Case No ET 0018

7 May 2019

Perit Simone Vella Lenicker
President
Kamra tal-Periti
The Professional Centre
Sliema Road
Gzira GZR 1633

Madam

Final Opinion

I am enclosing my final report on your complaint following investigation by this Office.

Yours sincerely

Perit Alan Saliba
Commissioner for Environment and Planning

Encl.

Report on Case No ET 0018

Complaint against the Planning Authority regarding the validity of CTB concessions following the issue of PA Circular 1/19.

Case history

On 13 March 2019 this Office opened an investigation following a complaint regarding the validity of CTB Concessions after the Planning Authority issued Circular 1/19 on 28 January 2019, with particular reference to where the Circular states that "... *any development covered by an approved CTB (and is thus considered illegal) needs to either be sanctioned or removed, prior to any processing of the application. If the illegal development cannot be sanctioned, a regularisation application would need to have been submitted and approved prior to the planning application being confirmed as complete (and published on the DOI website).*"

This Circular is preceded by the following statement:

> "*When a Planning Application (PA), is submitted, it needs to be processed in terms of the provisions of the Development Planning (Procedure for Applications and their Determination) Regulations in force at the time. When legislation still provided for the submission of a request for consideration under the CTB regime, the legislation in force was LN 514 of 2010 (as amended) [proviso to sub-*

regulation 14(1)], which provided that development subject to an approved CTB would not be considered as reason to halt the Authority from approving further development on site.

With the repeal of LN 514 of 2010 and the coming into force of Development Planning (Procedure for Applications and their Determination) Regulations, 2016 – LN 162 of 2016 (as may be amended) [S.L. 552.13], sub-regulation 17(4) therein sets out that:

"Any illegal development which is not indicated for sanctioning in a development application shall be removed prior to the issue of a development permission…""

Following a preliminary opinion, both the complainant and the Planning Authority were asked for their comments. In this preliminary opinion the Commissioner stated that:

"*... notwithstanding Chapter 504 and the relative subsidiary legislations have been superseded, it is beyond any reasonable doubt that what was not enforceable under the old regime is also not enforceable under the new Development Planning Act as long as no further illegal development was carried out on the site subject to the CTB application. This is consistent with the rules of natural justice since a concession procedure contemplated at any moment in time could not be simply overruled or rendered null and void on the basis that the old law has been superseded. Otherwise, what was the use of submitting a CTB application if not only to self-report the infringements in question!*

The Planning Authority may opt to issue an enforcement notice so that the Planning Board may dismiss an application according to Article 17(1). However, in my opinion, this is completely out of order and goes against the principles of natural justice as long as the same enforcement notice relates to issues that are covered within the relative CTB concession. This also without prejudice to the CTB applicants' rights to contest any enforcement notice in front of the Environment and Planning Review Tribunal in line with the relative legislation as outlined through this opinion.

Therefore, it is my considered preliminary opinion that for the reasons mentioned above PA Circular 1/19 should be clarified by the Planning Authority so that everybody is informed that the relative section 17(4) of Subsidiary Legislation 552.13 does not refer to works covered by CTB concessions unless these CTB concessions are indicated for sanctioning in the proposed plans and this on the basis that the Planning Authority cannot issue an enforcement notice under the current Development Planning Act on anything covered by a CTB concession as established in section 17(1) of Subsidiary Legislation 552.13 and in line with this preliminary opinion."

The Executive Chairman replied that:

"It does not appear that the guidelines (PA Circular) imply, or convey the message that CTBs already issued are rendered ineffective. This however does not change the fact the CTBs, under the law applicable at the time, where never intended, and are indeed not intended, to render permissible irregularities merits of the same.

Court judgements affirm this. Thus regardless as to how far the interpretation of a CTB grant may be stretched, the same can never be stretched so far as to render permissible development without a permit. Ultimately it remains in the interests of no one by the owner himself/herself to avail himself/herself of the opportunity which has now been granted at law to regularise the same development."

The Complainant replied that the fact that CTBs were never intended to render permissible irregularities is not disputed and added that the PA statement that *"It does not appear that the guidelines (PA Circular) imply, or convey that message that CTBs already issued are rendered ineffective"* is both incorrect and misleading since the referenced Circular states exactly that.

Observations

First and foremost it is to be made clear that the fact that CTB concessions do not render irregularities permissible is not under dispute.

The relative legislation dealing with illegalities and other developments on site during the processing of an application is section 17 of Subsidiary Legislation 552.13 regulating Development Planning (Procedure for Applications and their Determination). For ease of reference, this section is being reproduced hereunder:

"17. (1) When an application is submitted on a site which is subject to an enforcement notice, the Planning Board may dismiss the application unless the illegal development is included for

sanctioning and, or any payments due as a result of any enforcement notice on site are settled prior to the issue of the permission.

(2) The illegal development may either be regularised through a specific development application made solely for that purpose or through a development application which includes the sanctioning of illegal development as well as the proposed new development.

(3) Where sanctioning of illegal development is being requested in a development application, the proposal description and the drawings shall clearly indicate the development which is to be sanctioned so as to ensure that the illegal development forms part of the development application.

(4) The proposal description of a development application and the drawings submitted may not propose the removal of illegal development from the site. The development application shall include only illegal development which is proposed to be sanctioned. Any illegal development which is not indicated for sanctioning in a development application shall be removed prior to the issue of a development permission, provided that where the application is determined by the Planning Board, or the Tribunal subject to the removal of the illegal development prior to the issue of the development permission, the period by which the applicant is required to comply with this requirement shall not exceed six months or within a period specified by the Planning Board or the Tribunal, failing which, the application may be dismissed by the Planning Board or the Tribunal, as the case may be.

(5) Where parts of a site or building are illegal, permission for new development elsewhere on the site or on the building shall not be refused solely because there are illegalities on the site or on the building, subject, however, to all of the following conditions:

(a) the illegal parts do not form part of the application; and

(b) granting permission for the new development will not physically prevent, hinder or make difficult enforcement action, either for the removal or for the rectification, of the illegal parts; and

(c) the applicant has no control, whether directly or indirectly, over the illegal parts and the applicant was not involved directly or indirectly in the illegal development, even if the development formed part of a larger development which includes the illegal parts."

Article 91(1) of the Environment and Development Planning Act 2010 (Chapter 504 of the Laws of Malta) stated that "*Notwithstanding the other provisions of this Act, any person who is served with an enforcement notice in respect of development referred to in Schedule 8, shall have the right to claim that such notice shall not be executed.*" However, the Planning Authority adopted a procedure whereby applicants could avail themselves from this concession procedure even though the relative enforcement notice would not have been issued, thus signifying that once a concession in terms of Category B of Schedule 8 (or rather a CTB concession) is issued, no enforcement notice could be issued as it is useless and against the principles of natural justice to issue such an enforcement notice that could never be executed.

It is also in line with the principles of natural justice that an enforcement that could not be executed and thus not issued under the old law could not be issued under the new Development Planning Act if no further development was carried out other than that included in the relative concession. Therefore, sub-section 17(1) of Subsidiary Legislation 552.13 cannot be applied in this scenario since this sub-section clearly identifies the requirement of an enforcement notice for its applicability. This, without ignoring the fact that sub-section 17(1) does not automatically impose a dismissal of an application as it states that the Planning Board "*may*", rather than shall, dismiss the application.

A thorough analysis of the subsequent sub-sections of section 17 shows that these sub-sections are cumulative and each sub-section refers to and is subject to the previous sub-section. In this respect sub-section 17(1) states that the Planning Board may dismiss the application unless the illegal development is included for sanctioning. Then sub-section 17(2) states how this illegal development may either be sanctioned through a specific application or by being included with the new development. Sub-section 17(3) goes on to show how this sanctioning is to be indicated in the relative proposal description and drawings. Sub-section 17(4) describes how this proposal description and drawings may only include the illegal development which is proposed to be sanctioned and any other illegal development is to be removed prior to the issue of the development permission whilst sub-section 17(5) states that permission for new development elsewhere on the site shall not be refused solely because there are illegalities on the site subject to three conditions. Therefore, according to sub-section 17(1), the lack of an enforcement notice on a site renders the subsequent sub-sections and consequently section 17 of the mentioned subsidiary legislation inapplicable.

Whenever a CTB concession has been issued and no other illegal works were carried out.

One might argue that sub-section 17(5c) does not exonerate the applicant from including the illegalities subject to a CTB concession in any new development application on the same site whenever the applicant has control over the illegal parts. Nonetheless, once a CTB concession has been issued and no enforcement can be executed, the control an applicant might have on the illegal parts becomes superfluous. Furthermore, this sub-section 17(5) establishes the scenario when the relative application is being refused solely because of the illegalities on the site. Circular 1/19 under scrutiny neither distinguishes between applicants who are under control of the illegalities or not, nor on whether an application is being solely refused on the basis of the illegalities present or not.

One might also argue that Circular 2/98 established that where the applicants has control over those parts of the building where there is illegal development, then permission should be refused since the illegal development should be sanctioned before other development can be considered. First and foremost, one should refer to the previous paragraph where reference was made to the applicant's control over the illegalities. Secondly, Circular 4/12 dealing with CTB concessions stated that "... *as long as the sole infringements in that dwelling unit are those being covered by these provisions, apart from any enforcement notice not becoming executable by MEPA on these infringements, the applicant could benefit from ...: a) applications requesting permission for alterations and additions to the same dwelling unit could be accepted (without prejudice to any other requirements)*". Thus, the authority already acknowledged the fact that a new application could be submitted

on a property subject to a CTB concession notwithstanding Circular 2/98 applicable at that time.

One should also keep in mind that not everything that was acceptable under the CTB regime can necessarily be approved under a full development permission or regularisation procedure.

Therefore, for all the reasons mentioned above, the requirement in Circular 1/19 that any development covered by an approved CTB needs to either be sanctioned (either through a full development permission or through a regularisation procedure) or removed prior to any processing of the application goes quite against the principles of natural justice.

Both the description and the relative plans (in conventional colours) accurately indicate the proposal subject of the application, and even if the relative plans show illegal works allowed through a CTB concession that are not subject of the proposal, any eventual permission is issued without prejudice to the fact that the relative illegal works are still considered illegal. It is very unfair that applicants who applied for a CTB concession and who voluntarily indicated own irregularities and paid the relative fees to the Authority under a pre-established procedure are then asked to regularise their position when submitting a new application on the same site.

Conclusion and Recommendation

The last paragraph of the first part of Circular 1/19 issued by the Planning Authority that states that "*Any development covered by an approved CTB*

(and is thus considered illegal) needs to either be sanctioned or removed, prior to any processing of the application. If the illegal development cannot be sanctioned, a regularisation application would need to have been submitted and approved prior to the planning application being confirmed as complete (and published on the DOI website)" is found to be unfair, irregular and against the principles of natural justice as any new application is to be vetted on the nature of the proposal description and the relative drawings that may not include the works subject to the relative CTB concession.

The Planning Authority shall withdraw and cancel this part of the Circular to the effect that a new application can be submitted on a site covered by a CTB concession without the need for sanctioning, regularising or removing the illegal works covered by the same CTB concession, as long as no further illegal development has taken place on site.

Perit Alan Saliba
Commissioner for Environment and Planning

7 May 2019