

AUDIT REPORT 2010/006

Complaint by Ms Astrid Vella concerning the approval of development application PA 7283/07: *To sanction alterations from approved permits DN 447/06 and DN 736/06 consisting mainly of the replacing of an approved reservoir to an agricultural store and the provision of landscaping*

An investigation was carried out in terms in terms of Section 17C of the Development Planning Act.

Facts

Mr Noel Vella submitted an application on 28 November 2007 “*to sanction alterations from approved permits DN 447/06 and DN 736/06 consisting mainly of the replacing of an approved reservoir to an agricultural store and the provision of landscaping*” (PA 7283/07). The submitted photographs show a piece of land surrounding by a high (about 3m) rubble boundary wall. The proposal includes the replacing the existing reservoir by an agricultural store and extensive formal landscaping including hard landscaping. The nature of the works clearly indicates a formal garden with large open area and a building in the middle.

Consultations were carried out with the Ministry of Rural Affairs and the Environment and the Water Directorate of the Malta Resources Authority. The case officer noted:

Application is being referred in view of ECF 762/07. Kindly clarify if the application is sanctioning the illegalities covered by the enforcement notice. Also kindly attached photos.

The Enforcement Section replied by including internal photographs of the development and a copy of the Enforcement Order issued against the applicant (ECF 762/07) which reads as follows:

G]andek lvilupp irregolari u dan peress li x-xogjol li sar fuq is-sit jmur oltre dak li [ie accettat fil-Ordni {enerali dwar l-lvilupp (DNO) u cioe [iebja u pump room kif murija fi DNO 447/06 u DNO 736/07 rispettivamente [ew mibdula f'kamra t'abitazzjoni billi tbaxxa il-livell tal-]amrija, infet]u aperturi u saru olterazzjonijiet, kif ukoll sar landscaping, fencing fuq il-boundary wall, pavimentar, tinda ma l-istess kamra u dan ming]ajr permess.

On 10 April 2008 the applicant informed the MEPA to hold the application on hold as he intended to amend his proposal.

On 30 April 2008 a minute in the file indicates that a post-submission meeting was held with the applicant and his architect. The minute reads:

Further to minutes 19 and 20, meeting held on 30/04/08 – present architect and applicant. Revised drawings in relation with the new proposal were brought forward and explained. Those present were informed regarding the provisions set out in policy 4.3B of Policy and Design Guidance Agriculture, Farm Diversification and Stables (2007) and also the requirements of Appendix D of the same policy and design guidance. Architect will submit the required information, and amend the drawings and proposed development description accordingly:

In a letter dated 23 May 2008 the applicant changed the application and instead of an agricultural store he was now proposing the erection of stables and ancillary facilities.

The amended application was republished. After a number of amendments to the submitted plans, the Development Planning Application report was concluded on 4 November 2008 with a recommendation of approval. The report outlined the MEPA policies for the construction of stables particularly Policy and Design Guidance on Agriculture, Farm Diversification and Stables, January 2008. *Policy 4.3B: Construction of New Stables*, and it was concluded that the proposal is in line with these policies.

The DCC reviewed the application on 9 December 2008 and decided to hold a site inspection which was held on 10 December 2008.

In the meantime, a note in the file (minute 43) was inserted which states:

Please note that the use of the illegal structure was habitational or a recreational residence and not agricultural tool room as originally described in proposal. This fact can be asserted by the enforcement Officer Joseph Bezzina who inspected the site and issued ECF 762/07 as per attached document.

In the meantime it was discovered that the re-publication of the application had, inadvertently, not taken place. As a result on the 16 December 2008 the Team Manager informed the DCC not to proceed with their deliberations pending re-publication. Consequently on 17 December 2007 the DCC deferred their discussion for a later date. On that same day a report in a local paper (The Times) entitled “*MEPA to decide today on bungalows without permits*”

On 16 January 2009 the case officer inserted three aerial photographs of the site taken respectively in 1998, 2004, 2008. The first two photographs show virgin agricultural land without any construction. The last photograph shows extensive works on the applicant’s site and on adjacent sites.

In consequence of the additional information available the DPA report was thoroughly revised and the recommendation was changed to one for refusal. The reasons for refusal are being reproduced below:

A. In accordance with the provisions of Policy 4.3B of Policy and Design Guidance for agricultural buildings, the proposed change of use to stables cannot be considered as a development that will improve a degraded land. The development sought to be sanctioned - the existing room and landscaping - led to the unnecessary take-up of agricultural land and degradation of the agricultural value of the relevant site which is designated as an Area of Agricultural Value. Thus, the proposal runs counter to the overall aim of Central Malta Local Plan (policy CG24), Structure Plan policies AHF 1 and AHF 4, and Policy 4.3B criteria 1(f) of Policy and Design Guidance for agricultural buildings. Supporting text (paragraph 4.3.4) of Policy 4.3B unequivocally states that "good quality agricultural land should not be lost to this form of activity (stables)".

B. The proposal conflicts with the overall objectives of Central Malta Local Plan policy CG24 and Structure Plan policies AHF 4 and AHF 5. Central Malta Local Plan is showing that the relevant site forms part of an area which has been designated as Area of Agricultural Value. The objective of this Local Plan (policy CG24) in conjunction with Structure Plan policy AHF 4 is to support proposals that aim to continuously protect the agricultural value of the agricultural land by prohibiting developments that result in the subdivision of land holdings. The newly constructed boundary walls along the whole perimeter of the relevant site led to the subdivision of the previous larger agricultural holding. This runs counter to the objectives of the Local Plan.

C. The development sought to be sanctioned resulted in the demolition of rubble walls and so runs counter to Legal Notice 160/97 - Rubble Walls and Rural Structures (Conservation and Maintenance) Regulations and, Legal Notice 169/04 – Rubble Walls and Rural Structures, Conservation and Maintenance Regulations (Amendment). Both regulations declare rubble walls and non-habitable structures as protected, in view of their contribution to the character of rural areas, and their vital importance in the conservation of the soil and of water. D. The reconstructed high boundary walls are not in line with Article 5.3 of L.N. 160/97 (Rubble Walls and Rural Structures (Conservation and Maintenance Regulations)) as amended by L.N. 169/04 since they exceed 1.2m above soil level and were not constructed in whole rubble (sejjiagh) using the traditional method of construction.

E. The proposal conflicts with the aim of the Structure Plan (RCO 2 & RCO 4) since the erected high boundary walls visually encroach on the landscaped environment. The high boundary walls as reconstructed are not aesthetically compatible with the rural environment and thus run counters to Structure Plan Policy RCO 4, RCO 8 and AHF 5.

F. The sanctioning of the existing 'landscaping' run counter to the overall aim of Structure Plan policies RCO 4 and SET 11 since it will further formalise an area which is located within the countryside. The use of turf and the formal designed landscaped garden are out of context within the rural environment.

G. The proposal cannot be considered further in accordance with the provisions of Circular PA 2/96 since the erection of the new boundary walls and the land

fragmentation of an agricultural holding were carried out without planning consent and their sanctioning has not been requested.

On 30 March 2009 the Environment Protection Department sent the case officer a detailed report on the situation in the locality. It confirmed that in addition to the development carried out illegally by the applicant, there were other developments in the immediate locality carried out by members of the same family. It seems that an existing agricultural holding had been fragmented between different owners and each owner was carrying out some kind of development on his land. A crucial paragraph in the memorandum reads:

The site history is characterised by piecemeal illegitimate accretions to developments that have been approved. The inability to abide by the requirements of permit conditions is notable in the four cases, thus contributing to unjustified land take-up. This situation is of major concern to EPD, and should not be rewarded through retroactive sanctioning.

Consequently the final recommendation in the report states:

In view of the above, and also noting that applicants have demonstrated an inability to adhere to approved specifications, the proposals are strongly objectionable in principle, and it is recommended that the cases are referred to enforcement unit for direct action, with a view to securing removal of all illegalities and restoration of the site to its original state in accordance to a method statement approved in advance by MEPA.

The EPD noted that there were several similar applications on adjacent sites which would have to be approved if the particular application was accepted.

The application was also referred to the Heritage Advisory Committee which stated:

The only permits issued for this site are for an underground reservoir (DNO 447/06) and a pump room (DNO 736/06). The existing structure ('agricultural store') is therefore illegal. The sanctioning of the illegal building is highly objectionable and cannot be recommended. Conversion of such building to stables and associated paddock, manure clamp etc. is consequently objectionable, and refusal is therefore recommended.

The DCC approved the application on 26 August 2009 with the following justification:

Approved 4-2

Justification in relation to the bullets A to G in NTC 3.9:

A. Proposal lies on degraded land according to agricultural department letter dated 15 October 2008.

B. DNO 447/06 approved the subdivision of land

C. same as B

D. same as B

E. same as B

F. turf to be removed as per condition 2 imposed by the board.

G. covered by DNO 447/06

The architect during sitting stated that the applicant is ready to remove all illegalities and to comply with the following conditions:

1. the rubble walls shall be as per DNO 447/06

2. the turf to be removed and tied to a bank guarantee of EUR 25,000

3. no change of use will be permitted.

Development Notification DN 447/06

As the approval of the application is closely linked to this development notification, it was examined as well.

On 14 June 2006, the applicant had submitted a development notification for “*the construction of rubble walls, maintenance of existing and agricultural reservoir including placing of gate in existing access.*” The submitted drawing shows an existing plot of land surrounded in part by rubble walls which the applicant was proposing to demolish and re-erect on new alignment. He was proposing to raise the height of the external wall (on the existing road) from 1.2 metres above road level to 2.4 metres above road level (and 1.2 metres above soil level). The application was approved on 23 June 2006 with the following note:

In accordance with the Development Notification Order, 2001, the development as endorsed on the attached drawings and site plan is permitted under the following class and therefore does not require an application for development permission.

11.2 (iv) Agricultural reservoirs

This clearance is granted in relation to the proposed development as indicated in conventional colours ONLY as marked on plans 1b & 1c and does NOT cover any other works or sanction any illegal development which may exist on site.

Comments

This is the classical example on how to reward a lawbreaker in his work to create environmental damage. Throughout the processing of the submitted applications the applicant was acting in bad faith and the advice of the Environmental Protection Department quoted above was possibly the most relevant piece of advice given in the processing of this application.

When the applicant applied with the notification DN 447/06 he simply wanted to erect some rubble walls and a reservoir (partly underground). The approval of the application

therefore consisted in two separate requests: (1) the construction of a reservoir, (2) the dismantling of existing rubble walls and rebuilding of the same on a different alignment and considerably increased in height. The first development could be permitted with a simple development notification application, but the second could not. The Development Notification Order allows only an increase in height of existing rubble walls (Class 11 2 (ii) (c)). It does not allow the dismantling of existing walls, even if they would be rebuilt. The Environment Protection Department claims that the construction of the new rubble walls does not follow the construction method as allowed in the relevant legal notice. On examining the photographs taken by the Enforcement Section of the MEPA I tend to agree with this statement. My impression is that a wet rubble construction using a mortar has been used.

Consequently while the applicant had a permit to build the reservoir, the dismantling of the rubble walls and their subsequent reconstruction was illegal as the permit in as far as this part of the application is concerned is null and without effect. Incidentally the approval of the construction of the rubble wall resulted in the subdivision of the land which is illegal and hence could not be approved by a DNO (or even a full development permit).

Another point is also worth considering. The submitted drawings in conjunction with DN 447/06 clearly indicate that the boundary wall facing the street was to be 1.2 metres above soil level and 2.4 metres above road level. The drawings submitted in conjunction with development application PA 7283/07 show that soil level is approximately at road level. This leads to one of two obvious conclusions: either the drawings submitted with DN 447/06 are incorrect and hence fraudulent in terms of the provision of the Development Planning Act or the applicant removed the soil. A letter from the architect of the applicant dated 16 February 2009 states that his client (the applicant) never removed any soil from the site. Consequently it follows that the drawings submitted in connection with DN 447/06 are fraudulent and this permit should be withdrawn.

The removal or otherwise of soil from the land has a bearing on the letter of the Department of Agriculture where they stated that the land was of little agricultural value as the soil was shallow. I am sure that the Department of Agriculture was consulted in the preparation of Local Plans. Why was it that in the Local Plan the land was considered as being of agricultural value? I need not add that the advice of the Department of Agriculture in this respect is of little value. The provisions of the Local Plan take precedence over such statements. Irrespective of the true nature of the land, the provisions of the Local Plan should prevail.

Hence the justifications given by the DCC for approving the application cannot be accepted as being adequate and sufficient planning reasons for overturning the recommendations of the Planning Directorate

(a) The development was not located on degraded land according to the provisions of the Local Plan. It could have possibly have been degraded by the applicant if he removed part of the topsoil (which he denied).

(b) DN 447/06 did not approve the subdivision of land as this cannot possibly be approved by a development notification as stated above.

(c) The DCC did not indicate why they were approving a development with rubble walls about 8 to 9 courses high which is clearly against policy.

A look at the aerial photographs are a sufficient indication of the environmental damage carried out by the applicant. A tract of agricultural land had been converted illegal into three enclosed recreational areas. One of these sites has now been granted a permit for stables; it would be difficult to deny the same permit to the adjacent sites.

It is unfortunate that the attitude of DCC Boards concerning applications outside scheme leaves much to be desired. It is clear from the provisions of the Structure Plan that it is up to the applicant for such development to justify the need and location of the particular development and its compliance with relative policies. Only then can a proposed development be approved.

Conclusions and recommendations

1. The complaint that development application PA 7283/07 was approved contrary to approved policies is sustained. The DCC is solely responsible for this. There are no grounds for the withdrawal of the permit in terms of the provisions of the Development Planning Act.

2. The MEPA shall ensure that all rubble walls are constructed strictly in accordance with official policies in terms of height and method of construction. No additional fencing of any kind should be permitted.

3. Frequent monitoring of the premises is to be carried out to ensure that the use of the premises is in accordance with the permit conditions.

4. It is recommended that the role of the Environment Protection Department in the assessment of development applications be enhanced. It should be made clear that no permits should be issued unless the objections of the Department are addressed and a satisfactory solution found to the concerns of the Department.

MEPA's reaction to preliminary report

A preliminary version of this report was sent to the Chairman MEPA on 15 February 2010. In a reply dated 30 June 2010 the Chairman stated:

I had requested the Chairperson of DCC A to comment on your report. The four reasons submitted by the Chairperson for the approval of this application were the following:

1. The DPAR was confusing. The concluding part of the report which recommended a "Grant" should have recommended the "Refusal"/

2. The recommended reasons for refusal should not have been listed in the Notes to Committee but at the end of the report. It is to be noted that normally when the Directorate changes a recommendation the recommended reason are either listed in a separate document, or the supersede reasons crossed off.

3. The DNO 447/06 had committed the site to development by means of fragmentation, etc.

4. The fact that the land did not have any agricultural value and soil present was shallow as stated by the Department of Agriculture, following a site inspection.

In conclusion the Chairman stated that there are no grounds for the withdrawal of the permit. Regular inspections of the site will be carried out to ensure that no illegal change of use will take place. Applications on adjacent sites have been undelegated.

Rejoinder

The facts stated by the Chairperson DCC confirm that the DCC were solely responsible for what happened. There was a detailed DPA report which clearly indicated that the development was contrary to policy. Am I to assume that the DCC Board members do not read the report? The fact that the report was messy is no excuse. The DCC knows well enough that DPA reports are not modified once the report goes to the DCC and any subsequent changes are listed in Notes to Committee. Maybe the DCC members do not even bother to read the Notes to Committee.

The DNO only allowed the demolishing of rubble walls and their re-erection plus the construction of a reservoir. The demolishing of the rubble walls and subsequent re-erection resulting in fragmentation of land could not have been approved by means of a DNO and hence the decision was ultra vires.

Contrary to what the Director of Agriculture stated, the Local Plan for the area clearly states that the land has (or had) agricultural value. The least that could have been done was to require the Director of Agriculture to explain his position. The MEPA has to follow the provisions of the Local Plan and not the advice of the Director of Agriculture.

In the circumstances the report is not being amended, but in addition to the recommendations given, I recommend that the DCC Division A assumes its responsibilities for approving a permit contrary to policy and acts accordingly.

Joseph Falzon
Audit Officer

5 July 2010