, ghalkemm jinsab bejnithom; filwaqt li hemm dubju dwar il-permes PA 6308/01 dwar l-uzu ta' car port;

2. Illi parti biss minn Triq l-Imhazen huwa koncess li jsir zvilupp kummercjali, filwaqt li l-access principali tal-izvilupp huwa minn Triq San Nikola u mhux Triq l-Imhazen;

3. Illi l-izvilupp permess huwa principalment dak ta' uzu fi Klass 6, cioe' hanut fejn jigi servut ikel u xorb, u mhux dak fi Klassi 7, rigward esebizzjoni kulturali bhala attrazzjoni turistika;

4. Illi l-erja ghal-preparazzjoni tal-ikel kif ukoll dik riservata ghal-imwejjed u siggijiet tammonta ghal-aktar minn 25% tal-erja kollha tas-sit, filwaqt li l-permess ma jeskludix l-uzu tal-erja ta' l-esbizzjoni ghall-uzu ta' mwejjed u siggijiet.

Illi l-Awtorita' tikkonferma li s-sit jinsab bejn Triq l-Imhazen u Triq San Nikola, ghalkemm l-Awtorita' tirrileva li din id-deskrizzjoni tas-sit ma twassalx ghar-revoka tal-permess skont il-Artikolu 77(2) tal-Kap. 504, peress li ma jezistix ebda incidenza materjali fuq il-firug tal-permess ghall-izvilupp. Dan it-Tribunal qed jaqbel ma l-osservazzjoni ta' l-Awtorita' filwaqt li seta' jinnota li s-sit huwa korrettament indikat fis-site plan a fol 1C approvata parti mill-permess.

Illi l-istess jista' jinghad dwar il-permess PA 6308/01, fejn dan it-Tribunal seta' jinnota li dan kien hareg sabiex jinholoq access minn Triq l-Imhazen ghal-garage ezistenti li jinsab fuq Triq San Nikola. Il-pavimentar fis-sit li gie approvat bejn il-fetha fuq Triq l-Imhazen, u l-fetha tal-garage seta' jintuza bhala car port, ghalkemm dan gie minflok mibni bhala garage li sussegwentament gie approvat fil-permess PA 1065/08, prezentament il-mertu ta' dan l-appell.

Dwar Triq l-Imhazen, dan it-Tribunal seta' jinnota li Policy NWMD 2 fil-pjan lokali tindika li parti minn Triq l-Imhazen huwa permess zvilupp marbut ma attrazzjoni kulturali u turistika, skont kif indikat fil-mappa numru 61. Mill-banda l-ohra din il-mappa tindika Triq l-Imhazen fl-intier taghha fejn tapplika Policy NWMD 2, inkluz il-faccata tas-sit mertu ta' dan l-appell. Huwa evidenti li s-sit ghandu access minn Triq

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il-Mahzen u ghaldaqstant din il-policy hija applikabbli. Din l-istess policy ma teskludix access jew faccata fuq toroq ohra fl-Imdina.

Dwar l-uzu tas-sit, dan it-Tribunal jidhirlu li fil-permess, kif ukoll fil-pjanti approvati, dawn juru bic-car l-uzu tal-post ghall-esebizzjoni kulturali bhala attrazzjoni turistika, kif ukoll l-uzu ancillari fejn jista' jigi servut ikel u xorb fuq is-sit. Waqt il-process ta' l-applikazzjoni, l-applikant kien ipprezenta dokumenti necessarji dwar l-attivitá li ser issir f'dan il-gnien, u l-Kummissjoni kienet sodisfatta li l-proposta hija konformi mal-Policy NWMD 2 fil-pjan lokali, bhala attrazzjoni g'dida li qed tippromwovi l-istorja u l-kultura tal-post. Dan it-Tribunal jinnota li l-kunsiderazzjonijiet tal-Kummissjoni kienu korretti fil-kuntest tal-policy imsemmija supra, u ghaldaqstant ma jara li hemm ebda raguni valida li jista' jbidel jew ihassar d-decizjoni tal-Kummissjoni.

Dwar l-estent tal-post fejn jista' jigi servut ikel u xorb fis-sit, il-pjanta numru a fol 235c approvata fil-permess PA 1065/08, tindika bic-car fejn ser jitpoggew l-imwejjed u siggijiet, filwaqt li l-kumpliment tal-gnien ser jintuza bhala attrazzjoni ghat-turisti jew minn izur is-sit. Il-limitazzjoni ta' 25% indikat fil-policy hija applikabbli ghal daww il-istabilimenti ezistenti fi Klassi 4 u 6, u ghaldaqstant ma tapplikax ghal-kaz in ezami li huwa zvilupp gdid fi Klassi 7. F'dan ir-rigward, dan it-Tribunal jista' jikkonkludi li l-Kummissjoni applikat tajjeb il-policy fil-pjan lokali u ghaldaqstant m'hemmx ragunijiet ta' ippjanar sabiex dan il-permess jista' jigi revokat.

Ghal dawn il-motivi, it-Tribunal qed jichad dan l-appell, u ghaldaqstant qed jikkonferma l-hrug tal-permess mill-Kummissjoni tal-Ambjent u l-ippjanar datat 28 ta' Jannar 2013.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal iddecieda hazin meta qies illi ghalkemm id-deskrezzjoni tas-sit kienet zbaljata, din ma kinitx twassal ghal revoka tal-permess. Dan jinghad ghax kuntrarjament ghal dak li qal it-Tribunal, id-deskrezzjoni kellha incidenza materjali fuq il-hrug tal-permess. L-artikolu 32 tal-Kap. 356 jesigi indikazzjoni cara tas-sit biex kull min jista' jkollu interess ikun f'pozizzjoni li jirregola ruhu. It-Tribunal zbalja meta ikkonkluda li s-sit kein indikat tajjeb fuq is-site plan ghax ma jbidel xejn mill-obbligu tal-applikant li jiddikjara b'mod car fl-applikazzjoni l-indirizz korrett tas-sit;

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2. It-Tribunal ma indirizzax l-ilment tal-appellant illi l-appellant uza applikazzjoni biex jibbenefika mill-policy NWMD2 sabiex permezz ta' ftuh ta' access fuq Triq l-Imhazen jistabilixxi tourist attraction meta l-access principali tas-sit kien minn dejjem minn Triq San Nikola fejn mhux permess attivita kummercjali. It-Tribunal naqas li jikkunsidra l-permess fl-isfond tal-assiem tal-provi u l-aggravju u waqaf biss fuq il-fatt li la darba gie stabbilit access minn Triq l-Imhazen, dan jissodisfa l-policy NWMD2. Pero l-fatt li attivita kummercjali qed tigi permessa minn triq li mhux permess tali attivita tmur kontra l-ispirtu tal-ligi;
3. It-Tribunal injora li d-direttorat tal-Awtorita u kumitati konsultattivi stqarrew li l-proposta tal-applikant ma tekwalix ghal tourist attraction;
4. L-appellant talab lit-Tribunal biex jaghmel sottomissjonijiet ulterjuri fl-ahhar seduta quddiemu pero din giet rifjutata bla gustifikazzjoni.

L-ewwel aggravju

Dan l-aggravju ghalkemm jispecifica zball fid-deskrizzjoni maghmula fl-applikazzjoni ma jwassalx ghas-sanzjoni estrema tan-nullita tal-applikazzjoni jew revoka tal-permess u dan peress illi kif irrizulta minn ezami tal-aggravju quddiem it-Tribunal illi l-izvilupp per se ghandu indirizz gust. Hu minnu illi d-deskrizzjoni 'corner with' mhix preciza ghax iz-zewg toroq in kwistjoni cioe Triq l-Imhazen u Triq San Nikola huma paralleli. Pero l-intenzjoni wara l-izvilupp u s-sit kienu cari u indikattivi bizzzejjed li ma nholoq ebda pregudizzju jew dizgwid tant li t-third party oggezzjona ghall-izvilupp u l-Awtorita fid-decizjoni taghha kienet ukoll konsapevoli tal-pozizzjoni ezatta tas-sit mis-site plan li ma kinitx errata u indikat l-izvilupp propost b'mod preciz. Hu fid-dover tal-Qorti li ssalva l-atti fejn jidher li kien sar zball li ma jgibx mieghu nullita ex lege jew fejn ebda pregudizzju ma jkun gie rekat fl-ahjar amministrazzjoni tal-gustizzja. L-artikolu 32(1) tal-Kap. 356 jimponi indikazzjoni cara tas-sit u dan il-kliem mehud f-sens logiku u b'sens ta' lealta u onesta minn min japplika u min ghandu jiggudika l-applikazzjoni ma ghandux jigi interpretat b'mod tant ristrett li kull zball iwassal ghan-nullita. F'dan il-kaz iz-zball kien wiehed ovvju li ma jibiddel xejn mis-sustanza tal-applikazzjoni u s-sit fejn kien qed jintalab l-izvilupp.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

L-aggravju tal-appellant fost affarijiet ohra kien immirat sabiex jitlob lit-Tribunal jikkonsidra jekk fl-Imdina bir-restrizzjonijiet ta' zvilupp li hemm f'belt storika ta' din in-natura kienx accettabbli li jsir zvilupp kummercjali li hu permess biss f'certi toroq meta kien car li f'dan l-izvilupp, l-access principali ghal tali zvilupp kien qed jigi akkordat minn triq li minnha ma tistax tigi gestita attivita kummercjali. Dan jidher car mill-aggravju quddiem it-Tribunal u mis-sottomissjonijiet li saru mill-partijiet.

Il-Qorti tqis li dan l-aggravju kien wiehed serju hafna li kien jimmerita konsiderazzjoni approfondita mit-Tribunal ghax fil-fehma tal-Qorti kien punt kardinali ta' kif zviluppi fl-Imdina ghandhom jigu kunsidrati u sa fejn hu permissibbli semmai li wiehed igebbed il-policies rilevanti. Sfortunatament it-Tribunal ma indirizzax dan l-aggravju izda waqaf biss fuq l-ovvju. It-Tribunal accerta ruhu li l-izvilupp kellu access minn Triq l-Imhazen u b'hekk issodisfa l-policy rilevanti NWMD2 qua zvilupp ta' natura turistika u kummercjali u skarta l-aggravju billi qal biss li l-policy ma teskludix access minn toroq ohra. It-Tribunal pero ma approfondix fuq il-mertu proprju tal-aggravju cioe jekk tali accessi ohra li fihom infushom qed jammettu zvilupp kummercjali f'toroq fejn mhux permess tali zvilupp kienx kompatibbli mal-policy u l-ispirtu taghha. Il-fatt wahdu li access iehor mhux eskluż ma jfissirx li b'daqshekk id-dettami tal-policy gew sodisfatti. Dan jinghad peress illi jidher li hi kondizzjoni fil-permess dwar 'access for all' illi l-access fi Triq San Nikola mhux semplicement access sekondarju jew limitat fl-iskop izda access shih u miftuh biex l-izvilupp kummercjali jigi indirizzat lejn is-sit fejn qed isir l-izvilupp minn dak l-access mill-anqas daqs l-access minn Triq l-Imhazen.

Din hi kwistjoni li kellha tinghata importanza kbira mit-Tribunal u l-konsiderazzjoni xotta tieghu ma tirrendix il-gudizzju fuq tali aggravju bhala wiehed komplet, studjat, sod u approfondit kif imiss.

Ghalhekk dan l-aggravju qed jigi milqugh fis-sens hawn deciz.

It-tielet aggravju

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Dan l-aggravju mhux ammissibbli ghax jirrigwarda punt ta' fatt u kwistjoni teknika li fuqu l-Qorti ma ghandhiex ikollha jedd tissindaka speċjalment meta l-kwistjoni tkun giet trattata fil-kors tal-applikazzjoni u quddiem it-Tribunal.

Ghalhekk l-aggravju ma fihx mertu.

Ir-raba aggravju

Dan l-aggravju wkoll mhux gustifikat ghax fis-seduta tal-24 ta' Settembru 2013 quddiem it-Tribunal, il-verbal jindika li l-appell gie trattat u gie differit ghad-decizjoni.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' t-tieni aggravju tal-appellant fis-sens deciz mill-Qorti u kwindi tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-15 ta' Mejju 2014, u tibghat l-atti lura lit-Tribunal biex jerga' jiddeciedi l-appell mill-gdid. Spejjez ghall-Awtorita appellata.

< Sentenza Finali >

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