



MALTA

**QORTI TA' L-APPELL**

**ONOR. IMHALLEF**

**MARK CHETCUTI**

Seduta ta' l-20 ta' Mejju, 2015

Appell Civili Numru. 3/2015

**Alfred Magro**

**vs**

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

**Il-Qorti,**

Rat ir-rikors tal-appell ta' Alfred Magro tal-11 ta' Frar 2015 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Jannar 2015 li cahdet l-applikazzjoni PA 936/13 'to sanction minor alterations and change of semi basement games/stores approved in PA 6158/98 into 2 habitable units';

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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:

L-applikazzjoni giet rifjutata mill-Kummissjoni ta' l-Ambjent u l-Ippjanar ghas-segwenti ragunijiet :-

“1. The proposed development does not comply with policy 3.2 of the Policy and Design Guidance 2007 which allows a maximum of two habitable floors. The proposal therefore is counter to Structure Plan policy BEN 2.

2. The proposed development is unacceptable since it does not comply with policy 3.5 of the Policy and Design Guidance 2007 in relation to the minimum allowable area of 150 square metres for flatted dwellings.

3. The proposed development is unacceptable since it does not comply with policy 5.1 of the Policy and Design Guidance 2007 in relation to the proposed residential use at semi-basement area within villa zoning.

4. The proposal runs counter to Structure Plan policy TRA 4 and the car parking standards set out in Table A2.5 in the Structure Plan Explanatory Memorandum in that it fails to provide the required car parking spaces. It will give rise to unacceptable additional on-street car parking which would not be in the interests of the amenity of the area and which would exacerbate existing problems of congestion, potential highway danger and vehicular and pedestrian conflict.”;

Ra r-ragunijiet tal-appell li huma s-segwenti :-

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"I write on behalf of Mr Alfred Magro of 'Lavander'. Triq Victor Scerri, Naxxar NXR1032 with reference to the decision dated 16 December 2013 by virtue of which the Malta Environment and Planning Authority refused permission for the proposed development.

Appellant feels aggrieved by this decision and by the present submits an appeal from that decision in terms of article 41 of the Environment and Development Planning Act, 2010 for the following reasons:-

1. Proposed Development does not comply with Policy 3.2 of the Policy Design Guidance which allows for a maximum of two habitable floors.

With reference to Reason 1, in the Decision Notice, we would like to bring up the fact that the area in the vicinity with the same zoning, is already committed with several permits where three habitable floors or more have been approved. Moreover, the existing building envelope and building height have been already approved in PA6158/98, and this application is only seeking to sanction the change of use of the existing semi-basement.

A case in point is PA 6480/99, "Six semi-detached maisonettes two at semi basement level, two at elevated ground floor, & two at first floor level. The dwellings are to be constructed overlying 11 private garages at basement level on two storeys", approved on the 26th July 2002.

PA 1991/98 Construction of basement garages and overlying maisonettes" where 4 habitable floors were approved.

PA/00781/04 et PAB 112/05RR and previous permits PA 5230/02 & PA 6281/02, "Construction of additional floor and amendments to layout of approved garages in basement level" where 3 and 4 habitable floors were approved.

PA/00449/05 et PAB 30/08 "alterations and additions to approved permit PA 4687/04 including an addition floor consisting of residential units" where 4 floors were also approved on the 24th July 2009.

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Thus as can be seen the area is dotted with buildings whose density is similar or exceeds the proposed density and there shall be no changes to the existing already approved height and massing and density. Thus considering this commitment in the same area, it is difficult to understand why the Directorate is not taking note of the numerous similar commitments whereby this policy was overruled.

Hence the rejection of the application of applicant is being considered discriminatory in the face of the above-mentioned granted permits. Local courts have in varied instances reiterated that decision-bodies, including therefore MEPA and its EPC boards, are legally bound to take full regard of commitment established by other permits: in fact the Court in *Formosa Gauci noe vs MEPA (4/2008APP)* justified the Appeals Board for overturning a decision which was based on site commitment:

"Din il-Qorti thoss li jidher car li bhala fatt li hemm commitment fl-istess area ta' diversi zviluppi, koperti bil-permess, ukoll bhal jew simili, u anke ta' entita akbar minn dak propose mill-istess appellant, u allura a bazi tal-istess il-Bord tal-Appell hareg l-istess permess ta' zvilupp a bazi ta' commitment."

This has further been confirmed in the case *Dr Graham Busuttill vs MEPA* highlighted that decision-bodies cannot ignore any case precedent quoted by architects in their defence, carrying similar planning objective and principles. Indeed the instances of similar applications was raised by appellant during the discussions before the DCC but were nonetheless ignored or rejected.

Other instances of this principle, by now established by the Courts and the Planning Appeals Board, are *Salvu Mallia vs Kummissjoni ghall-Kontroll tal-Izvilupp (PAB 221/97)*; *Joseph Debono vs Kummissjoni ghall-Kontrol tal-Izvilupp (PAB 111/98SMS)*; *Dione Bartolo vs Kummissjoni ghall-Kontrol tal-Izvilupp (PAB 633/98)* that applied the rule of "cerimus paribus".

2. The proposed development is unacceptable since it does not comply with policy 3.5 of the Policy and Design Guidance 2007 in relation to the minimum allowable area of 150 square metres for flatted dwellings.

With reference this reason, we would like to point out that, a slight divergence of 10% which is being noted is common practice, and numerous permits have been issued and approved taking note of such marginal discrepancy both as an increase or a decrease from the stipulated areas as laid out in MEPA policies. Local Plans

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and Design Guidelines. One should note that MEPA is in fact understanding this issue and in the new Draft ODZ Policy and Design Guidelines issued in October 2013, it is being specifically noted that a divergence of 10% is allowable to all areas/footprints known as flexibility allowance.

Hence the rejection of the application of applicant on this reasoning is being considered discriminatory in the face of the above-mentioned granted permits. Local courts have in varied instances reiterated that decision-bodies, including therefore MEPA and its EPC boards, are legally bound to take full regard of commitment established by other permits.

3. Proposed development is unacceptable since it does not comply with Policy 5.1 of the Policy Design Guidance in relation to the proposed residential use at semi-basement level.

With reference to Reason 3, in the Decision Notice, we would like to bring up the fact that the area in the vicinity with the same zoning, is already committed with several permits where habitable floors are located at semi-basement.

A case in point is PA 6480/99, "Six semi-detached maisonettes two at semi basement level, two at elevated ground floor, & two at first floor level. The dwellings are to be constructed overlying 11 private garages at basement level on two storeys", approved on the 26th July 2002.

4. Proposal runs counter to TRA 4 and car parking standards as it fails to provide the required car parking spaces.

Finally with respect to Refusal 4, with respect to the Car Parking requirements, a contribution to the UIF fund of the area can be issued as required, due to the physical inability of providing additional parking spaces at this site, as indicated in the Case Officers DPAR.

For the reasons aforementioned, appellant humbly requests that this appeal is upheld and the decision of the Authority overturned.

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The Tribunal is requested to notify appellant of the date of the hearing of his appeal in order to be able to produce witnesses and make further submissions in addition to the above.”;

Ra r-risposta tal-Awtorita' prezentata lil dan it-Tribunal fil-11 ta' Marzu 2014 li jaqraw hekk kif gej :-

5.2 The Directorate has the following comments to make:

### 5.2.1 Introduction

In comments submitted, the appellant is arguing that the proposed development is situated in an area where other commitments of three habitable floors and habitable units at semi-basement level were approved by MEPA and are legally present in proximity despite similar designation and policy framework limiting two habitable floors for the villa area. Other argumentation against the reasons for refusal are also being mentioned regarding minimum allowable area and parking standards required for the development.

The Authority will be addressing the merits of the EPC Board decision in this report and will clarify to the Tribunal why the decision taken to refuse the proposed development was correct from a planning point of view.

### 5.2.2 Principle of Development

The site in concern is situated in an area designated as a Design Priority Area for two habitable floors in accordance with the North Harbours Local Plan. In line with policies 1.1 and 1.3 of DC 2007, new development should be compatible with its context and the surrounding area and respect the scale, bulk, proportions and materials of neighbouring buildings. Furthermore, any new development has to respect its context including the character, appearance, scale, massing, height and density of the particular area in which it is situated.

As site currently houses the two legally permissible residential levels and the development proposal is seeking to create additional two separate units at semi-basement level; the three residential floors does not respect the scale, massing and density of the area and therefore cannot be acceptable from a planning point of view.

### 5.2.3 Detached and Semi-Detached Dwellings

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Policy 3.2 of DC 2007 specifies that dwellings to be constructed in the areas zoned for detached/semi-detached dwellings in the Local Plan shall comply with the requirements for dwelling type, minimum site area, maximum site coverage, minimum side curtilage and maximum number of habitable floors as set out in the approved Local Plan.

Locality: Swieqi	Permissible development as per Table SW(b)  and  DC 2007 Policy 3.2
Permissible development	Villa
Dwelling type	D/SD
Minimum site area	N/A
Maximum site coverage	40%
Minimum site curtilage	3m
Maximum number of floors	2
Garage within	BL/SC
Area of soft landscaping	20%

Locality: Swieqi	Approved Development  (by PA 06158/98)	Proposed developme nt
Permissible development	4 Flatted Dwellings (Total)	6 Flatted Dwellings  (Total)
Dwelling type	Detached	Detached
Minimum site area	Site area – 665 sq. mtrs  Built up area (ground floor level) 270 sq. Mtrs	Site area – 665 sq. mtrs  Built up area (ground

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		floor level) 270 sq. Mtrs
Maximum site coverage	40.6%	40.6%
Minimum site curtilage	Minimum 3m	Minimum 3m
Maximum number of floors	2	3
Garage within	BL	BL
Area of soft landscaping	0%	0%

As noted in the tables provided the proposal satisfies the maximum site coverage, area of soft landscaping (as approved) and minimum site curtilage. Notwithstanding this, the proposed change of use of semi-basement level into two separate residential units resulting in three habitable floors runs counter to the maximum allowable number of habitable floors (2 floors) allowed by policy 3.2 of the Policy and Design Guidance 2007.

### 5.2.4 Residential Use of Basements

As set out in policy 5.1B of DC 2007 (except for detached or semi-detached dwellings as set out in policy 3.2), a basement may be used as a separate dwelling unit provided it has a satisfactory standard of internal environment, natural light, ventilation and outlook. The policy is therefore quite clear in addressing the fact that residential use of basement level is not allowed in villa zoning. The site proposed for the flatted dwellings is situated along Triq il-Gizimin in Swieqi and according to Map SW 2, site lies within villa zoning. The proposed flatted dwellings at semi-basement level are therefore considered objectionable in principle and cannot be acceptable.

### 5.2.5 Flatted Dwellings in Areas Zoned for Detached and Semi Detached Villas

As stipulated in Policy 3.5 in DC 2007, in areas zoned for detached and semi-detached dwellings, one dwelling unit at ground floor and one dwelling unit on the first floor may be permitted provided that:

- a) the floor space of each dwelling is not less than 150m<sup>2</sup>;
- b) access to the dwellings is internal and not by means of an external staircase;



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- c) the design of the dwellings is integrated such that they appear as one coherent building; and
- d) the building meets the other requirements set out in policy 3.2.

With regards to the above requirements, the flatted dwellings proposed for sanctioning have a floor area of approximately 120m<sup>2</sup> for Unit 1 and 135m<sup>2</sup> for Unit 2 (including the washrooms, pantry and store however excluding the corridor in front of the bathrooms and en-suite) and are therefore well below the minimum allowable area of 150m<sup>2</sup>. Moreover, as discussed above in section 4.8.4, the proposed three habitable floors run counter to policy 3.2 of the Policy and Design Guidance 2007. Therefore, proposal is counter to policy 3.5 of the Policy and Design Guidance 2007 and cannot be favourably recommended.

In comments made in submission for appeal, the appellant is arguing that in the new Draft ODZ Policy and Design Guidelines issued in October 2013, it is specifically being noted that a divergence of 10% is allowable to all areas/footprints known as flexibility allowance. With regards to this comment the Authority asserts to the Tribunal that the policy guidance mentioned is not an approved document and therefore not a policy framework in place at the time of decision by EPC. Further to this, the appellant is quoting a document for development ODZ and such documents have no affect on the proposed development especially since the site is situated in a Residential Priority Area where the harmony of future development must strictly respect the amenity and design of that currently in place.

### 5.2.6 Garage for Private Vehicles

As stipulated in policy 6.9 of DC 2007, three car parking spaces for every residential unit shall be provided – as per the medium parking standard as set out in the Explanatory Memorandum. With two new dwelling units being proposed a total of six car parking spaces must therefore be provided. The approved garage in original permit PA 6158/98 caters for a total of 15 car parking spaces, thus there is a shortfall of 3 parking spaces for one of the proposed flatted dwelling.

Since the site is situated in an area where only low-density development is acceptable (hence the limitation of habitable floors) to respect and retain amenity, the shortfall of parking spaces cannot be acceptable as it will give rise to acceptable additional on-street parking which would exacerbate existing problems of congestion, potential highway danger and vehicular and pedestrian conflict. Therefore proposal is counter to policy 6.9 of DC 2007 and counter Structure Plan policy TRA 4.

### 5.2.7 Claim of Cerimus Paribus

In claim for appeal the appellant is making reference to four permit applications situated in proximity to the site under appeal, where commitment of three habitable floors or more have been approved in the same zoning area. In the report below the Authority will examine the application mentioned in more detail to determine whether the case quoted merits such distinction:

PA 6480/99 – Full Development application for Six Semi-Detached maisonettes (2 at semi-basement, 2 at ground floor and 2 at first floor levels). The dwellings are to be constructed overlying 11 private garages at basement level over two stories. Site is approximately 10m away from the site under appeal and permit was approved by DCC Board in February 2002.

PA 1991/98 – Full Development application for Construction of basement garages and overlying maisonettes. Site is approximately 265m from the site under appeal and permit was approved by DCC Board in May 1999.

PA 781/04 (PAB 112/05) – Full Development application for Construction of additional floor and amendments to layout of approved garages in basement level. Site is approximately 25m from the site under appeal and permit was refused by DCC Board in March 2005 but later upheld at Appeal Stage in July 2006.

PA 449/05 (PAB 30/08) – Full Development application for Alterations and additions to approved permit PA 4687/04, including an additional floor consisting of residential units. Site is approximately 15m from the site under appeal and permit was refused by DCC Board in November 2006 and again by Reconsideration Board in January 2008 but later upheld by Appeal Board in May 2009.

#### (6) 5.2.7.1 Comments by Authority

The two permissions quoted by architect were upheld by the Appeals Board, namely (PA 781/04 and PA 449/05), whereas the other two permits were approved by the Directorate in view that both plots are between two streets having a high level of street/road difference (PA6480/99 - corner plot).

The Tribunal may wish to note that the last paragraph in policy 3.2 of DC 2007 refers to 'new development'. The case under appeal cannot be considered as a new development since the current proposal is for sanctioning (subject to Enforcement Action issued in ECF 312/12). In addition the Tribunal should also note that the

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existing development was constructed as an infill plot, abutting on a road with a limited sloping gradient. The current application is the second attempt to sanction the illegal works. The first attempt was in PA 666/01 which was recommended for refusal by the Planning Directorate and subsequently refused by both DCC Board and Reconsideration Board.

The Authority asserts that although the policy refers to particular attention to other commitments in the area, this has to be the exception rather than the rule. Following the review of the quoted permits by the architect, which were consistently recommended for refusal by the Authority, it transpired that the commitments in the area were mainly due to the difference in site topography and constraints from the site in question.

### 5.2.8 Conclusion

After discussing the site history and illegalities present on site and analyzing the proposed development vis-à-vis the current policy framework, it is clearly shown that the proposed development would result in overdevelopment of the site in view of impact to the amenities of the Residential Priority Area. The Authority recaps that the site is subject to Enforcement Action in ECF 312/12 and action against the illegalities is currently awaiting the outcome of this appeal to continue. It is clear that the development is unacceptable, and that the purpose of this Appeal is merely to delay the modus operandi of said enforcement action.”;

Ra s-sottomissjoni ulterjuri tal-appellant prezentata fis-16 t'April 2014 u r-risposta tal-Awtorita' prezentata fl-3 ta' Gunju 2014;

Ra r-replika tal-appellant prezentata fis-26 ta' Gunju 2014;

Ra l-policies BEN 2 u TRA 4 tal-Pjan ta' Struttura;

Ra l-policies numru 2.8, 3.2, 3.5 u 5.1 tal-Development Control Policy and Design Guidance 2007;

Ra ukoll il-PA files bin-numru 936/13, 1870/12, 6413/04, 781/04, 4591/02, 666/01, 3524/00, 6480/99, 6158/98, u 895/93;

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

Ikkunsidra ulterjorment;

Illi dan l-appell jirrigwarda s-sanzjonar ta' alterazzjonijiet u bdil fl-uzu tas-semi-basement f'zewgt idjar b'access separat dirett mit-triq.

Illi l-ewwel raguni ta' rifjut hija bbazata fuq il-policy 3.2 tal-linja gwida dwar il-kontroll tal-izvilupp tas-sena 2007 peress li l-uzu ta' abitazzjoni imur oltre il-limitazzjoni ta' zewg sulari ta' abitazzjoni f'zoni ta' vilell detached u semi-detached, bhaz-zona fejn jinsab is-sit in ezami.

Illi l-appellant qiegħed jikkontendi li fiz-zona hemm diversi bini b'numru ta' sulari abitabbli li jaqbez il-limitu ta' zewg sulari kif tipprovidi l-policy 3.2. L-Awtorita' rribitattiet li skont il-providiment tal-Artikolu 69(2)(i) tal-Kap 504, l-argument ta' commitment fir-rigward ta' l-gholi tal-bini li jeccedi l-height limitation m'ghandux jitqies bhala konsiderazzjoni materjali, u għaldaqstant l-argument ta' commitment ma jregiex.

Illi fl-ewwel lok dan it-Tribunal qiegħed jaqbel mal-appellant li l-invokar tal-Artikolu 69(2)(i) ma japplikax fil-kaz odjern. Għandu jigi ccarat li l-ewwel raguni ta' rifjut ma titrattax l-gholi tal-izvilupp bhala numru ta' sulari, fejn dan huwa regolat bil-policy 2.8 tal-linja gwida, imma precizament dwar in-numru ta' sulari abitabbli li huwa regolat bil-policy 3.2 tal-linja gwida. Il-proposta fl-applikazzjoni mhiex intiza sabiex izid in-numru ta' sulari fuq is-sit, li bhala stat ta' fatt l-gholi tal-bini ezistenti huwa skont il-policy 2.8, part A (zewg sulari u semi-basement); imma dwar il-bdil tal-uzu tas-semi-basement li bhala konsegwenza ser jizdied is-sulari abitabbli minn dak ta' tnejn għa approvat għal tlieta.

Il-kwistjoni ta' commitment huwa kunsidrat fl-istess policy 3.2 tal-linja gwida fejn fl-ahhar paragrafu ta' din il-policy jipprovdi dan li gej:

“Where a particular localised area (a street or block) has been developed otherwise than in accordance with the requirements for that locality set out above, new development in that area shall conform to the requirements/conditions which have been applied to the adjoining development, rather than to the requirements in the Table. Nonetheless, this should be the exception rather than the rule.”

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F'dan ir-rigward il-kwistjoni ta' commitment mressaq mill-appellant ghandu jigu mistharreg u kunsidrat fid-dawl ta' din il-parti tal-policy.

Kif gja accennat iktar 'il fuq, ir-rifjut huwa bbazat fuq il-policy 3.2 tal-istess linja gwida fejn fit-tabella numru 3.2, fis-Swieqi (taht 'Others') huwa permess sa massimu ta' zewg sulari abitabbli.

Ta' min isemmi ukoll li barra policy 3.2, l-uzu ta' sulari abitabbli huwa ukoll regolat fil-policy 3.5 fir-rigward ta' flatted dwellings u maisonettes f'zoni ta' detached u semi-detached identifikata fil-policy 3.2 fejn huwa permess 'one dwelling unit on the ground floor and one dwelling unit on the first floor' u ghaldaqstant qed jigi konfermat il-massimu ta' zewg sulari abitabbli – li hawnhekk il-policy 3.5 qed taghmiliha cara li dan ifisser dar separata fuq kull sular.

F'dan ir-rigward il-proposta fl-applikazzjoni qed tikser ukoll il-regolament fil-policy 3.5 peress li fil-kaz ta' flatted dwellings u maisonettes f'villa area bhal fil-kaz inezami mhux permess uzu abitabbli fil-livell tal-basement/semi-basement. Ghaldaqstant jibqa biss li jigi ezaminat il-commitment kif qieghed jigi allegat mill-appellant sabiex ikun hemm possibilita ta' divergenza mill-policis li jirregolaw l-izvilupp f'villa areas kif provdut fil-policy 3.2.

Illi l-appellant jaghmel referenza kemm ghal bini fil-blokka fejn jinsab is-sit inezami kif ukoll ghal-bini li hemm fuq in-naha opposta tas-sit, ossia fuq in-naha tat-Tramuntana ta' Triq il-Gizimin.

Illi dan it-Tribunal gja kellu l-okkazzjoni li jezamina d-diversi binjiet li hemm fl-istess blokka fejn jinsab is-sit, cioe, ghal dak il-bini ta' bejn Triq il-Gizimin, u Triq Josef Kalleja, f'kaz ta' appell fuq is-sit adjacenti tas-sit inezami, fl-ismijiet Darren Colombo vs MEPA (numru 57/14). Dan tal-ahhar ghalkemm mertu differenti (zieda ta' sular) gie kunsidrat l-istess aggravju, rigward commitments ta' bini li ghandhom iktar minn zewg sulari abitabbli fiz-zona fejn jinsab is-sit.

Fl-ewwel lok irid jigi meqjus il-fatt li l-blokka fejn jinsab is-sit hija kkaraterrizzata minn dizlivell qawwi bejn it-triq ta' fuq, Triq Gizimin, u Triq Josef Kalleja, li tinsab fl-livell iktar baxx ghar raguni li din tinsab ma genb wied (Wied Ghomor);

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Illi f'dan il-kaz l-appellant qed jaghmel referenza ukoll ghal permess numru PA1870/12, fejn dan it-Tribunal seta' jinnota li filwaqt li ma gie approvat ebda sitt sulari abitabbli, kontra dak li qiegħed jalleġa l-appellant, il-peremss gie limitat għal zewg sulari abitabbli fuq Triq il-Gizimin u zewg sulari abitabbli fuq Triq Josef Kallejja, bil-livell ta' semi-basement minn Triq il-Gizimin gie limitat għall-uzu ta' stores u games rooms ancillari mad-djar sovrastanti bħal ma huwa l-kaz tal-permess originali PA 6158/98 tas-sit mertu ta' dan l-appell.

L-istess seta' jigi osservat fil-kazijiet citati mill-appellant, cioè PA 895/93, 4823/88, 2711/92, PA 3720/99 u PA 6679/01 li kollha gew approvati b'zewg sulari abitabbli, bis-semi-basement bhala stores u games room ancillari mad-djar sovrastanti, u għaldaqstant certament ma jistghux jitqiesu bhala commitment favur il-kaz tal-appellant.

L-unika eccezzjoni li dan it-Tribunal seta' jinnota huwa fil-kaz tal-bini mibni fil-permess PA 1349/03 u PA 6413/04. Dan il-bini huwa ukoll mibni fuq hames sulari minn Triq Josef Kallejja, bid-differenza li filwaqt li fil-permess originali, ossia PA1349/03 fejn originarjament il-bini kien limitat għal-erba' sulari b'abitazzjoni separata, filwaqt li gie koncess sular addizzjonali t'abitazzjoni (bdil fl-uzu tal-livell semi-basement minn naha ta' Triq il-Gizimin) bil-permess PA 6413/04. F'dan il-kaz il-Kummissjoni tal-Kontroll tal-Izvilupp approvat favur iz-zieda ta' zewgt-id djar (semi-detached) mingħajr ebda gustifikazzjoni jew raguni (skont minuta numru 22 fl-inkartament tal-PA 6413/04) kif kien mitlub skont il-providiment tal-linja gwida dwar il-kontroll tal-izvilupp tas-sena 2000 (li kien japplika dak iz-zmien tad-decizjoni). Hekk kif provdut f'pagna 3 ta' dan id-dokument, il-Kummissjoni, b'mod simili għal-linja gwida applikabbli illum tas-sena 2007, tista' tezergita d-diskrezzjoni jew anke tiddipartixxi minn dak li jipprovdi l-istess linja gwida dment li jkun hemm gustifikazzjoni bil-miktub. F'dan il-kaz dan ma sarx u hawnhekk dan it-Tribunal jinnota li l-Kummissjoni naqset u abbużat mill-poteri tagħha u bl-ebda mod dan il-kaz izolat jista' jigi applikat sabiex dan it-Tribunal jippermetti dipartenza mill-policies li jirregola l-izvilupp ta' vilell.

Fil-kaz tal-blokka fejn jinsab is-sit inezami, dan it-Tribunal seta' jikkonkludi illi l-massimu ta' sulari abitabbli, cioè dar separat f'kull sular, gie rispettata f'kull bini li jikkaraterrizza din il-blokka fejn jinsab is-sit mertu ta' dan l-appell, kemm jekk dawn id-djar għandhom faccata fuq triq wahda (allura zewg sulari 'il fuq mit-triq, bħal fil-kaz inezami) jew inkella f'bini mibni bejn iz-zewg toroq (li allura jsarraf f'erba sulari abitabbli, ossia zewg sulari abitabbli fuq kull triq), għajr għal kaz wieħed biss kif gie msemmi hawn fuq. Għaldaqstant dan it-Tribunal jinnota li fil-blokka fejn jinsab is-sit ma jezistix dak il-commitment li jiggustifika dipartenza mill-policy 3.2 tal-linja kif jipprovdi l-ahhar paragrafu tal-istess policy.

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L-appellant ghamel ukoll referenza ghal kazijiet ohra ta' kumplessi residenzjali f'villa area fuq in-naha opposta tat-Triq il-Gizimin fejn gie permess gholi ta' bejn tlieta u erba' sulari abitabbli fuq Triq il-Gizimin. Dawn huma maqsuma fi tlett kumplessi ta' bini distinti, l-ewwel kumpless jibda mit-tarf ta' Triq il-Gizimin lejn in-naha tal-Lvant li jikkonsisti minn ringiela ta' hames blokock ta' villel detached b'gholi ta' tlett sulari, u dan skont il-permessi PB 2395/91 u PA 3441/96. F'nofs Triq il-Gizimin hemm kumpless kbir ta' djar maqsuma fi tlett blokock detached b'gholi ta' erba' sulari fuq Triq il-Gizimin skont il-permessi PA 5230/02, PA 6281/02 u PA 781/04. L-ahhar sular, ossia r-raba' sular hekk kif jidher minn Triq il-Gizimin gie approvat wara li gie milqugh l-appell mir-rifjut tal-applikazzjoni PA 781/04, (app. Numru 112/05RR datata 14 ta' Lulju 2006) fejn il-Bord tal-Appell ikkunsidra li l-gholi tal-bini ghandu jkun kompatibbli mal-bini fil-vicinanze; u billi hemm dislivell, l-izvilupp ghandu jkun mtarrag konformament mas-sit.

F'dan iz-zewg kumplessi ta' djar kien possibli z-zieda ta' aktar minn zewg sulari 'il fuq mill-livell ta' Triq il-Gizimin, peress li gew introdotti toroq privati fuq in-naha retrostanti tas-sit fejn ghaldaqstant l-gholi tal-bini gie mkejjel kemm mit-Triq il-Gizimin kif ukoll mit-triq interna li hija f'livell ghola mit-Triq il-Gizimin. Fil-fatt is-sulari addizzjonali li huma 'il fuq mit-tieni sular fuq Triq il-Gizimin gew irtirati mill-faccata fuq Triq il-Gizimin, u dan b'mod simili ghal kazijiet li hemm fl-istess inhawi fejn hemm bini li jinsab bejn zewg toroq sabiex ikunu konformi ukoll mal-policies li jirregolaw bini bejn zewg toroq, fejn jezisti dislivell bejniethom.

L-ahhar blokka msemija mill-appellant tinsab faccata tas-sit mertu ta' dan l-appell fi Triq il-Gizimin. Dan il-kumpless jikkonsisti minn zewg blokock ta' vilell detached mibnija fuq tlett sulari skont il-permessi PA 4687/04 u PA 449/05, fejn f'dan tal-ahhar gie permess it-tielet livell wara decizjoni tal-Bord tal-Appell numru 30/08 li laqghet l-appell kontra r-rifjut u gie gustifkat l-ahhar sular a bazi tal-commitments ta' diversi binjiet fil-vicinanze tas-sit, partikolarment dawk biswit dan is-sit, b'referenza ghal kumplessi ta' vilell fuq din in-naha tat-triq msemija supra. Anke f'dan il-kaz, d-djar fuq l-ahhar sular ghandomm access separat li jaghti ghal fuq in-naha retrostanti tas-sit, ghalkemm f'dan il-kaz l-access huwa wiehed pedonali biss.

Il-kumpliment ta' Triq il-Gizimin hija kkaraterrizzata minn vilell mibnija fuq zewg sulari.

Illi f'dan il-kaz l-appellant qieghed jishaq li a bazi ta' dawn il-permessi citati li jikkaraterrizaw din il-parti fuq in-naha opposta ta' Triq il-Gizimin, ghandu jigi trattat bl-istess mod u ghaldaqstant jigi approvat l-uzu residenzjali, ossia z-zieda ta' zewg-id djar fil-livell sotterran (semi-basement).

## Kopja Informali ta' Sentenza

F'dan il-kaz dan it-Tribunal ma jidhirlux li huwa b'xi mod marbut mal-permessi citati mill-appellant. Il-kazijiet imsemmija mhumiex simili ghal kaz inezami, fis-sens li f'dawn il-kazijiet il-bini ta' kumplessi residenzjali gew meqjusa bejn zewg toroq b'livell differenti bejniethom li wassal ghal dan l-gholi fuq Triq il-Gizimin, pero fl-ebda kaz ma jirrizulta li gie permess djar jew uzu strettament residenzjali fil-livell sotterran bhal fil-kaz mertu ta' dan l-appell.

F'dan ir-rigward il-policies huma cari u jeskludu l-uzu residenzjali ta' semi-basement f'zoni ta' vilell hekk kif tistipula l-policy 3.5 tal-linja gwida f'kaz ta' flatted dwellings f'villa area (li huwa l-kaz mertu ta' l-appell) hekk kif gja sucitata, kif ukoll fil-policy 5.1 tal-istess linja gwida li teskludi b'mod car l-uzu ta' basements ghal separate dwelling units f'detached u semi-detached dwellings, hekk kif citat fit-tielet raguni ta' rifjut.

Fir-rigward ta' din it-tielet raguni ta' rifjut, l-appellant ghamel referenza ghal permessi gja citati, u b'mod partikolari ghal-permess PA 6480/99. Fl-ewwel lok dan it-Tribunal gja kkonstata li ma gie prezentata ebda permess fejn gie approvat djar separati fil-livell sotterran. Dawk li gew permessi kienu kazijiet fejn il-bini jinsab bejn zewg toroq b'dislivell bejniethom fejn b'mod ovvju ser ikun hemm djar taht il-livell tat-triq fuq naha, imma ghandhom faccata 'il fuq mil-livell tat-triq l-ohra li qieghda fl-livell iktar baxx.

Dan kien proppju l-kaz fil-permess PA 6480/99 (ghalkemm il-bini ezistenti gie mibni skont il-permess PA 4591/02, bl-livell anqas ta' sulari mill-permess precedent PA6480/99), fejn addirittura dan is-sit jinsab bejn tlett toroq, peress li jinsab f'kantuniera bejn Triq il-Gizimin, Triq l-Arti (li fil-fatt tikkonsisti f'tarag peress li ghandha pendil qawwi) u Triq Josef Calleja fl-livell iktar baxx. Certamnet dak li jitqies bhala sular terran fuq Triq Josef Calleja ser jirrizulta bhala livell taht Triq il-Gizimin, imma b'daqshekk u b'mod ovvju ma jfissirx li gie permess xi djar separati fil-livelli ta' semi-basement kif qieghed jallega l-appellant. Certament il-kaz mertu ta' dan l-appell ma ghandu l-ebda similjanza jew l-istess karatteristici ghal kazijiet citati u ghaldaqstant l-aggravju mhux sostnut.

Dwar it-tieni u r-raba' ragunijiet ta' rifjut, cioe' l-kobor tad-djar li ma jilhqux dak minimu ta' 150 metru kwadru u n-nuqqas ta' parkegg fuq is-sit rispettivament, dan it-Tribunal jidhirlu li dawn jistghu jigu trattati aktar fid-dettal, inkluz tibdil fil-pjanti jekk ikun mehtieg, dment li l-uzu propost ikun gustifikat. Peress il-bdil tal-uzu tas-semi-basement f'zewgt idjar separati, li hija l-kwistjoni fundamentali f'dan il-kaz, qed jigi michud, ikun inutli li dan it-Tribunal jidhol iktar fil-mertu ta' dawn iz-zewg ragunijiet ta' rifjut.



## Kopja Informali ta' Sentenza

Ghaldaqstant, wara li ezamina fir-reqqa l-fattispeci tal-kaz, dan it-Tribunal qiegħed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma d-decizjoni ta' rifjut.

### Ikkunsidrat

L-aggravju tal-appellant hu marbut mal-kwistjoni tal-commitemnt fiz-zona. Hu qed isostni li t-Tribunal zbalja meta qies il-kwistjoni ta' commitment b'referenza għal kull żvilupp meħud wahdu ikkwotat mill-appellant. Dak li kellu jara hu illi għalkemm iż-zona hi desinjata bħala wahda ta' vilel detached u semi detached, dan hu hekk fl-isem biss għax it-triq kollha hi karatterizzata minn żviluppi li ma jikkostitwux vilel iżda multiplicita ta' units residenzjali. Għalhekk l-applikazzjoni ta' policies għal vilel meta z-zona giet żviluppata mod iehor hu zbaljat u japplika l-principju ta' commitment għaliex it-triq giet committed b'binjiet li iddipartixxu mid-desinjazzjoni originali. Di fatti hemm zewg permessi 6413/04 u 1339/03 li huma identici għal din l-applikazzjoni u t-Tribunal applika hazin il-principju ta' commitment meta injorahom għax qal li ma hemmx gustifikazzjoni għal hrug tagħhom. La darba ingħataw, l-appellant għandu dritt għall-istess trattament fl-istess zona. Anki żviluppi oħra mibnija fuq diversi sulari gew gustifikati mit-Tribunal fuq ragunijiet teknici mentri fil-fatt jirrizulta li z-zona giet kommissa bi żviluppi b'diversi sulari differenti minn vilel detached u semi detached mibnija sa massimu ta' zewg sulari skond il-policy. Di piu l-istess Bord tal-Appell kien ta' permess 30/08 għax adjacenti kien hemm bini b'permess simili cioè binja ta' tlett sulari.

Il-principji li din il-Qorti tishaq fuqhom fi kwistjonijiet ta' appelli fuq ippanar huma s-segwenti:

1. Appelli quddiem din il-Qorti jsiru biss fuq punti ta' ligi decizi mit-Tribunal;
2. Il-Qorti tagħmilha cara illi ma tirrikonsidrax kwistjonijiet ta' fatt decizi mit-Tribunal. Id-diskrezzjoni tat-Tribunal hi assoluta f'dak li hu valutazzjoni, apprezzment u piz probatorju tal-provi li jitressqu quddiemha u salv għal zball grossolan u manifest li jirrizulta bħala l-fattur determinanti għad-decizjoni tat-Tribunal, li allura jirrendiha annullabbli, din il-Qorti ma tindahalx.

## Kopja Informali ta' Sentenza

Gie deciz diversi drabi illi kwistjonijiet ta' 'commitment' u 'ugwaljanza' huma kwistjonijiet bazati fuq fatti illi t-Tribunal ghandu jinvestiga jekk jitqajmu qua aggravji u fil-kaz li ma jgux investigati jew addirittura injorati jistghu jwasslu ghal incertezza tal-ligi applikabbli u kwindi appellabbli. Dan pero ma jfissirx illi jekk it-Tribunal investiga u ddetermina l-kwistjoni, dan jaghti lok ghal revizjoni ta' dak deciz semplicement ghax il-parti sokkombenti ma qablitx mal-konkluzjoni li wasal ghaliha t-Tribunal. La darba t-Tribunal ikun investiga l-aggravju, sakemm ma jkunx gie kommess zball ta' punt ta' ligi mqajjem u deciz, il-kwistjoni deciza dwar commitment u ugwaljanza issir finali mad-decizjoni tat-Tribunal ghax altrimenti ikun qed jinghata skop li jinfethu provi fuq apprezzament ta' fatti, hafna minnhom ta' natura teknika, biex jigi skartat l-apprezzament tat-Tribunal dwar il-kwistjonijiet ta' 'commitment' u 'ugwaljanza' mqajma quddiem it-Tribunal (ara **Grezzju Axiaq vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar**, App Inf 02/05/2013);

3. Din il-Qorti hi tal-fehma illi l-legislatur bl-emendi li dahlu in vigore fl-2001 u li gew riprodotti fl-emendi u l-introduzzjoni tal-Kap. 504 fl-2010, l-enfasi li kienet tinghata lil 'konsiderazzjonijiet ohra' fosthom kwistjonijiet ta' commitment u ugwaljanza, ghalkemm huma ta' relevanza pero huma subordinati ghad-dover tal-Awtorita u Tribunal li l-ewwel u qabel xejn ghandu japplika u mhux biss iqis, il-pjanijiet u policies fl-iprocessar ta' applikazzjoni. Il-Qorti tqis li l-element dikrezzjonali tat-Tribunal meta fid-determinazzjoni ta' applikazzjoni iqis kwistjonijiet ohra hu llum mrazzan u ghandu jigi ezercitat barra l-parametri tal-ligi pjanijiet u policies fejn l-istess ligi pjan jew policy tippermetti eccezzjoni jew tippermetti l-użu ta' diskrezzjoni fl-interpretazzjoni jew fil-generalita tal-applikazzjoni taghhom meta dawn jipprovdu biss gwida jew ghajnuna (ara **Anthony Attard vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar**, App Inf 02/05/2013);

4. B'zieda ma' dan jinghad li hu minnu li fi kwistjonijiet ta' ipplanar l-Awtorita u l-Bord huma fdati b'hafna diskrezzjoni, diskrezzjoni li tirrizulta mill-applikazzjoni ta' varji policies, pjanijiet lokali u strutturali u interpretation documents u l-korrezzjoni taghhom mehud kont tal-fattispecie ta' kull kaz. Il-ligi stess taghti lil Awtorita u Tribunal il-mansjoni li filwaqt li ghandu japplika l-pjanijiet u policies, irid ukoll iqis kwistjonijiet ohra ta' sustanza bhal ma huma kwistjonijiet ta' commitment, ta' ugwaljanza fit-trattament ta' applikazzjonijiet identici, ta' konsistenza fil-principji li fuqhom jiddeciedi t-Tribunal ghalkemm mhux marbut bil-precedent. Pero kif ighid l-istess ligi fl-artikolu 69 tal-Kap. 504 gia artikolu 33 tal-Kap. 356, jipprevalu l-ewwel il-policies u pjanijiet fejn dawn ma jhallux lok ta' diskrezzjoni afdana lit-Tribunal (ara

**Stephen Seychell vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar**, App Inf 27/06/2013);

Il-Qorti hi konsapevoli li jezistu sentenzi li ssubordinaw l-applikazzjoni tal-pjanijiet u policies billi dawn kellhom jigu addatti biex jintegraw ruhhom ma' konsiderazzjonijiet fattwali ta' commitment fuq is-sit. Pero din il-Qorti tqis li l-legislatur kien car fl-ghazla tad-dicitura bejn l-artikolu 69(1) u 69(2) tal-Kap. 504 (kif inghad replikat mill-artikolu 33 tal-Kap. 356) u ghalhekk l-interpretazzjoni li ghandha tinghata u tigi addottata hi dik hawn enuncjata.

Applikati dan il-principju ghal kaz in ezami, t-Tribunal ghandu jikkonsidra kwistjonijiet ta' commitment u ta' ugwaljanza jekk jitqajmu pero a bazi ta' dak li trid il-ligi kif inhi u mhux oltre u sakemm it-Tribunal izomm mal-parametri ffissati mill-legislatur li anki din il-Qorti hi marbuta bihom, ma hemmx lok ghal revizjoni ta' decizjoni tat-Tribunal (ara **Anthony Attard vs L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar**, App Inf 02/05/2013);

It-Tribunal mhux marbut ma' decizjonijiet anterjuri tieghu stess u ghandu kull jedd jaghmel osservazzjonijiet dwarhom anki b'turija ta' nuqqas ta' qbil bl-iskop li jiggustifika l-kunsiderazzjonijiet li qed jaghmel fil-kaz li jkun qed jikkunsidra u b'hekk jaghti spjegazzjoni jew interpretazzjoni legali u/jew teknika ghaliex il-gudikat tieghu hu differenti fil-konkluzjoni raggunta minn ohrajn. Dan ma jwassalx ghal nuqqas ta' certezza izda biss divergenza ta' perspettiva legali u/jew teknika ghal kwezit post quddiemu.

Applikati dawn il-principji ghal dan l-appell, din il-Qorti ma issbx li l-appellant hu gustifikat. It-Tribunal applika l-policy rilevanti ghal kwistjoni liema policy l-istess appellant ma hux qed jissindaka. It-Tribunal ta l-ispjegazzjoni u gustifikazzjoni ghaliex ma kellhiex tapplika l-kuncett ta' commitment imsemmija qua eccezzjoni ghar-regola f'policy 3.2 tal-linji gwida dwar il-kontroll tal-izvilupp tas-sena 2007. Mhux hekk biss izda ikkunsidra l-aggravju tal-commitment kemm mill-punto di vista legali peress illi l-istess policy 3.2 tal-linji gwida jipprovdi ghalih u kemm mill-punto di vista fattwali u tekniku b'referenza kemm ghall-eccezzjoni ghar-regola imsemmija fl-istess policy 3.2 u b'paragun esplicitu ghal binjiet u permessi ohra imsemmija mill-appellant. It-Tribunal ghamel eccezzjoni ghal zewg permessi li ma qabilx li kienu fil-fehma tieghu allaccjabbli mal-policies vigenti. Dan ghandu dritt jaghmlu t-Tribunal. Ma jfissirx b'daqshekk li qed jitnaqqas l-efficacia tal-permessi mahruga jew qed jigi lez xi dritt tal-

## Kopja Informali ta' Sentenza

applikant ghal trattament ugwali peress li t-Tribunal ma ghandux jintrabat ma permess allegat bhala simili mill-applikant li hu jidhirlu mhux idoneju bil-policies vigenti biex jinhareg permess ghal applikazzjoni pendenti quddiemu. Ir-rwol tat-Tribunal hu li japplika il-ligijiet, pjanijiet u policies ghal kaz quddiemu mhux li jiffavorixxi applikant semplicement ghax permess anterjuri seta' inhareg li fil-fehma tat-Tribunal ma kienx gustifikabbli bhala paragon bil-policies vigenti. Konsegwenzi ta' tali operat jistghu semmai jkunu soggetti ghal xi pretensjonijeit da parti tal-applikant f'sede ohra izda mhux li jorbot lit-Tribunal milli japplika l-ligijiet, pjanijiet u policies ezistenti fil-kaz quddiemu skond ma jidhirlu idoneju u fejn l-appellant innifsu qed jilmenta mhux mill-gudikat innifsu izda minn fatt, cioe gudikat anterjuri ghal kaz differenti u partijiet ohra li ma jorbotx lit-Tribunal, u fejn in oltre l-appellant bl-ebda mod ma qieghed jikkontesta b'mod konkret l-applikazzjoni tal-policies li magghom it-Tribunal rabat il-konkluzzjoni tieghu.

F'dan il-kaz it-Tribunal sab illi l-policy kienet cara dwar l-eskluzjoni ta' uzu residenzjali ta' semi basement f'zona ta' vilel kif jistipula l-policy 3.5 tal-linji gwida f'kaz ta' flatted dwellings f'villa area kif inhu dan il-kaz u policy 5.1 li teskludi b'mod car l-uzu ta' basements ghal separate dwelling units f'detached u semi detached dwellings.

Ghalhekk il-Qorti tqis li t-Tribunal mexa skrupolozament mal-poteri lilu moghtija skond il-ligi u ezamina l-kaz f'kull asspett rilevanti tieghu inkluz l-aggravji tal-appellant u l-Qorti ma tirraviza ebda nuqqas ta' ebda tip fil-gudikat tat-Tribunal.

### **Decide**

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell ta' Alfred Magro u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tad-29 ta' Jannar 2015, bl-ispejjez kontra l-appellant.

**< Sentenza Finali >**

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