

Environment and Planning Review Tribunal
St Francis Ravelin
Floriana



PA File No.: PA/04777/20

ERA Reference: EA/00001/21

Project Title: Proposed demolition of existing hotel at San Niklaw Bay and existing bungalows at Santa Marija Bay. The proposed development consists of part excavation and the construction of Class 3B Hotel (140 beds) at San Niklaw Bay area and individual serviced Bungalows (21 units) at Santa Marija Bay area with ancillary facilities and amenities including Spa (class 3C), bars/lounges (Class 4C) and restaurants (class 4D), upgrading the existing berthing facilities (class 3D); construction of swimming pools; reservoirs; complete upgrade of the infrastructure systems and back of house facilities. Upgrading and reinstatement of the natural ecological and existing disturbed terrain in both San Niklaw and Santa Marija areas in accordance with the Gozo and Comino Local Plan

Location: Comino Hotel and Bungalows, Gzira ta' Kemmuna, Kemmuna, Ghajnsielem

Application of Appeal from the Decision taken by the Environment and Resources Authority (ERA) on the 15th July 2022 in regard to the Environmental Impact Assessment (EIA) regarding EA/00001/21 Proposed demolition of existing hotel at San Niklaw Bay and existing bungalows at Santa Marija Bay. The proposed development consists of part excavation and the construction of Class 3B Hotel (140 beds) at San Niklaw Bay area and individual serviced Bungalows (21 units) at Santa Marija Bay area with ancillary facilities and amenities including Spa (class 3C), bars/lounges (Class 4C) and restaurants (class 4D), upgrading the existing berthing facilities (class 3D); construction of swimming pools; reservoirs; complete upgrade of the infrastructure systems and back of house facilities. Upgrading and reinstatement of the natural ecological and existing disturbed terrain in both San Niklaw and Santa Marija areas in accordance with the Gozo and Comino Local Plan

Whereby appellants premise as follows:

That on the 15th July 2022 ERA Board approves the Final Assessment put forward by the Directorate regarding the above mentioned application. The decision taken by the ERA Board confirmed the Final Assessment put forward by the Directorate, which position will be submitted to the Planning Authority to be taken into consideration during the decision-taking on the application for the development permit on the proposed development.

This means that ERA approved the following:

1. The Environmental Impact Assessment Report (EIA)
2. The Appropriate Assessment Report (AA)

3. ERA's positive recommendation of the proposed project. This positive recommendation would be conveyed to the Planning Authority when the PA would be considering granting development permission.

The Appellants are aggrieved by this decision and are filing this appeal from the same.

That this is an appeal from the abovementioned decision of ERA – which appeal is being filed in accordance with Article 47 of Chapter 551 of the Laws of Malta¹. The grounds of appeal are laid down below.

The Facts

The proposed development site is located on the northern coast of Comino, with the Hotel overlooking San Niklaw Bay and the bungalows overlooking Santa Marija Bay.

The whole of Comino is designated a Rural Conservation Area and a Nature Reserve, in addition to being a Special Area of Conservation, a Special Protection Area, an Important Bird Area (IBA) of International and EU Importance and a Natura 2000 site.

Aat the beach at Santa Maria Bay, there are two sections of land that are scheduled as a Level 1 Area of Ecological Importance (AEI) and Level 1 Site of Scientific

¹ 47.(1) Any aggrieved party may appeal to the Tribunal in accordance with the provisions of the Environment Protection Act and any regulations made thereunder, and any person may 47.(1) Any aggrieved party may appeal to the Tribunal in accordance with the provisions of the Environment Protection Act and any regulations made thereunder, and any person may appeal any decision of the Environment and Resources Authority only in relation to environment assessments, access to environmental information and the prevention and remedying of environmental damage.

Importance, both being protected by virtue of GN 401 of 1996. The first section on the beachhead is protected for the sand dune habitats it supports, whilst the other section lies just inland behind the sand dunes, and protects a small saline marshland. The area surrounding both level 1 protection zones is a level 3 Area of Ecological Importance (AEI), which serves as a buffer zone for the previously mentioned other two sections.

The proposal consists of the redevelopment of the Comino Hotel and the construction of a bungalow village complex located on the north coast of the island of Comino. The proposal is to provide for a new hotel and serviced bungalows (described as Santa Marija Village). The proposed hotel will comprise 71-guestrooms, with amenities including food and beverage outlets, outdoor swimming pools, and a spa. A total of 21 bungalows are proposed in place of the existing bungalows, together with a restaurant and a general store. The serviced bungalows will be for sale and prospective owners can opt to put their property in a rental pool, serviced by the hotel. Bungalow owners/guests can make use of the hotel facilities and services.

In view of the fact that the development is situated on a Special Area of Conservation, a Special Protection Area and a Natura 2000 site, an Appropriate Assessment was carried out. The aim of the Appropriate Assessment is to determine whether the Scheme will result in likely significant effects to the habitats and species for which the Natura 2000 site/s was protected. This will thus be determined on the basis of identifying reasonable links between the Scheme's effects and the qualifying interests of the potentially affected Natura 2000 site/s. AN EIA was also carried out. As stated above, ERA approved the contents of the EIA Report and also its recommended approval of the project to be conveyed to the Planning Authority.

1. Ground of Appeal

ERA's decision based on unreasonable, understated, incomplete and unclear assessment as to the adverse effects of the urban village on Comino, its extended operational use and the introduction of new uses– lack of exhaustive assessment in relation to effects of visitors to the restaurant and spa envisaged in application - both EIA and AA contain grave and material omissions in these regards - Article 47 (1) (d) of Chapter 551 of the Laws of Malta

The application in question comprises different elements. These include the redevelopment of the site of the Comino Hotel at San Niklaw Bay, a spa, restaurants and the redevelopment of the site at Santa Marija Bay to provide for a bungalow village consisting of serviced bungalows. The former hotel had a capacity of 190 guests whereas the bungalows could host 92 guests. The proposed hotel would have a capacity of 144 guests, whereas the bungalows would have a capacity of 130 residents. With respect to the bungalows, the EIA Report states that these could **potentially be permanent residents**².

There duration of time of occupancy of the bungalows is never clarified, even though there were specific queries regarding this point. For example – during the public meeting held on the 15th July 2022, Bird Life Malta representative Nicholas Barbara made a query in this regard, as well as to the number of prospected hotel guests and day visitors to the spa and restaurants. Both the hotel representatives gave vague and non-committal answers in this regard. Mr. Andrew Forte, on behalf of HV Hospitality, said that the bungalows would operate as part of the hotel during the same operational period as the hotel – without specifying what this operational period would be.

² Environment Resources Authority (ERA) Annex I – Summary of the Environmental Impact Assessment (EIA) and the Appropriate Assessment (AA) Reports – July 2022 – Page 2

Similarly, Mr. Melo Hili from HV Hospitality said that the hotel and the bungalows would operate in tandem. He did not commit as to the duration of the bungalow occupancy. In fact he went as far to say that it was not possible to predict the future. It is highly unlikely that an investment of this magnitude is being made without the investors knowing for how long they will be operating during the year.

In any case, the effects of the intensification and extension of use caused by longer operational and occupancy periods of the bungalows, has not been assessed and/or quantified in the EIA or the AA.

The existing bungalows were seasonal and only operated in the summer months. This greatly limited the impact of the development both on the site and the surrounding area since it was limited to a few months a year

The indications are that the new 'village' is intended to be permanently operating throughout the year. This will significantly increase activity both on the site and in the surrounding area and qualify as an increase in the intensity of use with a knock-on increase in the impact of users on site/surroundings. This was confirmed by the EIA Co-Ordinator ADI in the AA (pg. 149 Paragraph 5.19). This states the following:

5.19. However, the proposed change in use of the bungalows from a tourism accommodation complex that operates for part of the year (like the hotel) to a permanent residential complex with all the changes that implies, including the potential for a substantial increase in the permanent residential population on the Island significantly increases the risk. The impact, though uncertain in view that the likelihood of bungalow owners transferring to live permanently on the island is an unknown, would be of major significance in the light that the current resident population counts only 3 persons. Any addition of permanent residents can have a severe impact on the ecology of the island and should not be underestimated.

The footnote (29) to this comment states:

29 Impacts of semi-permanent camping activity at Tal-Ful is already creating substantial concerns and can lead to significant ecological impacts if not addressed. The conversion of the bungalows into residents can have the same effect.

This impacts of this extended operational use and the effective permanent urbanization of part of a Natura 2000 site was not comprehensively addressed. Relegating such an important aspect to a footnote constitutes a glossing over of the true import of this change.

The extended occupation and use of the bungalows has other unquantified impacts which were not assessed with rigour. These include the following:

The restaurant and the retail outlet in the bungalow village servicing the village – The project description mentions a plurality of restaurants (Class 4D) and a retail outlet (Class 4B). A careful reading of the AA is required to understand that one of these restaurants is situated in the bungalow village, as is the retail outlet. There are few references to them as “*A series of five small pavilions will house a public restaurant and a small general store and all will be part of the same establishment.*”³ ⁴

³ Appropriate Assessment Page 256 Point 2.63

⁴ The restaurant and retail outlet are mentioned in an indirect manner in the AA in the section relating to Management of Waste ;

Restaurant and retail outlet at village Page 92

2.134. The operational waste likely to be generated by the Scheme will be primarily municipal waste. The operational waste estimates are shown in Table 3.8. The Scheme will have three waste rooms: one in the Hotel and two at the village (**including one at the village restaurant**). All waste generated on

These commercial outlets are completely inimical to a Natura 200 site. Moreover there is nearly no information available as to their location, extent, capacity, lighting, visual impact, opening hours, the number of employees running them, the type of wares they will be selling, how goods and supplies will be transported to the restaurant and retail outlet, the frequency of such transportation and the modality and route thereof, the expected client and visitor numbers and whether they will be owned and/or managed by operators who are different to those of the hotel/village. The omission of such an in-depth assessment renders both the EIA and the AA incomplete.

The impact of residents travelling to and from the bungalow village – The extended occupancy of the bungalow village should have been assessed when considering the impact of transportation between the bay, hotel and village sites (by guests and deliveries). Although there are roughly the same number of combined Hotel and Bungalow Village residents⁵, the fact that the Bungalow Village residents live there permanently (and not on a seasonal basis as was the case before) means that they will necessarily be transported between the sites more often. The same applies to the transportation of goods required to sustain them.

the Hotel site will be brought to the main holding waste area (HMWHA) located in the basement of the Hotel. All food and beverage facilities will have an intermediary holding area, or bins, where the waste can be stored during the day before it is sent to the HMWHA in the evening. **All waste generated in the bungalows at the village will be brought to the main holding waste area (BMWHA) found near the substation at the village. The restaurant and retail outlet at the village will store waste in the restaurant holding area (RMWHA).** It is envisaged that all the waste generated by the Scheme will be transported to Gozo.

⁵ Only 8 less with the proposed development

The impact of guests travelling from bay to hotel or village was underestimated since the assumption was that it would be the same as that for the existing scheme⁶. This cannot be true when the bungalow occupancy is no longer seasonal but permanent.

The impact of increased number of employees to service the extended bungalow village and hotel – The Appropriate Assessment refers to the three-fold increase in employees required to service the Hotel and extended bungalow village. From 45 full-time equivalent staff, it is envisaged that the staff complement will balloon to 140 employees:

“Employment 2.132.

Before it ceased operations, in October 2019, the existing Comino Hotel and bungalows complex had a staff compliment of approximately 45 full-time equivalent staff. It is envisaged that the full-time equivalent staff complement of the Scheme when it comes into operation will be approximately 140”⁷.

Again – the impact of this increased number of employees is not scrutinized. It is not clear whether they will reside on site or if they will travel to the island of Comino and with what frequency. The increase of a 100 persons on the site will result in further anthropogenic impacts – impacts which were not considered.

⁶ EIA Report Page 320 12.7. “It is envisaged that guests will travel to / from the Scheme site by boat. For transportation between the hotel and village sites (by guests and for deliveries), it is envisaged to use electric-powered, buggy-style vehicles. The route between the two sites will remain as it is currently, and the frequency of trips between the two sites is unlikely to significantly increase, since the maximum number of guests envisaged for the Scheme is the same as it was for the Comino hotel before it ceased operations (274).”

⁷ Appropriate Assessment Page 92

Increased vehicle use – the extended occupancy of the bungalows and the increased employee complement may have a knock-on effect on the number of vehicles used on Comino. In turn, this may have an impact on noise, emission-levels, micro-plastic emission from tyre abrasion ⁸ and dispersion of dust when in use. Although there is mention of electric vehicles⁹, there is no prohibition of non-electric vehicles in any condition. Moreover, electric vehicles still produce pollution from tyre-wear – a point which should have been addressed when considering the sensitive environmental context of Comino. Another point of concern arises because of the possibility of cement being used as a binder on paths.¹⁰

Impact of Spa has not been quantified – The development comprises the introduction of a Spa on Comino. The possible use of this spa by day visitors has not been clarified and the attendant impact of such visitors has not been quantified – in another glaring omission of the EIA and AA.

⁸ <https://epha.org/breathe-clean-air-not-microplastics/>

⁹ EIA Report Operation “2.139. Traffic emissions from the Scheme during operation are likely to be minimal, as the only transport between the Hotel and the village sites will be provided by the Applicant and electric vehicles will be used *where possible*”

¹⁰ ADI Response to ERA Comments 09 05 22_Appendices.pdf

The path surface will be a "beaten earth" effect system with the introduction of a natural compound to the mixtures made with natural soil or sand/aggregate, proprietary hydraulic binding systems or traditional binders such as cement.

Effect of the removal of public amenities has not been adequately assessed – Appellants note that the public toilets, located within the boundaries of the site at Santa Marija Bay are planned to be removed. The removal of such a convenience will indirectly cause an impact on the nearby habitats including the wetland area, as is evident from the current operational camp site which is surrounded by human waste all around it. The impact of this removal has not been assessed in any way – there is no indication as to if or where it will be relocated and the impacts of such a relocation. This is another deficiency of the EIA and AA.

Effect of removal of 380 protected trees has not been adequately assessed, nor has the potential success or otherwise of the proposed replacement by saplings.

The aforementioned impacts resulting from extended occupancy and land take-up and new uses at the Bungalow Village and Hotel have not been scrutinized in a manner befitting a protected site. ERA was remiss in taking a decision when it clearly did not have a comprehensive and holistic assessment at hand.

2. Ground of Appeal

Insufficient assessment of alternative solutions – effect of change of plans not quantified – no comparison of relative effects on the site’s listed habitat and species – breach of Terms of Reference for AA and Terms of Reference of EIA

Appellants highlight the fact that both the EIA regime¹¹ and the AA regime¹² require the assessment of alternatives. This is reflected in the relative Terms of Reference for the EIA and the AA. These stipulate that the following should be considered:

- Alternative sites
- Alternative technologies
- Alternative layouts
- Downscaling of the project, or elimination of project components
- Zero option (do-nothing scenario) - i.e. an assessment of the way the site would develop in the absence of the proposed project.
- Hybrids/combinations of the above

¹¹ S.L. 549.46 Environmental Impact Assessment Regulations

¹² S.L.549.44 Flora, Fauna and Natural Habitats Protection Regulations

It is evident that the assessment of alternatives was a superficial and cursory one as the following alternatives was not even mentioned:

- Retaining the existing bungalows and refurbishing them
- Restricting the bungalows to the same footprint
- Retaining the seasonal occupancy of the bungalows
- Removing the public restaurant and the public retail outlet at the bungalow village
- Reducing excavation

This omission was compounded by the fact that the alternatives were not thoroughly assessed by comparing them with the original proposal and clearly indicating the relative effects on the site's listed habitats and species as required by the mandatory Terms of Reference¹³. When the original plans were reduced by the elimination of two bungalows, there was no detailed assessment of this reduction on the environment and on the listed species and habitats. Not just *any* reduction should make the project acceptable, especially when the resultant effect was not clearly assessed. In view of the above, it is clear that the exercise in the assessment of alternatives and alternative solutions was flawed and not in accordance with the mandatory terms of reference.

¹³ AA Terms of reference 7. Alternative solutions

A list of alternatives to the proposal is to be submitted. Examples of alternatives may include, but not necessarily limited to, alternative technologies, alternative layouts, and relocation or downsizing of the project. The zero-option (do-nothing scenario) should also be considered. **Each alternative is to be thoroughly assessed by comparing it with the original proposal and clearly indicating the relative effects on the site's listed habitats and species.**¹³

3. Ground of Appeal

Lack of adherence to S.L. 549.44 Flora, Fauna and Natural Habitats Protection Regulations – breach of the Habitats Directive

ERA failed to respect the provisions of Regulation 19 of S.L.549.44 Flora, Fauna and Natural Habitats Protection Regulations. The said Regulation lays down the mandatory procedure which must be followed when there is the proposal of a plan or project which is not directly connected with, or necessary to the management of the protected site, and is likely to have a significant effect upon the site. In such circumstances, an appropriate assessment has to be carried out, consent may only be given if the plan or project **will not adversely affect the integrity of the site.**

In the case at hand, the loss of natural habitat within a protected Natura 2000 site, excavation, the intensification of urbanization and use within an extended footprint, the visual impact and the knock-on effects of such development will definitely alter the integrity of the site on a permanent basis in a detrimental way. Despite this, ERA gave its consent for the development.

Subregulation 2 states that if there is a **negative assessment of the implications** for the site **and** there are **no alternative solutions** – there must be **imperative reasons of overriding public interest** (hereinafter referred to as “IROPI”) for the consent to be granted.

In this case ERA did not exclude alternative solutions such as refurbishing the existing bungalows, omitting the public restaurant and retail store in the village, excluding excavation and ruling out permanent residency on Comino.

ERA only came up with very cosmetic and unenforceable “mitigation” measures which will not successfully neutralize the deleterious effects of a permanent residential village on a Natura 2000 site and the other impacts related to the development.

Moreover, ERA did not base its approval on IROPI – in fact these were not even mentioned. Appellants highlight the fact that there are absolutely **no imperative reasons of overriding public interest** for this project to be approved. It is a purely private commercial venture on a Natura 2000 site and goes against the Management Plan for the Area and is in breach of all relevant policies.

Subregulation 4 further limits the type of IROPI which may be considered if the site hosts a **priority natural habitat or species** (as Comino does). In this case the only IROPI which may be considered are reasons relating to human health, public safety or beneficial consequences of primary importance for the environment, or other reasons which in the opinion of the Commission are imperative reasons of overriding public interest. It is evident that the development in question is not being done for a public purpose, that there is no public health or safety factor involved. The development will not benefit the environment – rather it will affect it badly. As stated above, ERA never mentioned or assessed any of the factors mentioned in Article 19, nor did it consult the Commission. Consequently ERA did not adhere to Article 19.

Without prejudice to the above, and the fact that the regulation stipulates that consent/approval should not have been granted in these circumstances, ERA