

AUDIT REPORT 2009/078

Request for an investigation by the Ramblers' Association of Malta, Nature Trust, Flimkien ghal Ambjent Ahjar, Friends of the Earth, BirdLife Malta, Din l-Art Helwa, GAIA, Malta Organic Agriculture Movement and Light Pollution Awareness Group concerning the approval of development application PA 7810/06: *To construct additional facilities at first floor level.*

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

Facts

Messrs Kevin and Joseph Xerri applied on 12 December 2006 “*to construct additional facilities at first floor level*” on a site known as Xerri’s Complex Triq iz-Zewwieqa, Qala, Gozo (PA 7810/06). The site is on a ridge outside development zone in an area described as an “*ODZ Settlement*” in the Gozo and Comino Local Plan. The processing of the application followed as listed hereunder:

2007 (4 January) The MEPA identified a number of applications on the site as follows:

PB 3928/91: Application approved on 14 April 1992 “*to carry out alterations and additions as per fresh plans.*”

ECF 809/96: An enforcement order issued against the applicant for carry out an extension to the terrace at the back (over the ridge) On 13 July 2007 the case was referred for direct action. Application to sanction submitted as per PA 7810/06. (In reality, the application drawings represented the building as existing and there was no indication in the application that the applicant requested to sanction the development. Obviously if approved, the illegality would have been sanctioned).

GD 422/00: To change a dangerous roof. Request accepted.

GD 878/00: To change a dangerous roof: Request accepted.

PA 2224/98: To install satellite dish antenna. Application refused because of the location of the site on a ridge and the enforcement order existing on the site.

2007 (16 January): Applicant requested to submit previous approved plans on site. Applicant’s architect replied on 22 January 2007 where he stated that copies of the approved plans were not available, but he submitted a copy of the development permit

2007 (6 February): Application advertised with a final date for representations from third parties 4 March 2007.

2007 (1 March): National Commission Persons with Disability informs MEPA that the submitted plans do not meet the criteria of the Design Guidelines Access for all.

2007 (15 May): The architect wrote to MEPA and amended the application to read: *“To construct additional facilities at first floor level, to demolish dwellings, to construct dwellings with pools and to construct basement parking.”* Fresh drawings were submitted. The proposal in fact extended the development to include an adjacent building on one floor which the applicant was proposing to demolish and replace with a two-storey building plus basement. Consequently the application was advertised again with a closing date for representations 8 July 2007.

2007 (17 August): The MEPA requested amended drawings to take into consideration (1) sanctioning of illegal development, (2) part of the development on the western side was outside the limits for a Category 1 ODZ Settlement (3) extensions to Class 6 outlets and commercial activity in such a locality are not acceptable, (4) adequate setbacks and landscaping schemes, (5) cross-sections of the proposed development, (6) improved designs for the proposed elevations and to submit elevations of the sides overlooking the ODZ.

2007 (15 October): The Qala Local Council objected to the proposal (letter received after closing date for representations).

2007 (5 November): Architect submits fresh plans and requests that the application be amended to read: *“To construct additional facilities at first floor level, to demolish dwellings, to construct dwellings with pools and to construct basement parking, including sanctioning of small differences”* In his letter the architect stated: *“Please note that I am retreating 3m from the back for each floor and the proposed additional uses above the restaurant at first floor level are fully in compliance with local plan policies. The footprint of the proposed development is according to the area for development in the ODZ enclave.”* The application was advertised again with a final date for representations 10 February 2008.

2008 (28 January): Letter of objection received from two persons who objected to the proposed development giving the following reasons: (1) it is inexplicable how the GCLP zones the area as a Category 1 Rural Settlement as it is so small, (2) site is located on a ridge, (3) possible impact on the local flora and fauna, (4) another application for the installation of a dish antenna, PA 2224/98, had already been refused as it was very visible from the Mgarr Harbour area; (5) there is an illegal development on the site. (6) an approval of this application would create a precedent for similar developments elsewhere. Other letters of objection were received on the following days.

2008 (13 February): Development Planning Application report concluded with a recommendation for refusal. The reasons given are: (1) the proposal extends beyond the

limits for development for a Category 1 ODZ Settlement (Policy GZ-RLST-1 of the GCLP, (2) extension to Class 6 uses is not acceptable in residential areas (Policy GZ-HOUS-1), (3) the proposal does not respect the topography of the site and hence goes against Policy 2.7 of DC 2005; (4) design is incompatible with the urban design and environmental characteristics of the area, (5) the proposal detracts from the scenic value of the area, (6) inadequate car parking provision, (7) no Tourism Policy Compliance Certificate presented.

2008 (18 February): Architect submits revised plans, but the Planning Directorate retains its recommendation for refusal.

2008 (5 March): The DCC reviewed the application and asked for advice as follows: (1) from the LPU, a comment on the commercial activity on site re. policy, (2) from the Legal Office, to clarify why the application had to be republished.

2008 (4 March): The Qala Local Council sent a letter objecting to the proposal as it would obstruct the view to the Harbour from the nearby belvedere.

2008 (29 April): DCC decides to carry out a site inspection.

2008 (13 May): Site inspected in the presence of the applicants and objectors.

2008 (23 May): Fresh submissions from the architect received. Applicant amended his proposal to read: *“To construct additional residential units at first floor, to demolish dwellings, to construct dwellings with pools, to construct basement parking and to sanction variations at the existing commercial area.”* Consequently the application had to be republished. Letters of objection follow. The Planning Directorate still objected to the proposal.

2008 (2 September): DCC reviews the application again and requests applicant to submit fresh plans *“as per Directorate’s request in NTC 4”*. Where the architect disagrees with the Directorate, justified reasons for this are to be given.

2008 (2 December): Application refused unanimously as per DPA report.

2008 (31 December): Applicant submits a request for reconsideration of the application. The letter of the architect is practically identical to his reply to the DPA report when the application was originally considered.

2009 (28 February): Architect submits fresh plans addressing some of the issues which led to the refusal of the application.

2009 (25 March): DPA report concluded with a recommendation for refusal. The reasons given were generally similar to those given for the original application, but more emphasis given to the effect of the development on the appearance of the site.

2009 (26 May): DCC requests Sanitary Engineering Officer to vet the drawings. Architect requested to submit a photomontage.

2009 (5 June): Letter addressed to the Chairman and copied to this Office on behalf of the objectors where the objections to the development were reiterated. The objectors stated that in their opinion the DCC were going to approve the development.

2009 (4 July): The DCC upheld the request by 5 votes to 1 giving the following justification:

1. *GZ-Hous-1 considers frontages within residential areas. Extension is being proposed at the back.*
2. *From the sections approved it can be seen that development is being terraced as according the Policy 2.7 of DC 2005 and topography of site.*
3. *Proposed variations on the front are an enhancement to the existing.*
4. *Proposal lies within a Category 1 Settlement.*
5. *USIF to be applied.*
6. *Deleted by the Directorate.*

Comments

There are a number of facts which need to be looked into when considering this application:

What led the planners who formulated the Gozo and Comino Local Plan to zone this area as a Category 1 Rural Settlement? The Plan (Policy GZ-RLST-1) describes such settlements as “*large rural settlements*”. But this settlement consists only of one dwelling and an adjacent restaurant belonging to the same owners, probably a development known as casa bottega. The development is in close proximity to the existing boundaries of the development zone (actually on the other side of the road). Possibly it was a convenient way of classification, with unfortunate results. It is confirmed that when the Local Plans were issued for consultation there were no comments on the proposed zoning from any person. Objections were only forthcoming when an application was actually submitted.

It is to be regretted that the planners who formulated the local plan for the area showed lack of sensitivity in the zoning of the site. The main environmental concern to this development was its location on a very prominent ridge visible from a long distance away. So much so that the MEPA itself had refused another application for the installation of a dish antenna back in 1998 for this specific reason. If in 1998, the site was considered so sensitive that even a dish antenna was considered objectionable, why did the local plan in 2006 allow the erection of an additional floor? It would have been obvious to anybody with the slightest environmental concern that in the case of this locality, the protection of the ridge and views to it should have been paramount.

The cause of the whole controversy in the assessment of this application was simply the incorrect zoning of the area under the Gozo and Comino Local Plans.

Did the Planning Directorate give a correct interpretation of policy when it recommended a refusal of the application? Once again the DPA report leaves much to be desired. It is excessively long and does not address the issues at stake clearly. Instead it concentrated on a number of minor issues which blurred the major issues to be considered.

It was obvious that the applicant had a right to build a two-storey building according to the provisions of the Local Plan. The two issues to be considered were (1) the fact that the building was on a prominent ridge, and (2) the construction of the basement. In the first case the conditions of DC2005 applied, which simply required that the building be recessed back at each level. For a successful building a combination of architectural skill and a client who is willing to sacrifice space for the sake of appearance are necessary. The latter is even scarcer than the first.

The question of the basement was hardly considered at all, either by the case officer or the DCC. Policy GZ-RLST-1 of the GCLP clearly states that no underlying basements are permitted. This policy (whether for the site under consideration or elsewhere) has always been interpreted as meaning basements above street level. Basements completely underground were permitted. And the applicant insisted on this fact during the processing of the application. But in this case the situation is completely different: the basement may be completely underground on the façade of the building, but it is definitely completely exposed on the back side – where it matters. The net result is that there is a building over three floors high over the ridge.

The DCC did consider the problem of the appearance of the building. In fact it requested the applicant to submit photomontages of the proposed development. I have two different photomontages: one by the applicant which seems to indicate that the visual impact of the proposed development is fully acceptable and one from the objectors which shows a totally unacceptable development. Which is the correct one?

This is the typical situation where a decision-making body has to make use of its discretionary powers (assuming good advice had been given by the Planning Directorate). The crucial decision was whether to accept the basement or to apply rigidly the policy which prohibits any underlying basements. It is obvious that when the policy for rural settlements was written, the situation of a rural settlement on a very sensitive ridge was not considered. On the other hand it is obvious that the height of the buildings was of concern. I would have expected that the DCC would have insisted that no basements could be constructed which would have led the building to be left at one storey high as existing. How the DCC could accept a building which was three storeys high over a very sensitive ridge is difficult to explain.

The DCC has the right to overturn a recommendation of the Planning Directorate provided they give a planning reason for this. As stated above the DCC did give a planning reason and hence they complied with the provision of the law.

However I fail to understand the first reason given for justification of the approval. I have looked at Policy GZ-HOUS-1 of the GCLP and cannot find any reference to the reason given by the DCC. The reason for not accepting the third recommendation of the Planning Directorate is totally irrelevant. The DCC stated that the front elevation was an improvement on the existing, but the Planning Directorate stating that the proposal was “*incompatible with the urban design and environmental characteristics of the area*” and was not referring just to the front elevation.

In the fourth recommendation the Planning Directorate quoted a Structure Plan policy, RCO 4, which requires the protection of areas of scenic value. Once again the main responsibility lies with the persons who formulated the Local Plan for the situation that arose. But I would again have expected the DCC to give a much better justification for overturning the recommendation of the Directorate than simply stating that the building is located in a Category 1 Settlement with no reference to the conflict with the Structure Plan policy.

In conclusion a controversial development was approved which is likely to have an adverse effect on an area of high landscape value. The paragraph titled “Impact on ridge” reproduced hereunder gives a very good description on the impact of this building on the environment:

The proposed development is not acceptable since it does not propose adequate setbacks to respect the provisions of Policy 2.7 of the DC 2005. It does not respect the ‘profile of the existing topography’. Section on drawing 94F shows that the terraces behind the bar and the restaurant area are supported by walls and columns that extend beyond the cliff face. Paragraph (iii) of Policy 2.7 of DC 2005 stipulates that ‘the total height of the rear boundary wall together with any exposed foundations shall not exceed 2.4 metres’. In addition, the wall at the back of the basement level overlooking ODZ and indicated on drawing 94G is 4.25 metres high and thus creating an adverse visual impact that go against the provision of LP Policy GZ-RLST-1.

The main fault lies with the person who prepared the local plan for the area and those who approved it. But the DCC is also at fault. These are the situations where professional discretion is important. The Planning Directorate had given a recommendation for refusal listing five reasons for this. The reasons given for overturning the recommendation answers the objections of the Planning Directorate at best only in part and ignores completely the sensitivity of the site.

The Local Plans Unit was unable to give a satisfactory explanation as to the zoning of the area. The explanation was that it provided a simple classification which followed similar classifications in other Local Plans. But I wonder whether there are any other Category 1

Settlements consisting of just two units on a very prominent ridge. This is a serious matter which I recommend that the MEPA should look into.

Conclusions and recommendations

1. The complaint that development application PA 7810/06 is sustained only in part as stated above. The fault lies primarily with the formulation of the Local Plan which failed to give due consideration to environmental sensitivity of the site, but the DCC is also partly at fault for ignoring important objections of the Planning Directorate.

2. The MEPA is advised to take measures to ensure that areas of high landscape value or high architectural value are suitably protected. Irrespective of any Local Plans or other policies it should be made clear that the protection of such areas is paramount and should take precedence over any other policy which conflicts with this basic requirement.

MEPA's reaction to preliminary report

A preliminary copy of this report was sent to the Chairman, MEPA for his comments. The Chairman referred the report to the Chairperson, DCC Division who wrote a detailed comment on the report. Most of the comments are already included in the report. Her report justifies the approval on the basis of the fact that the Local Plan designated the area as a Category 1 Rural Settlement and hence the DCC had to apply the relevant policies. I agree with her that the main problem was the designation of the area. My disagreement with the DCC lies on two counts:

(1) Although a basement completely underground is permitted in Category 1 Rural Settlements, in this particular case the basement was only underground along the street. At the back, the sharp drop in the terrain exposed the basement completely. The DCC should have used their discretion, as advised by the case officer, and refused the application due to its negative visual impact as seen from a long distance away.

(2) The DCC failed to take into consideration the environmental sensitivity of the site.

Joseph Falzon
Audit Officer

3 November 2009