



MALTA

QORTI TA' L-APPELL

ONOR. IMHALLEF

MARK CHETCUTI

Seduta ta' l-20 ta' Mejju, 2015

Appell Civili Numru. 64/2014

**Maria Bonello, Carmel Bonello, Joseph Bonello,
Vincent Bonello, Doris Mancini, Nancy Caselli,
Dorothy Bonello, Rita Bonello, Gloria Seychell**

vs

**L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u
b'digriet tal-11 ta' Frar 2015
Sarah Ciantar Testaferrata Moroni Viani
interveniet in statu et terminis f'dawn il-proceduri**

Il-Qorti,

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Rat ir-rikors tal-appell tal-appellanti terzi interessati tal-15 ta' Dicembru 2014 mid-decizjoni tat-Tribunal ta' Revizjoni tal-Ambjent u l-Ippjanar tal-25 ta' Novembru 2014 kontra l-approvazzjoni tal-permess ta' renova PA 280/11;

Rat ir-risposta tal-Awtorita u tal-intervenuta li ssottomettew 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:

Illi permess ta' dan l-Appell l-Appellanti talbu lit-Tribunal sabiex to revoke the development planning permission PA 0280/11 issued by the Malta Environment and Planning Authority on the 25th May 2012.

Illi fl-Appell relattiv l-Appellanti spjegaw:

"In terms of Article 41 and the Second Schedule of the Environment and Development Planning Act 2010, Maria Bonello (1.0. 558123 [M]) of 29, Triq it-Tliet Knejjes, Balzan, Carmel Bonello (1.0. 346647 [M]) of 'Rainbow', Flat 3, Saqqajja Hill, Mdina, Joseph Bonello (1.0. 613548 [M]) of 'Aquarius', St. Anthony Street, Mosta, Vincent Bonello (1.0. 692749 [M]) of 'Victoria', 21st September Avenue, Naxxar, Doris Mancini (AA 7450222) of 301/4 Via Pistoiese, Firenze, Italy, Nancy Caselli (1.0. 499952 [M]) of 23, Triq Il-Gojjin, Kappara, Dorothy Bonello (1.0. 727553 [M]) of 29, Triq it-Tliet Knejjes, Balzan, Rita Bonello (1.0.211255 [M]) of 29, Triq it-Tliet Knejjes, Balzan, and Gloria Seychell (1.0. 300956 [M]) of 'Fluer' Triq Dun G.Zammit Hammet, Balzan

are hereby filing a third party appeal with the Environment and Planning Review Tribunal against the development permission PA 0280/11. Development planning

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permission PA 0280/11, issued by the Malta Environment and Planning Authority (MEPA) on 25 May 2012,

... renews permission to carry out the development described above (namely to erect dwelling with swimming pool), and in the development permit application number PA 5363/05, in accordance with the approved documents.

3.0 Planning permit PA 0280/11 is subject to the following four (4) conditions:

a) This development permission is valid for a period of FIVE YEARS from the date of this notice but will cease to be valid if the development is not completed by the end of this validity period.

This permission relates only to the development as specifically indicated on the approved drawings. This permission does not sanction any other illegal development that may exist on the site.

Copies of all approved drawings and documents shall be available for inspection on site by MEPA staff at all reasonable times. All works shall be carried out strictly in accordance with the approved drawings, documents and conditions of this permission. Where a matter is not specified, then the conditions of this permission and of Development Control Policy and Design Guidance shall take precedence and shall modify the drawings and documents accordingly.

Where applicable, all building works shall be erected in accordance with the official alignment and official/existing finished road levels as set out on site by MEPA's Land Surveyor. The Setting Out Request Notice must be submitted to the Land Surveyor Unit of MEPA when the setting out of the alignment and levels is required.

Where the street bordering the site is unopened or unformed, it shall be opened up and brought up to its proper and approved formation levels prior to the commencement of any development hereby being permitted.

Before any part of the development hereby permitted commences, the enclosed green copy of this development permission shall be displayed on the site. This must be mounted on a notice board, suitably protected from the weather and located not more than 2 metres above ground level at a point on the site boundary where it is

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clearly visible and can be easily read from the street. The copy of the permission must be maintained in a good condition and it shall remain displayed on the site until the works are complete.

The enclosed Commencement Notice shall be returned to MEPA so that it is received at least five days prior to the commencement of any works hereby permitted.

Where applicable, the development hereby permitted shall be carried out in accordance with the provisions of the Environmental Management Construction Site Regulations, Legal Notice 295 of 2007 (or subsequent amendments). Any hoarding shall be erected in accordance with Schedule 2 of the same Regulations.

The permission is issued on condition that, where applicable, any excavation shall be subject to the requirements of the Civil Code regarding neighbouring tenements.

All new developments shall be provided with a water cistern to store rainwater run-off from the built-up area of the development as required by the Code of Police Laws.

Where applicable, the ramp leading down to the underlying basement/garages for private car parking shall at no point be steeper than 1:5 from the back edge of the pavement. If there are more than 5 public car parking spaces or garages, the ramp shall not be steeper than 1:8 (or 1:10 if helical). The ramp shall always be so formed that it does not encroach onto the pavement.

Where applicable an area of a depth of 4 metres from the pavement, with a gradient not steeper than 1 :10, shall be provided within the site for vehicles to wait at pavement level before entering the street.

Where applicable, any garages/parking spaces shall only be used for the parking of private cars and they shall be kept available at all times for this purpose.

Where applicable, any approved stores shall be used for domestic storage only and shall be physically and internally linked to the overlying dwellings.

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The height of the development shall not exceed the permitted number of floors and the height in metres as indicated on the approved drawings.

No steps, ramps or street furniture are to be constructed on or encroached onto the public pavement or road.

Any doors and windows, the lower edge of which is less than 2m above road level, and any gates shall not open outwards onto a public pavement or road.

Where applicable, the garage door opening(s) at ground floor level, overlooking the public street, shall be fitted with a solid aperture within the thickness of the external wall along the building alignment. This aperture shall be of the same colour of the other apertures on the elevation, unless otherwise indicated on the approved drawings. This aperture shall be fitted prior to the issue of any Compliance Certificate (partial or full) on the whole or any part of the development hereby approved. No gates are permitted on this opening.

Where present, window grilles (including 'pregnant' windows), sills planters and other similar elements which are part of or fixed to the facade of buildings, the lower edge of which is less than 2 metres above road level, shall not project more than 0.15 metres from the facade over a public pavement or street.

Air conditioning units shall not be located on the facades of the building which are visible from a public space/street.

There shall be no service pipes, cables or wires visible on the front elevation or on any other elevations of the building which are visible from the street or public space.

2 a) Where applicable, prior to any demolition of buildings/boundary walls abutting streets, the Setting Out Request Notice must be submitted to the Land Surveyor Unit of MEPA. Demolition works shall not be undertaken before setting out is made by MEPA officials.

Internal and external walls shall not be hacked (mbaqqna) or grit- blasted.

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Unless otherwise indicated on the approved drawings, the facade of the building, all roof structures rear garden/yard walls, (but excluding internal shafts), and back elevation shall be retained/constructed in local stone. The stone shall remain unrendered and unpainted, and it shall be allowed to weather naturally.

All external apertures and closed balconies shall be constructed in timber. Open balcony railing and all other metalwork shall be in wrought iron.

Any balconies shall be located so that their side outer face is at least 0.75 metres away from the outer face of the party wall nearest to the balconies. The balconies shall not project more than 0.75 metres from the facade of the building. Any closed balconies shall not project more than 0.6 metres from the facade of the building.

Where applicable, the balcony base shall be no thicker than a maximum of one course (0.27m) and the balcony railing shall be fixed directly to this balcony base; no other stone courses are to be laid between the balcony base and the railing.

All services located on the roof of the building shall be clustered together and screened by a non-solid screen 1.5 metres (5 courses) high and set back by at least 2 metres from all the edges of the roof. The services shall not exceed the height of the screen. Unless indicated on the approved drawings, no services shall be located on the roof of the roof structures.

3 In addition to all the relevant conditions imposed in PA 5363/05 issued on the 26th January 2007, the amendments to conditions as approved by MEPA Board at its meeting held on 3rd December 2009 and communicated to applicant by letter dated 11th May 2010 shall apply.

4 No alterations to the original features of the facade of the Grade 2 scheduled building as indicated in GN362 of 2012 are acceptable as long as the scheduling is in force. New openings and/or widening of existing openings are not acceptable as long as the scheduling is in force.

Where the approved drawings and/or documents are dimensioned, then the declared dimensions shall prevail over the actual size as depicted on the approved drawings and/or documents.

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The execution and validity of this permission is suspended and no works as approved by the said development permission may commence before the lapse of the time period established in paragraph (1) of the second Schedule of the Act, and shall remain so suspended until the Environment and Planning Review Tribunal appoints its first hearing on an appeal from such a permission, if any, under the provisions and without prejudice to Article 41 (3).

If the declaration of ownership, as contained in the application form, is determined as incorrect by a Court of Law, then the said Court of Law can declare this development permission as null and void. This development permission does not remove or replace the need to obtain the consent of the land/building owner to this development before it is carried out. Furthermore, it does not imply that consent will necessarily be forthcoming nor does it bind the land/building owner to agree to this development. Where the land/building is owned or administered by the Government of Malta a specific clearance and agreement must be obtained for this development from the Land and/or Estate Management Departments.

This development permission is granted saving third party rights. This permission does not exonerate the applicant from obtaining any other necessary permission, license, clearance or approval required from any Government department, local council, agency or authority (including MEPA), as required by any law or regulation.

For any non-residential uses hereby being approved, prior to commencement of any works on site or any eventual permitted change of use, the applicant shall be required to contact the Environment Protection Directorate (within MEPA) to obtain any necessary operational permit or registration. This requirement does not apply to Class 4, 5, 7 and 8 uses as listed in the Development Planning (Use Classes) Order (1994), or its subsequent amendments.

4.0 The appellants hereby request the Environment and Planning Review Tribunal to revoke development planning permission PA 0280/11 issued by the Malta Environment and Planning Authority.

Considering that

5.0 Planning permit PA 0280/11 is for the renewal of development permission PA5363/05, a permit issued for the erection of a dwelling and swimming pool at site at Alley 1, Triq It-Tliet Knejjes, Balzan;

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6.0 The site is located at Three Churches Street within the Urban Conservation Area of Balzan (Figure 1). It covers 60% of the internal private open-space enclave (Figure 2) which is protected against development in terms of Central Malta Local Plan Policy CG09 which states:

In the open space enclaves in the UCAs of ... Balzan ... as designated on the relevant Area Policy Maps,' MEPA will not consider any development or redevelopment proposals that create new independent residential/non-residential units

The Central Malta Local Plan claims that ... internal open space enclaves play a very important role in maintaining a very high quality urban environment. The conservation, protection and enhancement of existing ... private open space enclaves ... is an objective of the Local Plan for improving the urban environment.

7.0 The site covered by planning permit PA 5363/05 is not simply a garden with a third of the area to be developed lying outside the Urban Conservation Area. It is a garden which formed part of an eighteenth century historical building. The drawings submitted to and endorsed by the Authority in issuing planning permit PA5363/05 do not reflect the existing cultural milieu.

Noting that

8.0 The relevant section of the planning application PA5363/05 which refers to categories of environmental constraints (scheduled property, protected areas or other conservation areas) was not duly completed. The developer argued that the proposed dwelling is within the building scheme and within the part of the garden which lies outside urban conservation area. This is not the case.

The development will obliterate one out of the eight enclaves of the village identified in the Central Malta Local Plan³. These enclaves form an integral part of the tangible heritage which characterizes the village.

9.0 Planning Application PA5363/05, and indeed also planning application PA1811/08, failed to represent the existing streetscape along Triq It-Tliet Knejjes. In case of PA5363/05, the site is indicated as having a frontage of 2.85 metres whilst in case of PA1811/08, a blank wall along Alley 1 off Triq It-Tliet Knejjes is shown. In both applications, this information is significantly misleading. The old remissa and

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the overlying third party room are effectively a part of an elegant building stylistically typical of eighteenth architecture.

Despite fragmentation in its ownership, the building still retains its imposing grandeur in its entirety not only from its intact massing but also from the stonework and stone decorations overlooking Triq It-Tliet Knejjes and the back garden. In this context, and given that the access to the garden being developed is through this building, one can easily read the site as a garden with vernacular agrarian irrigation heritage network, a conceptual extension of the said building.

10.0 The entrance to the remissa forms part of a late eighteenth century palazzo like elevation. The stereotomy is not common whilst the elegant small window Central Malta Local Plan, p.7. over the door (rewwieha) is quite unique. To demonstrate this, an architectural survey of the relevant part of the streetscape was undertaken (Drawing 11_11_1). Based on this survey, a computer model of the site as at present was developed (Figure 3). Furthermore, a drawing showing the elevation overlooking Triq It-Tliet Knejjes, without the high parapet wall and the garage to tenement at Nos 31 and 33, formerly Nos 5 and 6, 'The Orangerie', is also shown (Figure 3 and Drawing 11_11_1). The facade of the whole building, significantly hidden by the garage and the several courses high front garden wall of 'The Orangerie', Triq It-Tliet Knejjes, Balzan, has features which demonstrate the eloquence and the grandeur of the building which warrants to be maintained as at present in line with Structure Plan Policy UCO 6.

11.0 The drawings submitted with planning application PA 5363/05 failed to indicate the traditional masonry irrigation system of the garden. The application indicates a reservoir and other constructions at the entrance of the garden which will be removed, a development endorsed by the relative approved document to permit PA5363/05. The information supplied is not only incorrect but it is misleading. The water reservoir had a traditional water wheel (sienja) which is not indicated in the drawings. This heritage has significance not only for its historical water retaining capacity but also the associated irrigation artefacts which are still present on site such as the network of stone water channels (dorog) and the masonry sluice gate valve."

12.0 In response to our request for revocation, dated 9th July 2011, the Superintendent for Cultural Heritage (SCH) e-mailed the Chairman of MEPA and the Director of Planning on 23rd August 2011,

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1. Commending the scheduling of the property ... at an appropriate level of protection in terms of the Cultural Heritage Act and of the Development Planning Act;

2. Requesting investigations of planning permits on site to ... establish irregularities or shortcomings and

3. Requesting MEPA to halt any works on site, or planned to take place on site, until an appropriate Scheduling Level is established for this cultural property and until the request for revocation ... has been fully considered. Any construction works on site will have immediate negative impact on the cultural value of this property and would render null any scheduling and conservation exercise.

13.0 The e-mail of the SCH to the Chairman of MEPA and the Director of Planning, dated 23rd August 2011, further stated that If required, the Superintendence of Cultural Heritage will assist MEPA in establishing the appropriate level of legal protection that should be provided for this property - inclusive of the eighteenth-century building, its gardens and the underground shelters as necessary.

14.0 The Development Planning Application Report (DPAR) recommended refusal of PA 0280/11 for the following two reasons

The proposed development is unacceptable since it does not comply with policy 3.8 of the Development Control Policy & Design Guidance 2007 since internal developments within Urban Conservation Areas is not acceptable;

and

The proposal runs counter to Policy CG09 of the Central Malta Local Plan since within the designated open space enclaves, the development or redevelopment proposals that would create new independent residential/residential units including garages will not be permitted.

15.0 The DPAR recommended refusing planning application PA 0280/11 on the basis of planning policies only and not on the case for revocation of planning permit on sites including PA5363/05, which planning application PA 0280/11 sought to renew.⁷

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16.0 With respect to permit PA 5363/05, the SCH wrote to the Chairman of MEPA on December 2011, stating:

With respect to widening of entrance:

The arched way should be protected, as it is part of the eighteenth-century palazzo facade; and

MEPA should impose measures to protect the entire palazzo with its buffer in all development applications involving the site.

ii. Excavation for foundations for the construction of living room within garden designated as a buffer zone:

SCH agrees with MEPA that these are not acceptable. The developer should be requested to submit an amendment for this part of the permit.

iii. Dismantling of part of a garden wall dividing the main garden (buffer zone) and the smaller rear orchard (not within the buffer zone)

At the time of the on-site meeting of 15 November, MEPA did not inform SCH that PA 5363/05 required the protection of the wall. This position was also adopted by Cultural Heritage Advisory Committee;

By the meeting of 15 November, the SCH had not received this information. The SCH therefore did not take or pronounce a decision on the wall; and This notwithstanding, the future of this rubble wall should not be considered in isolation, but must be viewed against a general redesign.

iv. Excavation of ramp to garages in garden and roofing of part of ramp by reinstating garden landscaping

These works are unacceptable. It also implies damage to the protected arched doorway. The arched way is protected and thus parking facilities (both above

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ground and underground), the proposed ramp to the underground garage and the alternative pedestrian access cannot be accepted. Such facilities will require the breach or potential alteration of the palazzo's facade.

v. Opening of door from entrance remissa to pedestrian passage Prima facie these works would require a physical impact on the palazzo. Such impact is not acceptable and the proposed alterations should be refused; and

Given that vehicular access is not possible due to the width of the protected historic arched-way, the additional need for a pedestrian access can therefore be provided through the unaltered protected arched-way entrance.

17.0 As per Malta Government Gazette of March 23, 2012 (pp. 5920-1), the entire palazzo at 5 & 6, 'The Orangerie', Triq It- Tliet Knejjes, Balzan, has been scheduled as a Grade 2 building in terms of Structure Plan Policy UCO 7.

Thus, the entrance of the remissa cannot be widened as shown in the relative approved drawing included in permit PA 5363/05. Furthermore, the approved opening of door from entrance remissa to pedestrian passage covered by permit PA 1811108, presently subject to third party planning appeal PAB 356/11 CF, cannot be affected.

Recalling that

18.0 The DPAR states that the site"

... is accessible through a private alley from the street leading to a roofed passage to the open garden. The roofed passage is constructed on two floors of which the upper floor is third-party owned This statement is not true. The said alley is not private. It is public and bear official address as Alley 1, Triq It- Tliet Knejjes, the address stated in both planning applications PA5363/05 and PA0280/11.

19.0 During the board meeting of the Environment and Planning Commission of 28th October 2011, whereby planning application PA0280/11 was deferred to November 2011, the legal advisor of the applicant claimed that construction works were delayed to commence due to the objectors, is unfounded. It is true that permit PA 5363/05 was issued by MEPA on 25th July 2006 and the objectors filed a third

party with the Planning Appeals Board on 6th March 2007 which appeal was dismissed on 2nd July 2008. But it is also true that the objectors filed a request with MEPA on 11th July 2008 requesting revocation of planning consent PA5363/05. In response to this request, MEPA modified permit PA5363/05 in terms of Article 39A due to misleading information and the relative amended conditions were issued on 11th May 2010 which conditions included the preparation of a Construction Method Statement. This statement, dated 18th June 2011, was submitted to MEPA on 8th August 2011, that is 8 weeks after filing our objection to PA280/11 and 4 weeks after filing our request for revocation of permit PA5363/05. Thus, the delay in commencing works on site is the sole responsibility of the applicant of PA5363/05 who submitted misleading information in the relative planning application.

20.0 The correspondence sent to the appellant by the Directorate of Enforcement of MEPA, dated 15th November 2011 and post dated 17th November 2011, states that the site covered by permit PA 5363/05, as than present, is "still untouched by the new development". Also, as per correspondence of the SCH, e-mailed to the MEPA on 23rd August 2011, and already cited in a number of communications exchanged between our office and the Authority, Any construction works on site will have immediate negative impact on the cultural value of this property and would render null any scheduling and conservation exercise.

21.0 Through correspondence of the undersigned, dated November 2011, attention was drawn to the Directorate of Enforcement that the drawings submitted and approved by MEPA in development planning applications and permissions PA 5363/05 and PA 1811/08 do not tally with what is present on site. Contrary to the correspondence of the Directorate of Enforcement of MEPA, dated 15th November 2011, the survey undertaken by the Enforcement Directorate was not correct and did not reflect the existing situation on site:"

The entrance to the remissa which is covered by Condition 1 of permit PA 5363/05 is circa 1.6m wide, much less than that stated in the submitted and approved drawings and will not be able to cater for the vehicles shown in said drawings. This further implies that the approved development cannot support the parking spaces indicated on the submitted and subsequently approved drawings (thus breaching transport planning policies); and

The existing access shown in planning application PA1811/08 is not present and thus the original elevation of the palazzo at this point is still unpunctured. If it were punctured, than the premises covered by planning PA5363/05 and PA 1811/08 were interlinked.

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22.0 The correspondence of the undersigned, dated 25th November 2011, further requested the Directorate of Enforcement to ensure, without delay, through a site inspection:

The existing width of the entrance to the remissa as existing on site;

The width of the entrance to the remissa as shown in drawings;

Confirm that the existing access shown in planning application PA 1811/08 is not present;

Confirm that the building covered by PA 1811/08 forms part of 5 & 6, 'The Orangerie', Triq It-Tliet Knejjes, Balzan, and plans of which were not submitted with the relative planning application; and Confirm that part of the rear to building at 5 & 6, 'The Orangerie', Triq It- Tliet Knejjes, Balzan, is not covered by planning consent and thus, in terms of Circular 2/96, planning consent PA1811/08 could not have been granted.

23.0 This same correspondence concluded by stating that The incorrect survey of the Enforcement Directorate and its declaration that the plans and permissions do reflect the existing situation on site, led to the systematic rapid destruction to commit the site prior today's sitting of the Environment and Planning Commission with respect to planning application PA280/11 which application seeks to renew planning permit PA5363/05. Attached please find four (4) photos to testifying the state of affairs by noontoday [hereby attached as Photos 1 to 4].

24.0 The correspondence of the undersigned, also dated November 2011, to Environment and Planning Commission submitted following the sitting of the Commission held earlier on in the day whereby the decision re application PA0280/11 was suspended pending clarifications from the SCH, noted that

contrary to what was maintained by the applicant during the said sitting, the developer was informed in writing that an emergency conservation order was due to be issued; and

it transpired that the timing of such communication coincides with the commencement of removal of soil from part of the site.

25.0 As argued by the undersigned during the sitting of the Environment and Planning Commission of November 2011, the photos shown by the applicant were zooming on part of the soil removed to bedrock level. Thus, in the correspondence of the undersigned to the Commission, dated 25th November 2011, two (2) photos were attached (Photo 3 and 4), both taken from the property of the appellants, showing the state of the site one hour prior the sitting, which photos were also exhibited during same. Furthermore, this correspondence argued that

... the removal of said soil does not constitute commitment of the site for the development covered by permit PA 5363/05 which planning application PA0280/11 seeks to renew. In terms of development planning practice and the Local Plans Interpretation Document approved by the Malta Environment and Planning Authority, the removal of soil, a completely reversal operation, does not constitute a firm commitment on site which may run counter existing planning policies.

In addition to the above, one has to take note of the emergency conservation order and other considerations affecting planning application PA 280/11.

Concluding that

26.0 Approved documents through Permit PA 0280/11 includes not only PA 0280/11/1A but also PA5363/05/48C/48D/48E/1 00A11 OOB and the Construction Method Statement PA 5363/05/114A1114B. The entrance to the remissa is circa 1.6m wide, much less than that stated in the submitted and approved drawings with permit PA 5363/05 and which are also endorsed through permit PA 0280/11, the permit subject to this third party appeal. The width the entrance to remissa as shown in the submitted drawings, approved through PA 5363/05 and subsequently endorsed through PA 0280/11, is large than 1.6m. Thus the entrance, as existing at present on site, will not be able to cater for the vehicles shown in the approved documents. Thus, not only Condition 1 (c) of PA0280/11 cannot be complied with but the relative application, as submitted, constitutes misleading information in terms of Art 77(2) of the Environment and Development Planning Act 2010. Furthermore the development cannot support the parking spaces indicated on the submitted and subsequently approved drawings, thus breaching applicable transport planning policies."

27.0 The documents approved through permit PA 0280/11 fail to show the existing streetscape along Triq It-Tliet Knejjes and thus the information contained in the planning application is significantly misleading and completely misrepresenting the

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significant built-up heritage on site, an imposing well preserved, typically late eighteenth century, palazzo. Thus, the Environment and Planning Commission was misled to approve PA 0280/11. This constitutes misleading information in terms of Art 77(2) of the Environment and Development Planning Act 2010 and breaches the planning circular(s) regulating the submission of drawings with a given application.

28.0 Part of the dismantled garden wall dividing the site is not covered by planning consent. On the contrary, it was covered by a bank guarantee to ensure, amongst other items, its protection and conservation. In fact, from correspondence of the SCH to the Chairman of MEPA, dated 7th December 2011, it transpires that Cultural Heritage Advisory Committee had requested the protection of this wall, an opinion that SCH concurs to. Given that there was a breach of planning condition of permit PA 5363/05, renewal PA0280/11 could not have been issued once an infringement is present on site."

29.0 The relative declaration of ownership filled in the relative application PA 0280/11 is Certificate of Ownership A. Given that the development which Permit PA 0280/11 seeks to renew makes use of a third party wall common with the appellants, the incorrect Certificate of Ownership had been completed as part of the site affected by the development is co-owned. Thus, the application as submitted, runs counter to Art 68(3) of the Environment and Development Planning Act 2010.

30.0 Thus, the appellant is requesting the Environment and Planning Review Tribunal to revoke the development planning permission PA 0280/11 issued by the Malta Environment and Planning Authority on 25 May 2012.

L-Applikant irrisponda ghal dan l-Appell hekk:

"1. The Owner acquired property situated in Alley Number One (1), Three Churches Street, Balzan by virtue of a deed dated the 25th February, 2010 in the records of Notary Clyde La Rosa (the "Property"). The Property covers a superficial area of approximately one thousand and fifty one point eighty four square meters (1,051.84 m²) and consists of a garden and a "remissa" annexed to it;

2. The Property was purchased as covered by development permit PA 5363/05 dated 26th January, 2007 which was issued by MEPA for the full development of a "dwelling and swimming pool";

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3. Prior to purchasing the Property a meeting was held with MEPA officials [Mr George Delmar] to inquire whether the permit was in any way whatsoever flawed or irregular. MEPA through the said officer informed the Owner's father Peter Paul Testaferrata Moroni Viani and Architect Ivan Pace that the permit was valid and that there were no outstanding issues except for the issue of a bank guarantee when all the formalities were concluded. This meeting occurred just after the permit was modified by the MEPA Board on the 3rd December 2009 [Minute 6587];

4. Development permit PA 5363/05 was subsequently confirmed by MEPA after various contestations by Ms Rita Bonello [appellant] were consistently dismissed as unfounded and without legal basis. Such contestations were:

(i) An appeal against approval with reference number PAB- 67/07 /RT submitted by a third party [Mrs. Rita Bonello, a neighbour] on the March, 2007 which was dismissed

(ii) A report by Dorothy Bonello to the auditor of MEPA presumably asking that the permit be revoked. This was also dismissed;

(iii) Three requests for revocation by objector Mrs Bonello and or family Bonello/Seychell or their representatives under Article 39A of the then applicable Development and Planning Act [Chapter 356, Laws of Malta] and under Article 77 of Chapter 504;

All contestation were made by members of family Bonello who appear to have missed out on the property in a judicial division with relatives [the Property is fragmented and forms part of at least three different properties].

Such contestations were consistently dismissed by MEPA as unfounded and without legal basis [except for an amendment to a drawing to protect openings to a shelter referred to in point three [3] above] and development permit PA 5363/05 remained in force. Owner commenced works following the go ahead from the Superintendence of Cultural Heritage [SCH] on the is" November 2011;

At no point during the processing of PA 5363/05 which, as said, was considered as being in compliance with MEPA regulations and policies, did the SCH draw MEPA's attention to any features of cultural importance within the Property and/or request to have the Property scheduled. The SCH only intervened much later whereby, following a report by Architect Bianco acting on behalf of the objectors, which report was deemed as unjustified by MEPA, it proceeded to request the properties scheduling. Therefore:

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An Emergency Conservation Order ("ECO") was published on the 29th November, 2011 in the afternoon edition of the Government Gazette and;

The Property was affected by a scheduling order dated 10th April, 2012 which appeared in Government Gazette Number 18, 894 as Order Number 362.

This notwithstanding, PA 5363/05, which was by now approaching its expiration, was renewed by PA/00280/11 issued by the Malta Environment and Planning Authority on May, 2012, the renewal which is now subjected to the Appeal this reply refers to.

The application for renewal was scrutinized by the EPC in three [3] public sittings whereby clarifications were sought and obtained from various entities including the Superintendence of Cultural Heritage and Mepa's legal office.

The application was approved in view of the site commitment and taking into account that a request for the scheduling of the garden wherein the development is sited was discussed by the MEPA Board and dismissed.

The grounds for appeal.

Permit should not have been granted because it goes contrary to the prohibition of development as an open space enclave as illustrated in MAP BZN 01 and Policy CGOg of the local plan;

The opening [remissa] leading to the carport is too narrow [1.6m] to cater for vehicles shown in the approved drawing;

The Environment and Planning Commission was misled by the Owner for not having shown the existing streetscape of Triq it-Tlett Knejjes Balzan;

A garden wall was dismantled when it shouldn't have been and therefore there was an infringement on site prohibiting any form of renewal;

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Declaration of ownership [Certificate of Ownership A] was incorrect because it fails to acknowledge that one of the dividing walls is common wall with appellants;

Preliminary.

PA 0280/11 is a permit to renew permit [PA 5363/05]. The appeal therefore should be based on the renewal process and not the original permit being renewed.

Permit Holder will address the grounds of appeal in the same order presented:-

Proposed development is in line with the Central Malta Local Plan [the "CMLP"] covering the Local Council Areas 0/ Attard, Balzan, Birkirkara, Gharghur, ttamrun, L-Iklin, Lija, Mosta, Naxxar, Qormi, Sta. Venera [as approved in July 2006]

This ground of appeal fails to make reference to the Local Plans Interpretation document approved by MEPA and applied in countless similar situations. This specifies that when the applicant requests a renewal of a development permit within the validity period in accordance with the provisions of section 33[3] of the DPA and there is a firm commitment on site which may give rise to a conflict between the existing policies and the previous policies governing the original development permit the principle of the previous permit shall prevail'.

At the sitting for the determination of the application for renewal it was manifestly evident that the site was committed through excavation and masonry works. Evidence was provided which evidence was not disputed by appellants or by the case officers. Appellants had every opportunity at determination stage to bring up valid objective proof that the site was not committed. Naturally since the site was factually and firmly committed no such evidence could be produced the EPC was bound to apply existing policies/ in determining this application. Finally firm commitment was in fact acknowledged by appellants in paragraph 23 of their appeal.

Therefore this ground of appeal should be dismissed;

2. The Remissa opening.

This is not a ground for appeal in a renewal application but at best a further threat by appellant to invoke yet another procedure section 77 of the DPA by alleging baseless and wild allegations;

The approved drawings for PA 5363/05 include a construction method statement and approved drawings [by Development Notification Order 3061/01 dated 27th August 2001) which widen the opening by half a metre (0.5m). The approved works have been temporarily suspended following the scheduling of the house of which the remissa originally formed part. Scheduling was carried out merely because of the alleged use of the house as a casa del gioco not for its architectural/artistic merits which were declared to be nonexistent. In determining the request to have the house scheduled the Mepa Board and the officers of the Heritage Planning Unit declared that the house has no architectural merits which justified scheduling.

3. Failure to show the streetscape of Triq it-Tlett Knejjes Balzan

Appellant argues that at renewal stage the owner should have included documentation showing the streetscape of Triq it-Tlett Knejjes Balzan and in so doing misled the EPC and misrepresented the built up environment;

This is a renewal application of an approved permit and no such information is required to be submitted at renewal stage. In fact no drawings are submitted with such an application unless requested by the EPC for clarification purposes.

Owner asserts that it is appellant who is trying to mislead the Board in submitting arguments which were exhaustively examined during the lengthy applications processes and form no part of the renewal considerations.

This ground of appeal is with respect frivolous and vexatious

4. Dismantled garden wall.

The garden wall in question was not a rubble wall but a dry stone wall. Permit PA5363/05 contemplated openings in the wall which logically and rationally meant that the wall was to remain in a perilous state following these interventions. Prior to such works being undertaken the architect supervising the works, Perit Ivan Pace sought and obtained clarification from the Mepa Heritage Unit. When carrying out interventions to create the openings the remaining part of the wall was deemed dangerous by the named supervising architect and was dismantled accordingly.

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Such action does not amount to an illegality on site and the fact that no action was taken by the omnipresent enforcement officers on site continuously prompted by appellants, speaks volumes.

This with respect is another frivolous and vexatious reason for appeal.

Wrong declaration of Ownership because one of the walls is common to the appellants.

With respect this ground is not only frivolous and vexatious but flagrantly refers to the certificate of ownership filed with application PA 5363/05 and not the renewal application.

Furthermore this is a civil law matter which is not the competence of this Board to determine. Although this Board should not enter into civil matters it is pertinent to emphasize that this ground of appeal is generic and fails to give sufficient detail to be treated seriously.”;

L-Awtorita' fir-risposta taghha ndikat:

“5.2 The Authority has the following comments to make:

5.2.1 Re: Proposal vis-à-vis the local plan

The appellant is maintaining that the proposal to renew PA 5363/05 should not have been granted because there has been change of policies since the original permit has been granted due to the coming into force of the Central Malta Local Plan. The appellant is arguing that the local policies regulating the area precludes from having development within open space enclaves.

The Authority whilst recognising that the local plan precludes development in open space enclaves notes that the Local Plan Interpretation Document states that:

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Where the applicant requests a renewal of the development permit within the validity period in accordance with the provisions 33(3) of the DPA and there is a firm commitment on site in that part of the development which may give rise to a conflict between the existing policies and the previous policies governing the original development permit the principle of the previous permit shall prevail.

In this case the Authority determined that there was firm commitment for the development approved in PA 5363/05 (see document Red 76A in PA file). Therefore in view that the Authority had also confirmed that these works took place before the expiry (i.e. 25th January 2012) of permit PA 5363/05 (meaning that any works done are legally established), the Authority was correct to grant the renewal request in line with the provisions of the Local Plan Interpretation Document.

The appellant is arguing that no works took place until 25th November 2011 – the date when the EPC met for the second time on this case. However, this is simply inconsequential given that works could take place up until the 25th January 2012, which the applicant eventually did within the stipulated time frame. The Enforcement Unit had confirmed with the EPC that they never found any ongoing works on site from the 26th January 2012 onwards.

5.2.2 Re: the argument that the processing and decision in PA 5363/05 was faulty

The Authority notes that permit PA 5363/05 has been granted in 2007 and therefore any discussions on the substance of this permit are fuori termine. To add insult to injury, the appellant had already filed an appeal against this permit in front of the Planning Appeals Board (PAB 67/07), which appeal has been dismissed and permit confirmed; and thus res judicata.

5.2.3 Re: the argument that the drawings in PA 5363/05 and PA 1811/08 failed to show the streetscape, context and the traditional features within the garden; which element led the EPC to be misled.

The Authority already noted in the preceding paragraph that any discussions on PA 5363/05 are fuori termine and that the PAB already decided on this case and is thus res judicata.

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Furthermore, the Authority cannot understand why the appellant is mentioning PA 1811/08 when this is subject to a separate appeal. The Authority will address the third party appeal in its appropriate setting.

Nevertheless, the basic premise of the appellant, that the EPC was misled in some way because the streetscape was not indicated in the drawings of PA 5363/05 is simply wrong. The documentation available in both PA 5363/08 and PA 280/11 (the current appeal) including the drawings, site plan and photographs were clear, correct and showed exhaustively the context of the site. The Authority was also aware of the traditional and cultural elements of the garden since these were repeatedly mentioned by the appellants during the processing of the various applications on site, surveyed by the HPU and factored in the conditions amended by the MEPA Board in PA 5363/05 (new conditions 1 & 10(k)), which conditions remain in force even in permit PA 280/11 (the permit subject of this appeal).

5.2.4 Remissa

The appellant is arguing that the width of the remissa indicated in the approved drawings is more than what exists on site and therefore there is a discrepancy between the existing and the approved.

This issue is easily explained. In PA 5363/05, the Authority consented the widening of the existing remissa door. However, since when permit PA 5363/05 was issued, the building has been scheduled as Grade 2 – meaning that no interventions to the façade are now allowed. Hence, given that in renewal applications, no fresh drawings are submitted, the Authority confirmed the renewal (for the reasons outlined in paragraph 5.2.1 above), re-approving in the process the drawings in PA 5363/05 but with the specific proviso and condition that no works affecting the façade (and thus the remissa entrance) are to be effected in view of the scheduling.

In view of the above explanation, the Authority thus reiterates that the width of the existing remissa is to remain as is unless the scheduling is lifted.

The appellant is also arguing that since the remissa entrance cannot be widened, then the two vehicles shown on the approved drawing cannot be accommodated. Therefore the proposal run counter to transport policies and thus the renewal should not have been approved.

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The Authority disagrees on this point primarily because it maintains that the vehicles shown on the drawing do not indicate particular standard parking spaces. Therefore the renewal does not result in any 'loss' of parking since none have been approved.

Moreover, contrary to what the appellant has stated, shortfall in parking does not constitute grounds for refusing a permit unless this is severe. This is clearly not the case in this application as it regards just one dwelling.

However, should the Tribunal considers that the issue of shortfall in parking needs to be particularly addressed notwithstanding that this resulted from the scheduling process, the Authority wishes to refer the Tribunal to policy 4.18 of the DC2007. This policy establishes a standard monetary contribution to mitigate any shortfall in parking that cannot be provided on site because it is either physically impossible or considered undesirable. In this case any parking on site is deemed undesirable as this would require the widening of the remissa entrance which is now protected.

5.2.5 Re: Dismantling of Garden Wall

The Authority notes that the appellants have already been directly informed that the bank guarantee imposed to ensure that the surrounding rubble walls are protected does not include the masonry wall referred to by the appellant and that the works regarding this wall are approved in PA5363/05. On the other hand the applicant has to construct the façade as approved in the elevation drawing.

5.2.6 Re: Certificate of Ownership

The Authority notes that the appellant never made this claim during the processing of the application. Moreover the appellant did not indicate which wall is common to both parties.

The Authority notes also that the appellant's claim cannot be verified at this stage and the issue consists of purely civil matters that are not within the remit of the Tribunal to determine.”;

Ikkunsidra ulterjorment:

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Dan l-Appell ghandu s-segwenti aggravji:

i. Il-kwistjoni dwar il-local plan. Ghalkemm l-appellanti jargumenta li kien hemm a change in policies mill-hrug tal-Ewwel Permess (billi l-odjern huwa renewal) il-fatti juru li billi si tratta ta' renewal japplikaw principji li jmorru lil hinn mill-Local Plan fis-sens li jekk ikun hemm element ta' commitment on site, il-policies vigenti fil-mument tal-hrug tal-ewwel permess ghandhom japplikaw. L-applikazzjoni tar-regolamenti taht il-Local Plan Interpretation Document ghandhom jigu interpretati favur il-hrug tal-Permess.

ii. Il-kwistjoni ta' processar fir-rigward tal-PA 5363/05. Dwar dan it-Tribunal jaghmel biss punt wiehed - dan huwa appell minn PA 00280/11 u mhux minn PA 5363/05. Dak li seta gara fil-processar tal-PA 5363/05 ma jistax ikun mertu ta' dan l-Appell. Ghalhekk jezistu t-termini, u, wara kollox, ghalhekk tezisti wkoll il-Qorti. Dan l-istess argument ghandu japplika, mutatis mutandis, fejn l-Appellanti jilmenta dwar il-korrettezza tal-pjanti fil-PA file 5363/05 u PA 1811/08 (dan tal-ahhar huwa sahsitra mertu differenti).

iii. Dwar il-kwistjoni ta' remissa l-Awtorita' spjegat sewwa l-kwistjoni relattiva li issa hija ulterjorment koperta' mis-scheduling li sar wara l-hrug tal-permess originali u l-hrug tal-consrvation order fid-19 ta' April 2013.

iv. Dwar il-kwistjoni relatata mal-hajt fil-Gnien (dismantling) hawn ukoll si tratta ta' punt gja diskuss u deciz fil-permessi originali 5363/05. A skanz ta' ekwivoku jigi pero dikjarat li t-Tribunal jaqbel mal-argumenti li wasslu ghan-necessita' ta' garanzija bankarja in rigward.

v. Finalment dwar il-kwistjoni ta' ownership kif imqajjam din hija kwisjtjoni strettament ta' natura civili u li ghalhekk dan it-Tribunal m'ghandux kompetenza jiddiskuti.

In vista ta' dawn il-konsiderazzjonijiet ghalhekk l-Appell qed jigi michud.

Ikkunsidrat

L-aggravji tal-appellanti hu s-segwenti:

1. It-Tribunal naqas li jiehu konjizzjoni tal-aggravju ulterjuri b'rizultat li kieku intlaqa' kien iwassal ghan-nullita tal-permess. Wara tlett laqghat tal-Awtorita cioe fit-28 ta' Ottubru 2011,

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25 ta' Novembru 2011 u 4 ta' April 2012 intlaqa' l-permess bi pjanti u construction method emendati u mibdula li qatt ma kienu analizzati u skrutinizzati u b'hekk sar l-aggravju.

Din il-Qorti tqis li dan l-aggravju jista' jkun fih il-mertu tieghu pero ghandu zewg ostakoli ghaliex din il-Qorti ma ghandhiex tikkonsidrah. Fl-ewwel lok dan l-hekk imsejjah aggravju sar fl-ahhar tal-proceduri meta l-atti tal-permess originali kienu gia ilhom disponibbli (ghalkemm xi uhud bi hlas) ghal partijiet kollha. Mhux lecitu ghal parti li tqajjem aggravju fl-ahhar ta' process meta dan ma jkunx sar fil-bidu tal-process ta' appell intiz biex jigu identifikati bi precizjoni l-aggravji ghal hrug jew cahda ghal hrug ta' permess. Dan japplika fil-kamp civili u ghandu japplika bl-istess mod quddiem it-Tribunal sakemm l-aggravju ma jkunx wiehed ta' ordni pubbliku li jistrunka l-proceduri infishom fil-procedura jew fis-sustanza. F'dan il-kaz il-Qorti tifhem illi s-sottomissjoni tal-appellanti kienet fis-sens li r-renova tal-permess ar fuq pjanti u method statement li ma kienux dawk li gew approvati fil-permess 5363/05. Dwar dan bhala punt ta' fatt l-appellanti seghu kienu a konoxxenza, essendo l-atti huma pubblici u dawn l-emendi li fil-fatt jirrizultaw gew approvati fl-2010. Mhux hekk biss izda jidher car li kienu a konoxxenza taghhom tant li jsemmuhom b'mod preciz f'paragrafu 26 tal-appell promotur taghhom.

Dato non concesso illi tali aggravju hu ammissibbli anki fiz-zmien li sar u allura kellu jittiehed in konsiderazzjoni mit-Tribunal, fil-fatt it-Tribunal jirrizulta li dan ghamlu fil-fehma tal-Qorti b'mod korrett. Meta wiehed jigi biex janalizza l-aggravju tal-appellanti jidher car illi dak li qed jigi attakkat hawn mhux it-talba ghal renova tal-permess PA 280/11 izda xi haga li sehhet fl-ambitu tal-permess PA 5363/05. L-appellanti ma jistghux f'dan il-process ghalkemm konness izda b'parametri differenti minn dak li hu il-process originali tal-permess juzaw argumenti biex jippruvaw jwaqqghu jew ixejnu dak li illum hu stat ta' fatt li ma jistax jintmess tramite argumenti ghal hrug ta' permess li hu differenti in kwantu konsiderazzjonijiet li jridu jsiru, minn dak originali. Jekk l-appellanti qiesu li kellhom drittijiet kontra dak li sehhet fl-ambitu tal-permess PA 5363/05 setghu hadu l-azzjoni f'dak iz-zmien u jekk jidhrilhom li ghandhom illum drittijiet huma liberi li jiehu kull azzjoni civili jew amministrattiva li jidhrilhom xierqa pero ma jistghux jattakkaw permess li illum hu maghluq billi jirkbu fuq applikazzjoni ohra ghalkemm konnessa mal-permess originali pero trid tigi deciza fuq il-mertu taghha tenut kont dak li jidher mill-atti approvati u hu maghluq ghal finijiet tal-ligi tal-ippjanar. Id-decide tat-Tribunal indirizza l-ilment minn din il-perspettiva li fil-fehma tal-Qorti hi l-unika triq li seta jiehu t-Tribunal. Altrimenti tkun ta' periklu kbir ghal certezza ta' permessi li f'applikazzjonijiet sussegwenti ghalkemm konnessi jitqajmu kwistjonijiet li jattakkaw permess validament

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mahrug sakemm dak l-istess permess ma jigix attackkat kif tippermetti l-ligi tal-ippjanar taht per ezempju l-artikolu 77 tal-Kap. 504 jew taht il-ligi ordinarja jekk applikabbli.

Decide

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-appell tal-appellanti, bl-ispejjez kontra l-istess appellanti.

< Sentenza Finali >

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