



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tat-22 ta' April, 2015

Appell Civili Numru. 44/2014

Mario Muscat

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Mario Muscat tas-7 ta' Awwissu 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-24 ta' Lulju 2014 li cahdet l-applikazzjoni PA 4185/10 'to sanction farmhouse as built instead of approved stables';

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-30 ta' Awwissu, 2010 – Full Development Application – PA 04185/10 fejn l-appellant, f' Site at, Il-Bur ta' Ras il-Wied, Ghaxaq, talab:

“ To sanction farmhouse as built, instead of approved stables”

Permezz ta' rifjut mahrug fil-11 ta' Lulju, 2011, l-Awtorita' cahdet it-talba ghall-hrug tal-permess relattiv ghar-ragunijiet segwenti:

"1. The site lies outside the limits for development defined in the South Malta Local Plan and so it is located in an area which should remain undeveloped and open. The proposed development would run counter to this scheme and would represent unacceptable urban development in the countryside.

2. The proposed development conflicts with Structure Plan Policy SET 11, which does not permit urban development outside existing and committed built-up areas. The development does not fall into a category of non urban development which may be permitted outside existing or committed built-up areas in accordance with Paragraph 7.6 of the Structure Plan. The proposed development also therefore runs counter to policy BEN 5.

3. 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 cannot be located in an area designated for development or in an existing built up area.";

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Permezz tal-appell tieghu l-perit Musumeci ressaq l-aggravji tal-applikant billi ssottometta s-segwenti:

“3. Illi in breve, il- fatti koncernanti din l-applikazzjoni huma s-segwenti:

- Illi permezz ta' PA334/06, l-appellant ottjena permess To construct stables and reservoir.
- Illi permezz ta' PA4185/10 (applikazzjoni mertu ta' dan l-appell), l-appellant qed jittenta jissanzjona l- uzu ta' istrutturi gia muniti bil- permess PA334/06 bhala residenza.
- Illi l-applikazzjoni PA4185/10 odjerna kienet rifjutata mill-Kummissjoni ghar-ragunijiet indikati f' Dokument RM4 anness ma dan ir-rikors.

4. Illi l-appellant ihossu aggravat mid-decizjoni tal- Kummissjoni ghas-segwenti ragunijiet:

- Illi dwar l- ewwel raguni tar- rifjut, fejn l Awtorita allegat li “the proposed development [...] would represent unacceptable urban development in the countryside”, irid jinghad li is-sit in ezami huwa diga kommess bi zvilupp munit bil-permess. Il- proposta odjerna tirrigwardja semplicinnt bdil ta' uzu, ben intiz li is-sit huwa gia kommess. Wisq anqas allura ma jista jinghad li “the site is located in an area which should remain undeveloped and open” purche inhareg il- permess PA4185/10 sabiex din l-area tkun tista' tigi zviluppata. Bir-rispett kollu, irid jinghad li kwalunkwe konnotazzjoni ta' zvilupp urbanizzat ma ssib ebda sostenn f'dan l-istadju.
- Illi dwar it-tieni raguni tar-rifjut, fejn l- Awtorita qed targumenta li “ the development (u cioe' l- uzu residenzjali) does not fall into a category of non urban development which may be permitted outside existing or committed built up areas [...]”, irid jinghad li dan l-argument huwa assolutamnet fallacju. Minn analizi tad- decizjonijiet ta' l- ippjanar nostrani, altro che li l- uzu propost cioe' uzu residenzjali fil- kampanja, huwa meqjus bhala wiehed legittimu. Illi fil- fatt, dan il- principju huwa ben sostnut fis-segwenti decizjonijiet:

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PA NO	SENA	DESKRIZZJONI TA' L- IZVILUPP APPROVAT
5534	1999	To change use of premises into a semi detached residence.
2539	1993	Conversion and extension of existing house
4797	1995	To convert an existing residence and erect an extension at first floor level.
7295	1995	To demolish two small rooms, replace dangerous roofs and erect an extension over room.
7960	1995	Construction of a terraced house and garage for parking trucks and private cars
6245	1996	To extend the existing buildings at ground floor level to form a residential unit.
2154	1997	To erect 1st floor level, one classroom at ground floor level, construct assembly hall, open one door and construct canopy connecting blocks.
5682	1997	To demolish existing animal rooms and construct new residential ones as shown on attached plans
6017	1997	To regularise existing boundary wall in rubble wall construction. Application includes sanctioning of the farmhouse.
639	1998	To demolish existing building and construct two villas with pool and basement garage.
2971	1998	To change use of a store surrounded by boundary wall into a residential unit.
3098	1998	Additions and alterations.
5315	1998	Dwelling and garage.
6661	1998	To extend the existing building at ground floor level to form a residential farmhouse.
6675	1998	To demolish and erect extension to existing residence
1114	1999	Restoration and extension to an existing farmhouse. Existing dwelling to be restored and extended.
5534	1999	To change use of premises into a semi detached residence.

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1826	2000	Additions and alterations to existing building to be converted into a dwelling.
1846	2000	To change use of premises into residence. Application includes alterations and addition of a first floor.
1995	2000	Proposed additions and alterations to existing building.
2835	2000	To reconstruct the existing structures with very minor alterations to facilitate use.
3178	2000	To change use of land presently cultivated for growing wheat and other crops into vine yard. Application includes carrying out repair work to all rubble walls and minor alterations and additions to existing building.
6154	2000	Additions and alterations to existing farmhouse for rehabilitation as residence.
1800	2001	To extend existing residence previously used as a residence.
1865	2001	Change of use from store to residential unit.
2963	2001	Alterations to existing dwelling and sanctioning of three rooms.
6149	2001	To demolish existing dwelling and construct new residence
695	2002	To reinstate parts of a dilapidated farmhouse and construct an extension to existing to maximum area 125m ² . Application includes sanctioning the reinstatement of a boundary wall by reconstructing same into rubble [sejjegh] up to 7 courses.
3524	2002	Alterations and additions to disused farmhouse and erection of boundary wall
4610	2002	To carry out additions and alterations to existing farmhouse and erect rubble boundary wall.
5036	2002	To demolish existing farmhouse and reconstruct on a smaller footprint, to construct rubble boundary walls, to demolish small rooms in fields, to set up sign indicating vineyard and to construct underground reservoir.

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5756	2002	To sanction additions and alterations to existing farmhouse
6992	2002	To sanction alterations to existing rural dwelling including replacement of delapidated structures and carry out enhancement works including cladding and timber apertures.
472	2003	Alterations and additions to an existing farmhouse
882	2003	Alterations to existing farmhouse for residential use (one unit)
2240	2003	To demolish and rebuild part of dilapidated structure and carry out internal and external modifications to existing building and change of use from a farm to a habitation
2286	2003	Additions and alterations to existing farmhouse
2505	2003	Construction of dwelling and garage.
3453	2003	Change of use from store to residential unit.
5599	2003	To create a decent dwelling unit by demolishing sporadic rooms and regroup around remaining using same materials and same footprint.
6088	2003	Additions and alterations and sanctioning of rooms.
463	2004	Additions and alterations to existing dwelling and reconstruct roof.
682	2004	Restoration of existing farmhouse, reconstruction as per original development. Minor alterations.
1584	2004	To sanction farmhouse as built and additions and alterations to existing farmhouse.
3186	2004	To sanction minor alterations and carry out minor additions.
3315	2004	To carry out additions and alterations to existing military building, to be used for residential use, to construct swimming pool.
3887	2004	To construct dwelling in a committed built up area.
3965	2004	Proposed semi-detached villa.
4331	2004	Addition and alterations to an existing farmhouse.

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3449	2005	To sanction room and remedial works to its own roof, internal alterations and construction of sanitary facilities.
3725	2005	Additions and alterations to existing farmhouse.
7215	2006	Alterations and additions to an existing disused farmhouse.
5877	2007	To construct additional rooms, modify and alter part of existing farmhouse.
3819	2008	Restoration, alterations and additions to existing building.

• Illi dwar it-tielet raguni tar-rifjut, fejn l-Awtorita sostniet li “there is no justification for the development of this site as required by Structure Plan SET 12 [...]”, l-esponenti jaghmel riferenza ghal dak li huwa issollewa fil- punt precedenti, fejn huwa indika numru konsiderevoli ta’ permessi li jistabilixxu soddisfacentement li permessi bhal dak odjern iduru limitament mal- prova (jew ghall- grazzja ta’ l-argument “justification”) li hemm xi forma ta’ commitment fuq is-sit. In pessima ipotesi, l-Awtorita kien ikollha saqajn fuq xhiex iserrah l-argummenti taghha kieku dawn il-permessi inhargu limitament fejn diga kien jesiti permess ghal residenza.

5. Illi tajjeb jinghad li sal- lum, l- ebda wiehed mill- permessi suseccepti ma gie ikkontestat a bazi ta’ allegat ksur ta’ Artiklu 77 ta’ l- Att tal- 2010 dwar l- Ambjent u l- lppjanar ta’ l- Izvilupp (precedentement l- artiklu 39 A ta’ l- Att dwar l- Ambjent u l- lppjanar) rizultanti minn xi “zball f’dokument li jidher minn eżami ta’ l-istess dokument” jew allegat ksur ta’ punt ta’ ligi ghaliex il- Bord ma ddecidiex skond il-provedimenti tal- policies u ligijiet vigenti kif titlob l-istess ligi u ghalhekk dak li gie deciz jikkostitwixxi stat fil-konfront tal-ligi.

6. Illi il-gurisprudenza nostrana stabbiliet illi meta ghandek l-esistenza ta’ permess ta’ l- izvilupp b’mertu identiku, ma hemm ebda raguni il-ghaliex iz-zewg kazijiet ma ghandhomx jigu kkunsidrati bl-istess mod . Dan ilprincipju kien sollevat fid-decizjoni stabbilita mill-Bord ta’ l- Appell fl-ismijiet George Farrugia vs MEPA [PAB 89/09, RT. 1011/08] deciz nhar id-29 ta’ Lulju 2009 , fejn intqal “minhabba l-ezistenza ta’permess ta’ l-izvilupp b’mertu identiku mahrug mill- Awtorita’ stess fuq is-sit immedjatament adjacenti ma’ dik ta’ l-appellant..... il-Bord (ta’ l- Appell) wasal ghal konkluzjoni illi ma hemm ebda raguni il-ghaliex iz-zewg kazijiet ma ghandhomx jigu kkunsidrati bl-istess mod”.

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7. Illi di piu huwa principju ben rispaut fil- gurispridenza nostrana li una volta ikun applikat principju f'xi applikazzjoni, dan l-istess principju ghandu jkun applikat fil-kumpliment ta' Malta u Ghawdex, u mhux limitament fl- ekwati fejn ikun hareg gia permess, u dan peress li una volta jkun applikat principju, dan jikkostitwixxi "commitment". Hawnhekk issir riferenza ghad-decizjoni tal- Qorti ta' l- Appell fl-ismijiet Leisure & Theme Park Limited vs. L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar (Appell Civili Numru. 2/2007) fejn il- Qorti qalet dan li gej: "Illi l-appell odjern huwa bbazat fuq l-aggravju li l-Bord ma applikax il-principju ta' cerimus paribus u ta' commitment ghall-kaz in ezami u dan peress li minkejja li l-appellant kien irrefera ghall-diversi permessi li nhargu ghal numru ta' tined f'Malta (sottolinejat mis-sottoskritt) b'nota datata 14 ta' Lulju 2006 dawn ma gewx trattati mill-Bord ta' l-Appell dwar l-Ippjanar....." B'hekk qed jinghad bil- forza kollha "commitment" mhuiwex necessarjament marbut ma' zona wahda partikulari.

8. Illi jirrizulta ghalhekk li ma ghandu jkun hemm ebda diffikulta sabiex il-proposta odjerna tigi milqugha, u dan anke a bazi tal- principju legali ben stabbilit li l-konsiderazzjonijiet li jwasslu ghal decizjonijiet ta' ippjanar necessarjament jinhtieg li jkunu konsistenti u dan kif gie sostnut diversi drabi mill- Qorti ta' l- Appell. (Ara decizjoni fl-ismijiet Grace Borg vs. l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar (AIC – (RCP) 29th October 2009) fejn ut sic inghad: "Fil-fatt gie ritentut gudizzjarment li applikazzjonijiet simili jirrikjedu trattament identiku. Id-decizjonijiet f'dan ir-rigward, u l-konsiderazzjonijiet li jwasslu ghal dawn id-decizjonijiet necessarjament jinhtieg li jkunu konsistenti. L-inkonsistenza ghandha bhala konsegwenza l-kontestazzjoni gustifikata, iddiskriminazzjoni, l-inugwaljanza, u mill-aspett soggettiv ta' l-applikant l-ingustizzja." Dan il-principju isib sostenn fi skorta ta' decizjonijiet ohrajn, fejn l-Awtorita' espressament intalbet "timxi fuq principji ta' gustizzja naturali u ta' ekwita" u "ghal fini ta' konsistenza, timxi ma' l-applikanti bl-istess mod bhalma timxi mal-applikanti l-ohra" (PAB 9/00 SMS.PA 2378/99 Adrian Stivala kontra l-Kummissjoni Ghall-Kontroll ta' l-Izvilupp). L-istess intqal fid-decizjoni fl-ismijiet Coronato Portelli vs MEPA (PAB 50/00 KA PA 3874/99 fejn inghad li "Ghall-fini ta' konsistenza tezercita uniformita' fl-applikazzjoni u fl-interpretazzjoni tal-policies. Dan ir-ragunament kien ukoll sollevat fid-decizjoni fl-ismijiet Simon Scerri kontra l-Kummissjoni ghall-Kontroll ta' l-Izvilupp (PAB 872/98 KAPA 4854/97) fejn intqal bla tlaqliq li "Ghall-fini ta' konsistenza, il-Kummissjoni gahnda timxi bl-istess mod li mxiet ma' haddiehor"

9. Illi in vista tal- principji legali suecceptiti, it- Tribunal hu mistieden sabiex jevalwa il- principji applikati fil- kazijiet suriferiti (in linea maddecizjoni tal- Qorti ta' l- Appell fl- ismijiet Grace Borg vs. l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar (Appell Civili Numru. 6/2010)), u irrispettivament jekk il- permessi sucitati ma jinsabux fil-vicinanze taz-zona de quo (in linea mad- decizjoni tal- Qorti ta' l- Appell fl- ismijiet Leisure & Theme Park Limited vs. L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar (Appell Civili Numru. 2/2007)).

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10. Illi ukoll it- Tribunal hu mistieden jikkonferma li l- principji sollevati fil- kazijiet sucitati huma applikabli fil- kaz de quo u dan peress li meta wiehed jevalwa il-kunsiderazzjonijiet applikati fil- permessi sucitati fid-dawl tal-principji legali hawnhekk sollevati, isib li jissustixxu dawk l-elementi "materjali" necessarji sabiex il-permess de quo jkun approvat kif l-esponenti

kellu l- opportunita josserva fid-dettal aktar 'il fuq."

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

"5.2.1 Preliminary Plea – Illegal Development

On a preliminary point, this Tribunal cannot hear and decide on the merits of this appeal as this application seeks to sanction illegal development in a scheduled area. Article 70 (1) and Schedule 6 (2) of Act X of 2010 (Environment and Development Planning Act) unequivocally state that no development may be regularized in scheduled property.

On a preliminary point, the Authority respectfully asserts that the Tribunal cannot hear and decide on the merits of this appeal, as this application does not seek to sanction illegal developments on site in the form of boundary walls constructed counter to the provisions of LN 160/97 and as amended by LN 169/04. Article 14 (1) of LN 514/10 clearly states that where illegal development is present on a site, new development on that same site cannot be considered unless it is regularized.

5.2.2 Overview of Appellant's Arguments

In comments submitted, the appellant is alleging that the Authority is incorrect in determining that the development in concern would be unacceptable to the surrounding countryside by reminding that a MEPA permit was issued on site in PA 334/06 for stables. In addition, the appellant is seeking to justify the proposal by listing a total of fifty-four applications submitted to MEPA between 1993 and 2008.

The Authority wishes to underline the fact that no explanation or justification to quoting these applications was submitted; and therefore their relevance to the case in concern is uncertain. In addition, these cases were not plotted to establish their location or context to the case in concern. Notwithstanding this, the Authority wishes to simplify that on examination of these quoted applications, it resulted that none of these cases merit comparison to the proposal in concern; since none of the developments involved the illegal construction of the structure in its entirety. In addition, most of the cases mentioned by appellant only involve minor alterations to

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existing legally-constructed buildings; and have therefore been added to the equation in a misleading attempt to strengthen a weak argument.

5.2.3 Principle of Development

The appellant is requesting the sanctioning of change of use from stables to a residential farmhouse. In accordance policy PLP 20 of the Development Control Outside Built-Up Areas (1995), the proposal cannot be acceptable for the following reasons:

The building in concern is not of architectural or historical interest worthy of retention as per Section 8.1 (i) – in fact the structure is new

The building is not redundant as per Section 8.1 (ii) – in fact the original use as stables was never faithfully visualized

The need of the new development must be clearly justified as per Section 8.2 (i) – there is no justification as to why the proposed residential structure cannot be located on a site designated for urban development

The extension to existing building must not create a total floorspace exceeding 150m² as per Section 8.2 (iii) – the total floorspace of the structure proposed is approx. 298m² at ground floor and 262m² at basement level (excluding addition hard landscaping, paving, etc.)

5.2.4 Policy Framework

The site in question lies outside the development zone and does not fall within an identified Category Settlement as indicated in the Local Plans which provides residential development ODZ. In addition, from the information submitted in this application, there is no evidence to suggest that applicant is a registered full-time farmer. Therefore, there is no evident justification for the approval of further intensification of urban development outside the limits of development. As such, the proposal runs counter to Structure Plan policies SET 11, SET 12 and BEN 5; which seek to protect the limit developments ODZ to those essential to agriculture, ecology or scenic interests whilst deeming new urban structures unjustified.

The Environment Protection Directorate (Doc 18 in PA File) and the Heritage Advisory Committee (Doc 18 in PA File) strongly objected to the proposed sanctioning in consideration of a number of repercussions on the rural environment particularly the agricultural and landscape value of the area, and the unnecessary land take-up.

5.2.5 Overview of Site History

The original permit issued in 2007 (PA 334/06) approved the construction of stables on site. In no form or manner can this permit be interpreted as committing the site in concern to urban development since approval was issued solely on condition that the structures development were to follow approved plans and be used for the stabling of horses. It is clear from the resulting development on site that the intention of the appellant for residential use was present from early stages of construction. This is evident from the provision of a ramps, stairwells and setbacks normally associated to urban architectural practices.

A Stop and Enforcement Notice in ECF 993/09 was issued in November 2009 since the development was highly in breach of approved plans. The appellant submitted an application to sanction works in PA 5337/09; although misleading information was again submitted since the appellant attempted to retain the nature of the structures as "stables". This application was dismissed by the Authority in July 2010 since there was a breach of Enforcement Notice 993/09. The Enforcement started the process towards Direct Action.

In the attempt to delay action being taken against the illegalities on site, the appellant submitted the application in concern; which was refused by the Authority in July 2011. The proposal is clearly a blatant disregard to the previously issued permit for the construction of stables and the associated permit conditions. All arguments that the site in concern is committed through permit PA 334/06 are incorrect since this application was never abided, and the extent of the illegalities has nullified the permit approval.

5.2.6 Other Comments

As identified by the Environment Protection Directorate in their communication during the processing stages of this application (Doc 18 in PA File), it is clear that the submitted plans do not fully indicate the site interventions as shown in comparison between 2004 and 2008 Aerial Photos; particularly to changes in the boundary rubble walls, multiple gates, entrance tracks and uprooting of trees.

The constructed rubble walls are considerable substandard from an environmental point of view, and are not in line with the relevant regulations for boundary walls ODZ as per L.N. 160/97 (and amendment L.N. 169/04) which seek the proper conservation and maintenance of traditional rubble walls as an integral component of the rural environment and landscape. In addition, photos submitted by appellant (Docs 1a and 24i in PA File) indicate in particular the use of ashlar masonry, mortar and ashlar pillars. The proposal therefore also runs counter to L.N. 160/97 & L.N. 169/04; and the provisions of Regulation 14 of L.N. 514/10 also apply.";

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Permezz ta' nota l-appellant irrisponda ghar-rapport tal-Awtorita', inter alia, bis-segwenti:

“1. Illi wara li ha konjizzjoni tar-risposta ta' l- Awtorita li ggib id-data ta' l- 14 ta' Novembru 2011, l-appellant jirrileva s-segwenti kunsiderazzjonijiet.

2. Illi l-Awtorita ma opponietx ghal dak li sostna l-appellant fir-rikors promotur, fejn inghad li l- proposta odjerna ma tammontax ghal bini gdid li se jipprevedika il-karatteristici cirkostanti tas-sit, u dan stante li s-sit in ezami huwa diga kommess bi zvilupp munit bil- permess.

3. Issa f'dan il- kaz, il- proposta odjerna tirrigwardja semplicimet bdil ta' uzu, ben intiz li s-sit huwa gja kommess bi zvilupp. Sintendi, ma jista' qatt jinghad li “the site is located in an area which should remain undeveloped and open” stante li kif intqal fis-suespost, illum jesisti il- permess PA334/06 sabiex din l-area tkun tista' tigi zviluppata bil- bini.

4. Illi tra l'altro, ma gie kontradett fl- ebda hin dak li inghad fir-rikors promotur, fejn inghad li l- uzu residenzjali propost huwa meqjus bhala wiehed legittimu, u dan aktar w aktar meta l- Awtorita ma irribadiet ebda fatt filkonfront tal- permessi li saret riferenza ghalihom fir-rikors promotur.

5. Illi l-appellant jippreciza li l- files li huwa rrefera ghalihom fir-rikors promotur huma rilevanti ghal kaz odjern stante li dawn ILKOLL (i) jirrigwardjaw residenza gdida fl- ODZ (ii) jirrigwardjaw bdil ta' uzu (iii) gew rakkomandati mid- Direttorat li ma ghandomx jinhargu a bazi ta' policies SET 11 u SET 12 tal- Pjan Strutturali jew il- paragrafu 7.6 tal- Pjan Strutturali, jew addirittura policy BEN 5 tal- Pjan Strutturali - l- istess ragunijiet li jiformaw il- mertu ta' dan l-appell.

6. Illi allura dak li kien mistenni mill- Awtorita hu appuntu li din tikkonferma li permezz tad-decizjonijiet suriferiti, l- Awtorita xorta wahda zammet ferm mal-policies incitati mid- Direttorat, u cioe' il- policies SET 11 u SET 12 tal- Pjan Strutturali jew il- paragrafu 7.6 tal- Pjan Strutturali, jew addirittura policy BEN 5 tal- Pjan Strutturali.”

Ikkunsidra ulterjorment:

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Il-mertu ta' dan l-appell jirrigwarda talba ghas-sanzjonar ta' zvilupp li kien inghata bil-permess PA 334/06 izda li ma' nbeniex skond il-pjanti approvati b' dak il-permess. Il-permess PA 334/06 kien hareg ghal stables.

Skond l-Awtorita' :

- Dan l-izvilupp ma' giex mibni skond il-pjanti approvati fil-permess PA 334/06;
- F' Novembru 2009 kien hareg Stop and Enforcement Notice (ECF 993/09) peress li l-izvilupp kien sar differenti minn kif kien gie approvat fil-permess PA 334/06; u
- L-appellant issottometta applikazzjoni biex jissanzjona x-xogholijiet (PA 5337/09) li kienet giet michuda skond l-Artiklu 52(7) f' Lulju 2010.

Is-sit mertu ta' dan l-appell jinsab fiz-zona maghrufa bhala Il-Bur ta' Ras il-Wied, limiti ta' Hal-Ghaxaq u huwa indikat fis-South Malta Local Plan bhala li jinsab ODZ.

Din l-applikazzjoni giet rifjutata peress li:

- Is-sit jinsab f' zona ODZ li skond il-pjan lokali ghandha tibqa miftuha u m'ghandhiex tigi zviluppata. L-izvilupp li qed jintalab is-sanzjonar tieghu mhux accettabbli peress li dan huwa wiehed urbanizzanti li m'hemmx postu fil-kampanja;
- L-izvilupp propost jmur kontra l-policy SET 11 u l-policy BEN 5 tal-pjan ta' struttura u dan peress li s-sit jinsab ODZ;
- L-izvilupp propost mhuwiex gustifikat u ghalhekk imur kontra l-policy SET 12 tal-pjan ta' struttura.

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

L-argumenti principali li jsemmi l-appellant biex jiggustifika l-appell tieghu huma s-segwenti:

- L-Awtorita' qed tghid li l-izvilupp li qed jintalab s-sanzjonar tieghu huwa wiehed urbanizzanti li huwa inaccettabbli fil-kampanja meta fil-fatt is-sit huwa diga kommess bl-izvilupp li gie approvat bl-applikazzjoni PA 334/06;
- Waqt li l-Awtorita' qed targumenta li l-izvilupp ma' jaqax fil-kategorija ta' zvilupp li huwa accettabbli ODZ, l-appellant jelenka 54 permess li inghataw ghal zvilupp li skond l-appellant huwa simili; u

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- Ghalhekk kontra ghal dak li qed tghid l-Awtorita' jirrizulta li jezistu argument sodi biex jiggustifikaw l-izvilupp li qed jintalab is-sanzjonar tieghu waqt li fl-istess hin huwa car li s-sit de quo huwa diga kommess.

Fir-rapport taghha l-Awtorita' tibda biex tressaq eccezzjoni preliminari fis-sens li t-Tribunal ma' jistax jisma dan il-kas stante li l-proposta hija ghas-sanzjonar ta' zvilupp gewwa area li issa giet skedata. F' dan is-sens l-Awtorita' tghid li l-Art 70 (1) u Skeda 6 (2) tal-Att X tal-2010 jaghmluha cara li ebda zvilupp ma' jista jigi sanzjonat f' zoni skedati.

Fil-mertu. l-Awtorita' tikkonferma u telabora izjed fuq ir-reasons for refusal u zzid, inter alia, li:

- Dwar l-54 permess li jsemmi l-appellant, l-Awtorita' tirrileva li l-appellant ma' ssottometta ebda spjegazzjoni dwar ir-relevanza ta' kull wiehed minn dawn ghal kas in ezami. In oltre l-appellant lanqas ma' ssottometta plots biex juri l-kuntest u l-vicinanza ta' kull wiehed minn dawn ghal kas in ezami. In fatti wara studju li ghamlet l-Awtorita' ta' dawn il-kazi jirrizulta li ebda wiehed minn dawn il-kazi ma' tista tqabblu ma' dak in ezami tant li hafna minn dawn il-permessi jidher li zdiehu semplicement biex jaghtu l-impressjoni li l-kas tal-appellant huwa konvincenti;
- Biex isir change of use minn stables ghal residenza fl-ODZ tapplika l-policy PLP 20. Skond din il-policy l-proposta mhix accettabbli ghal mill-anqas erbgħa ragunijiet;
- Ma' jirrizultax li l-appellant huwa registrat bhala part-time farmer;
- Minn kif sar l-izvilupp fuq is-sit de quo jidher car li l-appellant kellu l-intenzjoni li juza dan l-izvilupp bhala residenza mill-bidu nett. Dan jirrizulta minn-numru ta' features urbanizzanti li gew inkluzi fl-izvilupp li huma tipici ta' dawk li normalment jsiru f' residenza;
- L-izvilupp tant ma' kienx konformi mal-pjanti approvati li kien hareg Stop and Enforcement Notice. L-appellant kien ipprova jissanzjona l-izvilupp kif kien gie mibni permezz tal-applikazzjoni PA 5337/09 izda anki f' dan il-kas l-appellant kien baqa jinsisti li l-uzu kien ser ikun ta' stables. Din l-applikazzjoni kienet giet dismissed peress li kien irrizulta ksur tal-enforcement notice; u
- Meta kien gie kkunsultat l-EPD dan ikkonkluda li:
 - L-izvilupp kif muri fil-permess relattiv ma' kienx jirrifletti dak li kien fill-fatt inbena skond l-aerial photos u li dak li nbena huwa ta' disinn formali u urbanizzanti;
 - Il-boundary walls ma gewx mibnijin skond il-policies rilevanti.

Ikkunsidra ulterjorment:

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L-Artiklu 70(1) tal-Kap. 504 jittratta dwar 'Supplimentary Provisions regarding permissions and licences'. Minn dan l-Artiklu huma eskluzi pero' l-kazijiet elenkati fis-Sitt Skeda annessa mal-Att – fosthom dik numru 2 – applikazzjoni biex jigi regolarizzat zvilupp fi propjeta' skedata. L-applikazzjoni prezenti qed titlob li jigi sanzjonat zvilupp li nbena f' area li illum hi skedata.

Skond dan l-artiklu ghalhekk il-proposta ghas-sanzjonar ta' l-izvilupp in ezami ma tistax tigi awtorizzata.

Fiz-zewg sottomissjonijiet tieghu l-appellant ma' jaghmel ebda kumment biex jirribatti l-eccezzjoni preliminari li qajmet l-Awtorita'. Ghalhekk jidher li l-eccezzjoni sollevata mill-Awtorita' hija fondata u ghalhekk qed tigi milqugha.

Dwar il-mertu l-appellant ibbaza l-kas tieghu principalment fuq zewg argumenti u cioe li jezistu numru ta' precedenti ta' permessi ghal residenzi li inghataw ODZ u li s-sit diga kien committed bl-izvilupp approvat fl-ewwel permess.

Fil-kors tas-smiegh ta' dan l-appell, l-appellant baqa' ma' ta ebda spjegazzjoni jew gustifikazzjoni ghall-54 permess li jsemmi fl-appell tieghu. Dan l-anqas m' ghamlu wara li fir-rapport taghha l-Awtorita' ddikjarat li wara studju li kienet ghamlet, irrizulta li ebda wiehed minn dawn il-permessi ma' kien rilevanti f' termini ta' ppjanar ghall-kas de quo.

Apparti minn dan, kif spjega dan it-Tribunal f' hafna decizjonijiet li diga ta, precedent u commitment m' ghandhomx jidhlu meta jsir assessment f' termini ta' ppjanar ta' applikazzjonijiet ta' zvilupp. Dan ma' jnaqqas bl-ebda mod id-dritt li jista' jkollu l-applikant li jipprocedi kontra l-Awtorita' civilment jekk ihoss li hu kien haqqu jiehu permess ghaliex fil-passat kien inghata permess simili ghat-talba tieghu. Id-differenza hi li din il-kawza civili ma' tistax issir bhala parti mill-process tal-ippjanar.

Jirrizulta wkoll li dan l-izvilupp jikser numru ta' provvedimenti tal-policy PLP 20 u kif ukoll numru ta' policies tal-pjan ta' struttura. L-appellant ma' ghamel ebda replica f' termini ta' ppjanar fil-kors tas-smiegh ta' dan l-appell jew fiz-zewg sottomissjonijiet li ghamel biex jiggustifika dan l-izvilupp f' dawn ic-cirkostanzi. In fatti l-appellant ma' gabx ragunijiet kredibbli f' termini ta' ippjanar biex jiggustifika t-talba tieghu li qed issir fuq sit li, skond il-policies vigenti tal-ippjanar, huwa ODZ u skedat . Ghal din ir-raguni it-Tribunal huwa tal-fehma li f'dawn ic-cirkostanzi dan l-appell ma' jistax jintlaqa'.

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Kif jirrizulta car mill-premess, ghalhekk, il-pozizzjoni tal-Awtorita' f' dan il-kas hija wahda korretta u li hija pjenament konformi mal-policies vigenti. Ikun perikoluz hafna li wiehed jipprova igebbed izjed dawn il-policies ghaliex b' hekk ikun qed jinfetah il-bieb ghal numru kbir ta' talbiet simili li jistghu jwasslu ghad-distruzzjoni totali tal-kampanja f' dawn il-gzejjer u dan kontra wiehed mill-principji fondmantali tal-iStructure Plan.

It-Tribunal, ghalhekk qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma ir-rifjut mahrug mill-Aworita' ta' l-applikazzjoni PA 04185/10, " To sanction farmhouse as built, instead of approved stables", tal-11 ta' Lulju, 2011, billi jilqa l-proposta preliminari tal-Awtorita' li l-proposta ta' sanzjonar ta' zvilupp illegali f' area skedata, hi in kontravvenzjoni tal-Artiklu 70 u s-sitt skeda annessa mal-Att X tal-2010.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. It-Tribunal ma identifika il-policies bi precizjoni li jiksru l-izvilupp propost ghal sanzjonar ta' bdil ta' uzu izda biss irrefera b'mod generiku l-pjan ta' struttura u numru ta' provvedimenti tal-policy PLP 20;
2. It-Tribunal ma qies l-argument tal-commitment u skartah ghax qal li dawn il-principji ma jitqiesux meta jigi trattat zvilupp f'termini ta' ippjanar. Dan mhux minnu ghax il-permessi kwotati jirrigwardaw residenzi godda f'ODZ u bdil ta' uzu;
3. It-Tribunal ma setax japplika artikoli godda tal-Kap. 504 ghal applikazzjoni sottomessa qabel id-dhul fis-sehh taghom u b'hekk jinghata effett retroattiv ghal dawn l-artikoli.

It-tielet aggravju

Dan l-aggravju ghandu jigi trattat l-ewwel peress illi d-decide tat-Tribunal kien ibbazat principalment fuq l-eccezzjoni preliminari tal-Awtorita' li saret fil-mori tal-appell illi ebda sanzjonar ma jista' jsir f'zoni skedati a bazi tal-artikolu 70 tal-Kap. 504 u s-Sitt Skeda tal-istess Kapitolu. Jekk id-decizjoni tat-Tribunal hi gusta allura ebda aggravju fil-mertu ma

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ghandu jew kellu jigi trattat anqas mit-Tribunal, ghalkemm it-Tribunal xorta esprima l-fehma tieghu fuq il-mertu tal-appell ghalkemm ma kienx jiffirma parti mid-decide.

Il-Qorti tinnota illi l-appellant ma ressaq ebda argument quddiem it-Tribunal kontra din l-eccezzjoni u l-argument imressaq quddiem din il-Qorti dwar din l-eccezzjoni qed isiru ghall-ewwel darba. Madankollu l-kwistjoni hi wahda ta' natura legali u din il-Qorti trid tikkunsidraha anki in vista tal-argumenti migjuba mill-appellant.

Kif qalet din il-Qorti fl-appell **Margaret Mercieca vs L-Awtorita ta' Malta Dwar l-Ambjent u l-Ippjanar** (11/12/2014):

Dan l-aggravju irid jittiehed fil-prospettiva gusta tieghu. Fl-ewwel lok jigi rilevat illi l-Kapitolu 504 hu ligi regolat bid-disposizzjonijiet specifici tieghu ghalkemm bla dubju l-principju ta' gustizzja naturali jridu jigu rispettati f'kull hin. In linea ta' principju t-Tribunal hu marbut bl-aggravji mressqa u r-risposta li tkun saret ghal tali aggravji sakemm il-kwistjoni gdida li titqajjem mill-partijiet jew it-Tribunal ex officio mhix wahda ta' ordni pubbliku fost cirkostanzi eccezzjonali ohra. Wiehed pero irid izomm quddiem ghajnejh li hu l-obligu principali tat-Tribunal li japplika l-ligijiet, pjanijiet u policies u dan hu obligu li ma jistax jezonera ruhu minnu u li ma ghandu ebda diskrezzjoni li jinjora. Il-Qorti hi tal-fehma illi t-Tribunal ghandu l-obligu fi kwistjonijiet ta' ippjanar li jqajjem ex officio kwistjonijiet ta' ippjanar li jmorru direttament kontra xi ligi pjan jew policy anki jekk mhix mqajma mill-partijiet basta li dan jirrizulta mill-parametri specifici proposti fl-applikazzjoni. Hu d-dmir tat-Tribunal li ma jhallix li ssir approvazzjoni ta' applikazzjoni jekk ikun qed jigi vvolat pjan, ligi jew policy cari. B'danakollu t-Tribunal irid jirrispetta l-principju ta' gustizzja naturali u jekk jirrizulta xi punt li jekk ma jigix indirizzat jista' jwassal ghal vvolazzjoni ta' ligi, pjan jew policy ghandu jew jirrimetti l-atti lura lil Awtorita biex terga' tixtarr mill-gdid l-applikazzjoni fid-dawl tal-kwezit li qam fl-istadju tal-appell jew jekk iridu l-partijiet il-kwistjoni tigi ventilata direttament u l-kwistjoni tigi deciza mit-Tribunal. Hi pero l-fehma tal-Qorti illi hi l-ewwel triq li t-Tribunal ghandu jiffavorixxi biex ikun hemm il-possibilita tad-doppio esame.

F'dan il-kaz il-kwistjoni mhix wahda li tqajmet ex officio mit-Tribunal izda mill-istess Awtorita fil-mori tal-appell.

Din l-eccezzjoni tqajmet mill-Awtorita fil-mori tal-appell u ghalhekk proceduralment bhala eccezzjoni ta' natura perentorja setghet titqajjem f'dan l-istadju u fejn il-partijiet kellhom l-opportunita li jiehdu konjizzjoni taghha u jitrattawha

Il-Qorti izzid illi:

It-Tribunal stess ex officio seta' qajjem il-kwistjoni peress illi l-ligi kienet tipprekludi l-izvilupp propost u t-Tribunal bhal Qorti ghandu dejjem id-dritt li jqajjem hu punt ta' dritt sakemm dawn ikunu pertinenti ghal azzjoni jew bhal f'dan il-kaz, ghal izvilupp innifsu. Wara kollox 'skedar' hu zgur kwistjoni ta' ordni u dritt pubbliku intiz fl-interess generali socjali ghall-izvilupp sostenibbli tal-pajjiz u jista' jkun ta' importanza fl-ambitu ambjentali, kulturali, xjentifiku jew storiku tal-pajjiz. Dan jiddistingwi l-ligi tal-ippjanar minn ligijiet ohra peress li l-ligi tal-ippjanar hi intiza primarjament ghall-uzu tajjeb u sostenibbli tal-ambjenti kollha ta' pajjizna fl-interess generali tas-socjeta Maltija li hafna drabi jipprevali fuq l-interess purament privat.

Hi jurisprudenza kostanti, minhabba n-natura stess tal-ligijiet ta' ippjanar intizi fl-interess tas-socjeta in generali biex jirregolaw l-uzu u l-izvilupp tal-ambjent in generali u fl-ispecifiku u dan skond iz-zminijiet u l-evoluzzjoni kontinwu tal-ambjent li nghixu fih, illi applikazzjoni ma tikkreja ebda drittijiet lil applikant izda biss talba jew xewqa li jizviluppa s-sit soggett ghal applikazzjoni, dejjem jekk dan l-izvilupp hu kompatibbli mal-ligijiet, pjanijiet u policies vigenti fil-mument li tinghata d-decizjoni finali. Dan ma jikkreja ebda zvantagg fuq applikant ghax kif il-ligijiet ta' ippjanar jistghu jinbidlu biex jirrestringu zvilupp hekk ukoll jistghu jinbidlu biex jestenduh u l-applikazzjoni tibqa' miftuha ghal dawn l-izviluppi sad-decizjoni finali. Id-decizjoni tal-Awtorita ma tikkrejax drittijiet ghal applikant izda stat ta' fatt u, jekk ma jsirx ebda talba ta' rikonsiderazzjoni jew appell, allura f'dak il-mument dan l-istat ta' fatt jikkreja stat guridiku li jaghti dritt kwezit lil applikant in linea tal-permess li jkun inghata fiz-zmien meta applikazzjonijiet bl-istess fatti specie ghandhom jircevu l-istess soluzzjoni. Fl-invers ic-cahda ta' applikazzjoni ma tippredludix lil applikant milli jerga' japplika fuq binarju differenti jew anki l-istess jekk fi zmien wara jinbidlu l-ligijiet, pjanijiet jew policies li huma ta' natura mutabbli skond ic-cirkostanzi u l-bzonnijiet generali li jirrikjedi l-pajjiz. Il-jurisprudenza kostanti kienet u ghahda l-istess (ara fost ohrajn **Stella Buttigieg et vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar**, App Inf 29/01/2009 u **Ted Mizzi vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar**, App Inf 29/01/2009, u decizjonijiet ohra moghtija minn din il-Qorti kif preseduta).

F'dan il-kuntest ma hux ta' ebda import il-kwistjoni ta' retroattivita ta' ligijiet, pjanijiet u policies tal-ligi ta' ippjanar la darba huma l-ligijiet, pjanijiet u policies vigenti fil-mument tad-decizjoni finali li japplikaw ghad-determinazzjoni tal-izvilupp propost. Applikazzjoni ma takkwista ebda jedd awtomatiku ghal approvazzjoni izda biss talba fakolattiva maghmula min applikant ghal hrug ta' permess ghal zvilupp kif jixtieq l-istess applikant tenut in konsiderazzjoni kull ligi, pjan jew policy in vigore fil-mument tad-decizjoni finali, hemm jekk id-decizjoni tkun favur jew kontra l-interessi tal-applikant li huwa subordinat ghall-interess generali tas-socjeta u tal-ambjent u s-

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sostenibilita tal-pajjiz li nghixu fih, liema interess hu fdat lil entitajiet appoziti, approvati mill-Gvern biex jigi delineat u specificat.

Madankollu fuq il-kwistjoni legali specifica ta' retroattiva l-insenjament li taghti l-Qorti tal-Appell Inferjuri fil-kawza **Jack M.A. Olin et vs Anthony Sant Portanier nomine** deciza fis-6 ta' Ottubru 2010 tinkapsula l-principji

regolaturi in materja fejn jinghad hekk:

Huwa utli li jibda biex jigi osservat illi, kif deciz, "meta gudikant jew interpretu jigi biex japplika l-ligi ghall-kaz prattiku, l-ewwel tfittxija u indagni li ghandha ssir minnhom hija dik li jaraw liema ligi ghandha tigi applikata; u din in-necessita tidher aktar cara speċjalment meta ligi gdida tigi attivata u maghmula effikaci dwar materja li qabel jew ma tkunx regolata, jew li tkun regolata mil-ligi anterjuri. Dan aktar u aktar johrog car meta jigi kunsidrat fejn il-materja in diskussjoni tkun tirrigwarda fattijiet kompjuti, jew li kellhom il-bidu u l-inkomincjament taghhom taht l-imperu tal-ligi antika jew anterjuri li tkun irregolathom u jipprotraw ruhhom, f'din l-ahhar ipotesi (mhux fl-ewwel wahda tal-fatt kompjut), taht il-ligi l-gdida". ("Chev. Antonio Cassar Torreggiani nomine -vs- Nutar Dr. Vincenzo Gatt nomine", Appell Civili, 12 ta' Mejju, 1950);

Din il-predetta decizjoni tkompli tillustra fuq l-insenjament ta' awturi kontinentali illi f'tema ta' dritt transitorju ghandhom jigu rigwardati fost ohrajn dawn il-principji:-

- i. li l-attijiet jew it-trasferimenti huma regolati mil-ligi li tahtha jkunu gew kompjuti;
- ii. li l-attijiet mibdija taht il-ligi l-antika u li jestendu ruhhom taht il-gdida, ghandhom jigu regolati minn din ta' l-ahhar;
- iii. li meta jkun jezisti veru u proprju dritt kwezit kompjut taht il-ligi antecedenti, dak id-dritt ghandu effikacija fih innifsu li jirrezisti ghall-applikazzjoni tal-ligi l-gdida f'kaz ta' mutament tal-ligi anterjuri;

Applikati dawn il-principji ghal kaz in ezami, din il-Qorti tqis kif gia nghid illi applikazzjoni ghal zvilupp ma tikkostitwix dritt izda biss rieda u xewqa ghal zvilupp sakemm dan ikun permissibbli skond il-pjanijiet u policies vigenti meta jinhareg jew tigi rifjutata l-applikazzjoni. Dan ghalix il-pjanijiet u policies jinbidlu jew jigu aggstati jew modifikati tul iz-zmien fl-interess generali tal-izvilupp sostenibbli fil-pajjiz u fejn allura l-interess pubbliku irid jipprevali fuq l-interess purament privat. Applikazzjoni mhix att kompjut jew terminat izda biss process mibdi taht regim antik li jista' jestendi ruhu taht ligi gdida fejn allura ma japplikax u ma jigix regolat mir-regim l-antik izda dak gdid.

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Din hi sitwazzjoni prevalenti fil-ligijiet ta' ppjanar kif tifhimha din il-Qorti, u ghalhekk it-Tribunal kellu kull dritt japplika l-artikolu 70 u Sitt Skeda kif ezistenti fiz-zmien li ttiehdet id-decizjoni. It-tibdil fil-ligi hu biss modifikazzjoni ta' kif ghandhom jittiehdu d-decizjonijiet li jolqtu zviluppi li ghandhom sotto skrutinju u mhux gia approvati f'liema kaz jikkostiwixxu dritt kwezit favur dak li favur tieghu gia ghandu permess. Din il-Qorti tqis li l-artikolu 70 u Sitt Skeda li jitratta l-effett retroattiv ta' ligijiet godda ghandu jitqies fil-kuntest tal-principju regolatur dwar dak li jikkostitwixxi att jew trasferiment kompjut u kwindi regolat bir-regim legali applikabbli fiz-zmien tal-att jew trasferiment.

Il-certezza legali tal-applikazzjoni tal-ligijiet, pjan u policies fi zmien tad-decizjoni tohrog minn zewg fatti cioe illi l-applikazzjoni ma tikkreja ebda dritt u illi c-certezza legali tohrog mill-fatt stess li sad-data ta' decizjoni finali, kull aplikazzjoni ghandha l-potenzjalita li tuzufriuxxi minn kull ligi, pjan jew policy maghmula sa dak inhar basta li l-partijiet ikollhom il-possibilita li qabel id-decizjoni finali jgawdu mis-salvagwardji tal-principji ta' gustizzja naturali. B'dan il-mod ukoll ikun hemm uniformita u certezza fid-determinazzjoni ta aplikazzjonijiet ta' zvilupp f'kull zmien partikolari.

Il-Qorti wkoll tirmarkar rigward l-argument tal-appellant illi l-paragrafu 2 tas-Sitt Skeda li hu applikabbli ghal kaz ma kienx applikabbli minhabba li l-legislatur ikkreja transitory provision fir-rigward tal-paragrafu 1 u 3 meta tissemma' s-sena 2008 u li l-paragrafu 2 ma jintrabat ma ebda data. Il-Qorti tqis illi d-data imposta fil-paragrafu 1 u 3 tas-Sitt Skeda tirreferi ghad-data meta jkun sar l-izvilupp illegali izda fil-kaz ta' skedar il-ligi ma tintrabat ma ebda data li jfisser illi l-kaz ta' art skedata, kull zvilupp illegali, sar meta sar ma jistax jigi sanat.

Ghalhekk il-Qorti tqis illi dan l-aggravju ma jistax jigi milqugh u stante li d-decizjoni ghalhekk toqtol l-appell fil-mertu l-Qorti ma tqis li ghandha tidhol f-dawn il-kwistjonijiet.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Mario Muscat in linea ma' dak deciz u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-ppjanar tal-24 ta' Lulju 2014, bl-ispejjez kontra l-appellant.

< Sentenza Finali >

-----TMIEM-----