



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta ta' l-20 ta' Mejju, 2015

Appell Civili Numru. 62/2014

Mark Vella

vs

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

Il-Qorti,

Rat ir-rikors tal-appell tal-objector Franco Tabone tat-12 ta' Dicembru 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-25 ta' Novembru 2014 li approva l-hrug tal-permess PA 2189/13 'to sanction additions and alterations and change of use from part of garage to stone carving unit';

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Rat ir-risposti tal-Awtorita u l-applikant Mark Vella;

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 raguni :-

“1. The proposed development is unacceptable in a residential area as it would have a deleterious impact on the amenity of the area and of existing adjoining uses by virtue of noise, vibration. It therefore constitutes bad neighbour development and so conflicts with Policy BEN 1 of the Structure Plan and Policy GZ-HOUS-1 of the Gozo and Comino Local Plan, which seek to protect the amenity of existing uses.”;

Ra l-aggravji tal-appell li huma s-segwenti kif gej :-

“I write on behalf of my client, Mark Vella of Casa Vella, Triq il-Kapuccini, Rabat, Gozo and make reference to the EPC refusal of the aforementioned application dated 13 Nov 13 (copy attached).

On behalf of my client, I am hereby submitting an appeal against this decision on the grounds that:

The only reason for refusal reads:

The proposed development is unacceptable in a residential area as it would have a deleterious impact on the amenity of the area and of existing uses by virtue of noise, vibration. It therefore constitutes bad neighbor development and so conflicts with Policy BEN 1 of the SP and policy GZ HOUS 1 of the Gozo Local plan which seek to protect the amenity of existing uses.

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First part of reason for refusal - Allegated deleterious impact on the amenity of the area and of existing uses by virtue of noise, vibration allegedly rendering proposal contrary to BEN 1.

It is being explained that:

- The proposed stone carving unit is to be used for hand carving of delicate mouldings in stone. Hence, rather than constituting an industrial activity, it is more of a distinguished traditional handicraft activity and hence should be encouraged.

- The activity is again of a very small scale, involving only applicant who has in his blood veins his family ancestry aptitude and skills for this unique traditional handicraft activity. The unit area is less than 50 sq.m.

- Stone will be brought readily cut to the shop and will only be carved and decorated on site using mainly hand tools (chisels) with electrical tools only being intermittently used .. No pneumatic or percussion tools will be used. Such tools (rotor, small crosscut and a small lathe as better detailed in submitted engineers's report) are however all single phase and are not of pneumatic or of a percussion nature. Furthermore as again certified in submitted engineer's reports, the noise generated is within acceptable limits.

- Again the stone will inevitably be wetted on site to avoid chipping of the mouldings during carving. Hence practically no dust is generated.

- In fact attached declarations by the neighbours (Dok SM1, SM2 and SM3) clearly testify that this activity never caused any disturbance to the surrounding uses.

- The only neighbor objecting to this use is clearly motivated by other ulterior motives and surely not because of sound and vibrations generated. This is being said because the Court expert who conducted noise level test from this objector's own property clearly concluded that : "Illi b'rispett pero minghajr ebda tlaqlieq, 1-esponent jaghmilha cara li fl-ebda hin li fih kien qieghed jigi operat l-apparat ma kien odibbli kif konfermat sahsitra permezz tal-qari tas sound pressure metre" And additionally "illi l-esponent osserva fil-hin ta' l-access mizмум illi kif mistenni, il-qari tas-sound pressure meter beda jvarja drastikament aktar meta kien ghaddej it-

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traffiku mit triq kif ukoll meta ndaqqu l-qniepen tal-knisja tal- kapuccini fil-vicinanza".
Copy of the Court report is being attached as document SM 4.

It is hence clear and physically tested and proven by the independent Court expert that the use being applied for is not causing the noise and vibrations alleged in the reason for refusal.

Hence the use is not contrary to SP policy BEN 1.

This first part of the reason for refusal is hence clearly proven as unfounded and unjustified.

Second part of reason for refusal - proposal allegedly contrary to Policy GZ HOUS 1 of the Gozo Local plan which seek to protect the amenity of existing uses.

LP Policy GZ HOUS 1 in fact permits Class 11 uses in residential areas provided that only single phase machinery are used, provided that area does not exceed 50 sq.m., provided that no pneumatic tools are used etc.

Our proposal is in line with these LP GZ HOUS 1 requirements.

Given that GZ Hous 1 allows light industrial uses, the proposed use, being more of a handicraft nature, is acceptable. Indeed examples of non-acceptable uses mentioned in GZ HOUS 1 include carpentry, panel beating, mechanic, mechanical plant servicing, spray painting and bakery. Clearly, proposed use does not involve or even resemble these unacceptable uses.

Mepa in fact constantly approves similar no-residential uses in residential areas when prove is given that the use will not create a negative impact. PA 522/95 is a similar approved use and PA 610/12 is an approved meat packing unit.

Site location and surrounding commitments

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Without prejudice to the above justification viz a viz the provisions of LP policy GZ HOUS 1, we further contend that the actual site location and commitments further justify the proposed use under the flexibility policy FL-GNRL-1 par g because:

- Site is located on a busy distributor 1 arterial road, where the noise generated by traffic is much higher than that negligibly generated by proposed use as certified by the court expert.

- Site is not located within the centre of a residential area but on the periphery, facing a distributor / arterial road and the capuchin convent gardens on the opposite side of the street.

- Moreover the area is heavily committed with much larger non-residential uses as shown on attached site plan DOK SM 5, including a carpenter, blacksmith, mechanical garage, bakery, boat yard , Works Department stores, supermarket and showrooms, whose scale is additionally much larger than this small handicraft unit.”;

Ra s-sottomissjonijiet tal-Awtorita' dwar l-appell li saru permezz ta' nota li giet ipprezentata lit-Tribunal fit-23 t'April, 2014, u li jaqraw kif gej:

“4.0 COMMENTS ON APPELLANT’S ARGUMENTS

4.1 The Authority has noted the arguments as brought forward in appellant’s request for appeal and shall address these issues hereunder:

4.1.1 In this request for appeal, appellant is stating that this request for development is justified in view that the proposed development satisfies all the requisites of the relevant policies.

4.1.2 However, after noting all of appellant’s arguments as presented in this request for appeal the Authority disagrees with these justifications and states that the development as proposed breach the relevant policies as will be discussed below.

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4.1.3 As regards to the arguments of the appeal itself, the Authority disagrees with appellant's statement on various accounts and will be explained below.

4.1.4 The Tribunal is notified that the site lies within a residential in the Rabat area of the Gozo and Comino Local Plan 2006. The application seeks permission to carry out a change of use of part of the basement level into a Class 11 stone carving unit. The proposed workshop will cover an area of just under 50m² (including sanitary facilities).

Policy GZ-Hous-1 states that class 11 development can be permitted subject to the following criteria:

- The gross floor area does not exceed 50 square metres (including storage areas);
- Does not make use of heavy duty (including pneumatic) or noisy electrical/mechanical equipment or equipment that requires a 3 phase electrical supply;
- The activity does not entail the prolonged use or extensive use of percussion hand tools;
- The commercial activity does not employ more than 5 people and;
- The use does not generate particular by-products.

In view of the above constraints, the architect submitted an engineer's report (documents 26C and 26D) detailing the noise generation of the activity using the machinery indicated by the applicant (refer to document 26D). In the report, the engineer indicated that the noise generated by the machinery at any one time will not exceed 94.8 dBa inside the premises whilst the increase in sound pressure levels outside the workshop will be less than 5 dBa. Although BS 4142 1997 indicates that noise level increases of less than 5dBa will not likely induce complaints the engineer noted that:

'It is imperative that the door and window are kept closed during the operation of machinery' – document 26C, page 3 part 6.

On the other hand although the SEO approved drawings in view of the revised ventilation report, initially (min. 44) the closing of the windows and doors was not considered acceptable by the Sanitary Engineering Office as officer stated that this fact is an impractical and an unenforceable requirement, as it would entail the

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opening and/or closing of the window/door every time the operator switches on and/or off any equipment.

Further to the submitted reports, the architect indicated (document 26A) that no percussion tools will be used and the activity will not generate particulate by products in view of the use of the vacuum dust extraction equipment to be used. However, both documents 26A, and 26B indicate that the dust extraction equipment is fixed with the cross cut machine and that the final product will be finished with the use of chisels (considered as a percussion tool). It is therefore inevitable that the produced use will generate particulate matter. Therefore, in view of the above comments the proposed Class 11 unit does not respect policy GZ-Hous-1 of the Gozo and Comino Local Plan 2006 and hence the proposal runs counter to policy BEN 1 of the Structure Plan for the Maltese Islands 1990.

4.1.5 Five representations were initially received by the Directorate (documents 37,38,39,41 and 42) all objecting to the proposal in view of the resulting noise, vibrations and dust the stone carving unit would generate.

From these five , three objectors have however submitted further correspondence that upon viewing the plans they are no longer concerned about the impact of the proposal (documents 47, 48 and 49). In reaction to these objection letters received, the Directorate made the following comments: As indicated in the report the directorate is of the opinion that the proposed Class 11 (stone carving) use is not compatible with the surround residential area.

4.1.6 The architect submitted two PA permits numbers in which it is claimed that they were similar approved.

PA 522/95: Change of use from garage to stone carving studio Casa Madonnina, Triq Ta' Saguna, Sannat Gozo. DCC approved on 3/1/96.

(Prior to Local Plan)

PA 610/12: To construct meat packing (Class 11) and flats overlying basement garage approved in permission PA3515/09 at, Triq Ta' Bardan, Sannat, Gozo. EPC approved 24/7/12. The official minute of the EPC grant was:

Approved 3-2

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Fine is applicable if this application is approved and is sanctioning illegalities on site. Prior to the issue of the permit clearance from the Veterinary Services of the Department of Agriculture is to be obtained.

Whilst the Board is invited to take note of the above short comments, the Authority states that none of the above cited cases had identical planning considerations to the case under appeal in the light of their location, surroundings, policies applicable at the time of the decisions and any other particular planning considerations which had resulted in a positive conclusion. In this respect, reference is made to the Authority previous reports and respectfully asks the Tribunal to confirm the DCC's decision.

4.1.7 A consultation was carried out by the Local Planning Unit prior to the DPAR as requested by EPC in that it shows that not enough information was submitted regarding the exact nature of the activity. Thus the EPC refused this development on the basis of what was put forward and what had been concluded during the processing of this application. The official minutes (77 &78) of the LPU were:

Policy GZ-HOUS-1 (viii) contemplates Class 11 business and light industry. The information in the file suggests that the proposal may qualify under this policy on a number of points. Considering the small scale of the operation (total floor space less than 50sqm), the fact that the proposed stone carving outlet will mainly entail the use of hand tools, with the occasional use of electric equipment, and that the property above the workshop belongs to the applicant (document 26C) one cannot necessarily conclude that the operation is not in line with GZ-HOUS-1. However not enough information has been submitted on the legitimacy and the exact nature of the operations although it does seem to be of a limited nature. Cognisance is also taken of the location on a busy road which is not too far from a commercial area. An argument could also be posited that the application is seeking to consolidate a traditional handicraft which seems to have been in operation for some time. Min 77 cont...

Moreover expansion and relocation are not being contemplated. Therefore it can be argued that the proposal may then be in line with the principle of clause (e) of policy FL-GNRL-1. However from the information submitted it is not clear if the operation in question is covered by any tangible evidence that would give some legitimacy to the operations in the absence of evidence for prior planning permission. Should the EPC be inclined to approve this application, as an additional safeguard it is recommended that a condition is inserted that ensures that any permit issued is strictly tied with the specific operation in question with a proviso against further intensification.

4.1.8 With regards to site location and surrounding commitments cited in the statement, the Authority notes that no permits were quoted in terms of these cited uses and the quoted permits differ from the case under appeal. Furthermore, the Authority makes reference to several Planning Board's decisions in which the Board constantly emphasis that decisions taken in the past and which were decided through different planning policies are not to be considered as being relevant for requests which breach present policies and such applications should only be assessed through present plans and policies according to law.

Il-Pjan Lokali kien specifikament mahsub sabiex jaghti direzzjoni ta' kif zoni differenti ghandhom ikompli jigu zviluppati. Kieku wiehed kellu jinjora l-pjan lokali u johrog permessi abbazi biss ta' xi tip ta' commitment dan ikun ifisser illi l-ghanijiet tal-Pjan Lokali ma jkunu jistu qatt jintlahqu u l-ezercizzju kollu tal-pjanijiet lokali jkun sar ghal xejn. PA 5727/05 – RT 04.02.09 - PAB 161/07 - Fenech Victor – Attard – Scheme.

Il-Bord ikkunsidra wkoll illi permessi mahruqa taht policies differenti minn dawk tal-lum ma jistawx awtomatikament iservu ta' precedent sabiex illum jinharu permessi li jmorru kontra l-policies in vigore fil-prezent. – PA 1154/05 - RT 29.07.09 – PAB 205/06 - Agius Bernard – Paola – UCA

Il-permess PA 0511/05 inhareg qabel ma gie fis-sehh il-Pjan Lokali u ghalhekk ma jistax jitqies bhala precedent; il-permess PA 0056/05 ukoll inhareg qabel ma gie fis-sehh il-Pjan Lokali u ghalhekk ma jistax jitqies bhala precedent. PA 4290/04 – RT 14.04.10 – PAB 61/06 - Vella Clint – Mosta – UCA

Il-Bord ikkunsidra l-argumenti kollha mqajjma miz-zewg partijiet u jinnota illi hemm numru ta' decizjonijiet tal-Qorti ta' l-Appell li jstabilixu illi, decizjonijiet fuq applikazzjonijiet ghal permessi tal-bini, ghandhom jittiehdu mhux fuq il-policies fiz-zmien meta tkun saret l-applikazzjoni izda fuq il-policies in vigore meta tkun qed tittiehed id-decizjoni. PA 1597/05 – RT 14.04.10 – PAB 77/07 – Cassar Mark – Siggiewi – ODZ.

4.1.9 Conclusively, the Authority states that whilst taking note of appellant's arguments in this request for appeal, the Authority notes that there are no sound planning justifications which could justify a breach to the above cited policies. Hence, reference is made to the reports as presented by the Directorate and to the EPC's decision which dismissed this request for development since the EPC Board had based their decision on the valid relevant policies applicable to this area.

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Reference is also made to the detailed reports as included in the file and to the submissions (verbal and written) which will be presented during the appeals sittings.

4.2 MEPA therefore reiterates that it acknowledges and confirms that the reasons for refusal can be justified on sound planning considerations which took into consideration all the relevant facts, planning policies, legislation and submissions and thus, respectfully requests that the Environment & Planning Review Tribunal to confirm the decision as issued with the refusal notice and to refuse this appeal. The Authority reserves the right to forward further submissions during the appeals process as necessary.”;

Ra s-sottomissjoni ulterjuri tal-Avukat Dottor Mario Scerri ghall-appellant prezentata fit-3 ta' Lulju 2014 hekk kif gej:

“This is an appeal from a refusal of appellant's application to sanction additions and alterations and change of use from part of basement level garage to stone carving unit. MEPA's main objection is in regard to the change of use being proposed;

Appellant is in total disagreement with the Directorate's submissions against the granting of a permit to change part of the garage into a stone hand carving unit, and with all due respect to the planning officer who drew up the report, she has shown manifestly total lack of knowledge, experience, and proficiency in what this handicraft really involves. Hand carving in stone is a distinguished traditional art which, once it is carried out in a professional manner and with due diligence, ought to be encouraged rather than discouraged as the number of artisans in stone hand carving on the Island is all the more becoming extinct. Appellant's ancestry is well known for the artful craftsmanship in stone hand carving and decorating and appellant's ancestry is well famed for the building of magnificent churches the most conspicuous of which is Ta' Pinu shrine. It is rather appellant's passion to continue his family lineage and tradition by consolidating his traditional family handicraft rather than making it a trade from which to earn his main living;

Appellant reiterates that the proposed development satisfies all the requisites of the relevant policies GZ-Hous-1 which allows light industrial uses as is the proposal in point, and is in line with the principle of clause (e) of policy FL-GNRL-1. No expansion and/or relocation are being contemplated unlike in the cases PA5841/01 and 5125/06 where the applicant of a carpentry shop in a residential area was granted permit to be relocated and to expand the operation of his trade;

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That considering the small scale of the operation with a gross floor area that does not exceed 50 square metres, including the storage area, and the limited nature of the operation manufacturing showpieces rather than mass production, the proposed development definitely qualifies as a light industry in terms of GZ-House-1. Photographs have in fact been exhibited to the EPC Board to prove that the proposed stone carving unit is to be used for hand carving of delicate mouldings in soft stone.

Appellant's request rather than constituting an industrial activity, it is more of a distinguished traditional handicraft activity, and hence should be encouraged rather than discouraged;

Although the site lies in an area designated as a residential area, it is an undeniable fact that it is located in one of the busiest roads of Victoria locality on the way to Marsalforn resort where traffic is rather dense day and night and all year round. Besides it is a rather heavily commercial area where all sorts of retail outlets are opened and vary from supermarket, hardware store, bathroom centre, boat yard, turning metal workshop, carpenter, pharmacy, car sales and rental showroom, real estate, skin graphic design and tattoo shop, offices and clinics, Works Department Stores, home decor, clothes shop, ice cream parlour. The urban and natural soundscapes exceed by far any possible noise and/or vibration this small scale craft may generate and the traffic exhaust emissions exceed by far any possible dust emissions this craft may generate. This was even technically proven to be the case and appellant is exhibiting a court expert's report being marked as document 'A' in support of this assertion. The expert was appointed by the Magistrates' Court in Gozo as a Court of Criminal Judicature in the proceedings taken against appellant by the Police following a report made to the Executive Police by the same person Franco Tabone who is the sole complainant to appellant's proposal. Mr. Tabone had launched a report to the Executive Police following his complaint made to MEPA in opposition to appellant's proposed development in an attempt to bear some weight to his complaint made. However, the report made by him resulted to be manifestly unfounded and trumped up and the Magistrate's Court in Gozo had quashed all charges brought against the appellant and acquitted the appellant from all the charges brought against him. Appellant is also exhibiting as document '8' a copy of the relative court judgement which was decided on the 6th May 2014. The judgement has now become res judicata. In his report the court expert after having carried out an on sight inquiry in the presence of the prosecuting officer, the appellant and the complainant and their respective legal councils, and all tools were operated for noise level tests, has concluded that complainant's allegations of nuisance by appellant's usage of tools were manifestly unfounded. Of particular importance to this appeal are the following observations made by the court expert in his report :-

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"Mill-qari mehud (tas-sound pressure meter), jirrizulta b'mod evidenti illi l-apparat uzat mill-imputat mhux jikkawza hsejjes li jipprovokaw lill-kwerelant.

..... Illi fil-hin li l-imputat gie ordnat jongor gebra, irrizulta li l-qari fuq is-sound pressure meter baqa' kostanti, u cioe', ma giet registrata l-ebda differenza. Illi l-esponenti osserva fil-hin ta' l-access mizмум, illi kif mistenni, il-qari fuq is-sound pressure meter beda jvarja drastikament l-aktar meta kien ghaddej it-traffiku mit-triq, kif ukoll meta ndaqqu l-qniepen tal-knisja tal-kapuccini fil-vicinanze.

Illi b'rispett, pero' minghajr ebda tlaqliq, l-esponenti jaghmlha cara lli fl-ebda hin li fih kien qieghed jigi operat l-apparat ma kien odibbli bil-widna l-hoss allegatament generat bit-torn, kif konfermat sahsitra permezz tal-qari tas-sound pressure meter.

Illi peress li l-esponenti ta struzzjonijiet fil-hin ta' l-access mizмум biex il-kwerelant jacedi fil-lok fejn kien qieghed jigi operat l-apparat, il-kwerelant irritorna u talab lill-esponenti jordna lill-imputat biex fil-hin li kien qieghed jahdem fuq it-torn , ix-xoghol jaghmlu kif suppost u mhux 'jgharxu'.

Illi meta l-esponenti acceda fejn kien qieghed jahdem l-imputat, irrizulta lill-esponenti li l-imputat kien qieghed jopera l-apparat kif suppost, u cioe' kien qieghed jiffirma cilindru mahdum mill- gebel.

Illi tajjeb jinghad, illi biex isehh dak li huwa maghruf bhala provokazzjoni, id-differenza bejn l-ambjent reading, u cioe' 1- hsejjes moqrija bl-ingenji mitfija u l-specific noise, u cioe' il-qari bl-apparat jopera jrid jecedi id-10db, li certament ma rrizultax fil-kaz odjern."

The observations made and the conclusions reached by the court expert in his technical report weakens significantly the planning officer's arguments that the proposed development is not compatible with the surround residential area. The tests carried out and the readings taken have shown that the noise generated by the operating tools and machinery are practically non-existent rather than insignificant compared to the ambient sounds and noises. To an extent the technical expert's report supersedes the engineer's report which was submitted before the EPC Board. No difference at all was in fact registered between the ambient reading and the specific noise of the tools/machinery in operation. It must be noted also that the site lies almost at the furthest part of the road and opposite there is the Franciscan Capuchins Friary's garden which extends further up the road

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as well as further down. The proposed development does not constitute bad neighbour development by virtue of noise, and therefore does not run counter to Structure Plan Policy BEN 1;

The planning officer's submission that the activity generates particulate matter is also not the case at all and in this regard the planning officer's observations have shown once again her lack of knowledge and proficiency in the art of stone hand carving. A professional stone hand carver uses wet stone rather than dry stone to better see the bed lines, which often appear as distinctive colour patterns. Carving along these lines would ensure better structural integrity. Besides crack and fissures are very often easiest to see when the stone is wet. Carving or sculpting on wet stone reduces the friction that causes heat that can damage both the tools and the stone. Carving/sculpting on wet stone eliminates drastically and significantly the generation of particulate matter and the cross cut machine is equipped with vacuum dust extraction equipment to avoid any possible dust generation or emission at all. Besides steps will be taken to have the unit adequately ventilated as per specifications laid down in the engineer's report so that the least possible dust emission shall be extracted and conducted at the backgarden of applicant's house;

The proposed development entails an activity where hand tools are mainly used and the electrical hand tools and stone working lathe do not require a three-phase electrical supply. With all due respect the planning officer has failed to make a distinction between the various types of percussive or pneumatic tools and has made a general classification statement of the hand chisel as percussive tools. The principal representatives of percussive tools are the axe and the hammer which are force generated or transmitted. Hand carving is a rather delicate craft. When working stone, a brittle material that responds to a sharp tool point by breaking into small chips, the sculptor strikes many light blows to remove material. As a consequence, mallets have short handles and the amplitude of swing is small, allowing a succession of rapid blows without undue fatigue. To provide energy and momentum, the mallet head is heavy. Being of wood, it does not rebound in the manner of a metal head but stays on the chisel, which transmits the blow to the cutting head and focuses it into a small area of stone to be spalled off. The net effect of the proper combination of all elements - the properties of wood, chisel, and stone, the weight of the head, and the short handle - is to waste the least energy which then reflects itself in the generation of noises and vibrations on very and rather insignificant small scales. The proposal does not therefore constitute bad neighbour development by virtue of dust and noise, and therefore does not run counter to Structure Plan Policy BEN1;

MEPA had in fact raised the same application of Structure Plan Policy BEN1 in its report against the granting of PA 0522/95 which was a similar proposal to the one under examination, but the case officer's objection was turned down by the DCC

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Board and a permit was in effect granted. The EPC had no justification to turn down appellant's application when it had granted permits very similar if not identical to the case in question and the same planning considerations to the case under appeal were raised by MEPA. The only difference between the two sites is that the one under appeal is located in a much more hectic road where the ambient noise levels are significantly higher than is Saguna Street where the site under PA 0522/95 lies in the quiet locality of the village of Sannat, and therefore in the circumstances the policy BEN1 should be applied with less rigour considering the particular circumstances;

In conclusion should this Tribunal be inclined to reverse the EPC Board decision in view of the above and grants permit, appellant submits himself to any safeguards the Tribunal may recommend to ensure that any permit issued be strictly qualified and tied with specific operation in question including a proviso against further intensification.”;

Ra s-sottomissjoni tal-Avukat Dottor Simone Grech ghat-terza persuna interessata prezentata fil-11 t'Awissu 2014 u r-risposta tal-Avukat Dottor Mario Scerri ghall-appellant prezentata fit-22 ta' Settembru 2014;

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

Ra l-policy GZ-HOUS-1 (Residential Areas) tal-Gozo and Comino Local Plan;

Ra ukoll il-PA file bin-numru 2189/13;

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

Ikkunsidra ulterjorment;

Illi l-mertu ta' dan l-appell jirrigwardja l-użu ta' parti ta' quddiem tal-garaxx sabiex isir xogħol ta' lavur fuq il-gebla tal-franka.

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Illi skont il-mappa 14.9-A tal-Pjan Lokali (Gozo and Comino Local Plan), is-sit jinsab gewwa z-zona erja residenzjali tar-Rabat, Ghawdex u ghalhekk tapplika l-Policy GZ-HOUS-1, tal-istess pjan lokali.

Illi r-raguni ta' rifjut, hija bbazata fuq il-Policy BEN1 tal-Pjan ta' Struttura minhabba mpatt negattiv generat minn hsejjes, u vibrazzjonijiet f'zona residenzjali. Ghalhekk, l-uzu propost jista' jitqies illi jikkostitwixxi bad neighbourlines, u ghaldaqstant l-uzu propost mhux konsidrat bhala uzu kompatibli ma erja residenzjali kif elenkat fil-policy tal-pjan lokali, imsemmija supra.

Dan it-Tribunal jinnota illi il-proposta kif kunsidrata mill-Awtorita' tista' tikkwalifika taht Class 11 businesses and light industry ai termini ta' l-istess policy. F'dan l-istadju, huwa mprotanti jigi kjarifikat li kull referenza ghal-klassijiet ta' uzu f'din id-decizjoni huma skont l-Ordni ta' l-1994 dwar il-Klassijiet ta' Uzu fl-Ippjanar ta' l-Izvilupp, ossia l-Avviz Legali numru 53 ta' l-1994.

Fil-Policy GZ-HOUS-1 hemm numru ta' kundizzjonijiet specifici ghall-istess Class 11, hekk kif gej:

- The gross floor area of the premises does not exceed 50sqm (including storage of materials and/or finished products);
- The activity conducted within the premises does not use heavy duty and/or noisy electrical/mechanical (including pneumatic) equipment, and equipment which requires a 3 phase electricity supply;
- The activity conducted within the premises does not entail extensive and/or prolonged use of percussion hand tools (e.g. hammers, mallets etc);
- The activity employs less than 5 people; and
- The activity conducted within the premises does not inherently entail the generation of combustion, chemical or particulate by products.

Illi l-oggezzjoni principali ghal dan l-uzu propost hija bbazata fuq t-tieni u l-ahhar kriterju fejn l-Awtorita', kif ukoll it-terza persuna nterressata, qeghdin jinsistu li l-generu tal-uzu propost, jirrikjedi l-uzu ta' makkinarju li jiggenera storbju u trabbijiet.

Illi fil-process tal-applikazzjoni, l-appellant ipprezenta a favur tieghu rapport dwar l-emmissjonijiet tal-hsejjes datat 4 ta' Gunju 2013 (a fol 26c il-PA 2189/13). Minn ezami ta' dan ir-rapport, huwa evidenti li r-readings tal-hsejjes huma bbazati fuq tlett

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makkinarji li jintuzaw fis-sit, li jiggeneraw livell gholi ta' hoss, partikolarment il-crosscut machine (93.8dBA), li dan tal-ahhar nzamm bhala l-hoss massimu generat. Madankollu, il-hoss mkejjel minn barra l-garaxx ghandu jonqas ghal madwar 48.6dBA fejn gie notat illi: "this value is below the present background noise and is not expected to cause nuisance", ghalkemm bil-kundizzjoni illi "It is imperative that the door and window are kept closed during operation of machinery."

Sabiex jindirizza l-kwistjoni tal-emissjonijiet tat-trabbijiet, l-appellant prezenta ukoll qabel id-decizjoni tal-Kummissjoni tal-Ambjent u l-Ippjnar Ventilation Report datat 18 ta' Settembru 2013, a fol 51B.

Illi dan it-Tribunal seta' jinnota li l-attivitá relatata ma xoghol ta' lavur kif indikat mill-appellant jista' jitqies bhala wiehed artigjanali, illi skont evidenza mressqa fil-process tal-applikazzjoni kif ukoll f'dan l-appell kien ghaddejj ghal diversi snin fuq is-sit, li jaghmel parti mir-residenza tal-appellant.

Illi l-appellant ressaq provi illi x-xoghol maghmul fis-sit jikkonsisti minn lavur fil-gebla fejn hafna mix-xoghol isir b'ghodda tal-idejn. Meta ser jintuza l-makkinarju, l-appellant ressaq provi li l-impatt tal-hsejjes huwa wiehed minimu hekk kif gie iccertifikat mir-rapport tal-Inginier prezentata fl-applikazzjoni odjerna, kif ukoll minn rapport ta' espert indipendenti mqabbad mill-Qorti f'kawza kriminali fil-konfront tal-appellant.

Illi dan it-Tribunal huwa propens li jilqa dan l-appell, peress li l-attivitá hija wahda relatata ma xoghol artigjanali fil-gebla, u ghaldaqstant tista' tigi kunsidrata fil-providiment tal-policy GZ-HOUS-1, billi l-impatt generat mill-istorbju u trabbijiet huwa wiehed ikkontrollat.

Illi dan it-Tribunal huwa sodisfatt bil-mizuri ta' mitigation measures kif proposti fl-applikazzjoni, ghalkemm it-tqassim tax-xoghol fis-sit jista' jitjieb. Dan it-Tribunal jidhiru li jkun ahjar illi l-makkinarju tal-crosscut, jigi segregat mill-kumpliment tal-garaxx, billi jitpogga fuq in-naha retrostanti tas-sit, u ghaldaqstant ikun ukoll vicin tal-extraction grills indikati fir-rapport tal-ingenier a fol 51B fil-PA 2189/13, filwaqt li jinghalaq b'partition mill-kumpliment tas-sit u dan ghandhu jwassal sabiex jigi mitigate iktar l-generazzjoni tal-hsejjes fl-istess sit.

Illi minhabba li rizulta li sar zvilupp minghajr ma ntab permess, dan it-Tribunal serjimponi multa ta' Eur 500.

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Ghal dawn il-mottivi u wara li gie kkunsidrat il-fattispeci tal-kaz, dan it-Tribunal qiegħed jilqa' dan l-appell, iħassar ir-rifjut tal-permess għall-izvilupp, jordna lis-Segretarju ta' l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar tal-Awbilli sabiex fi zmien tletin gurnata wara li l-appellant iħallas il-multa ta' Eur 500, u jipprezenta pjanti godda skont kif gie deciz hawn iktar fil-fuq f'din is-sentenza, u jigi mposti dawn il-kundizzjonijiet elenkati fid-dokument a fol 82A fil-inkartamet tal-PA 2189/13.

Ikkunsidrat

L-aggravji tal-appellant huma s-segwenti:

1. L-applikant naqas li javza lis-sid tal-proprjeta dwar l-applikazzjoni fuq il-formola appozita b'ittra registrata kupjata lil Awtorita u naqas li jipprova li s-sid ta l-kunsens skond l-artikolu 68(3) tal-Kap. 504. L-applikant iddikjara li hu s-sid u li din hi r-residenza tieghu meta mhux il-kaz. It-Tribunal fid-decizjoni ordna li jinhareg permess f'ismu meta mhux il-proprjetarju. Għalhekk id-decizjoni hi irregolari;
2. It-Tribunal naqas li japplika c-cirkolari 2/96 u 1/98 li jipprovdu li fejn qed issir attivita illegali, ebda permess ma jinhareg qabel l-irregolarita tieqaf jew tigi regolarizzata. L-attivita in kwistjoni qed tigi ezercitata sa issa fid-fond kollu f'kull parti tal-garage anki fil-livell mit-triq mingħajr ebda trading licence. B'din l-attivita kien konsapevoli l-istess Tribunal, u fil-fatt impona multa. L-applikazzjoni ma kinitx għal sanctioning izda change of use u kwindi t-Tribunal ma setax jagħti permess għal haga mhix mitluba;
3. It-Tribunal applika hazin il-policy GZ-HOUS-1 fil-kundizzjonijiet specifici rikjesti għal zvilupp Class 11. L-applikant kellu l-oneru li jipprova li jissodisfa il-kundizzjonijiet (a), (c) u (e) cioe dwar l-kobor, l-uzu ta' makkinarju u l-prodotti uzati. Invece t-Tribunal tefa' l-oneru li jgħib prova kuntrarja fuq it-third party. It-Tribunal zbalja meta qal li l-attivita qed issir mir-residenza tal-applikant meta mhux il-kaz u lanqas fil-fatt hu s-sid. In oltre l-provi juru illi l-attivita mhix issir mill-basement kif allegat izda mill-pjan fil-livell tat-triq, li bhala fatt l-ispazju li minnu gia jopera hu akbar minn dak propost ta' 49 metru kwadru, tant li l-garage hu open plan bla segregazzjoni. Bhala uzu ta' makkinarju gie ppruvat li l-uzu tal-ghodda in kwistjoni tinvolvi uzu prolongat ta' percussion hand tools, ghodda espressament projbita bil-policy u fejn it-Tribunal għamel eccezzjoni, li ma tinstabx fil-policy, illi l-ghodda ma tiggenerax storbu għal girien. It-Tribunal zbalja meta addotta bhala tieghu rapport espert fi proceduri kriminali fuq

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episodju wiehed. L-istess rapport imbaghad lanqas dahal fl-element tal-prodotti uzati li jggeneraw trabijiet kontra d-dispost tal-policy.

Eccezzjoni preliminari tal-Awtorita

L-Awtorita qed tecepixxi illi l-appellant ma kienx appella quddiem it-Tribunal u ghalhekk ma setax jappella quddiem il-Qorti. L-emendi fil-ligi bl-Avviz Legali 404/2014 ghall-artikolu 11 tat-Tieni Skeda tal-Kap. 504 saret biex third party objector mhux appellant quddiem it-Tribunal ikollu dritt jappella quddiem il-Qorti u din l-emenda dahlet fis-sehh fil-11 ta' Novembru 2014, wara li gie intavolat l-appell quddiem it-Tribunal u ghalhekk mhix applikabli ghal kaz.

Il-Qorti tqis li din l-eccezzjoni ma fihex mertu. L-appell quddiem din il-Qorti sar fit-12 ta' Dicembru 2014 minn decizjoni tat-Tribunal tal-25 ta' Novembru 2014.

Qabel l-emendi fil-ligi registered third party objectors li ma kienux appellanti quddiem it-Tribunal kienu espressament eskluzi milli jappellaw quddiem il-Qorti tal-Appell. Bl-emenda fil-ligi, dan id-dritt ta' appell gie moghti lir-registered third party objectors avolja ma kienux appellaw quddiem it-Tribunal. L-appell odjern gie intavolat wara l-emenda fil-ligi. Issa hu pacifiku fil-gurisprudenza illi ligijiet godda ta' procedura skond principji mhux kontestati jidhlu ghall-applikazzjoni immedjatament meta ma hemmx dispozizzjoni kuntrarja. Ara **Giorgio Gauci vs Felice Abela noe**, App Civ 14/02/1936; u iktar ricenti **Mario Tonna vs Morland u Mallett Limited**, PA 27/06/2003; u **Kummissjoni Nazzjonali Persuni b'Disabilita vs Michele Peresso Limited**, App Civ 28/09/2007.

Ghalhekk l-appell gie intavolat mit-third party objector wara l-emenda fil-ligi u b'decizjoni li ittiehdet wara l-istess emenda u ghalhekk a bazi tal-artikolu 11 tat-Tieni Skeda tal-Kap. 504, l-appellant kellu kull dritt jappella.

L-ewwel aggravju

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Dan l-aggravju fil-verita lanqas ghandu jigi kunsidrat peress illi dan l-ilment qatt ma tqajjem f'ebda stadju hliet quddiem din il-Qorti. L-appellant accetta l-istat ta' fatt sal-proceduri quddiem din il-Qorti. Kwindi jigi li irrinunzja ghall-ilment la darba qatt ma tqajjem meta hu l-istadju li seta jitqajjem. Fi kwalunkwe kaz l-aggravju fih innifsu ma fihx mertu peress illi permess jinhareg fuq sit u l-kwistjoni dwar min hu s-sid u l-permess tas-sid jekk l-applikazzjoni issir f'isem terz, kif inhu possibli li jsir, hi kwistjoni bejn l-Awtorita u l-partijiet interessati u mhux it-terz li l-interess tieghu hu cirkoskritt ghall-izvilupp u kif dan ser jaffettwah.

Ghalhekk dan l-aggravju qed jigi michud.

It-tieni aggravju

Dan l-aggravju ma ghandux jigi mismugh billi ebda ilment f'dan is-sens ma tqajjem quddiem it-Tribunal. Din il-Qorti tinvestiga biss ilmenti fuq punti ta' ligi li tqajmu u gew decizi mit-Tribunal. F'dan il-kaz ebda punt ta' ligi rigwardanti l-applikabilita tac-cirkolaru 2/96 u 1/98 ma tqajmet u ghalhekk ma ghandhiex tigi kunsidrata.

It-tielet aggravju

Il-punt ta' ligi imqajjem mill-appellant, jekk tiskarta l-kwistjonijiet ta' fatt u dawk teknici li huma parti mill-mansjoni tat-Tribunal u li l-Qorti ma ghandhiex jedd tissindaka jekk mhux eccezzjonalment meta jkun hemm enuncjazzjoni ta' zball ta' fatt lampanti li kien sostanzjali ghad-decizjoni mehuda, hu marbut mal-applikazzjoni tal-policy GZ-HOUS-1. L-appellant irrefera ghal paragrafu (a), (c) u (e) tal-istess policy. Fl-ewwel lok l-argument li l-prova li l-izvilupp hu kompatibbli mal-policy jispetta lil applikant mhux lil objector. Din il-Qorti taqbel mal-principju kif sottomess mill-appellant izda ma taqbilx li t-Tribunal stenna lit-third party objector igib il-prova kuntrarjakif jimplika l-appellant, izda evidentement strah fuq ir-rapporti esebiti senjatament ir-rapport ex parte u r-rapport esebiti fil-proceduri kriminali kontra l-applikant dwar l-emissjoni ta' hsejjes u trabijiet, u tip ta' xoghol artigjanali maghmul.

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In kwantu jekk l-izvilupp hux ser jigi ezegwit mill-proprjeta tal-applikant o meno kif l-appellant ilmenta fl-ewwel aggravju din mhix kwistjoni li ser timpingi fuq il-mertu tal-applikazzjoni.

In kwantu ghas-sottomissjoni li l-uzu mhux ser isir mill-basement izda mill-pjan terran, jidher li t-Tribunal kien konsapevoli ta' dan ghax jirreferi ghal lok mnejn ser issir l-attivita bhala l-parti quddiem il-garaxx.

In kwantu ghal kundizzjonijiet specifici allegatament mhux sodisfatti skond policy GZ-HOUS-1, l-appellant jirreferi ghal kobor skond paragrafu (a) tal-policy. Pero l-pjanta li hi parti esenzjali mill-permess tindika l-estent tal-izvilupp li l-applikant hu marbut biha fil-permess u li hi anqas minn dak li tippermetti l-policy. Jekk l-applikant jivvjola l-kundizzjoni tal-kobor fil-permess allura hemm sanzjonijiet li jistghu jittiehdu izda dan ma jistax isir a priori kif donnu jrid l-appellant.

L-appellant jinsisti wkoll illi l-policy b'mod kategoriku tipprojbixxi l-uzu prolungat ta' percussion hand tools skond paragrafu (c) tal-policy. Hu pacifiku illi fil-fatt ser isir uzu ta' percussion hand tools. L-Awtorita issemmi 'chisel' li hi percussion tool. L-applikant innifsu isemmi li ser jintuzaw 'chisels'. L-appellant isostni li l-projbizzjoni hi assoluta u tassattiva. Din il-Qorti ma taqbilx peress li dan is-subinciz ighid li 'prolonged use' ta' din l-ghodda hi projbita, u dan evidentement minhabba l-hoss u disturb generat. It-Tribunal ghalhekk ghandu diskrezzjoni jevalwa jekk l-uzu prospettat tenut kont l-attivita mitluba hix ser tivvjola din il-kundizzjoni mehuda fis-sens logiku li filh saret. It-Tribunal ikkunsidra li fil-kumpless il-hsejjes generati mill-attivita komplessiva inkluz l-uzu estensiv tax-xoghol bl-idejn mhux ser jiggenera disturb inkontrollat. Din il-Qorti tista' taqbel jew ma taqbilx ma' din il-konkluzjoni izda ma tqis b'daqshekk illi t-Tribunal mar oltre d-diskrezzjoni li l-istess policy affidat f'idejn it-Tribunal munit bl-ghajnuna teknika tal-membri tal-istess Tribunal li jiddeciedi kwistjonijiet teknici fil-parametru tal-ligi jew policy li f'dan il-kaz huma wiesa bizzejjed biex jaghtu diskrezzjoni fl-interpretazzjoni tal-istess policy.

In kwantu ghal paragrafu (e) tal-policy rigward it-trab, din hi kwistjoni ta' fatt u di piu teknika u t-Tribunal li evalwa z-zewg fatturi wasal ghal konkluzjoni, li fil-fehma tal-Qorti hi

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insindakabpli, illi l-impatt generat ser ikun ikkontrollat aktar u aktar bil-mitigation measures proposti u dawk mizjuda mill-istess Tribunal.

Ghalhekk dan l-aggravju qed jigi michud.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-eccezzjoni tal-inammissibilita tal-appell, u tichad l-appell tal-appellant Franco Tabone u tikkonferma d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-25 ta' Novembru 2014, bl-ispejjez kontra l-appellant.

< Sentenza Finali >

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