



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta tat-12 ta' Novembru, 2014

Appell Civili Numru. 60/2013

Paul Camilleri f'isem u in rappresentanza

tas-socjeta Trimeg Ltd.

vs

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

Il-Qorti,

Rat ir-rikors tal-appell ta' Paul Camilleri nomine tat-30 ta' Ottubru 2013 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-15 ta' Ottubru 2013 rigward outline

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development permit application PA 6451/04 – site at Triq I-Gharbiel, Pembroke: to develop low density residential area in exclusive landscaped communal gardens’;

Rat ir-risposta tal-Awtorita li ssottomettiet li l-appell ghandu jigi michud u d-decizjoni tat-Tribunal konfermata;

Rat l-atti kollha u semghet lid-difensuri tal-partijiet;

Rat id-decizjoni tat-Tribunal li tghid hekk:

Ikkunsidra:

A. Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp fis-7 ta' Marzu 2007, irrifjutat l-outline development permit application PA 6451/04 – “Site at Triq I-Gharbiel, Pembroke: To develop low density residential area in exclusive landscaped communal gardens.”

L-erba' ragunijiet ghar-rifjut kienu s-segwenti:

"1. The site is located in a Special Area of Conservation (LN 257/03) and in an Area of Ecological Importance (GN 583/96), where physical development, particularly in the form proposed, is not desirable. The proposal would therefore adversely affect the area, hinder its protection, and run counter to the rural conservation and ecological objectives of the Structure Plan particularly paragraph 15.4 of the Explanatory Memorandum.

2. The site is located on the upper reaches of Wied Harq Hammiem and the proposed development will result in changes to the hydrodynamics of the area which in turn may lead to significant changes in the ecology of the valley further downstream. The proposed development goes beyond the small to medium scale physical development which can be considered in this type of location, provided no suitable alternative exist and features of ecological and scientific interest are protected. It would therefore run counter to the objectives of paragraph 15.40 of the Structure Plan Explanatory Memorandum for the protection of areas of ecological importance, and to policy RCO 29, which seeks to prevent soil erosion and encourage the conservation and management of water resources.

3. Development of the site would adversely affect the upgrading and junction improvement on the adjoining arterial road network. The proposed development therefore runs counter to Structure Plan policy RDS 2 which aims at safeguarding land required for the improvement of the arterial road and links.

4. Development of this site would compromise the Malta Environment & Planning Authority's ability to review the layout and other provisions of the Temporary Provisions Scheme through the Local Plan process as proposed in Structure Plan policies SET8 and BEN4. The proposal is therefore premature and counter to Structure Plan policies SET8 and BEN4.”;

B. In-nota tal-Perit Joe Cassar ghall-Appellant nomine, ipprezentata fit-2 t' April 2007, senjatament il-punti segwenti:

“1. Independent reports carried out by EMDP present different conclusions re the environmental importance of the site in question. This study which had already been submitted to the directorate had concluded that:-

Ecologically the site does not manifest significant scope of conservation.

The site's delineation as agriculture is not conducive to the optimization to which the site is put.

The delineation of valley protection zone does not feature in the Structure Plan. Neither can the site be considered to form part of a 'rural conservation area', an area of ecological importance or a site of scientific importance'.

Rather the site is located within a highly urbanised area.

The site is surrounded by the highly developed localities of Swieqi, Paceville and Pembroke.

2. The environmental value of the site is so questionable that MEPA does not object to this land being developed as part of the improvement in the Traffic Network. A couple of years ago part of the site was taken over by the Roads Department to construct the road leading to the Corinthia San Gorg and SAS Radison Hotels. It seems that part of the site next to Regional Road will be taken over for the improvement of the junction. If a site is so environmentally sensitive then no form of development be it buildings and/or road construction should be permitted.

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It is my opinion that MEPA are being subjected to third party pressures who object to any form of proposed building development but are complacent to construction of roads. Constructions of roads do not hinder or obstruct views, buildings do and this I strongly believe is the main reason why this land in the midst of building development has never been favourably considered for development. It is a sheer waste that a pocket of land within the building zone that qualifies as a building site in terms of the law and is completely surrounded by development should remain undeveloped in an area where demand for development is in abundance.

3. The proposed development in this application envisages a low density development with a site coverage of only 15%. Surely this should not be considered as a proposed development which goes beyond the small to medium scale development. It is more a landscaped garden with the minimum of construction. Buildings have been recessed by 14.5 metres from Regional Road allowing for the possible widening of the said road.

To compare the sale of this development one needs only glance at developments all around the site and can easily gauge the scale of this development in comparison with nearby developments.

4. The local planning unit should seriously consider the potential of this site for development purposes bearing in mind that:

The site is within the development boundaries

It is the only pocket of land within boundaries left undeveloped.

Its inclusion as a special area of conservation has always been questioned. Presently it is the subject of a court case which my clients instituted against MEPA.

MEPA is adopting two weights and two measures when on the one hand it refuses to grant permission for a low scale development which takes into account possible road widening whilst on the other hand is prepared to keep this land on hold for future road developments that might occur.”

C. In-nota responsiva ta' Mario Scicluna ghall-Awtorita', ipprezentata fit-8 ta' Mejju 2007, inter alia l-punti segwenti:

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"5.2.1 During the initial stages of the processing of this application, submissions were received from the Pembroke Local Council, the Nature Protection Unit and the Integrated Heritage Management Team.

5.2.1.1 The Pembroke Local Council submitted his objections more than once due to the importance to safeguard the existing open space, the protection of the valley and the plans to improve the Pembroke entrance junction.

5.2.1.2 The report of the Nature Protection Unit (Red 15) includes references to the Legal Notice 257/03 and the threat to the integrity of the Special Area of Conservation (SAC). The scheduling of the site and the protected species found in this valley renders the proposal unacceptable from a Nature Protection point of view.

5.2.1.3 The report compiled by the Heritage Management Team (Red 13) lists the various scheduling of the site and after assessing the proposal, highlighted its objections based on a number of issues and Structure Plan Policies which safeguard such areas from urban development. The report strongly recommends a refusal.

5.2.2 With the approval of the North Harbours Local Plan, Map PE1 designates this site as "Protected Valley Area" with the relevant Policy NHCV 01 and S.P. Policies RCO 28 & 29. Local Plan Policy NHCV 01 identifies this site as Level of Protection 1 as regards Geology and Geomorphology and Level of Protection 1 and 4 regarding its Ecology.

5.2.3 Furthermore, Map PE1 also makes provision that within this site there is to be an improvement in the junction to Pembroke. Policy NHTR 9 fully supports ADT's plan to upgrade such junctions. In this regard, the Transport Planning Unit acknowledged that this site is subject to a junction improvement plan which forms part of the "TEN-T Network Malta Road Project" and any development within this site is to abide with the provisions of the Local Plan and other policies relating to this particular site."

D. Ir-rapport ta' Richard Lia u Michelle Borg għall-Awtorita', ipprezentat fl-24 ta' Mejju 2007, inter alia l-punti segwenti:

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"1.3 Scheduling of Harq il-Hammiem (limits of Pembroke and St. Julians) was published via Governemnt Notice 583 of 1996 in Government Gazette dated 6th September 1996, Wied Harq il-Hammiem and the cave at the Northeastern tip of this valley (hereinafter referred to as Harq il-Hammiem cave) are scheduled as Level 1 Area of Ecological Importance and Level 1 Site of Scientific Importance respectively, with a level 4 buffer zone, in terms of Structure Plan Policies RCO 10, RCO 11 and RCO 12.

2.1 The 1996 scheduling presents several shortcomings since:

It does not cover the whole valley system and the upper reaches of Wied Harq il-Hammiem do not benefit from any protection measures;

The scheduling is not aligned with existing physical boundaries and does not reflect the current road alignment; and

The scheduling of the cave does not reflect its actual location and extent

2.2 MEPA Board approved the amendments to the 1996 scheduling on the 22nd March 2007, as follows:

Amendments to the previously approved scheduling boundary, covering the whole valley system, retaining the same level of protection along the upper and lower reaches of the valley as scheduled in 1996 (i.e. Level 4 AEI/SSI) [...]

The precise location of Harq il-Hammiem cave [...]

Delineation of the 30-metre constraint zone as amended following consultation with the Natural Heritage Panel [...]; and

Publishing of the constraints zone as recommended by the Natural Heritage Panel.

2.3 The scheduling has been changed so that the boundary is aligned with the valley system as a whole, MEPA Board also approved the extension of the boundary of the Special Area of Conservation. The SAC boundary now also covers the entire valley system and is aligned with the scheduling boundary.

3. Wied Harq il-Hammiem

3.1 General description

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3.1.1 Wied Harq il-Hamiem begins as a very narrow ditch flanked by agricultural land to its South at the main junction of Pembroke with Triq Sant'Andrija. This ditch gives way to a wider water course flanked by relatively steep valley-sides

3.1.2 This valley has been highly affected by development and is enclosed by a major road along its Northwestern periphery, residential buildings along the Southeastern valley-sides and Villa Rosa (and its gardens) located at the mouth of the valley.

3.2 Ecology

3.2.1 Although highly affected by urbanization the valley still supports important vegetation communities, including patches of maquis along the sheltered valley banks. A number of rare species and/or species with a restricted distribution in the Maltese Islands are known to occur from this valley including:

Crested rock (*Rumex cristatus*) which has only been recorded from this valley and another site in Gozo.

Cage thistle (*Atractylis cancellata*, RDB: very rare with a restricted distribution in the Mediterranean and in the Maltese Islands)

Hairy plantain (*Plantago bellardi*; RDB: very rare; restricted distribution in the Maltese Islands)

Tooth-leaved club-moss (*Selaginella denticulate*; RDB: rare; restricted distribution in the Maltese Islands);

Sicilian squil (*Scila sicula*; RDB: rare; restricted distribution in the Maltese Islands)

3.2.2 The valley sites also support a number of temporary freshwater rockpools (kamenitzas) with the associated rare biota including:

Maltese waterwort (*Elatine gussonei*; RDB: rare with a restricted distribution in the Maltese Islands and the Mediterranean) Horned pondweed (*Zannichellia palustris*; rare; restricted distribution in the Maltese Islands)

3.3 Site Evaluation

3.3.1 The site subject to Appeal PAB 95/2007 is characterized by agricultural land located within the upper reaches of Wied Harq il-Hammiem. This land forms an integral part of the valley system, both in terms of its hydrology and geomorphology.

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The core area of Wied Harq il-Hammiem (Level 1 AEI/SSI) is dependent on the integrity of the entire valley system, including this site.

3.3.2 Any changes to the hydrodynamics of the area may lead to significant changes in the ecology of the valley further downstream. This in turn might lead to shifts in the vegetation communities that characterize the valley, with serious repercussions on the rare species it supports.

3.3.3 The need to safeguard the entire valley system has also been addressed in the Local Plan for the area, Policy NHCV01 seeks to safeguard and protect all AEIs, SSIs and Areas of High Landscape Sensitivity within the North Harbours area.

'... In these protected areas and sites development will only be permitted provided it accords with all the relevant Structure Plan Policies, Legal and Government Notices relating to SACs, AEIs, SSIs and AHLs...'

3.3.4 Apart from applicable Structure Plan policies, the site is also subject to the provisions and limitations of Paragraph 15.30 of the Structure Plan Explanatory Memorandum (Level 4 AEI/SSI):

For Level 4 AEIs and SSIs which include habitats and/or features of general interest, the following are applicable:

Small to medium scale physical development can be considered, provided no suitable alternatives exist and features of ecological and scientific interest are protected;

A suitable environmental impact assessment is undertaken

3.3.5 Although buffer zones may include features of ecological importance, their aim is to reserve the integrity of habitats/species/features in adjacent sites, hence may also include sites that are not of ecological value per se. To this extent, the absence of ecological features does not undermine the importance of buffer zones.

3.3.6 In this particular case, however, the site also forms an integral part of the geology and geomorphology of the valley. Indeed, the integrity of the core area of Harq il-Hammiem may be negatively affected by the type and extent of development within its upper and lower reaches, as already pointed out above.

3.3.7 The development subject to this appeal is not considered to be small to medium scale and there is no justification for its location within this site.”

D. In-nota ta' sottomissjonijiet tal-Perit Joe Cassar ghall-Appellant nomine, ipprezentata waqt is-Seduta numru 18 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fl-4 ta' Lulju 2007, precizament il-punti segwenti:

“1. The directorate failed to explain why on the one hand it is stating that the site is located in a specified area of conservation and in an aarea of ecological importance where large/medium scale physical development is not desired on the other hand a road has already passed through the site and other road developments are envisaged in future.

2. the report also failed to mention that the proposed development in PA 6451/04 has taken into consideration the developments that could be implemented by the ADT. In fact proposed buildings are envisaged to be recorded by 13.5 metres from regional Road to allow for any possible widening of the said road.

3. in the report prepared by the EPD it is stated that small to medium scale-physical development may be considered. I fail to understand why a low density development with a site coverage of only 15% is not considered as small/medium development whilst major road improvements that are being envisaged are considered acceptable.

4. As stated in previous correspondence my client's site is within development boundaries surrounded by built up areas. My clients are presently contesting in court the validity of the inclusion of their site as a special area of conservation. They strongly believe that there has been a gross miscarriage of justice orchestrated by MEPA aimed at satisfying third party interests. It is their desire that this board would upheld their appeal so that what they have endured since the early eighties will be rectified.”

Ma din in-nota gew annessi tlett dokumenti in sostenn tal-argumenti mressqa mill-Appellant nomine.

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E. In-nota second statement ta' Mario Scicluna ghall-Awtorita', ipprezentata fis-27 ta' Settembru 2007, inter alia l-punti segwenti:

“Being an outline application, it is the principle of the proposed development that is assessed vis-à-vis all the relevant planning policies. Hence, in principle, the approved North Harbour Local Plan's Policy NHTR 9 fully support ADT's plan to upgrade the road junction, and so, the granting of residential units in this particular area would prejudice the proposed network in this area.

Major road networks are considered to be of national interest and are needed to create safe and efficient connections between different localities. This often necessitates the formation of new roads or improvements to existing ones which could be located outside the development zones. In this particular case, any necessary junction improvements in this area would involve the least possible land disturbance and would include other necessary mitigation measures to safeguard the valley system.

Additionally, the Authority has to note that it disagrees with the closing statement of this submission wherein it was stated that 'As stated in previous correspondence my client's site is within development boundaries surrounded by built up areas.'

On the contrary, the fact is that the site was not within the boundaries of development prior to the issuing of the Local Plans, and within the Local Plan process, this area was furthermore designated to be left undeveloped through the relevant policies.

Map PE1 of the North Harbours Local Plan identifies this area as forming part of a “Protected Valley Area” in line with policies NHCV 01, RCO 28, RCO 29. It is for these reasons that that the Authority is not in favour of the proposed urban development in the ODZ area and any attempt to allow the construction of dwellings would inevitably mean a change to the designation of this area as identified in the North Harbours Local Plan. Such a change to the approved Local Plan cannot be made through an appeal against a refusal, but through different procedures.”

F. Is-sottomissjonijiet tal-Avukat Dott.ssa Jacqueline Borg ghall-Appellant nomine, ipprezentati waqt is-Seduta numru 26 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fl-24 t' Ottubru 2007. F' din is-Seduta gew ipprezentati zewg rapporti maghmula mill-Perit Mariello Spiteri (Planning Memorandum u Preliminary Independent

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Assessment), kif ukoll dikjarazzjoni konfermata bil-gurament u block plan mill-Perit Joe Cassar.

G. In-nota third statement ta' Mario Scicluna ghall-Awtorita', ipprezentata fit-2 ta' novembru 2007, inter alia l-punti segwenti:

"As regards to Doc: 'Preliminary Independent Assessment' dated March 1996 (Red 83C), the Authority states that:

With regards to the first part of this assessment, the concluding statement states that '... the Local Planning Unit should consider a change in delineation of the site in question from that of a 'valley protection zone' to that of a 'commercial area ...'

The Land Capacity Survey of the Agricultural Area as prepared on February 1996 highlights the main issues of this area and includes the agricultural limitations of this land.

The Ecological Appraisal of this site highlights that certain areas 'indeed are recommended for conservation' and also others which do not 'presently support natural habitats and biota of high significance.'

The brief overview of recognized planning legislation concludes that the Local Plan and Structure Plan fail to specifically and officially identify the valley protection zone.

On the other hand, the Authority states that these arguments are now superseded with the official issuing of the North Harbours Local Plan which has specifically designated the site as a "Protected Valley Area" as per Map PE 1 and PV 1.

As regards to Doc: 'Planning Memorandum – Why Development at Ta' Najsu St. Andrews should be allowed', dated 1st October 2007 (Red 83B) the Authority states that:

This planning memorandum raises arguments against the protection of this area as designated by the North Harbours Local Plan in Maps PV1 and PE1 and states that

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the area in question should be developed. It concludes 'that the scheduling should be dropped and, given that the area is surrounded by urban development and that no particular ecological important habitats exists on site, then the site could be developed in a sensitive manner.'

On the other hand the Authority states that although there are urban development across the road from the site in question, these are well within the boundaries of development and do not constitute a valid reason why the area under appeal should change its present zoning and be considered for such urban development. Any requests for areas to be considered for inclusion in the development boundaries as well as request for descheduling should take a different procedure than that of an appeal against refusal.

In this particular case, the main issue relating to this request for development remain that it is basically requesting an area which was never designated for urban development to be considered as if it was within the boundaries of development in spite of being scheduled as highlighted in report dated 21st May 2007 by the Resource Management Unit and the provisions of the CMLP. This clearly entails a change of the zoning of the site with clear breach of the designation as approved in the Central Malta Local Plan and to the relative scheduling of the area."

H. Ix-xhieda tal-Perit Mario Ellul, rappresentant tal-Awtorita' dwar it-Trasport Pubbliku, prodott mill-Appellant nomine u moghtija bil-gurament waqt is-Seduta numru 29 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fil-15 t'Ottubru 2008.

J. Is-sottomissjonijiet tal-Avukat Dott.ssa Jacqueline Borg ghall-Appellant nomine, ipprezentati waqt is-Seduta numru 2 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fil-4 ta' Frar 2009. F' din is-Seduta gew ipprezentati affidavit tal-Perit Mariello Spiteri, kif ukoll kopji tat-Temporary Provisions Scheme (TPS).

K. Ir-rapport ta' Richard Lia u Joseph Magro Conti ghall-Awtorita', ipprezentat fis-7 t' April 2007, inter alia l-punti segwenti:

"2.1 Amendments to the 1996 scheduling boundary of Harq il-Hammiem valley and Harq Hammiem cave (limits of St. Julians and Pembroke) were approved by MEPA Board on the 22nd March 2007. Following Ministerial endorsement of the descheduled areas on the 29th February 2008, the approved scheduling boundary was published as per Government Notice 370 of 2008 in the Government Gazette of the 6th May 2008.

3.1 The justifications for the revisions of the 1996 scheduling boundary were already specified in a previous report to the Planning Appeals Board, dated 21st May 2007 [...].

3.2 Therefore, contrary to the objector's claim, there were valid reasons from an environmental point of view that were put forward and approved by MEPA Board on the need to extend the scheduling boundary along the upper reaches of the valley. This was not in any way intended as a means of 'having stronger grounds for opposing any development whatsoever proposed or to be proposed thereupon'. Furthermore, contrary to the objector's claim, development within a Level 4 buffer zone is not prohibited outright. Paragraph 15.40 of the Structure Plan Explanatory Memorandum specifies that within a Level 4 degree of protection the following applies:

Small to medium scale physical development can be considered, provided no suitable alternatives exist and features of ecological and scientific interest are protected; and a suitable environmental impact assessment is undertaken.

3.3 The terraced fields within the upper reaches of Harq Hammim form an integral part of the valley system. Moreover, the water channel on the opposite side passes along the contested area. This channel feeds run-off rain water into the Level 1 area and is thus crucial for the integrity of the core part of the valley. Any development within this buffer zone must take into full account the likely impacts further downstream, particularly impacts on the hydrological regime.

The amended scheduling is in line with the 2006 North Harbours Local Plan.

3.4 At the time when the August 2005 report on the amendments to scheduling was presented to MEPA Board this area had still formed part of the scheduling boundary. Removal of this area from the scheduling boundary was necessary following approval of the North Harbours Local Plan (July 2006), which indicated the extent of the valley protection zone and that of 'Villa Rosa Urban Design Concept Map'. Removal of this part was carried out to avoid conflicting designations between the scheduling boundary and the final approved North Harbours Local Plan. This subsequent amendment was presented to MEPA Board as a follow-up report dated 27th February 2007, and approved on the 22nd March 2007. Its descheduling was endorsed by the Minister for Rural Affairs and the Environment on the 29th February 2008.

3.5 Perit Spiteri also made reference to the removal of the said area from the boundary of the candidate Special Area of Conservation of National Importance. The Unit responsible for the transposition of the EU Habitats Directive was duly consulted and agreed with the delineation of the SAC boundary to be aligned with that of the amended scheduling boundary: 'The Nature Protection Unit within the Environment Protection Directorate was also recommending to amend the boundary of the Special Area of Conservation for consistency with the proposed scheduling' (Extract from MEPA Board minutes PA 128-06/07 held on 22nd March 2007, para. 5256).

3.6 In 2003, when candidate Special Areas of Conservation were declared, the boundary of Wied Harq Hammiem was delineated with that of the 1996 scheduling boundary [...]. Following amendments to the scheduling boundary, the boundary of the SAC was also amended and delineated with that of the revised scheduling. The area referred to by the objector has already been de-scheduled.

3.7 Any development within this area is governed by the approved North Harbours Local Plan policies. Furthermore, the revised SAC boundary wall will be published in the Government Gazette under LN 311/06 as confirmed by the EcoSystems Management Unit (e-mail blue 59 in GF 67/04, dated 16/6/2008).

3.8 Alignment of the scheduling boundary along the entire upper reaches of Wied Harq Hammiem has already been justified in that the entire area forms an integral part of the remaining valley system. The only difference between the upper reaches and the des-scheduled area along the south eastern segment (which was also removed from the c.SAC boundary) is that the upper reaches have more weighting on the hydrological regime of the core Level 1 area due to topography/geomorphology.

No conflicting designations between the Local Plan and the scheduling boundary.

3.9 Architect Spiteri claims that 'this is therefore leading to a situation where, development over land touching or actually forming part of the Level 1 scheduled area is to be allowed, whilst MEPA is refusing to allow my client to develop its land.'

3.10 The extent of the Level 1 area along the north-eastern part is aligned with an existing boundary wall, which separates the scheduled area from the area earmarked for development by the Local Plan. The level 4 area is also aligned with

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the Local Plan designation. Hence there are no conflicting designations between the Local Plan and the scheduled boundary.

4 Conclusion

4.1 The 1996 scheduling boundary was extended so that it includes the full extend of this valley system, including the upper reaches, to ensure a holistic conservation approach to Wied Harq Hammiem (a remnant of a larger valley system that is now engulfed by urban development). The site subject to this request for reconsideration not only serves as a crucial buffer zone to protect the integrity of the core Level 1 area (which sustains rare species of flora – see Appendix A) but also forms an integral part of Harq Hammiem valley system, particularly from the points of view of geomorphology and hydrogeology.

4.2 The physical changes within the upper reaches of Wied Harq Hammiem, mainly due to cultivation practices; do not undermine the role this buffer zone has in protecting the Level 1 area. Removal of this buffer zone (de-scheduling) will seriously undermine the conservation value of the Level 1 area with significant ecological consequences on its integrity as a valley system (geomorphology), to the detriment of the species it sustains. The Level 1 area cannot be protected in isolation from the rest of Harq Hammiem valley system.

4.3 Scheduling boundaries, including buffer zones, are not constrained by distance per se since these must follow the geology/geomorphology of a particular area to safeguard the more sensitive locations.

4.4 Furthermore, since Wied Harq Hammiem is designated as a Special Area of Conservation of Natural Importance any plan or project that is submitted within this area is also subject to an appropriate assessment, in terms of Legal Notice 311 of 2006(Article 19). An appropriate assessment is required even if a proposed development is located outside the boundaries of the Special Area of Conservation.”

L. Is-sottomissjonijiet tal-Avukat Dott.ssa Jacqueline Borg ghall-Appellant nomine, ipprezentati waqt is-Seduta numru 11 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fit-22 t' April 2009. F' din is-Seduta gew ipprezentati serje ta' dokumenti, inter alia konsistenti minn ritratti, fotomontaggi u site plans spjegattivi.

M. In-nota ta' sottomissjonijiet tal-Perit Mariello Spiteri ghall-Appellant nomine, ipprezentata fit-13 ta' Mejju 2007, precizament il-punti segwenti:

“Hydrogeology:

From documentation it transpires that MEPA are basing the importance of Wied Harq Hamiem on the ecosystem which depends on the hydrological characteristics of the area. In fact they are arguing that ‘the only difference between the upper reaches and the descheduled area along the south-eastern segment (which was also removed from the SAC boundary) is that the upper reaches have more weighting on the hydrological regime of the core Level 1 area due to topography/geomorphology.’

It is pertinent to point out the following:

Wied Harq Hamiem leads water from the Pembroke area to the sea. The Pembroke water catchment leads water through a man made culvert on the side of the road which eventually feeds the valley system. Pictures of this water culvert and the surrounding area have already been presented to the Board as two sets of documents marked 'MV' and 'MW' as better explained above. Note that storm water coming from the Pembroke area moves through road surfaces. The storm water enters the valley system through the man made culvert.

From tests already carried out along the water course by Dr. George Peplow (copy of tests appended), it is pertinent to point out that hydrocarbon and heavy metals residues can be found in the sediment found along the manmade water course reaching Wied Harq Hamiem. In fact sampling locations were taken as indicated in the appended survey sheet. Through this culvert most, if not all, storm water reaching Wied Harq Hamiem actually passes. The danger of leachate exists. A full report by Dr. George Peplow will be submitted shortly.

It is pertinent to point out that from tests carried out the sediment found along the manmade water course leading water from Pembroke to the valley cannot be considered as inert waste and therefore cannot be disposed of in a landfill given the high level of lead, chromium and C 12-C40 hydrocarbons found in the said sediment. It is pertinent to point out that, upon leaching, said contaminants would enter the surface water run-off contaminating the valley.

From tests carried out the type of water that is finding itself in the valley leaves much to be desired and, although not of the same quality as sewerage, it still cannot be considered to be potable. Once leachate from the sediment along the manmade water course leading storm water from Pembroke to Wied Harq Hamiem finds its way into the valley system then said leachate would contaminate the valley. This could potentially have occurred much earlier than the application in caption. In

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fact when the road indicated in the adjoining plan was being constructed this danger was never raised.

Kindly note that a number of petrol stations have been located within aquifer recharge areas at various locations in Malta - but to name a few, kindly refer to PA 2223/06, PA 1141/06 and PA 3115/00. All these are located within the recharge area and/or at distances closer to watercourses than the site in caption.

It is pertinent to point out that a petrol station is much more likely to be a source of pollutants than a development of low density residential area in exclusive landscaped communal garden.

Furthermore, kindly note that PA 2223/06 is located at 106m from the water course, P A 1141/06 is 126m from the water course and PA 3115/00 is 71 m from the water course. In all three cases development was permitted subject to mitigating measures being incorporated into the development. Said mitigating measures include bunding, the creation of waterproof surfaces and the introduction of inspectable double-bottomed tanks which will enable adequate online monitoring if so requested.

Such a development as is being proposed by the application in caption is conducive to significantly lower levels of potential contaminants. In fact, the proposed development would generate sewerage and the collection of rain water. It could also potentially require electricity, telephone, cable and other similar services whilst cars could potentially be parked within the precinct of the proposed development in caption. If adequate mitigating and protection measures could be in place when considering the development of petrol stations, it can be safely argued that if the same measures are applied to the development in caption, these would be an overkill which will amply ensure that no potential water contamination (if any) could actually find itself from the site in caption to Wied Harq Hamiem.

Kindly be informed that the proposed development in caption will not be connected in any way with the culvert system reaching Wied Harq Hamiem. In fact, all water will be directed to double bottom water systems and therefore will be completely independent of the water catchment area leading water to Wied Harq Hamiem.

Arbitrary Changing of SAC boundaries:

In various locations of the report presented by the Heritage Planning Unit, kindly note that the changing of the boundary was arbitrary in nature. In fact, Clause 3.4 of

said report dated 3rd April 2009 argues that removal of the area to the north eastern segment of the site from being scheduled to developable land was only made in order to follow the north harbours local plan delineation which was issued in 2006. In fact, 'removal of this part was carried out to avoid conflicting designations between the scheduling boundary and the final approval North Harbours Local Plan.'

Furthermore, in Clause 3.5 "the Nature Protection Unit within the Environment Protection Directorate was also recommending to amend the boundary of the Special Area of Conservation for consistency with the proposed scheduling (extract from the MEPA Board minutes PA 12806/07 held on 2211d March 2007, para. 5256).'

Furthermore, in Clause 3.6 and Clause 3.7 similar arguments that the boundary of the Level 1 SAC was amended since they were in conflict with North Harbour Local Plans delineation were presented. All this shows that the level of protection of the site is arbitrary and that boundaries are shifted from one delineation to the other for a very simple reason - i.e. that the Local Planning Unit and the Environment Department of MEPA together with the Heritage Planning Unit are either in discord as to what constitutes a protected zone or its significance.

The boundary of the scheduled areas is set arbitrarily and changes with the whims and/or needs of the various entities within the Planning Directorate. In fact, the only plausible suggestion why the site covered by application in caption should retain Level 4 protection whereas Level 1 areas are actually descheduled and earmarked for development is due to hydrological and geomorphological reasons. It has already been demonstrated that water contamination has already been occurring for a number of years and that significant toxic waste can be found within the sediment of the manmade culvert leading water from the Pembroke catchment area to Wied Harq Hamiem. Furthermore it has been amply demonstrated that the proposed development can easily accommodate mitigating measures which will ensure that no water from the proposed development will find itself into the water course leading to the valley.

I again reiterate that my client is willing to undertake all necessary assessments and analysis in order to ensure that the necessary environmental measures are put in place prior to, during and after any possible development of the site.

Finally the Heritage Planning Unit itself recognises the fact that development on the site is possible since in Clause 3.2 of its correspondence it states that 'small to medium scale physical development can be considered.'

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N. Ix-xhieda ta' Richard Lia, Environment Protection Officer fi hdan il-Heritage Planning Unit tal-Awtorita', prodott mill-Appellant nomine u moghtija bil-gurament waqt is-Seduti numru 29, 4 u 16 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fit-28 t' Ottubru 2009, fis-17 ta' Frar u fis-16 ta' Gunju 2010, rispettivament.

P. Is-sottomissjonijiet tal-Avukat Dott.ssa Jacqueline Borg ghall-Appellant nomine, ipprezentati waqt is-Seduta numru 16 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fis-16 ta' Gunju 2010. F' din is-Seduta gew ipprezentati affidavit tal-Perit Conrad Thake u rapport redatt minn Dott. George Peplow.

Q. Is-sottomissjoni ta' Richard Lia, Environment Protection Officer fi hdan il-Heritage Planning Unit tal-Awtorita', konsistenti minn hames dokumenti u pprezentata waqt is-Seduti numru 24 tal-Bord ta' l-Appell dwar l-Ippjanar, mizmuma fit-3 ta' Novembru 2010 in sostenn tax-xhieda tieghu moghtija f' seduti precedenti.

R. Il-verbal tal-access fuq il-post tas-Seduta numru 37, mizmuma fis-27 t' April 2012, senjatament il-punti segwenti:

"L-appellant wera s-sit in kwistjoni li tinsab adjacenti St Andrews Road adjacenti t-triq li taghti ghal lukandi Corinthia San Gorg u Radisson. L-area hija ta' ghaxart itmiem u l-oggezzjoni hija ghar-raguni li s-site hija located in a special area of conservation u skedata level 4.

Il-proposta hija li jsiru units zghar biex ikunu residenzi ghall-anzjani pero' fl-livell baxx b'mod li s-saqaf taghhom minhabba d-dislivell, bil-kemm ikun jidher mit-triq. Gie rilevat waqt l-access illi hemm il-possibilita' li tinbidel il-konfigurazzjoni tat-toroq fil-lokalita' b'mod li ssir roundabout u ghalhekk, l-istess roundabout tiehu parti mill-propjeta' li llum hija mertu tal-proposta soggett ghal dan l-appell.

It-Tribunal gie mistieden jimxi aktar 'lifel biex jara fejn jispicca il-wied u gie indikat ukoll il-boundary wall ta' Villa Rosa.

Dr. Jacqueline Grech uriet lit-Tribunal proposta alternattiva kemm-il darba jsir l-izvilupp tat-triq propost."

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S. Il-verbal tas-Seduta numru 64, mizmuma fl-4 t' Ottubru 2012, precizament il-punt segwenti:

“Ghall-Awtorita’ deheru l-Avukat Dr. Anthony De Gaetano, Richard Lia u l-Perit Denise Martin li b’referenza ghal verbal tal-access, ghal korrettezza jirrilevaw li l-proposta m’hijjex ghal residential homes izda hija ‘to develop low density residential area in exclusive landscaped communal gardens’.”

Ikkunsidra ulterjorment:

Il-mertu ta’ dan l-appell jirrigwarda proposta ghal outline development permission sabiex font li jinsab barra z-zona tal-izvilupp (ODZ) ta’ Pembroke, jigi zviluppat bhala low density residential area, b’ gonna u landscaping.

Skond il-policies NHCV 01 tal-Pjan Lokali (NHLP), u RCO 28 u 29 tal-Pjan ta’ Struttura, is-sit hu ddesinjat bhala protected valley area. In oltre, permezz tal-Avviz Legali 257 tal-2003 u tal-Avviz tal-Gvern 583 tal-1996, l-arja giet skedata rispettivament bhala special area of conservation kif ukoll of ecological importance.

Ir-ragunijiet ghar-rifjut jistghu jigu riassunti kif gej:

Din hi zona sensittiva u protetta:

Peress li hawn si tratta minn arja sensittiva u protetta skond l-avvizi sucitati, il-proposta odjerna sejra tippregjudika il-harsien ta’ tali zona. Is-sit mertu tal-appell de quo jinsab fil-parti l-izjed gholja ta’ Wied Harq Hammiem. Ghalhekk, kwalsiasi intervent sejjer jippregjudika l-idrodinamika tal-wied b’dana li tista tigi kompromessa l-ekologija li tinsab aktar l-isfel (downstream). Ghalhekk, it-talba hi in kontravvenzjoni tal-paragrafu 15.4 tal-explanatory memorandum u tal-policy RCO 29 tal-Pjan ta’ Struttura.

L-izvilupp jista jippregjudika toroq arterjali:

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Fiz-zona huwa previst li jsir titjib fil-junctions tat-toroq arterjali. Peress li l-proposta tista' tikkomprometti t-tfassil ta' dawn it-toroq godda, it-talba hi f'kunflitt mal-policy RDS 2 tal-Pjan ta' Struttura.

L-izvilupp ser jikkomprometti biddliet fil-Pjan Lokali:

Il-proposta kienet ser tikkomprometti emendi jew modifiki fit-Temporary Provisions Scheme (TPS). Dawn kellhom iwasslu ghal l-implementazzjoni tal-Pjanijiet Lokali kif indikat permez tal-policies SET 8 u BEN 4 tal-Pjan ta' Struttura. Madankollu irid igi nutat li peress li fil-frattemp il-Pjanijiet Lokali kollha gew ppublikati, din l-oggezzjoni illum giet superata.

L-aggravji ta'-Appellant nomine huma bbazati fuq il-fatt li rapporti mhejjija minn esperti indipendenti qajmu dubbju fl-importanza ekologika tas-sit in kwistjoni. Is-sit jinsab f' zona urbanizzata, maqbuda bejn Swieqi, Pembroke u Paceville; u l-Awtoritajiet ma sabu l-ebda oggezzjoni sabiex jghaddu triq li twassal ghall-lukandi Corinthia San Gorg u Radisson SAS minn hemmek. Ma jidhirx li s-sit ghandu xi potenzjal ekologiku jew valur xjentifiku, u li l-uzu agrikolu tieghu huwa limitat. In oltre, il-Pjan Lokali ma jidentifikax l-ebda konfini ghal valley protection zone u ghalhekk huwa dubbju anke kemm fil-verita' din tista' tissegjah valley protection area.

Jirrileva wkoll li l-proposta tirrigwarda low density development b' site coverage ta' madwar 15%. Il-maggor parti tas sit ser tkun landscaped u r-residenzi ser ikunu maqtughin minn ma' Triq Rejonali b' madwar 14.5 metri. Ghalhekk ma jistax jinghad li l-izvilupp propost hu xi wiehed intensiv.

L-Awtorita' zammet ferm l-oggezzjoni taghha u rilevat kif il-Kunsill Lokali ta' Pembroke u kemm in-Nature Protection Unit (NPU) u l-Integrated Heritage Management Team fi hdan l-Awtorita' oggezzjonaw ghal-proposta. Saret ukoll riferenza ghall-Avviz Legali sucitati, ghar-rigward ta' special area of conservation (SAC). Ghalhekk, peress li s-sit hu skedat u l-ispeci li hemm fil-wied huma protetti, il-proposta hi wahda inkompatibbli mal-preservazzjoni tal-ambjent naturali.

Oltre minn hekk, l-Awtorita' tirrileva li peress li hawn si tratta minn outline development application, il-mertu tat-talb irid jigi mwiezen fid-dawl tal-Pjan Lokali vigenti. Minn dan isegwi li peress li l-policy NHTR 9 tal-istess Pjan Lokali tindirizza l-ameljorament tat-toroq arterjali, l-argument tal-Appellant nomine li t-triq ser tippregjudika l-karatteristici naturali taz-zona ma treggix.

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Fil-fatt, kif tajjeb rilevat l-Awtorita' il-kostruzzjoni tat-toroq huma fl-interess nazzjonali – mentre it-talb odjerna hi purament ta' natura kummercjali. Ghalhekk, anke semmaj ser tghaddi triq fl-ODZ biswit il-font in ezami, m' ghandux isegwi li allura iz-zona naturali b' xi mod giet prejudikata u li allura huwa konsentit li din tithalla tinbena ghal skopijiet spekulattivi. Oltre minn dan, kemm il-darba ssir talba ghal upgrading tat-traffic network, ikun hemm bzonn li jsiru studji tal-impatti ambjentali (Environmental Impact Assessment, etc.) u ghalhekk, anke f' dak il-kaz, l-ambjent naturali jinghatalu l-harsien mehtieg.

Jigi rilevat li kien sar appell f' isem 'Trimeg Ltd. kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar' (PAB 101/97 KA) mill-iskedar ta' din il-parti tal-Pjan Lokali bhala valley protection zone – buffer zone level 4, kif pubblikata fl-Avviz Legali 583 tal-1996 rilevata supra. L-iskedar kien sar sabiex jigi salvagwardat Wied Hanq Hamiem li jisbokka fil-Bajja ta' San Gorg. L-appell gie michud fl-20 ta' Settembru 2002, u d-decizjoni kkonfermata mill-Oorti ta' l-Appell fis-Seduta ta' l-24 ta' Frar 2011 (appell civili 34/2002).

Ezaminati fid-dettal is-sottomissjonijiet tal-partijiet, peress li l-wied illum huwa skedat, kwalsiasi intervent bhal dan in ezami sejjer jipprejudika l-buffer zone li tferra fuq din iz-zona sensittiva. Ghal din ir-raguni biss, l-appell odjern ma jimmeritax li jigi milqugh.

Jigi rilevat in oltre, li bil-pubblikazzjoni tal-Pjan Lokali, iz-zona llum hi ndikata bhala ODZ u ghalhekk anke ghal din ir-raguni, l-applikazzjoni ma tistax tigi kkunsidrata favorevolment.

Ghalhekk, in vista tal-konsiderazzjonijiet kollha hawn fuq maghmula, u fuq kollox sabiex ikun konformi mal-policies tal-ippjanar vigenti, dan il-Tribunal qed jiddisponi minn dan l-appell billi jichad l-istess u jikkonferma ir-rifjut ghal-PA 6451/04 kif mahrug mill-Kummissjoni

Ikkunsidrat

L-aggravju tal-appellant hu s-segwenti:

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1. It-Tribunal naqas li jindirizza l-aggravju tal-appell u jimmotiva d-decizjoni tieghu. It-Tribunal ikkunsidra biss illi l-wied hu skedat u kull intervent bhall-izvilupp in ezami ser jippregudika l-buffer zone li jferra fil-wied. In oltre t-Tribunal qal li bil-pubblikazzjoni tal-pjan lokali l-att in kwistjoni saret ODZ. L-appellant isostni illi dawn il-konsiderazzjonijiet ma kienux flokhom fl-isfond tal-fatti u policies rilevanti peress illi ghalkemm hemm livell ta' skedar, xorta hu permess zvilupp limitat u dan kellu jigi kunsidrat mit-Tribunal u mhux jiddeciedi li ebda zvilupp ma jista' jsir. Meta saret l-applikazzjoni s-sit kien white area subject to zoning u aktar il-quddiem fil-mori tas-smigh tal-applikazzjoni sar buffer zone ghal protezzjoni tal-wied u finalment sar green area Grade 4. L-appellant jikkontendi li t-Tribunal kellu japplika l-policies taz-zmien l-applikazzjoni, billi l-agir tal-Awtorita bir-restrizzjonijiet li ghamlet irrendiet l-art inutilizzabbi ghax lanqas hi tajba ghall-agrikoltura. In oltre t-Tribunal naqas li jqis li l-art hi f'zona urbanizzata u kommissa ghall-izvilupp. L-art in kwistjoni giet limitata fl-izvilupp b'konsegwenza tal-iskedar tal-wied u l-Awtorita messha skedat iz-zona korrettement mill-bidu u mhux in segwitu ghall-applikazzjoni.

Mehudin flimkien dawn il-lanjanzi l-Qorti tirrileva illi d-divergenza principali bejn il-partijiet kienet jekk l-izvilupp propost kienx ser ikollu impatt negattiv fuq il-wied. Ma hemmx dubju bhala fatt illi z-zona hi wahda cirkondata bi zvilupp urban u illi fil-mori tal-applikazzjoni gie skedat il-wied, sar buffer zone f'livell aktar il-fuq u l-parti aktar gholja fejn hemm l-izvilupp propost gia desinjat bhala protected valley area u skond il-local plan is-sit ghandu level of Protection 1 fl-aspetti geologici u geomorfologici tieghu u level of Protection 1 u 4 fl-aspetti ta' ekologija. L-Awtorita sahqet illi ghalkemm zvilupp limitat hu permess f'sit ta' din in-natura pero tali zvilupp irid ikun konformi mal-policies rilevanti, kif ukoll l-paragrafu 15.30 tal-istruttura Plan Explanatory Memorandum li fil-fehma tal-Awtorita l-izvilupp ma jistax jigi konsidrat bhala tali li ma jikkrejax hsara fuq iz-zona protetta senjatament l-ambjent tal-wied u l-ispazji fid-dintorni.

L-argumenti tal-partijiet, hafna minnhom ta' natura teknika bil-produzzjoni ta' rapporti esperti, kienet jekk fil-fatt id-desinjazzjoni taz-zona u s-sit kienx fil-fatt tirrispekkja r-realta tal-fattispecie tal-kaz, u kwindi jekk l-izvilupp propost kienx ser ikun deliterju ghaz-zona tenut kont li skond l-appellant, kienu ser ighaddu xi toroq mill-istess zona protetta.

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Dak li t-Tribunal kellu jindirizza ghalhekk kien l-istat legali tad-desinjazzjoni taz-zona u kif din kienet taffettwa lis-sit in kwistjoni u jekk, kemm-il darba jigi konkluz illi xi forma ta' zvilupp hu permissibbli, jekk dan l-izvilupp kienx konformi mal-policies rilevanti.

Sfortunatament hi l-fehma tal-Qorti illi t-Tribunal naqas ghal kollox fuq dawn l-binarji. Hu wasal ghal konkluzjoni wahda cara bla ebda gustifikazzjoni ghaliha. It-Tribunal ighid testwalment:

Ezaminati fid-dettal is-sottomissjonijiet tal-partijiet, peress li l-wied illum huwa skedat, kwalsiasi intervent bhal dan in ezami sejjer jipprejudika l-buffer zone li tferra fuq din iz-zona sensittiva. Ghal din ir-raguni biss, l-appell odjern ma jimmeritax li jigi milqugh.

Din il-konkluzjoni qed tippresupponi li ebda zvilupp ma jista' jsir, minghajr mat-Tribunal evalwa b'mod konkret l-argumenti tal-partijiet u ddecieda ghalfejn wasal ghal konkluzjoni xotta u gharwiena li wasal ghaliha. Il-fatt wahdu li l-wied hu skedat u hemm buffer zone ghal protezzjoni tal-wied ma jfissirx b'daqshekk li a priori t-talba lanqas messha giet kunsidrata kif qed jimplika t-Tribunal f'dawn iz-zewg linji decizivi. Dan ma jirrizultax la mill-policies u anqas ma jirrizulta mill-argumenti tal-Awtorita li kienu ta' natura teknika u ambjentali u li waslu lil Awtorita tichad l-applikazzjoni.

Aghar minn hekk pero, it-Tribunal fil-paragrafu ta' wara, ighid illi peress fil-pjan lokali z-zona hi ODZ l-applikazzjoni ma setghatx tigi kunsidrata faverevolment.

It-Tribunal kien laxk u generiku hafna fid-deskrizzjoni taz-zona bhal ODZ billi s-sit ma hux kwalifikat bhala ODZ izda ghandu deskrizzjoni cara kif rilevat supra u fejn hemm limitazzjonijiet cari u serji ghal kull forma ta' zvilupp. Pero hi l-fehma tal-Qorti illi t-Tribunal ghamel forma mentis errata billi eskluda l-possibilita ta' kull forma ta' zvilupp meta fil-fatt mhux hekk.

Ta' min jinnota wkoll illi t-Tribunal eskluda l-formazzjoni ta' toroq bhala xi forma ta' kunsens li jista' jsir zvilupp, u zied li hemm differenza bejn zvilupp fl-interess pubbliku u iehor fl-interess kummercjali privat. Il-Qorti ma taqbilx li dan l-argument kien f'postu mehud il-kontezjoni fil-

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perspettiva gusta taghha. Li kellu jikkonsidra t-Tribunal hu jekk bil-formazjoni prezenti u futuri tat-toroq kienx ser jeffettwaw in-natura u l-protezzjoni li ghandha z-zona u wara li ssir dik il-konsiderazzjoni u dipendenti fuq il-konkluzjoni raggunta, l-impatt li ser ihalli l-izvilupp tenut kont ta' dak gia ezistenti fiz-zona.

Hu evidenti ghal din il-Qorti illi t-Tribunal ma tax risposta ghal lanjanzi mressqa mill-appellant kontra d-decizjoni tat-Tribunal u naqas li jindirizza l-kwistjoni b'mod li evalwa d-desinjazzjoni taz-zona u s-sit kif imiss ma' dak mitlub li jsir qua zvilupp u jekk kienx permessibbli jew le u r-ragunijiet, f'kaz negattiv, li jimmilitaw kontra l-izvilupp fil-totalita tieghu jew parzjalment. Il-konkluzjonijiet raggunti mit-Tribunal kienux ibbazati fuq premessi erroneji kif rilevat supra u dan ipoggi l-gudikat kollu f'dubju serju kemm fil-fatt hu attendibbli. B'dan kollu din il-Qorti mhix bl-ebda mod taghti xi ragun lil appellant li l-izvilupp propost hu accettabbli izda biss qed tikkonkludi li t-Tribunal ma tax decizjoni motivata skond il-ligi ghar-rifjut li l-istess Tribunal ikkonferma wara d-decizjoni tal-Awtorita.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tilqa' l-appell ta' Paul Camilleri nomine ghar-ragunijiet fuq moghtija, u tirrevoka d-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-15 ta' Ottubru 2013, u tirrinviya l-atti lura lit-Tribunal biex jerga' jiddeciedi l-appell. Spejjez ghall-Awtorita.

< Sentenza Finali >

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