

continued to perpetuate its breach by **not taking compensatory measures** to ensure that the overall coherence of Natura 2000 is protected. ERA omitted to take compensatory measures and informing the European Commission of the same.

Compensatory measures are not the same as mitigation measures. Although the term compensatory measures is not defined in the Habitats Directive (which are transposed into Maltese Law as the Flora and Fauna Protection Regulations) the European Commission Guidance document¹⁴ makes a distinction between mitigation measures and compensatory measures.

Mitigation measures would include the minimization of adverse impacts, by scaling down, relocating or redesigning elements of a project. On the other hand, compensatory measures would consist of the creation or restoration of the affected habitat types or species' habitats. The issue of compensatory measures should have been discussed beforehand with the European Commission - which was not done in the present case.

Regulation 19 of the Flora, Fauna and Natural Habitats Protection Regulations is being reproduced below. It is evident that ERA completely disregarded the mandatory provisions of this Regulation and followed an ad hoc irregular procedure which is contrary to the law.

19.(1) Where it appears to the competent authority that an application for consent under these regulations relates to an operation or activity which is or forms part of a plan or project which –

¹⁴ European Commission, Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC, 2007, (last visited 23 March 2014).

(a) is not directly connected with or necessary to the management of the protected site,
and

(b) is likely to have a significant effect thereon, either individually or in combination with other plans or projects, the competent authority shall make, or require the applicant to make, an appropriate assessment, of the implications of the operation or activity on the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of sub regulation (2), **the competent authority may give consent to the operation or activity only after having ascertained that the plan or project will not adversely affect the integrity¹⁵ of the site concerned** and if appropriate, after having obtained and taken into account the opinion of the general public and representations made within such reasonable time as the competent authority may specify.

(2) If, in spite of a negative assessment of the implications for the site and the competent authority being satisfied that there being no alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, which subject to the subsequent sub regulation, may be of a social or economic nature, the competent authority may give its consent for the operation or activity to be carried out.

(3) Where the competent authority gives such consent under this regulation, it shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

(4) Where the SAC concerned hosts a priority natural habitat type and, or a priority species, the reasons referred to in the previous sub regulation must be either:

(a) reasons relating to human health, public safety or beneficial consequences of primary importance for the environment, or (b) other reasons which in the opinion of the Commission are imperative reasons of overriding public interest.

4. Ground of Appeal

¹⁵ Integrity is not defined in the Habitats Directive, although it is introduced under Article 6. Official guidance on nature conservation in the UK provides a definition in relation to European sites that can be applied more generally: 'The integrity of a site is the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and / or the levels of populations of the species for which it was classified.' (Box, J. 2006. A guide to Ecological Impact Assessment. Town and Country Planning)

ERA's decision is in breach of S.L. 549.46 Environmental Impact Assessment Regulations Regulation 32(1) (c) - no refusal, dismissal or effective restriction of project with unacceptable environmental effects

Appellants highlight the fact that the conclusions of the EIA and the AA show that there will be major adverse negative effects which cannot be mitigated or removed. In view of this ERA should have recommended that the project be refused, dismissed or effectively restricted. ERA did none of these things. By acting in this manner ERA breached Regulation 31(1) (c) of S.L. 549.46 Environmental Impact Assessment Regulations which requires that this is done when "*the project would have unacceptable environmental effects, such that more detailed consideration would be ineffective, superfluous, counter-productive, or in conflict with other environmental obligations*". Besides having proven unacceptable environmental effects the project is in conflict with the environmental obligation to conserve and maintain the status of the protected site. ERA exercised its discretion in an unreasonable and unmotivated way in disregarding this provision of law.

5. Ground of Appeal

ERA's decision to retain certain aspects as reserved matters resulted in an assessment which is not exhaustive – project fragmentation – underestimation of impacts and cumulative effects of other activities on the island

ERA chose not to decide on several aspects which could have a material bearing on the Natura 2000 site and its sensitive ecological balance. ERA hived off these aspects under the guise of reserved matters. These consist of the following:

“Reserved Matters - Others

The following shall only be approved once the respective details have been concluded to ERA's satisfaction. No works thereon shall commence prior to such approval, and thereafter works shall adhere to all conditions and specifications that may be stipulated in such approval.

18. The design and location of the piers at Santa Marija and San Niklaw bays;

19. The proposed geo-thermal system;

20. The proposed relocation of the Nissen hut; and

21. Sewerage infrastructure, including the proposed Wastewater Treatment Plant.”

There is no reason for ERA to leave these aspects to be decided at a later stage. This is a full development permit and the design and location of the piers, the geo-thermal system, the Nissen hut of cultural value and the sewerage

infrastructure should constitute an integral part of this application and its assessment. Appellants note that some of the aspects which have been hived off in this manner, are those which may have the most significant adverse impact (The design of the piers on Posidonia meadows for example. Or the effects of the geo-thermal system on the island geology and hydrogeology). ERA's decision not to consider these aspects has allowed a non-exhaustive, non-holistic appraisal of the development and even project fragmentation which may mask the over-all impact of the project and its cumulative effects.

Another example of ERA's negligent approach in considering the cumulative effects of the project is seen in its omission to consider it in conjunction with the current number of visitors who visit Comino (especially at the Blue Lagoon). The existence of amenities such as the restaurants at the bungalow village and hotel and the spa may entice visitors to traverse Comino to reach these amenities. This may result in trampling of sensitive habitats, species disturbance, littering and noise. The lack of consideration for this impact is further compounded by the fact that EKA has not completed and published the study regarding the carrying capacity of Comino as required by the relative Management Plan¹⁶.

The intensification of the touristic/entertainment/catering use on one side of the island and its potential to draw further visitors (with absolutely no limitations as to numbers) from the Blue Lagoon has not been assessed to study its cumulative effects. This is also in breach of EIA Regulations.

¹⁶ Kemmuna u l-Gzejjer ta' Madwarha www.natura2000malta.org.mt Natura 2000 Management Plan (SAC/SPA) Operational Objectives - OO69.1 **To plan and implement a tourism carrying capacity assessment of the Blue Lagoon and provide recommendations for management, include at least: seasonal variability of number of tourists, landings of tourists by ferries, entrance fee-options, zoning and wardening**
OO69.2 Implement the recommendations for sustainable management of the Blue Lagoon area

6. Ground of Appeal

ERA based its decision on mitigation measures which are inadequate and dependent on factors that are beyond the developer's and ERA's control and which are difficult to monitor, implement or enforce – breach of Terms of Reference

The Terms of Reference of the EIA state that the mitigation measures imposed should be “feasible, realistically implementable to the required standards and in a timely manner, effective and reliable, and reasonably exhaustive. They should not be dependent on factors that are beyond the developer's and ERA's control or which would be difficult to monitor, implement or enforce¹⁷.” The Terms of Reference of the AA also necessitate a degree of scrutiny and certainty as to the efficacy of the proposed mitigation measures and who will enforce them.

However, ERA has approved nebulous and unenforceable mitigating measures. For example, under the heading Comprehensive Management of the Development and its Ancillary Uses¹⁸ the following mitigation measures are proposed:

¹⁷ EIA Terms of Reference 5.1. Mitigation Measures

¹⁸ ERA Assessment and Recommendations Annex II

7. The site shall be operated and managed as a single complex. Works shall only commence once applicant is in possession of a written agreement with ERA comprehensively regulating the detailed operational use including the parameters below. Such agreement shall constitute an integral part of the development permit and shall be contractually binding on all owners, tenants and operators under all circumstances including but not limited to full or partial transfer of title.

i. Prohibition of ad hoc future lateral or vertical extensions and ancillary development (e.g. pools, landscaped areas);

ii. The permitted uses shall be residential/accommodation only;

iii. Restrictions on the introduction of vehicles;

iv. Compliance with comprehensive lighting scheme and avoidance of additional light pollution;

v. Limitation of operational noise emissions;

These mitigation measures are largely unenforceable. For example – there is no way that ERA can enforce a condition whereby there will be no future lateral, vertical extensions or ancillary development. ERA cannot stop the filing of future development applications and their approval by the Planning Authority so Mitigation Measure (i) is utterly meaningless. It is highly ironic that ERA is imposing an absolutely unenforceable prohibition against future development, when it is presently recommending the approval of large urban development, intensification of use and a restaurant on a Nature Reserve! More so when there is a general presumption against such developments in the Local Plan.

ERA continues to contradict itself in Mitigation Measure (ii) when it states that the permitted uses must be residential only. How does ERA explain its recommended approval of a Class 4D restaurant and a Class 4B retail outlet in a Special Area of Conservation? These are clearly not residential or accommodation uses, so why has ERA recommended their approval?

Another vague Mitigation Measure is that of Mitigation Measure (iii) which requires the restriction on the introduction of vehicles. Again, this is not clear or quantified. How far does the restriction apply? How many cars will be allowed on the island? How can an unquantified measure be enforced? Why is there no specification of the type of vehicles allowed?

In the same way, the other mitigation measures are unquantified and unenforceable. There is no evidence of how the mitigation measures will be tangibly implemented and by whom. Nor is there any evidence of the degree of confidence in their likely success or an explanation of any proposed monitoring scheme and how any mitigation failure will be addressed.

All of these were required in the AA Terms of Reference¹⁹ – all these requirements were completely disregarded by ERA which imposed mitigation

¹⁹ AA TOR

Mitigation Measures Where possible, measures should be identified to eliminate and/or mitigate adverse effects on the integrity of the site as well as on the relevant habitats and species. In this regard, the AA should include: • A reasonably detailed identification of the measures to be introduced for all relevant phases of the project; • An explanation of how the measures will eliminate and/or mitigate adverse effects; • **Evidence of how the mitigation measures will be tangibly implemented and by whom;** • **Evidence of the degree of confidence in their likely success;** • A timescale, relative to the project, when they will be implemented; • **An explanation of any proposed monitoring scheme and how any mitigation failure will be addressed;**

measures which are doomed to fail and have little chances of enforceability or success.

7. Ground of Appeal

ERA's decision is in breach of S.L. 549.46 Environmental Impact Assessment Regulations - Regulation 32A(1) – it did not take into account the comments received from the public and the public concerned when reaching its decision – ERA did not motivate its decision – ERA ignored the opinion of the Superintendent of Cultural Heritage and failed to motivate its decision in doing so

Although a public consultation exercise was carried out, ERA did not address many of the points brought up by the public. The only form of “response” was the often cryptic and unsatisfying comments of the EIA Co-Ordinator. It is clear that in its decision ERA ignored concerns expressed by the public (including the appellants) about the increased and unquantified number of visitors, the expanded footprint of the project, the unquantified effect of the reduction of 2 bungalows, the concrete batching plant, what would happen if there was no diligent monitoring (as is the case in several major projects), removal of public amenities, the effect on the Dark Sky Heritage, the visual impact resulting from the spread of the bungalow village complex and the loss of trees (especially in a Tree Protection area) and the inadequacy of planting saplings to “replace” said trees.

ERA did not explain why it was dismissing these concerns – this disregard constitutes a breach of Regulation 32A(1) of S.L 549.46 which states that, “*When providing recommendations following the completion of an environmental impact assessment, the Authority shall duly take into account the comments received from the public and the public concerned in line with these regulations.*” Once again, ERA breached the relevant regulations making the public

consultation exercise a sham exercise where the public files representations only to be ignored or fobbed off with irrelevant comments. This is not in keeping with the public participation obligation of the EIA process.

ERA also ignored the misgivings of the SCH about the inadequacy of the and the fact that the holistic impact of the development could not be assessed by the SCH. The SCH stated, “Notwithstanding, the Superintendence reiterates its concern at the EIA’s lack of engagement with the cultural heritage impact of the proposed residential use of the bungalows. The Superintendence is therefore unable to exhaustively assess the holistic impact of such development”. ERA disregarded the fact that the SCH was unable to assess the important cultural heritage aspect of the project and went ahead and recommended its approval. It did not motivate its decision to disregard the SCH’s opinion breaching the principle of natural justice “the duty to give reasons”.

8. Ground of Appeal

ERA decision was unreasonable and provided insufficient consideration of adverse effects and a lack of proportionality

Appellants contend that ERA did not adhere to the provisions of Subsidiary Legislation 549.96 in several regards and consequently was amiss in honouring its obligations as the Competent Authority and moreover deprived the public of

the right to comprehensive environmental information and comprehensive EIA and the possibility of informed participation in the planning process.

Appellants contend that ERA's approval of the EIA Report was superficial and cosmetic – a case of going through the motions to avoid thorough scrutiny of a project which will have long-term effects on the sensitive context of Comino without due regard to environmental factors.

ERA has neglected to request detailed information regarding the project and its impacts. It has failed to request an assessment of alternatives, including that of downsizing the project far more extensively. ERA has not assessed the project in light of its cumulative effects which may lead to significant impacts on the environment. Consequently the decision of ERA was unreasonable and provided insufficient consideration of adverse effects and a lack of proportionality in relation to the impact of the project on the environment.

In view of the above, the appellants humbly request this Honourable Tribunal to:

1. **Revoke** the above cited decision of ERA of the 15th July 2022 wherein ERA approved the Final Assessment put forward by the Directorate, and approved the submission of the same to the Planning Authority to be taken into consideration during the decision-taking on the application for the development permit on the proposed development and;
2. **Order** ERA to adhere to its obligations according to law, and:

3. **Suspend** and stop all procedures relating to the consideration, deliberation and decision of the planning application Number PA/04777/20 until such time as a complete and comprehensive EIA is compiled, there is full adherence with the provisions of S.L.549.44 Flora, Fauna and Natural Habitats Protection, the Habitats Directive and all other legislative instruments relating to protected sites and their environs.

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Witnesses

The appellants

Members of the public who filed submissions

Scientific experts

Alfred Baldacchino

The Superintendent of Cultural Heritage

The Archaeological Society of Malta

Dr Reuben Grima

Ghajnsielem Local Council

ERA representatives, past, present and future

ADI Consultants

Consultants and persons involved in drawing up the EIA and AA

The project applicants, architects and experts

The Planning Authority

Residents of Comino

Historians

Other witnesses who may be required as the need arises.