At the Supreme Court Sitting as the High Court of Justice

HCJ 9717/03
HCJ 10359/03

Before: **The Honorable Justice E. Rivlin**
The Honorable Justice A. Procaccia
The Honorable Justice A. Grunis

The Petitioner in HCJ 9717/03: **Naale – Association for settlement in Samaria of employees of the Israel Aerospace Industries**

The Petitioner in HCJ 10359/03: **The Nili Local Committee**

- Versus -

The Respondents in HCJ 9717/03:

1. **The Civil Administration for Judea and Samaria, The Supreme Planning Council-The Sub-Committee for Mining and Excavation**
2. **The Civil Administration for Judea and Samaria, The Supreme Planning Council, in the Judea and Samaria Region-the Sub-Committee for Contestations**
3. **Shafir Civil Engineering Ltd.**
4. **Mateh Binyamin Development Company Ltd.**

The Respondents in HCJ 10359/03:

1. **The Supreme Planning Council in the Judea and Samaria Region-the Sub-Committee for Contestations.**
2. **The Supreme Planning Council in the Judea and Samaria Region-the Sub-Committee for Mining and Excavation**
3. **Mateh Binyamin Regional Council**
4. **Mateh Binyamin Development Company Ltd.**
5. **Shafir Civil and Marine Engineering Ltd.**

Petition for the issue of an order nisi and for an interim order

Date of the hearing:	7 Iyar, 5764	(28 April, 2004)
For the Petitioner in HCJ 9717/03:	Adv. R. Fori	
For the Petitioner in HCJ 10359/03:	Adv. R. Yarak	
For the Respondents 1-2 in HCJ 9717/03 and in HCJ 10359/03:	Adv. A. Etinger	
For the Respondent 3 in HCJ 10359/03 and the Respondent 5 in HCJ 10359/03:	Adv. I. Horesh	
For the Respondent 3 in HCJ 10359/03:	Adv. D. Rotem	
For the Respondent 4 in HCJ 9717/03 and in HCJ 10359/03:	Adv. I. Benkel; Adv. A. Schmerling	

Judgment

Justice A. Grunis:

1. A quarry is about to be built within the jurisdiction of the Mateh Binyamin regional council in the Judea and Samaria region (the "**Regional Council**") by virtue of a detailed zoning plan 52/8 (the "**Plan**"). The Regional Council includes, *inter alia*, the settlement Naale, (an association of whose inhabitants is the Petitioner in HCJ 9717/03) and the settlement Nili (whose local committee is the Petitioner in HCJ 10359/03). Once it was decided to deposit the Plan, contestations were submitted by various bodies, including the Petitioners. The contestations were dismissed. The two petitions, the hearings of which were consolidated, were filed against the dismissal of the contestations.

2. In 1987, Shafir Civil and Marine Engineering Ltd. (Respondent 3 in HCJ 9717/03, which is Respondent 5 in HCJ 10359/03 that shall be referred to below as "**Shafir**") sought to initiate the building of a quarry in the Natof River, within the area of the Regional Council. The settlements Naale and Nili are located in the vicinity of the planned quarry. Due to contestations of various bodies, the civil administration for the Judea and Samaria region amongst them, the Plan was taken off the agenda. Shafir raised the idea again in 1991. The zoning procedures in the Judea and Samaria region are conducted according to a Jordanian law, which is the Towns Villages and Buildings Planning Law number 79 for 1966. The Sub-Committee for Mining and Excavation of the Supreme Planning Council for Judea and Samaria (Respondent 1 in HCJ 9717/03, which is Respondent 2 in HCJ 10359/03, that shall be referred to below as the "**Mining**

and Excavation Committee") deliberated on the subject several times in the years 1991-1992 and decided that there is no room to advance the initiative to build a quarry. At the time, various bodies in the civil administration (Environment Headquarters Officer and Archeology Headquarters Officer) as well as the Regional Council, objected to the idea. It appears that the main consideration was the fear of harming the environment and the quality of life of the inhabitants of the settlements nearby. Shafir did not sit back doing nothing and again put the issue of building a quarry on the table in 1997. In a decision from December 1997, the Mining and Excavation Committee rejected the application but noted that it will be prepared to reconsider the issue under certain conditions, *inter alia*, a reduction of the mining area, a solution for the problem of flood-waters and institution of steps for the protection from environmental harm. The issue was again brought before the Mining and Excavation Committee in October 1999. It was then was decided to issue a preliminary approval to the application to build a quarry. The Plan was later brought before the Mining and Excavation Committee which decided, on 27 June, 2001, to deposit the Plan. This decision was conditioned upon various conditions, including the imposition of limitations on the operating of the quarry due to the proximity thereof to various settlements, the determination of instructions for purposes of protection from prejudice to the quality of life and the internalization of the conclusions of the review on the effect on the environment, in the provisions of the Plan. The two Petitioners submitted contestations. In addition, contestations were submitted by the Arab villages Shibtin and Shukaba that are located nearby. The contestations to the Plan were deliberated before the Sub-Committee for Contestations of the Supreme Planning Council (Respondent 2 in HCJ 9717/03, which is Respondent 1 in HCJ 10359/03 that shall be referred to below as the "**Contestations Committee**"). On 28 July, 2003, the Contestations Committee decided to dismiss the contestations whilst imposing various limitations and determining specific conditions. *Inter alia*, limitations were imposed pertaining to the quantity of explosives which will be used in the quarry and pertaining to the hours of activity of various means in the quarry. It was further set forth that instruments for monitoring dust will be placed at various points. To the abbreviated factual description that we brought we will add that the Regional Council changed its opinion several times with respect to the Plan. Before the decision on depositing the Plan it objected to the initiative, later, it changed its mind and supported the Plan, and at the stage of the contestations, it objected again.

3. The two Petitioners raised a great number of arguments against the decision to deposit the Plan and to dismiss the contestations which were submitted. From amongst such arguments it is appropriate to address the following: first, the decision to deposit the Plan came after that on two previous opportunities, the competent authority decided that there is no place to advance the plan. According to what has been argued, no justification was found for changing the previous administrative decisions which refused to allow the building of a quarry. Second, the decision to deposit the Plan under conditions is wrong. The depositing thereof under conditions should not be permitted, thus it was argued, especially when the conditions which were set forth as part of the deposit are material conditions, which amount to a significant modification of the plan. Third, the building of a quarry in a region that is under belligerent occupation is

contrary to the Hague Regulations, 1907. Fourth, the building of a quarry and the operation thereof will cause harm to the quality of life of the inhabitants that are living in the settlements in the vicinity of the quarry. We shall discuss the arguments according to the order thereof.

4. As we have seen, the competent authority decided, on two different opportunities, in 1989 and in the beginning of the nineties, that there is no room to advance a Plan to build a quarry in the Natof River. The administrative authority changed its opinion several years thereafter. The Petitioners argue that there was no justification whatsoever for changing the decision. The answer to that is that the competent authority in this case, like any administrative authority, is not subject, for purposes of its decisions, to the finality and *res judicata* rules (HCJ 18/82 *The Tel Aviv True Charity Burial Society v. The District Zoning Committee, Tel Aviv Jaffa, Piskei Din* 38(1) 701, 717; Y. Zamir *Administrative Authority* (Volume 2, 5756) ("**Zamir**"), 981-983). Naturally, a change of information or circumstances may lead to, and occasionally must lead to, the changing of an administrative decision. A deviation from a previous administrative decision may also occur pursuant to a re-evaluation of existing information, without a change in circumstances (with regard to a change of circumstances and re-evaluation: HCJ 318/75 *Hadjas v. The Haifa District Zoning Committee, Piskei Din* 30(2) 133, 137; HCJ 795/79 *The Gezer Regional Council v. The National Zoning Committee, Piskei Din* 36(1) 561, 571; *Zamir*, on p. 1008-1010). The aforesaid principles are especially appropriate in one of the branches of the administrative law-zoning. In this branch, which primarily engages in the physical planning of the person's environment, there is great importance to giving broad discretion to the administrative authority without it being overly bound by its former decisions. The reliance interest has relatively low weight in this field. Thus, for example, a person purchasing a real property after having conducted comprehensive examinations pertaining to the property's zoning status cannot argue that his reliance on the existing condition should serve as a barrier against a modification of the plans that are applicable there. Does the case of the quarry and the plan justify changing the administrative decision? Our answer to this question is affirmative, since specific changes occurred in the information and we will make do with mentioning two: a) In the past, a quarry in an area of approximately 700 acres was deliberated, whereas we are now dealing with a quarry in an area of approximately 300 acres. It appears that such a change has various ramifications, *inter alia*, in all that pertains to the environment. b) The plan to build the quarry incorporates a flood-water reservoir for purposes of infiltration thereof into ground water. Namely, the updated plan has an additional benefit which did not exist in the previous proposal. Also without the aforesaid changes, it may have been possible to make a decision with regard to the advancement of the quarry's Plan, in view of a renewed evaluation of the risks of injury to the environment. We therefore find that the later decisions to advance the Plan were not flawed, although they contradicted the previous decisions of the Mining and Excavation Committee.

5. The decision with regard to depositing the plan determined that the deposit shall be performed subject to conditions, the essence of which we have mentioned (see paragraph 2 above). According to the claim, the aforesaid decision has no force and effect because the conditions deliberated therein are material conditions and

therefore a deposit cannot be approved, so long as such conditions are not brought before the planning institution that decided on a deposit. Conversely, the Respondents argue that the Petitioners missed the chance to raise the aforesaid argument. Their argument is as follows: the decision on the deposit under conditions was adopted in June 2001. The decision to dismiss the contestations was issued in July 2003. The petitions were filed several months thereafter. Therefore, thus the Respondents argue further, the objection to the administrative decision to deposit the plan should not be accepted, since the petition against it should have been submitted shortly after June 2001. To us, this answer appears problematic. It is possibly that if a petition against the decision to deposit the Plan under conditions had been filed a short time after the making thereof, the petitioner would have been told that he is acting hastily and that he should first submit a contestation. But, if the contestation will be rejected, he will also be able to complain against the decision to deposit under conditions. However, there is no room to accept the Petitioners' argument for other reasons. It transpires that the conditions on which the deposit was conditioned were included in the deposited plan when the same was made available for the public's inspection (this arises from the decision to dismiss the contestations (Exhibit 24, page 10, of Shafir's response)). The purpose of the deposit is to bring the language of the proposed plan, including all of the details thereof, to the public's knowledge. All this in order to allow to submit contestations (HCJ 288/00 *Adam Teva V'Din-Israel Union For Environmental Defense v. The Minister for Internal Affairs, Piskei Din* 55(5), 673, 691). Once it transpired that the conditions on which the deposit was conditioned were indeed fulfilled, and included in the announcement on the deposit, there are no grounds to challenge the mere decision to deposit under conditions. Even if the conditions were material, potential objectors were given the possibility to know what they were about. Hence, they were entitled to object to the conditions on the merits thereof. In other words, the Petitioners were not prejudiced pursuant to the decision to deposit under conditions.

Although the Planning and Building Law, 5725-1965 (the ""**Law**") does not apply in the Judea and Samaria region, it is appropriate to mention the provisions thereof in all that pertains to the deposit of a plan under conditions. Article 86 of the Law includes an arrangement in this matter. There is no need to delve into the details of the provisions. It is sufficient if we note that it is clear from the statements there, that there is no hindrance to make a decision that a plan will be deposited under conditions. This is called for by the mere fact that these are matters which require complex rulings with many ramifications whilst often numerous bodies, with conflicting interests, are involved. Of course, the more the planning proceeding progresses pursuant to the plan's deposit, less justification is found for changes in the plan, because of the fear from prejudicing various persons who saw no need to contest the plan as the same was deposited. On the other hand, it should be recalled that a contestation to the plan may, in itself, cause a change in the plan, and will not necessarily prevent the approval thereof. It is impossible that each and every change pursuant to the acceptance of a contestation will require a re-opening of the planning procedure from the start thereof (see and compare Article 106(b) of the Law as well as HCJ 189/74 *Bruno v. The District Zoning Committee, Jerusalem, Piskei Din* 29(1) 492, 496). The primary question in each case of change is, will we prevent, pursuant thereto, a potential injured party from bringing his contestation before

the authority. As aforesaid, upon the deposit the required conditions were indeed included in the Plan and therefore the argument in this matter should be rejected. Furthermore, the conditions upon which the deposit was conditioned toughened the Plan's requirements with regard to the environment and other such matters. The toughening of the requirements certainly did not prejudice the Petitioners, but rather, took steps in their direction (although in their view, the Plan is altogether unacceptable).

6. The next argument which requires inspection is that the building of a quarry contradicts the Hague Regulations pertaining to belligerent occupation. According to the Petitioners, according to the rules of international law, a state which is in an area that is subject to belligerent occupation is not entitled to utilize the local resources for its own benefit. This claim is based on Regulation 55 of the Hague Regulations. This Regulation determines that the state which controls another area, from a military aspect, may administrate and generate fruit from (administrator and usufruct) public buildings, real estate, forests and agricultural works (see G. Von Glahn *The Occupation of Enemy Territory-A Commentary on the Law and Practice of Belligerent Occupation* (Minneapolis, 1957) p. 176-177). Based on this it is argued that the building of a quarry is not consistent with the limited permit to administer and generate fruit.

   It should be noted that although the aforesaid terms of administrating and generating fruit do not include sale, they do not preclude rent, lease or cultivation (HCJ 285/81 *El Nazer v. The commander in Judea and Samaria, Piskei Din* 36(1) 701, 704 opposite the letter F). The question can be asked, are excavation acts are included in the scope of generating fruit? Seemingly, this is not so, because use is made of a resource in a manner that is depleting it. Also if this is the case, the prohibition does not apply where an act that is performed for the benefit of the local population or for local needs is concerned. So for example, road building within the area that is under belligerent occupation is allowed when the persons using it are also local inhabitants (HCJ 393/82 *Askan v. The commander of the IDF forces in the Judea and Samaria region, Piskei Din* 37(4) 785 (the "**Askan Case**"), 795, 811). It shall be mentioned that it has already been ruled that the settlers too may be deemed as local population (in one case the inhabitants of Qiryat Arba were mentioned when a question arose pertaining to the provision of electricity to the local population: HCJ 256/72 *The Electricity Company for the Jerusalem District Ltd. v. The Minister of Defense, Piskei Din* 27(1) 124, 138). An additional datum that projects on the entire treatment and the applicability of the rules of customary international law is the length of the period in which the area is under belligerent occupation. The accepted rules developed against the background of various wars which led to the belligerent occupation lasting a relatively short period of time. In the case of very long periods of time there appears to be a justification to acknowledging that the occupying state is entitled to make moves which can have a long term effect on the area which is under belligerent occupation (the *Askan* Case; and also see HCJ 337/71 *Aljamaiah v. The Defense Minister, Piskei Din* 26(1) 574, 582; For a discussion on long term belligerent occupation see E. Benvenisti *The international law of occupation* (Princeton, 1993) p. 146-148). From the decision of the Contestations Committee and from the material that was presented by Shafir it arises that the output of the quarry will also serve for work within the

boundaries of Judea and Samaria. Therefore, the Petitioners' argument that is based on international law should not be accepted.

7. The Petitioners raised various different arguments against the dismissal of their objection to the Plan. It appears that the real problem bothering them is the fear from the prejudice to the quality of life of the inhabitants living in the proximity of the site where a quarry will be built. And indeed, their fears can be understood. The activity of a quarry creates hazards of noise, pollution and dust. The settlement Nili is located at a distance of 1,000 meters from the border of the excavation and approximately 700 meters from the area which will be affected by the quarry. The settlement Naale is located at a greater distance. In the deliberations which were conducted over the years since Shafir first initiated the building of the quarry, the fear from prejudicing the environment repeatedly came up. The settlements Nili and Naale objected to the building of the quarry the entire time. Pursuant to their objection and with their consent, the Regional Council decided in 2002 to ask that an additional review be prepared on the subject of the anticipated effects of the quarry on the quality of life in the settlements. Such a review was submitted in May 2002. From a summary of the review it arises that if the guidelines and the recommendations that are included therein will be implemented, no material change is expected in the quality of the air and in the noise levels in the two settlements. In a decision of the Contestations Committee in which it was decided to dismiss the contestations, conditions and guidelines were set forth according to the statements in the review. Hence, and since the court does not act as a supreme planner, the last argument should also be dismissed (HCJ 102/52 *Organization of owners of plots across the Yarkon v. The Minister for Internal Affairs, Piskei Din* 6 827, 829; The *Askan* Case, on p. 811; HCJ 2324/91 *The Movement for Quality Government in Israel v. The National Zoning Council, The Ministry for Internal Affairs, Piskei Din* 45(3) 678, 688; C.A. 5927/98 *Bahos v. The Local Zoning Committee, Piskei Din* 57(5) 752, 760).

8. [sic] Therefore the petitions are denied. Each one of the Petitioners shall bear legal fees in the sum of NIS 10,000 to the credit of the Mining and Excavation Committee and the Contestations Committee (together) and in the same sum to the credit of Shafir.

Justice E. Rivlin:

I agree.

Justice A. Procaccia:

I agree.

Decided as stated in the judgment of Justice A. Grunis.

Issued today, 25 Sivan 5764 (14 June 2004).