



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta ta' l-20 ta' Mejju, 2015

Appell Civili Numru. 43/2014

Justin Zammit Tabona

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Justin Zammit Tabona tas-6 ta' Awwissu 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-17 ta' Lulju 2014 rigward outline application PA 5563/10 'proposed demolition of existing permises and construction of apartments over underlying basement';

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Rat ir-risposta tal-Awtorita li ssottomettiet li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata;

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

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

Illi l-appellant applika fi stadju ta' outline sabiex jitwaqqa' l-bini ezistenti li jikkonsisti min fond konsistenti minn town-house li tinsab Triq il-Qalb Mqaddsa gewwa San Giljan, sabiex jinbena mill-gdid blokka ta' apartamenti fuq erba' sulari, b'livell sotterran ghall-parkegg, u penthouse fil-livell tal-bejt.

Illi l-Kummissjoni tal-Ambjent u l-Ippjanar, irrifjutat l-applikazzjoni ghal din ir-raguni segwenti :-

“1. The proposed development in terms of its floor area, massing, building depth and site coverage is of an excessive scale and would lead to an over development of the site. This would not be in the interest of the amenity of the area and would increase the problem of over-development.”;

Ra l-appell tal-Perit Dottor Edwin Mintoff f'isem l-appellant li jaqra' kif gej:-

“I write on behalf of my client, Mr. Justin Zammit Tabona, with reference to the refusal of the above-mentioned outline application by the EPC, to request the Appeals Board to reverse said decision. Kindly note that my client, his lawyer and myself would like to be present during the deliberation this case.

I refer to the latest correspondence submitted by the EPC, dated 20th. March 2012, which refuses permission for the above based on the following grounds:

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1.The proposed development in terms of its floor area, massing, building depth and site coverage is of an excessive scale and would lead to an over development of the site. This would not be in the interest of the amenity and would increase the problem of over-development.

I avail myself of this opportunity to address this issue hereunder.

In the first circumstance, I must draw your attention to the fact that the proposal adhered to all relevant policy and legislation as designated by the MEPA. The proposed height, scale and massing was in complete accordance to the Local Plans corresponding to the area. Moreover, in an effort to satisfy any additional requirements, it was agreed that the existing facade and setback should be retained.

Furthermore, it is pertinent to note that nearly identical applications have been approved in the same road as, and in fact almost adjacent to, the site in question. Not only was an outline application, namely PA 7507/06, enjoying the same characteristics as that of my client's proposal, granted but a full development application, namely PA 5088/06, was approved and constructed. In both aforementioned cases, the applicant was permitted to develop the maximum extent of the property and no restrictions were applied.

We, therefore, kindly request the Appeals Board to overturn the decision of the EPC and approve this application accordingly.”;

Ra s-sottomissjonijiet tal-Awtorita' dwar l-appell li saru permezz ta' nota li giet ipprezentata lit-Tribunal fl-1 ta' Gunju 2012, u li jaqraw kif gej :-

5.2 The Directorate has the following comments to make:

5.2.1 Introduction

In comments submitted, the appellant is alleging that the EPC Board did not consider the recommendation presented by the Planning Directorate where it was explained that the proposal adhered to all relevant policy legislation as designated for Development Control. Notwithstanding this, the Authority will

explain in detail to the Tribunal that the decision taken by the EPC Board in March 2012 was correct; and that all information present in the case had been revised.

5.2.2 Overturning of Recommendation

The case in concern is requesting the demolition of existing premises and construction of apartments over underlying basement. During the assessment of the proposal the Planning Directorate discussed in DPAR that the overall dwelling sizes, building height, and services were within the permissible standards provided by DC 2007. Notwithstanding this, such guidelines are not to be interpreted as blanket maximum limitations where for example every site in an area designated for a maximum height of four floors should in fact be constructed at four floors from a planning point of view.

With respect to the proposal at hand, the mere factor that the proposed single dwelling unit is proposed to be replaced by nine dwelling units (one maisonettes, six flats and two penthouses) is already painting a better picture of how the area in concern and also the general amenity of the neighborhood will be affected as a result of such an increase. The impacts begin with comments taken from the same DPA Report by the Planning Directorate, where it explained in para. 4.8(6) how the number of off-street parking spaces to cater for the scale of requested development fell short by far. In fact, in accordance with Table A2.5 of the Explanatory Memorandum and PA Circular 3/93, the number of off-street parking spaces required to cater for all the dwelling units amounted to 18 whereas the proposal could only provide 7 (hence only 39%).

Furthermore, as shown in Doc 1C in PA File, the site depth covered by the existing structure is approx. 22m whereas the site depth proposed for construction in this application (Doc 22A in PA File) rises to approx. 41m (nearly 190% the original depth). Given that the plot in concern is surrounded by development on three sides (excluding façade onto street) where the neighboring developments are all on similar scale to the existing building rather than as proposed; it is evident that the requested proposal would create bad neighbor development with regards to massing, building depth and site coverage. On this note, the proposal is clearly an over-development of the site in concern. The development would not be in the interest of the amenity of the area and therefore runs counter to Structure Plan policy BEN 1 as well as DC 2007 policy 1.3.

5.2.3 Claim of Cerimus Paribus

In arguments for appeal against the decision the appellant is claiming that near identical applications have been approved in the same road as the site in concern in PA 7507/06 and PA 5088/06; and is requesting that the Tribunal overturn the decision taken by EPC Board on grounds of cerimus paribus. In the report below

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the Authority will examine the application mentioned in more detail to determine whether the case quoted merits such distinction:

PA 7507/06: Outline Development application for demolition of existing premises and construction of apartments over underlying basement parking at Casa Verdala, Triq il-Qalb Imqaddsa, San Giljan. This site is situated approx. 10m away from the site in concern on the same side of the street. Although the proposal was issued by MEPA in December 2009 the fact that this is an Outline Permit allowed matters such as internal layout and design amongst others to be retained as reserved matters to be discussed further in Full Development application.

PA 5088/06: Full Development application for demolition of existing premises and construction of apartments over underlying basement at Triq il-Qalb Imqaddsa, San Giljan. This site is also situated approx. 10m away from the site in concern on the same side of the street (although on the other side of the development as PA 7507/06). This permit was approved by MEPA in March 2007 however the depth of the proposed building is retaining the 22m depth as that existing; and hence is not invasive onto the amenities of the area as that under appeal.

5.2.3.1 Comments by Authority

In view of the merits in PA 5563/10 as explained above, it is clear that there is no relation whatsoever between the quoted permit and the case in concern since the following obvious differences are present:

PA 5563/10 regards development with is increasing the building depth of the site from 22m to 41m from street alignment.

The determining factor to the case in PA 5563/10 was that the proposal was an overdevelopment of the site and that the compatibility of the new development would constitute bad neighbor development to the amenities of the area.

The overall recommendation made by the Planning Directorate may have been favourable, however in the DPA Report the EPC Board were advised that the proposal was overdeveloping the site in the fact that there was a great shortfall in the parking spaces required to cater the development in accordance with Structure Plan TRA 4. The scaling, massing and density of the proposal does not respect the context of the surrounding built environment.

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Therefore, in spite of the appellant's claims of *cerimus paribus*, the Authority has clearly examined that the quoted permit application does not justify the request since the relation of the case is not similar to that at hand. Furthermore, the Authority wishes to underline the fact that arguments raised are frivolous and misleading; and therefore will not be divulged into further.

6.0 REQUEST

6.1 For the above-mentioned reasons, the Malta Environment & Planning Authority respectfully requests the Environmental and Planning Review Tribunal to confirm the decision of the EPC and to refuse this appeal for development permission.”;

Ra s-sottomissjoni ulterjuri tal-Avukat Dottor John Refalo ghall-appellant tas-6 ta' Novembru 2012, li taqra' kif gej:

“We would like to comment to the report filed by MEPA in the premised appeal:

1. The first point to make is that the development proposed conforms to all mandatory MEPA policies and guidelines. This is conceded by the Authority at paragraph 5.2.2. of its report. In such a situation appellant's argument is that he is entitled to carry out development within the limits of the policies. Appellant is entitled to develop according to the zoning. The comments made by the Authority in its report are really comments that should have been made at zoning stage. Considerations of bad neighbourliness simply because other properties have not been developed are out of place in this appeal. They should have been taken into consideration at the opportune moment and that is, when the area in question was zoned for development. This Tribunal cannot review zoning issues but must review whether the application was made in conformity with the policies. This is stated also in view of recent and constant decisions of this Tribunal.

2. The second point, also linked to the first, is that the discretion of the Authority cannot extend to refuse a development in line with the policies. It is submitted in fact that the existing of a particular zoning over a particular piece of land grants the applicant the right to insist that his application be dealt with solely on the merits of the existing zoning.

3. As regards the commitment it is clear that the area in question has now been opened to development according to the present zoning and policies. A number of

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initial applications have gone through and more are pending approval. It is clear that the sites already developed were given the maximum possible building envelope development according to the same policies which are before us today. In this case applicant's site is larger and deeper but in effect all applicant is asking for is for the same principles adopted in the other sites to be adopted also in his case. This is in reality the issue of commitment. The area is committed because developments have been granted according to the policy for the area and applicant has a right to also be given a permit according to the same policies which are still applicable over the area in question.

The site in question must therefore today be considered to be a committed site. Commitment is after all a principle that is accepted and understood. The guiding principles are today found in several judgments of the Court of Appeal that cannot be ignored by the Authority. When a site is committed it is considered as though it is already developed. Therefore, the fact that there are other similar developments in the same street implies that a prospective developer has a right to insist that his application be likewise considered. It is clear in this case that the commitment arises from the fact that the other developments were allowed to rise to four floors on the street scape and to extend to the rear of the building line. This principles are in effect the commitment on the site that has to be respected.

PA 5088/06 is a full development application for the demolition of existing premises and construction of apartments over underlying basement situated in the same street as the proposed development. In fact this development which was granted a full development permit lies only 10m down the road from the site in question and consists of four floors with penthouse level exactly as is the proposed development.

Commitment is also shown by PA 4189/09 which is an application for the demolition of existing building and construction of a block of apartments and overlying penthouse with underground garages for private cars.

Appellant reserves the right to comment further as may be required and to submit evidence in support of his appeal as necessary.”;

Ra r-risposta tal-Awtorita' li giet prezentata lil dan it-Tribunal fid-29 ta' Novembru 2012, li taqra' hekk kif gej:

“1.2 The Authority has the following comments to make:

1.2.1 Reply to Comments

The appellant begins the arguments raised in Second Statement by arguing that the proposed development conforms to all mandatory MEPA policies and guidelines, and that the comments made by the Authority in its report should have been made at zoning stage. This argument is misleading since the zoning of the proposed development is not on trial in this appeal, but rather the requested development for demolition and reconstruction. This is an appeal against decision, and should the appellant genuinely wish a review or propose a change to the zoning of the area, the correct channels must be used.

As explained in detail in para. 5.2.2 of the initial report, the proposal to convert one single dwelling unit into nine (9) units is an overdevelopment and would have repercussions on the surrounding amenities. An example to justify this statement is the shortfall of required off-street parking to cater for the proposed units, where only 7 of the required 18 spaces may be physically catered for. In addition to this and as already remarked in initial report, the increase from 22m building depth to 41m is not only counter to the requirements of DC 2007 policy 1.3 but would also result in bad neighbour development with regards to massing and site coverage.

1.2.2 Return to Cerimus Paribus

In Second Statement the appellant is addressing that the Authority approved PA5088/06 and PA 4189/09 to justify that similar developments to that requested have been approved in the past. Whilst the comments against PA 5088/06 have already been made in para. 5.2.3 of the initial report, the Authority will review the relevance of PA4189/09 to the case at hand.

PA 4189/09 – Proposed development for demolition of existing building and construction of a block of apartments and overlying penthouse with underground garages for private cars – Site at Triq il-Qalb Imqaddsa, St. Julians. Development permit was refused by EPC Board in October 2010 but later upheld by Reconsideration Board in November 2011.

Although proposal description to the quoted case may sound similar to that in concern, the planning merits of the two cases were not similar at all. Originally the quoted case was refused permit by EPC since the proposed car lift was not in line with the requirements of DC 2007. This issue was later addressed through fresh plans and the decision was upheld by Reconsideration Board.

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In the case under appeal, the impacts of the development and breaches to the requirements of the current policy framework for development control render the proposal as an overdevelopment. The two cases are not similar in any planning arguments and the requested Cerimus Paribus is not valid.

2.0 CONCLUSION

2.1 The Authority reiterates that in line with its previous reports, this request for appeal goes against the present planning policies relevant to this area and states that the EPC Decision to refuse this application was justified; and hence respectfully requests the Environmental and Planning Review Tribunal to confirm this decision and to refuse this appeal for development permission.

The Authority reiterates that in line with its previous reports, the EPC Decision to grant planning permit for this application was justified; and hence respectfully requests the Environmental and Planning Review Tribunal to confirm this decision and to dismiss this appeal.”;

Ra r-risposta tal-Avukat Dottor Simon Galea Testaferrata li giet prezentata fis-27 ta' Jannar 2013, hekk kif gej :-

“Mrs. Vassallo refers to her submissions of the 24th January 2013, and to the subsequent site visit which together exhaustively prove her point. This final submission is solely intended to address two points raised by the appellant in his rejoinder, namely the alleged 'subjective' nature of the qualitative test, and the implications of 'commitment'.

Qualitative test

1. In the first place it is incorrect to claim (as the appellant has) that Mrs. Vassallo concurs that appellant has satisfied all policies. This view is not shared by Mrs. Vassallo. On the contrary, her arguments have consistently highlighted the appellant's failure to meet the qualitative requirements.

2. It is equally incorrect of the appellant to claim that here Mrs. Vassallo is Bringing forward subjective arguments. These are not subjective issues at all. The qualitative test she is invoking is a mandatory requirement imposed by the authority's regulations currently in force - vide Policy A2 & Statement E2 of the Development

Control Policy & Design Guidance 2007. A policy must be abided by, whilst guidelines ought to be followed. There is nothing subjective about this policy. Mrs. Vassallo is merely calling for the observance of these applicable policies and regulations.

3. Not only is it an objective test, but it is also mandatory, in that any development must not merely satisfy the quantitative requirements, but also the qualitative requirements laid out in the policy which states "the main objective of this guidance is to promote the creation of high quality development which is visually attractive and appropriate to its surroundings". The appellant's proposal may meet other requirements but it is certainly not "appropriate to its surroundings", and definitely not "attractive". Mrs. Vassallo is an immediate neighbour and is therefore the most competent person to speak of the surroundings. The deleterious effects this development would have on these surroundings have already been highlighted and need not be repeated. This is a serious default which cannot be ignored, and no arguments on rights and commitment may override this requirement. Simply because the appellant does not like it, or refuses to satisfy this requirement does not mean it does not exist, nor that it may be brushed aside.

Commitment

4. The appellant's submissions repeatedly imply that for him 'commitment' means being treated equally ("equal treatment, non-discrimination, transparency and the rule of law"). It is evident that the appellant is conveniently arguing that his site ought to be treated in the same manner as other sites have in recent years, with a total disregard to the applicable policies. To the appellant his view of 'commitment' overrides the obligation to satisfy the qualitative test, which of course does not make any sense, since this test is obligatory, and cannot be discarded, irrespective of what previous permits may have allowed. If one were to accept the appellant's argument at face value, the authority would be bound to blindly follow previous decisions even if these were wrong. Thankfully, the authority is not bound by precedent, and rightly so. If it were, there would be no need for any policies or guidelines in the first place, not to mention the danger of awarding permits based on wrong precedents. The authority, and this tribunal, are bound only by the applicable regulations, policies and guidelines, nothing more, nothing less.

5. The appellant further submits in this regard that Mrs. Vassallo's objection cannot serve to "negate rights created by commitment". In so doing the appellant is admitting that his argument is based purely on commitment. With all due respect planning precedents do not bestow any rights at all. Neither can they supersede policies and regulations. The fact that the appellant is resorting to rights allegedly emanating from previous commitments, can only be seen as an attempt to clutch at straws. This appeal is not about rights, it is about the observance of parameters established by the relevant planning policies and regulations. Any arguments based

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on non-discrimination ought to be brought before the competent forum, not here. This is not the proper forum to hear or decide such issues. This Tribunal, being a planning review tribunal can only decide and uphold planning policies & regulations. This is all that Mrs. Vassallo demands, and given that her consistent argument is hinged on a specific requirement of the applicable policies, a requirement which the appellant has clearly ignored, she humbly submits that this development cannot be acceded to.”;

Ra s-sottomissjonijiet ulterjuri tal-partijiet li gew prezentati fil-process ta' dan l-appell;

Ra l-verbal tal-access li sar fuq is-sit minn dan it-Tribunal fit-30 ta' Jannar 2014;

Ra l-policy BEN 1 fil-Pjan ta' Struttura;

Ra l-policies numru 1.1, 1.2 u 1.3 tad-Development Control Policy and Design Guidance (2007);

Ra ukoll il-PA files bin-numru 5563/10, 7507/06 u 5088/06;

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

Ikkunsidra ulterjorment;

Illi dan l-appell jirrigwarda t-twaqqiegh ta' dar residenzjali kbira li tinsab fi Triq il-Qalb Mqaddsa gewwa San Giljan, sabiex jinbena mill-gdid blokka ta' appartamenti fuq erba' sulari, b'livell sotterran ghall-parkegg, u penthouse fil-livell tal-bejt.

Illi l-oggezzjoni principali tal-Kummissjoni tal-Ambjent u l-Ippjanar kien rigward it-twaqqiegh tal-faccata ezistenti, kif ukoll il-bini tal-gnien li jinsab fuq in-naha retrostanti tad-dar mertu ta' dan l-appell.

Illi d-dar ezistenti taghmel parti minn ringiela ta' hamest idjar kbar (town houses) mibnija fuq zewg sular bi stil, volum u disinn identiku ghal xulxin, b'gonna kbar retrostanti rispettivament. Kull dar ghandha kamra fuq sular wiehed, bhala garage (ghalkemm xi whud gew konvertiti fi kmamar, bhal fil-kaz tad-dar mertu ta' dan l-

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appell) mal-linja tat-triq, filwaqt li l-faccata principali hija rtirata l' gewwa mil-linja tat-triq. Il-faccata ta' wara li thares fuq il-gnien huma wkoll identici, fl-linja wahda, madwar 25 metru fond mil-linja tat-triq. Hekk kif seta' jigi konstatat waqt l-access, kif ukoll minn ezami tas-site plan tal-erja, dan it-Tribunal seta' jinnota li l-maggor parti tal-bini fuq Triq il-Qalb Mqaddsa ghandu l-istess fond ta' bini mit-triq, ghal-kemm huma dawn il-hamestt idjar li ghandhom gonna estensivi fuq in-naha retrostanti.

Illi mill-pjanti prezentati fl-applikazzjoni jidher li l-faccata u l-alinjament tal-bini ezistenti qieghed jinzamm filwaqt li l-bini kif propost ser jokkupa l-fond tal-plot kollu, cioe' madwar 47 metru fil-livell sotterran, u madwar 43 metri ghas-sulari sovrastanti (inkluz it-terrazzin ta' wara).

Illi l-gholi tal-bini propost huwa dak ta' erba' sulari (mill-livell tat-triq), b'livell sotterran ghal parkegg u livell ta' penthouse. F'dan ir-rigward l-uzu residenzjali u l-gholi tal-bini propost huwa konformi mal-pjan lokali (mappep SJ 2 u SJ 4 tan-North Harbour Local Plan rispettivament). Jidher li m' hemmx oggezzjoni ukoll ghat-twaqqiegh intern tal-bini ezistenti. Ghaldaqstant il-kwistjoni principali f'dan il-kaz huwa l-fond tal-bini hekk kif propost.

Illi dan it-Tribunal studja bir-reqqa l-argumenti mressqa mill-partijiet, inkluz l-oggezzjonijiet tal-objector, residenti fid-dar, biswit fuq in-naha tal-Lvant tas-sit inezami. Illi waqt l-access, dan it-Tribunal seta' jevalwa u jikkunsidra l-ambjent u l-karattru tas-sit fil-kuntest tal-erja fejn jinsab, u f'dan ir-rigward qieghed jaqbel mal-konkluzzjoni tal-Kummissjoni li l-fond tal-bini propost huwa massic u mhux idoneju qalb il-gonna li jikkarettizzaw il-qalba tal-bini fejn jinsab is-sit.

Illi ricentement l-Awtorita' harget cirkolari bin-numru 3/14 datata 5 ta' Mejju 2014, fejn propju taghti direzzjoni dwar l-importanza tal-green enclaves, cioe' il-gonna u l-btiehi bhala element importanti tal-morfologija tal-bini li jikkarettizzaw iz-zoni urbani. Fil-fatt f'dan il-kaz, il-Kummissjoni ghamlet referenza ghal-policy 1.3 fid-Development Control Policy and Design Guidance, li tezigi dwar 'compatibility' tal-izvilupp gdid mal-kuntest urban ezistenti, fejn l-istess cirkulari tghamel ukoll referenza u tispjega dan li gej (paragrafi 1.3 u 1.4):

"The General Design Principles section of the Development Control – Policy and Design Guidance 2007, in particular policies 1.1, 1.2, 1.3 and 1.8, give direction towards respecting the positive features of an urban area and towards adopting a contextual approach. The main aim of these policies is to ensure that a proposed development will not contribute towards further deterioration. These green enclaves enhance and characterise our urban environment and should therefore be given due consideration. There are other policies in other subsidiary policies which

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advocate the importance of such spaces and these should be given due consideration.

1.4 In the light of the above, any development extensions onto such spaces should be justified and 'minor' so as to safeguard the integrity of the overall green lung as well as the character of the overall urban area. As a rule of thumb, the back elevation context should be taken into account in all cases with special attention given in instances where the site lies:

- a) within a series of back elevations where there is a uniform back elevation planimetry or typology;
- b) within or contiguous to an UCA;
- c) close to a Development Zone boundary (particular attention given when this happens to be a ridge edge);
- d) close to a scheduled (or proposed to be scheduled) property;
- e) contiguous to a different zone type (e.g. site lies contiguous to a detached dwelling area);
- f) faces a green enclave;

and in such cases emphasis should be on fitting within the surrounding context. Unless there are circumstances to suggest otherwise, and taking into account the above, the depth of the built footprint as measured from the building alignment should not exceed 30m.

Illi dan it-Tribunal jidhirlu li dawn il-konsiderazzjoni japplikaw b'mod ampju fil-kaz mertu ta' dan l-appell, fejn il-karattru u l-ispazzji miftuha kkaraterrizzati minn dawn il-gonna ezistenti ghandhom jigu prottetti, u ghaldaqstant kull zvilupp gdid ghandu jigi limitat fil-parti gja kommessa tal-plot, b'mod simili ghall-kull zvilupp ma tul l-istess triq, sabiex jigi rispettati ukoll il-linja retrostatni tal-bini. Ghaldaqstant dan it-Tribunal huwa tal-fehma li l-bini m'ghandux jeccedi l-fond tal-bini ezistenti, cioe' madwar 25 metri mill-linja tat-triq.

Illi fl-aggravvji mressqa f'dan l-appell, l-appellant ghamel referenza ghal-zewg permessi mahruqa fl-istess triq, f'it metri 'l boghod mis-sit inezami. Dawn huma s-segwenti:

PA 5088/06, li jinsab madwar distanza ta' ghaxar metri lejn id-direzzjoni tal-Punent fejn gie approvat (full development) it-twaqqiegh tal-bini ezistenti, u l-bini mill-gdid ta' apartament fuq erba' sulari u livell sotterran. Illi f'dan il-kaz, dan it-Tribunal

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qiegħed jaqbel mal-Awtorita' li dan il-permess mhux simili għal kaz inezami, meta l-bini li twaqqgħa ma kellux l-istess tipologija tal-bini ezistenti mertu ta' dan l-appell, għalkemm huwa mportanti jigi sottolinjat li l-fond tal-bini kif approvat ma jeccediex il-25 metru fond mil-linja tat-triq, u għaldaqstant mhux qiegħed johloq xi forma ta' commitment favur il-kaz odjern.

PA 7507/06, fi stadju ta' outline, huwa identiku għal-kaz mertu ta' dan l-appell, u fil-fatt huwa mahrug fuq isem l-appellant ukoll. Is-sit jikkonsisti minn wahda mill-hamest idjar simili għad-dar mertu tal-appell, li qiegħda madwar 10 metri 'l bogħod lejn id-direzzjoni tal-Lvant. Dan il-permess mahrug fis-7 ta' Dicembru 2009 għadu validu, għalkemm għada ma dahlietx l-applikazzjoni full development. Illi f'dan il-kaz, dan it-Tribunal seta' jinnota li d-disinn tal-bini, inkluz l-internal layout, huwa reserved matter u għaldaqstant mhux eskluż li l-principji fir-rigward il-protezzjoni tal-gonna kif elenkati fic-cirkolari mahruġa mill-Awtorita' jigu applikati fl-applikazzjoni għida ta' zvilupp full development għal dan is-sit.

Illi għaldaqstant dan it-Tribunal ma jarax li b'xi mod dan il-permess kif mahrug qiegħed jiddetta l-parametri ta' zvilupp li għandhom jigu applikati fil-kaz mertu ta' dan l-appell, li fil-fatt dan it-Tribunal huwa propens li jilqa fir-rigward tat-twaqqiegħ tal-bini ezistenti u l-gholi tal-izvilupp propost, imma ser jimponi kondizzjonijiet cari dwar iz-zamma tal-faccata ezistenti, u l-fond tal-bini sa massimu ta' 25 metru fond mill-linja tat-triq.

Għal dawn il-motivi, u wara li gie ezaminat bir-reqqa l-fattispeci tal-kaz, dan it-Tribunal qiegħed limitatament jilqa' dan l-appell, ihassar ir-rifjut tal-permess għall-izvilupp u jordna lis-Segretarju ta' l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar biex johrog il-permess fi zmien tletin gurnata bil-kondizzjonijiet standard li normalment japplikaw għal permess outline, bir-reserved matters fir-rigward tal-'external appearance', 'landscaping' u 'parking', u biz-zieda ta' dawn il-kundizzjonijiet hekk kif gej:

"The proposal to be submitted in the full development application shall be subject to the following conditions:

a. The existing façade and building alignment shall be retained and incorporated in the new development proposal;

b. The design of the new development shall respect the architectural features of the existing façade;

c. The building depth for all levels, including the basement level, shall not extend more than 25 metres from road alignment, and shall not exceed 4 floors with

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underlying basement above road level in accordance with the North Harbour Local Plan (map SJ4).”

Ikkunsidrat

L-aggravji tal-appellant huma dwar il-kondizzjoni (c) imposta fil-hrug tal-permess:

1. It-Tribunal applika l-MEPA circular 3/14 ghal din il-kondizzjoni liema circular qatt ma giet dibattuta quddiem it-Tribunal. Din ic-cirkolari dahlet in vigore f'Mejju 2014 ftit qabel inghatat id-decizjoni u qatt ma saru sottomissjonijiet dwarha. L-appellant ghalhekk ma kellux opportunita jidhol fil-mertu tal-linji gwida u ghalhekk hemm ksur tas-smigh xieraq;
2. Fil-mertu c-cirkolari mhix applikabbli ghax il-parti ta' wara tal-binja ma tikkwalifikax biex tigi deskritta taht paragrafu 1.4 tac-cirkolari. In oltre l-istess paragrafu jghid illi l-fond ma ghandux jeccedi 30 metru mill-building alignment u t-Tribunal illimitah ghal 25 metru bi pregudizzju ghall-appellant;
3. Ic-cirkolari mhix ligi u taghti sitt istanzi fejn hi applikabbli ghal gonna u btiehi u mkien ma tghid jekk dawn is-sitt istanzi humiex sussidjarji ghal xulxin jew alternattivi ghal xulxin. Il-kondizzjoni (c) fil-fatt timblokka l-izvilupp nonostante li intlaqa' l-appell;
4. Bid-decizjoni tieghu l-Bord effettivament ordna skedar tal-gnien meta dan ma ghandux poter jaghmlu. Il-gnien ma ghandux sinifikat storiku u necessita ta' konservazzjoni u d-decizjoni tat-Tribunal ghalhekk hi bla bazi. Billi ma hemmx ordni ta' skedar, l-appellant spicca bla rimedju quddiem id-decizjoni tat-Tribunal;
5. Il-kondizzjoni (c) ma setghetx issir f'outline permit izda f'full development permit billi kien f'dan l-istadju li jsiru l-accertamenti approfonditi dwar l-izvilupp;
6. It-Tribunal zbalja meta qies li l-aggravju tal-commitment mhix applikabbli.

L-ewwel aggravju

Dan l-aggravju jisthoqqlu jigi milqugh mhux ghax it-Tribunal ma kellux jedd jikkonsidrah izda ghaliex hu car mid-decizjoni li hu strah fuq is-sustanza tal-paragrafu 1.3 u 1.4 tac-cirkolari 3/14 fil-konisderazzjonijiet tieghu li wasluh ghad-decizjoni mehuda minnu. Din il-Qorti tqis illi

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t-Tribunal kellu kull dritt japplika u jikkunsidra c-cirkolari pero din ic-cirkolari dahlet fis-sehh wara li l-vertenza thalliet ghad-decizjoni pero qabel ma inghatat id-decizjoni. Dan hu argumentat mill-appellant mhux kontraddett mill-Awtorita. Kien id-dover tat-Tribunal li jekk ried jaghti importanza, kif fil-fatt ghamel, ghall-linji gwidi imposti f'din ic-cirkolari biex isahhah l-argument tieghu li d-Development Control Policy and Design Guidance 2007 li hi l-policy applikabbli kellha tigi applikata fl-isfond u fl-ispirtu tac-cirkolari, kellu jaghti l-opportunita lil partijiet li jressqu l-argumenti taghhom fuq ic-cirkolari qabel jikkunsidra hu l-piz tac-cirkolari fl-isfond tal-policies applikabbli ghas-soluzzjoni tal-vertenza.

Invece l-partijiet gew sorprizi b'decizjoni li ghalkemm ghal grazzja tal-argument tista' tkun ineccepibbli legalment jew teknikament, pero naqset milli taghti dritt lil partijiet li jikkonsidrawha la darba kienu inghalqu l-provi u l-vertenza thalliet ghad-decizjoni. It-Tribunal li irraviza l-importanza tac-cirkolari ma irrelevax din ic-cirkolari lil partijiet biex jekk jixtiequ jaghmlu sottomissjonijiet dwarha qabel it-Tribunal jiddelibera u jaghti decizjoni. Wara kollox dan hu wiehed mill-elementi tas-smigh xieraq cioe li kull parti hi armata l-istess fuq il-punti legali u fattwali tal-vertenza. Is-sitwazzjoni kienet tkun differenti li kieku c-cirkolari kienet gia in ezistenza qabel il-vertenza thalliet ghad-decizjoni u issemmiet biss mit-Tribunal fid-decizjoni, ghax it-Tribunal ghandu l-jedd li japplika u jikkonsidra kull pjan, policy u linji gwidi bhal ma huma cirkolari in vigore kemm jekk jissemmew o meno mill-partijiet sakemm huma direttament applikabbli ghal vertenza. Dan wara kollox hu d-dover tat-Tribunal li fejn jonqsu l-partijiet milli jikkonsidraw xi element saljenti rizultanti minn ligi, pjan jew policy jew linji gwida, dan jaghmlu t-Tribunal. Pero l-kaz odjern mhux l-istess ghax ic-cirkolari li strah fuqha biex isammar l-argumenti tieghu dwar il-gnien tal-fond in kwistjoni dahlet fis-sehh meta l-partijiet ma kellhomx l-opportunita li jsemmuha jew jikkonsidrawha bhala parti mill-materjal disponisbbli fl-ambitu tal-ligi tal-ippjanar.

It-tieni u t-tielet aggravji

Dawn l-aggravji mhux ser jigu kunsidrati peress illi la draba intlaqa' l-ewwel aggravju, dawn l-argumenti jiformaw parti mit-trattazzjoni fuq il-valur u sustanza legali u teknika tal-istess cirkolari. Jigi relevat biss pero illi kuntrarjament ghal dak sottomess mill-appellant, ghalkemm cirkolari ma ghandhiex forza ta' ligi, it-Tribunal ghandu kull jedd bhala dokument

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ta' relevanza mahrug mill-Awtorita li jikkonsidraha biex isostni l-argumenti tiegħu b'relevanza jew elucidazzjoni jew interpretazzjoni għal xi ligi, pjan jew policy partikolari konnessi mal-kaz.

Ir-raba aggravju

Dan l-aggravju ma għandux mis-sewwa għax l-Awtorita u t-Tribunal għandhom il-jedd li jimponu kondizzjonijiet jew jillimitaw żvilupp jekk dan hu in konformita ma' ligi, pjan jew policy partikolari. Dan il-kaz ma hux skedar li jirrikjedi procedura ad hoc u fejn fic-cirkostanzi ta' skedar jippermetti biss żvilupp limitatissimu fejn dan hu permess izda dan hu kaz ta' żvilupp li qed jingħata izda mhux fil-kobor u estensjoni mixtieqa għal ragunijiet ta' ippjanar. L-artikolu 41(13) tal-Kap. 504 hu car bizzjed u ma għandux bżonn intepretazzjoni. Il-kwistjoni hi f'dan il-kaz wahda fejn it-Tribunal irid jevalwa jekk l-izvilupp propost u sa certu punt permissibbli hux qed jikser xi element tal-ligi tal-ippjanar li allura jehtieg jigi rivedut jew ridimensjonat.

Il-hames aggravju

Dan l-aggravju ma fihx logika apparti li l-appellant innifsu ma issostanzjax, minn fejn jirrizulta d-distinzjoni magħmula. Il-kondizzjoni tista' tigi imposta mit-Tribunal bhala mizura u kejl a priori biex fl-istadju tal-full development jittiehed kont ta' dak li t-Tribunal ikun iddecieda bhala parametri accettabbli għall-izvilupp mitlub u l-partijiet ikunu ben konsapevoli tad-drittijiet u limitazzjonijiet tagħhom.

Is-sitt aggravju

Dan l-aggravju hu magħmul hazin. It-Tribunal ma qalx li l-kuncett tal-commitment mhux applikabbli izda fl-isfond partikolari tal-permessi kwotati mill-appellant ma kienx hemm dik il-kongruenza tal-fattispecie li l-applikazzjoni kellha tigi trattata bl-istess mod tal-permessi kwotati. In oltre l-Qorti izzid għal precizzjoni illi ebda aggravju ta' commitment ma jista' jew għandu jintuza jekk dan ser ixxejjen pjan, ligi jew policy in vigore u jinhareg permess li jmur kontra tali ligi, pjan jew policy.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-ewwel aggravju tal-appellant u ghalhekk tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tas-17 ta' Lulju 2014 ghal din ir-raguni biss u a bazi ta' dak kunsidrat mill-Qorti, u tirrinvoja l-atti lura lit-Tribunal biex jerga' jiddeciedi l-appell wara li jaghti l-fakolta lil partijiet li jaghmlu sottomissjonijiet rigward ic-cirkolari 3/14. Spejjez jibqghu bla taxxa.

< Sentenza Finali >

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