



Environment and Planning Review Tribunal

Floriana

Application of Appeal from PA 8143/21

Location: Site At, Hal Wardija, Triq ta' Kassja, Triq il-Wardija, New street off Triq Ta' Kassja &, Triq il-Wardija, Qala

Proposal: To sanction over excavation of site and proposed construction of 2 pools as well as soft landscaping

Applicant Excel Investments Ltd. Attn:Mr Mark Agius

Architect : Perit Alexander Bigeni

Appellants: Kunsill Lokali Qala, Moviment Graffitti

This is an appeal from the decision of the Planning Commission which approved an application to sanction over excavation of site and proposed construction of 2 pools as well as soft landscaping.

The Appellants are duly registered objectors and are aggrieved by the above mentioned decision and are submitting this Appeal.

The Facts

This is an application "*To sanction over excavation of site and proposed construction of 2 pools as well as soft landscaping.*" The application history of the site is one where the applicant/s (all linked) apply in a piecemeal fashion, incrementally encroaching within the ODZ. Although several representations were made objecting to this cumulative (and unlawful) uptake of ODZ, these concerns were always dismissed by the Case Officer and the Planning Commission. ERA repeatedly objected to the take up of ODZ land.

These objections were brushed away with some excuse or other such as the encroachment being minimal or that it is being landscaped. One of these preceding permits is currently under appeal. The Planning Commission disregarded this point.

It is clear that the Planning Authority was complicit in allowing the laying of the ground work for 2 huge pools which will formalize the ODZ, are alien to the vernacular rural character of the area and will cement the PA's reputation for permitting the sanctioning of abusive development, despite the clear breaches of policy.

The following is an application history of the site

PA Number	External Consultant submission	Case Officer's Recommendation
<p>PA 8590/19</p>	<p>ERA Doc 67a Overall Environmental Assessment It is being noted that part of the development will protrude beyond the development zone boundary, into undeveloped land ODZ (Docs. 61b-c). The encroachment into ODZ land is objectionable. All development should be limited within the development zone.</p>	<p>Case officer Doc 79a As highlighted in section 4.6 of this report, ERA objected to the development since it encroaches into ODZ land at basement level (drwg.61B), however this encroachment can be considered as minimal, and most of it is being covered by landscaping at ground floor. Therefore, the proposal can be considered acceptable.</p>
<p>PA 8669/19</p>	<p>ERA Doc 69a Overall Environmental Assessment It is being noted that part of the development will protrude beyond the development zone boundary, into undeveloped land ODZ (Docs. 61b & 67b). The encroachment into ODZ land is objectionable. All development should be limited within the development zone.</p>	<p>Case Officer 171a ERA - It is being noted that part of the development will protrude beyond the development zone boundary, into undeveloped land ODZ (Docs 61b and 67b). The encroachment into ODZ land is objectionable. All development should be limited within the development zone - doc. 69a. (Note: The development is within the limits to development and it is only the terraces which are protruding beyond. This is considered acceptable)</p>
<p>PA 9606 /19 Currently being appealed PAB 112/21</p>	<p>ERA Doc 63a It is being noted that part of the development will protrude beyond the development zone boundary, into undeveloped land ODZ (vide Fig.1 below). The interventions being proposed ODZ are therefore objectionable since these will result in the uptake of rural land and urban sprawl in rural areas. Additionally, ERA is concerned that should this development application be approved, it would encourage further additions on site, such as future extensions to the building and construction of pools with landscaping and hard surfacing ODZ, which would lead to the proliferation and intensification of built development ODZ and significant uptake of rural land. In view of the above, this development application is objectionable from an environmental point of view. All development should be strictly limited within the development zone.</p>	<p>Case Officer Doc 103a Building Depth The proposed development extends by more than the maximum permitted 30m building depth as stipulated by policy P27 of the DC 2015. This includes part of the basement level, backyards at ground floor and the back passageway, which also encroach outside the development zone. In view of the latter, ERA is objecting to the proposal as per doc. 63A. However, considering that the encroachment is minimal, most of it is being covered by landscaping at ground floor and similar commitment exists at the adjacent development covered by virtue of PA 8590/19 and PA 8669/19, the proposal being as a continuous design can be favourably considered.</p>

Grounds of Appeal

The grounds of Appeal are the following:

1. Ground of Appeal

Breach of Local Plan Policy GZ- ENCL-1

The site in question is an ODZ Enclave. Such ODZ Enclaves are regulated by Local Plan Policy GZ-ENCL-1 which states that such sites may be used for greenhouses and for agricultural storage or agricultural processing facilities subject to certain conditions – including the requirement that at least 20 tumoli (2.248 hectares) of good quality agricultural land (registered on the applicant's name) will be retained for cultivation as a condition for development permission. In the case at hand, the enclave is not being used as a greenhouse or for an agricultural purpose – as required by the Local Plan. Two huge swimming pools in an ODZ site are inimical to any agricultural use and in breach of the Local Plan Policy GZ-ENCL-1.

GZ-ENCL-1:

The Enclaves ODZ indicated on MAPS 14.8-A and 14.12-A shall be considered adequate for the development of greenhouses.

Requests for the construction of agricultural storage/agricultural processing facilities in these enclaves may be also considered provided that:

- a) the proposed built-footprint shall not exceed 50 m² ;
- (b) at least 20 tumoli (2.248 hectares) of good quality agricultural land (registered on the applicant's name) will be retained for cultivation as a condition for development permission. The geographic extent of the cultivated land shall be indicated with the request for development permission for the proposed building. The same agricultural land shall lie within a radius of 2 km from the built footprint of the store; and
- c) no point along the edge of the proposed building footprint shall be closer than 50 m. from the nearest inhabited building or 25 m. from a nearby agricultural store. Proposals for horse stables may also be considered in these enclaves, provided that adequate measures are taken to safeguard neighbour compatibility.

2. Ground of Appeal

Breach of SPED

The permitted development is in breach of SPED as it consists of development which is not “necessary” in a Rural Area. In allowing these 2 massive pools to be situated in a Rural ODZ area, the Planning Commission deliberately ignored the sequential approach advocated by SPED and the following objectives of SPED. The pools could have been located in the Urban area and not taking up a site which should have been used for agricultural purposes (as per the Local Plan). Moreover 2 massive pools do not constitute traditional or desirable components of the rural landscape. Consequently the development is in breach of the following SPED Objectives.

Strategic Plan for Environment and Development (SPED)

TO 1.10: To manage the available potential space and environmental resources on land and sea sustainably to ensure that socio-economic development needs are met whilst protecting the environment and **limiting land take up within the Rural Area by socio-economic development should ensure that rural areas are not exploited by uses which are not legitimate or necessary.**

RO 4: To protect and enhance the positive qualities of the landscape and the traditional components of the rural landscape.

3. Ground of Appeal

Breach of Rural Policy and Design Guidance 2014 – Breach of Policy 1.2H

Policy 1.2H of the RPDG 14 seeks the safeguarding of landscape features. It states that proposals which would have an adverse impact on important landscape features including their integrity or character, will not be permitted, will not be permitted. In this case the integrity of typical rural landscape of the Gozitan countryside is being irreversibly altered adversely, formalized beyond recognition. This the case as rubble walls which were on site seem to have disappeared from the approved plans. In view of this, there is a breach of this policy.

POLICY 1.2H: PROTECTION OF LANDSCAPE FEATURES

The Authority will seek to conserve, maintain and enhance important landscape features that contribute to:

- the connectivity, appearance and/or integrity of protected areas, sites and/or features,
- the character, scenic or ecological value of the rural area.

Proposals which would have an adverse impact on important landscape features, **including their integrity or character**, will not be permitted, unless the adverse impact is avoided or mitigated to the satisfaction of the Authority. The Authority will seek to establish a legal management agreement with the applicant to ensure adequate protection and continuous management of important landscape features.

4. Ground of Appeal

Breach of Article 52 of Chapter 552 of the Laws of Malta – disregard of order of precedence of plans and policies – lack of motivation/reasons for such disregard

The Planning Commission disregarded the order of precedence of plans and policies as laid out in Article 52 of Chapter 552 of the Laws of Malta in the case where there is conflict between them. Moreover, it particularly failed to apply the Local Plan GZ-ENCL- 1 which is specific to the site and which can be considered as a specially applicable law and where the principle “lex specialis derogat lex generalis” should have been applied.

Order or precedence of plans and policies in case of conflict.

Article 52.

In the circumstances where multiple plans and policies apply to the same matter or area and there is a material conflict between any of them, precedence should be afforded in the following order: the Spatial Strategy over the subject plan; the subject plan over the local plan, the local plan over the action plan or management plan, the action plan or the management plans over the development brief and the development brief over other policies mentioned in article 50

5. Ground of Appeal

Breach of Article 72(2) of Chapter 552 of the Laws of Malta – lack of motivation for Planning Commission’s disregard of Article 72

The Development Planning Act specifies what are the factors the Planning Commission should take into consideration when deciding upon a planning application. The Commission is obliged to have regard to relevant plans – in this case it completely disregarded SPED and the Local Plan GZ-ENCL-1. It has to consider other material environmental and visual considerations such as the fact that 2 massive lagoon-like pools are taking the place of scarce agricultural land, that rubble walls are being demolished..

The Commission completely ignored ERA’s objection and that of the SCH about the take-up of ODZ land (just as it had done in the previous applications on this site where ERA and the SCH had also objected). The Commission ignored the many objections made in respect of this application. It ignored the material consideration consisting of the fact that there is a pending appeal about the site. In short, the Planning Commission disregarded every single relevant factor and went ahead in dishing out this permit – without giving any valid reason for its flagrant disregard of the law, plans and policies. Moreover, the Commission did not

deign to explain or motivate its decision or its disregard of all the above. For this reason, the permit should be revoked.

Article 72 (2)

In its determination upon an application for development permission, the Planning Board **shall** have regard to:

(a) plans;

(b) policies: Provided that subsidiary plans and policies shall not be applied retroactively so as to adversely affect vested rights arising from a valid development permission, or a valid police or trading licence issued prior to 1994;(c) regulations made under this Act:

Provided that the Planning Board shall only refer to plans, policies or regulations that have been finalized and approved by the Minister or the House of Representatives, as the case may be, and published;

(d) any other material consideration, including surrounding legal commitments, **environmental, aesthetic** and sanitary considerations, which the Planning Board may deem relevant;

(e) representations made in response to the publication of the development proposal; and

(f) representations and recommendations made by boards, committees and consultees in response to notifications of applications.

7. Ground of Appeal

Planning Commission is in breach of S.L. 552.13 – mandatory procedures not followed – mandatory information not available

The Planning Commission did not follow the mandatory procedure laid down in Article 552.13 wherein the members of the Commission are to express their provisional opinion¹ on the recommendation made by the Case Officer². Instead, the Planning Commission deferred the hearing of the application so that the applicant could address the reason of refusal. It is being submitted that the Planning Commission is not the applicant's helper or advisor – it has no remit to try and “save” the application as submitted – more so in the case of an application for sanctioning – where the applicant took matters in his own hands and started excavating in an ODZ area with the removal of rubble walls. The untoward attitude of the Commission is highlighted by the fact that previous incursions in ODZ in linked applications were always approved on the basis of the ODZ incursion being minimal. The Commission is actively encouraging the incremental and irregular take-up of ODZ.

Moreover, information which should have been submitted with the application (site photos of site where pools are excavated, demolition of rubble walls etc) as required by SL. 552. 13 and PA Circular 4/16 are not accessible to the public – and there is no evidence that they have been submitted. In view of this the Commission's decision is even more questionable

PA CIRCULAR 4/16 SUBMISSION REQUIREMENTS FOR PLANNING APPLICATIONS

Circular 4/16

3.1.F

(v) if new or altered access is required, this should be clearly indicated in the description of the proposal and indicated on the site plans and on a block plan.

¹ Reg 13 a

² 5. Recommendation: REFUSE - for the following reasons: -

1 The proposed development runs counter to the provisions of policies 1.2G and 1.2H of the Rural Policy & Design Guidance (RPDG) 2014 in view that no effort has been made to minimize/mitigate the impact of the illegal excavations being proposed for sanctioning through the reinstatement of the original site levels, so as to reinstate and protect the cultural and rural landscape value of the area.

(vi) **any rubble walls to be demolished should be identified on plan**, whilst any trees proposed to be felled should be described by their correct local and scientific names and indicated on a block plan.

3.5 (B) Additional photographic information required for specific developments:

- **Where works are proposed in gardens, backyards or courtyards, the photos should clearly show such outdoor space.**
- **Applications for swimming pools should include a photo of the area of the proposed pool.**
- **In the case of large sites, additional photographs should be submitted so that they convey a clear and representative picture of the entire site.**

4.4 Applications for development located outside development zone (ODZ)

(A) A block plan at a scale of 1:200 (or 1:500) to indicate the existing/ proposed boundary walls; trees (providing scientific [Latin] and vernacular names in Maltese and English); hard-landscaping; and site access. The type of land use and vegetational cover should also be included on the plan; i.e. agricultural land, steppe, garrigue, maquis, woodland.

(B) A photo-survey, cross-referenced with the block-plan, illustrating any existing rubble walls, trees/shrubs/vegetational cover, structures, site access, and other features within the site boundary.

(C) Detailed drawings should show the external elevations of all buildings, and should include the materials and height of boundary walls and gates, and materials and colours for the hard landscaping.

(D) Landscaping schemes should include a minimum of three different forest indigenous tree species planted in clumps. Linear planting is acceptable for windbreaks. The indigenous species must add to the conservation of local forest species and hence the inclusion of Araar trees, Judas' trees, Holm oaks, and Aleppo Pines should be included especially if these species are not already present on site. Near the sea African Tamarisk and Phoenician Juniper are to be used. Other small shrubs are to be used when the size of the field or area requires it. Such species include the Mediterranean buckthorn, the Myrtle, the Spanish Broom, and Lentisk. Ivy may be used to cover walls along with other indigenous creepers. All ODZ applications should include landscaping and **land management schemes.**

6. Ground of Appeal

Breach of S.L. 552.01 Rubble Walls and Rural Structures (conservation and Management Regulations - no mention of sanctioning this demolition

The unauthorized works also consisted in the demolition of rubble walls which runs counter to S.L. 552.01 Legal Notice 160 of 1997 - Rubble Walls and Rural Structures (Conservation and Maintenance) Regulations and, Legal Notice 169 of 2004 - Rubble Walls and Rural Structures. Both regulations declare rubble walls and non-habitable structures as protected, in view of their historical and architectural importance, their contribution to the character of rural areas, their affording a habitat for flora and fauna, and their vital importance in the conservation of the soil and of water

This removal led to adverse impact on the site/area's landscape features thus running counter to Policy 1.2H (protection of landscape features) of the RPDG 2014 and Thematic Objective 1 of the Strategic Plan for Environment & Development for limiting the land take up for uses which are not necessary or legitimate in rural areas. Consequently, the development also runs counter to Rural Objectives 1, 3, and 4 to facilitate sustainable rural development by controlling the location and design of rural development, as well as the cumulative effect of such development. 4 The sanctioning for the deposition of soil runs counter to Policy 2.8 of the RPDG 2014, since clearance from the Environment and Resources Authority was not obtained and such works resulted in adverse environmental and topographical impacts. Hence the proposal is also in conflict with Rural Objective 4 of the Strategic Plan for Environment & Development for the protection and enhancement of the rural landscape.

It is not clear whether the illegal works included in changes to the topography which gave rise to adverse environmental and topographical impacts. The Commission should never have authorized such developments. Moreover, the sanctioning of the removal of the rubble walls is not specifically provided for.

In view of the above, and for reasons which will be expounded upon during the course of this appeal, this Tribunal is requested to revoke the decision of the Commission and the permit relative thereto.

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215/4 Old Bakery Street, Valletta

Appellants

Qala Local Council - Qala Civic Centre, Bishop Mikiel Buttigieg Street, Qala, QLA 1040.

Moviment Graffiti - 67 Strait St, Valletta

Witnesses

1. The applicant, his employees, partners, consultants, architect, companies
2. The Planning Authority – past, present and future employees, advisory boards
3. ERA
4. SCH
5. Objectors and their representatives and experts
6. Consultants

