THE DEVELOPMENT PLANNING ACT, 2016 –
A CRITICAL APPRAISAL

A Dissertation presented by Robert Musumeci in part-fulfilment of the requirements for the obtaining of the degree of Doctor of Laws.
Faculty of Laws, University of Malta.

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ANNEX D

UNIVERSITY OF MALTA

FACULTY OF LAW

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Abstract

This thesis takes as its starting point the May 2014 document entitled ‘For an efficient Planning System – A Consultation Document’,¹ which document provided the foundations for the prospective ‘demerger’ of the Malta Environment and Planning Authority (MEPA), proposing that the ‘planning regime’ within the then current MEPA would be regulated by a new Planning Authority which would handle both building² and sanitary matters.³ In parallel, the Environment Directorate within the MEPA was destined to be elevated to an autonomous Authority, today known as the Environment and Resources Authority. The envisaged proposals further provided for the setting up of an Environment and Planning Review Tribunal under separate legislation, whose mandate was to hear and determine appeals from decisions taken by both Authorities.

In July 2015, the Development Planning Bill (hereinafter also referred to as ‘2015 Planning Bill’ or ‘Planning Bill’), the Environment Protection Bill together with the Environment and Planning Review Tribunal Bill (hereinafter also referred to as ‘2015 Tribunal Bill’ or ‘Tribunal Bill’) were published and, after extensive parliamentary debating, became law. In this thesis the author considers the legal ramifications consequential to the promulgation of the Development Planning Act, 2016 and the Environment and Planning Review Tribunal Act, 2016. In essence, this study focuses on the administrative setup of the new Planning Authority, the permitting process and the new Environment and Planning Review Tribunal.

Keywords: Planning, Development, Permits, Policies

²The functions of the Building Regulations Board and the Building Regulations Office continue to be regulated by the Building Regulations Act (Chapter 351 of the Laws of Malta) until the Minister so decides by virtue of Article 35(5) of the Development Planning Act, 2016.
³Sanitary rules and regulations concerning buildings were previously found in Part V of the Code of Police Laws (Chapter 10 of the Laws of Malta).
Dedicated to my dear partner Consuelo for her continued support and dedication shown towards me in the attainment of my Doctorate of Laws
### Table of Contents

Abstract ........................................................................................................................................... 3  
Table of Contents ........................................................................................................................... 5  
Abbreviations ................................................................................................................................. 8  
Case Law ....................................................................................................................................... 10  
  - Cases decided by the Planning Appeals Board ................................................................. 10  
  - Cases decided by the Environment and Planning Review Tribunal ........................................ 11  
  - Cases decided by the Court of Appeal (Inferior jurisdiction) ..................................................... 13  
  - Cases decided by the First Hall, Civil Court ................................................................................ 16  
Table of Laws ................................................................................................................................ 17  
  - Maltese Legislation - Acts .......................................................................................................... 17  
  - Maltese Legislation - Bills ........................................................................................................... 18  
  - European Union Legislation ....................................................................................................... 18  
Parliamentary Debates .................................................................................................................. 19  
Acknowledgments .......................................................................................................................... 20  
Introduction .................................................................................................................................. 21  
  1 General ........................................................................................................................................ 21  
  2 Statement of research questions ................................................................................................. 22  
  3 Thesis Structure ......................................................................................................................... 23  
  4 Method of research ..................................................................................................................... 24  
Chapter 1: Scope, Functions, Boards and Committees ................................................................. 25  
  1.1 Introduction ............................................................................................................................... 25  
  1.2 The Planning Authority ............................................................................................................ 26  
  1.3 The Executive Council ............................................................................................................ 29
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.3.1</td>
<td>The Executive Chairperson</td>
<td>34</td>
</tr>
<tr>
<td>1.4</td>
<td>The Planning Board</td>
<td>36</td>
</tr>
<tr>
<td>1.5</td>
<td>Does separation of powers really exists?</td>
<td>40</td>
</tr>
<tr>
<td>1.6</td>
<td>The Planning Commissions</td>
<td>42</td>
</tr>
<tr>
<td>1.7</td>
<td>Other Committees</td>
<td>43</td>
</tr>
</tbody>
</table>

Chapter 2: Permitting and enforcement .......................................................... 46

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1</td>
<td>What is development?</td>
<td>46</td>
</tr>
<tr>
<td>2.2</td>
<td>Developments specifically exempted from the need to obtain a permit</td>
<td>47</td>
</tr>
<tr>
<td>2.2.1</td>
<td>Maintenance Operations</td>
<td>47</td>
</tr>
<tr>
<td>2.2.2</td>
<td>Use of land for agriculture, animal husbandry and forestry</td>
<td>48</td>
</tr>
<tr>
<td>2.2.3</td>
<td>Change of use within the same use class order</td>
<td>49</td>
</tr>
<tr>
<td>2.2.4</td>
<td>Pre 1967 Developments</td>
<td>50</td>
</tr>
<tr>
<td>2.2.5</td>
<td>Display of advertisements</td>
<td>51</td>
</tr>
<tr>
<td>2.2.6</td>
<td>Development Orders</td>
<td>52</td>
</tr>
<tr>
<td>2.3</td>
<td>Types of permissions</td>
<td>52</td>
</tr>
<tr>
<td>2.3.1</td>
<td>Outline Development Permissions</td>
<td>52</td>
</tr>
<tr>
<td>2.3.2</td>
<td>Full Development Permissions</td>
<td>55</td>
</tr>
<tr>
<td>2.3.3</td>
<td>Non Executable Permissions</td>
<td>56</td>
</tr>
<tr>
<td>2.3.4</td>
<td>Regularization Permits</td>
<td>57</td>
</tr>
<tr>
<td>2.4</td>
<td>Owner consent</td>
<td>58</td>
</tr>
<tr>
<td>2.5</td>
<td>Determination of planning permits</td>
<td>60</td>
</tr>
<tr>
<td>2.6</td>
<td>Revocation of permits</td>
<td>68</td>
</tr>
<tr>
<td>2.7</td>
<td>The removal of the Sixth Schedule</td>
<td>70</td>
</tr>
</tbody>
</table>

Chapter 3: The Environment and Planning Review Tribunal........................................ 75

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.1</td>
<td>General</td>
<td>75</td>
</tr>
<tr>
<td>3.2</td>
<td>An ad hoc Tribunal</td>
<td>76</td>
</tr>
<tr>
<td>3.3</td>
<td>Functions of the Tribunal</td>
<td>78</td>
</tr>
<tr>
<td>3.4</td>
<td>Composition of the Tribunal</td>
<td>80</td>
</tr>
<tr>
<td>3.5.1</td>
<td>New powers enjoyed by the EPRT</td>
<td>86</td>
</tr>
<tr>
<td>3.6</td>
<td>Who and when one may appeal</td>
<td>88</td>
</tr>
</tbody>
</table>
3.6.1 Instances when applicants may appeal ................................................................. 88
3.6.3 Special rights enjoyed by the Attorney General .................................................. 95
3.6.4 Powers which were intended to be given exclusively to Environmental Non Government Organizations (eNGOs) .............................................................. 96
3.6.5 Special Powers enjoyed by the Superintendent of Cultural Heritage .................. 97
3.6.6 Cumulative Appeal .............................................................................................. 98
3.7 Principles of good administrative behavior .......................................................... 99
3.7.1 The first principle of good administrative behaviour – fair hearing .................... 100
3.7.2 The second principle of good administrative behaviour – timely decisions .......... 103
3.7.3 The third principle of good administrative behaviour – procedural equality ........ 107
3.7.4 The fourth principle of good administrative behaviour – availability of information .... 107
3.7.5 The fifth principle of good administrative behaviour – evidence admitted to be available .......................................................... 108
3.7.6 The sixth principle of good administrative behaviour – Tribunal in a position to examine all factual and legal issues .............................................................. 109
3.7.7 The seventh principle of good administrative behaviour – deliberations open to the public .......................................................... 109
3.7.8 The eighth principle of good administrative behaviour – duty to give reasons .......... 110
3.8 Time to submit an appeal ...................................................................................... 110
3.9 Appointment of experts ......................................................................................... 112
3.10 Power to make corrections .................................................................................... 112
3.11 The role of the Court of Appeal (Civil Jurisdiction) ............................................... 113

Chapter 4: Conclusive remarks .................................................................................. 118
4.1 Reconsideration of research questions .................................................................. 118
4.2 Evaluation of thesis ............................................................................................... 118
4.3 Areas for further analysis ...................................................................................... 123

Appendix A: Cases linked to Chapter 2 ...................................................................... 126
Appendix B: Cases linked to Chapter 3 ........................................................................ 137
Bibliography ............................................................................................................... 144
Abbreviations

AAC – Agriculture Advisory Committee

AG- Attorney General

ART – Administrative Review Tribunal

COCP – Code of Organization and Civil Procedure

DAC – Design Advisory Committee

DC15- Planning and Design Guidance, 2015

ECF – Enforcement Notice

EIA – Environment Impact Assessment

eNGOs – Environmental Non Government Organisations

EPDA – Environment and Planning Development Act

EPRT – Environment and Planning Review Tribunal

ERA – Environment Resources Authority
EU – European Union

GRTU – General Retailers and Traders Union

GSB – General Services Board

IPPC – Integration Pollution and Prevention Control

LN – Legal Notice

MEA – Malta Environment Authority (the Environment and Resources Authority was initially to be known as Malta Environment Authority)

MEPA- Malta Environment and Planning Authority

MTA – Malta Tourism Authority

NGOs – Non Government Organisations

ODZ – Outside Development Zone

PA – Planning Authority

SCH – Superintendence of Cultural Heritage

SEO – Sanitary Engineering Officer
Case Law

Cases decided by the Planning Appeals Board


Anthony Borg et nomine vs l-Kummissjoni ghall-Kontroll ta’ l-Izvilupp, decided on 18th April 1997 by the Planning Appeals Board. [Ap. No. 102/94 KA]

Charles Bugeja vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 19th July 2000 by the Planning Appeals Board. [Ap. No. PAB 627/98 SMS. PA 0656/98]

Biagio Muscat vs l-Kummissjoni ghall-Kontroll ta’ l-Izvilupp decided on 2nd March 2001 by the Planning Appeals Board. [Ap. No. 224/00 KA. PA 952/00]


Dr. Gerard Spiteri Maempel vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza l-Avukat Dottor Joseph Zammit Maempel LL.D decided on 22nd October 2003 by the Planning Appeals Board. [Ap. No. PAB 393/02 TSC. PA 0598/02]

Savio Spiteri vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 25th July 2008 by the Planning Appeals Board. [Ap. No. 222/04 ISB. PA 6293/01]

Kunsill Lokali Xewkija vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 24th July 2009 by the Planning Appeals Board. [Ap. No. PAB 46/06 ISB. PA 6039/05]
Cases decided by the Environment and Planning Review Tribunal


Grezzju Zahra vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 7th February 2012 by the Environment and Planning Review Tribunal. [Ap. No. 207/09 CF. PA 3907/06]


OSA Services Ltd vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 14th November 2013 by the Environment and Planning Review Tribunal. [Ap. No. 177/13 MS. ECF 408/12]


Cases decided by the Court of Appeal (Inferior jurisdiction)

Louise Anne Sultana vs Kummissjoni ghall-Kontroll ta’ l-Izvilupp decided on 14th April 1997 by the Court of Appeal (Inferior Jurisdiction).

Ġustu Debono vs Emanuel Buħaġiar, decided on 21st October 2002 by the Civil Court of Appeal.

Joseph Attard vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 28th October 2002 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 13/01]


George Attard vs L-Awtorita`ta` Malta dwar l-Ambjent u l-Ippjanar decided on 26th June 2012 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 51/2011]


Roger Vella vs L-Awtorita` ta` Malta dwar l-Ambjent u l-Ippjanar decided on 29th November 2012 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 7/2012]

Carmel Gauci vs L-Awtorita` ta` Malta dwar l-Ambjent u l-Ippjanar decided on 4th December 2013 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 28/2013]

Frans Mamo vs L-Awtorita` ta` Malta dwar l-Ambjent u l-Ippjanar decided on 4th December 2013 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 193/2012]

Martin Baron vs L-Awtorita` ta` Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Mario Farrugia f`isem il-Fondazzjonji Wirt Artna decided on 22nd January 2014 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 54/2013]

June Laferla vs L-Awtorita` ta` Malta dwar l-Ambjent u l-Ippjanar decided on 26th March 2014 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 36/2013]

Rebecca Darmanin Kissaun vs L-Awtorita` ta` Malta dwar l-Ambjent u l-Ippjanar decided on 26th March 2014 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 47/13]

Emanuel Formosa vs L-Awtorita` ta` Malta dwar l-Ambjent u l-Ippjanar decided on 26th June 2014 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 82/2013]

Anne Marie Agius vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 12\textsuperscript{th} November 2014 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 71/2013].


Angiolina Buttigieg vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 11\textsuperscript{th} December 2014 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 15/2014]

Michael Axisa ghas-socjeta Lay Lay Co. Ltd vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 14\textsuperscript{th} January 2015 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 44/2013]

Mary Psaila vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 26\textsuperscript{th} March 2015 by the Court of Appeal (Inferior Jurisdiction). [Ap. No.6/13]

Joseph Apap, Carmelo Zammit, John Attard, Rita Fenech vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Maria Debattista ghan-nom ta’ Tourist Services Limited Franco Debono vs l-Awtorita’ ta’ Malta dwar l-Ambjent decided on 9\textsuperscript{th} July 2015 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 16/15]

Franco Debono vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Carmelo Borg decided on 5\textsuperscript{th} November 2015 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 42/15]

Pasquale Catuogno vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 10\textsuperscript{th} December 2015 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 45/2015]
Cases decided by the First Hall, Civil Court

Bunker Fuel Oil Company Ltd vs Paul Gauci et., decided on 6th May 1998 by the First Hall, Civil Court.

Decree given on 29th December 2016 by the First Hall, Civil Court in the Acts of the Warrant of Prohibitory Injunction in the names of Jonathan Buttigieg vs L-Awtorita’ ta’ Malta dwar l-Ambjent u Ippjanar. [46/2016 AE]
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- Chapter 9 of the Laws of Malta – Criminal Code
- Chapter 12 of the Laws of Malta – Code of Organization and Civil Procedure
- Chapter 356 of the Laws of Malta - Development Planning Act
- Chapter 413 of the Laws of Malta – Equal Opportunities (Persons with Disability) Act
- Chapter 490 of the Laws of Malta – Administrative Justice Act
- Chapter 504 of the Laws of Malta - Environment and Development Planning Act
- Chapter 513 of the Laws of Malta – Building Regulation Act
- Chapter 551 - Environment and Planning Review Tribunal Act, 2016
- Chapter 552 of the Laws of Malta – Development Planning Act, 2016
- Legal Notice 74 of 2014 - Environment and Development Planning Act (Cap. 504) - Development Planning (Use Classes) Order
Maltese Legislation - Bills

Bill entitled Development Planning Act, 2015 – Published July 2015

Bill entitled The Environment and Planning Review Tribunal Act, 2015 – Published July 2015

Bill entitled Development Planning (Health and Sanitary) Regulations, 2016 – Published April 2016

Bill entitled Development Planning (Procedure for Applications and their Determination) Regulations, 2016 – Published April 2016

European Union Legislation

Regulation No. 347/2013/EU on Guidelines for trans European energy infrastructure
Parliamentary Debates

Sitting No. 97 held on 27th April 1988. House of Representatives, Malta.
Sitting No. 287 held on 8th July 2015. House of Representatives, Malta.
Sitting No. 292 held on 17th July 2015. House of Representatives, Malta.
I would like to thank my supervisor Dr. Ivan Mifsud (LL.D.,Ph.D.) who was of great inspiration. My heartfelt thanks also go to the Dean of the Faculty of Laws, Prof. Kevin Aquilina, for his constant feedback during the course of this study.
Introduction

1 General

The Environment and Protection Act (Act V of 1991) was a first attempt to codify previous fragmented environmental legislation under one umbrella. The said Act specified the duties of the Minister responsible for the environment and *inter alia* dealt with legal provisions relating to toxic substances, noise, energy control, environmental impact assessments and other supplementary provisions. The following year, Parliament enacted what was considered to be the first major step towards consolidating fragmented pieces of outdated planning legislation at the time - the Development Planning Act (Act I of 1992) which was modelled to a large extent on Sir Desmond Heap’s Town and Country Planning Act, 1969. Act I of 1992 repealed the Building Development Areas Act (1983), then described as the ‘chief culprit legislation which brought about the sporadic proliferation of buildings throughout Malta’. The Aesthetics (Buildings) Ordinance, the Building Permits (Temporary Provisions) Act as well as parts of the Code of Police Laws were concurrently repealed. Act I of 1992 also signified the shifting of the Minister’s powers, who until then was responsible for the issuing of building permits, to an ‘independent’ Authority. Shortly after, the ‘independence’ of the Planning Authority started to be questioned by commentators who considered the introduction of certain legal amendments in subsequent years, particularly in 1997 and 2001, as a return of ‘ministerial intervention’.

The year 2001 saw the consolidation of Act I of 1992 and Act V of 1991 into one piece of legislation - Act VI of 2002. At this juncture, the Malta Environment and Planning Authority (MEPA) was set up with the primary role to oversee both planning and environmental matters. Subsequently, in 2008, the Nationalist administration resolved to undertake a ‘reform’ in the MEPA directed towards more consistency and transparency in the development application

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4 Sitting No. 97 held on 27th April 1988 - House of Representatives, Malta. Parliament discussed a motion to revoke a declaration of 18th June 1985 which declared various sites in Malta as building development area.
process together with the strengthening of the enforcement arm within the same Authority. The Environment and Development Planning Act (Act X of 2010 - Chapter 504 of the Laws of Malta) was in fact enacted through Parliament in 2010, bringing about a number of administrative changes within the MEPA. The salient changes included the setting up of four independent Directorates (the Planning, Environment, Enforcement and Corporate Services Directorates), the creation of a Chief Executive Officer, the introduction of full time Environment and Planning Commissions including also the setting up of an Environment and Planning Review Tribunal which succeeded the Planning Appeals Board.

In the run up to the 2013 general elections, the Labour opposition pledged that once it is elected, the MEPA would be ‘demerged’ so that the planning and the environment regime would then be migrated under the auspices of two separate Authorities. The publication of the 2015 Planning Bill, the Environment Protection Bill and the 2015 Tribunal Bill in July 2015 were followed by an intense discussion and the relative laws were eventually enacted by Parliament towards the end of that same year.

2 Statement of research questions

In this thesis, the following questions are addressed:

• What are the main changes brought about by the new legislation?
• How do the said changes reconcile with the aims of the legislator?
• How do these changes ‘interact’ with established case law?
• To what extent do these changes reflect the public’s criticism in furtherance to the published Bills?
• Could the legislative product be better?
3 Thesis Structure

This thesis is divided into three chapters followed by conclusions. Chapter One explains the administrative set up of the new Planning Authority. The Executive Council and the Planning Board are discussed along with their respective mandate and composition. Particular attention is given to the role of the Executive Chairperson who now heads the Executive Council. Further on, the author delves into the role of the Planning Commission, which took over the role of the previous Environment and Planning Commission. Finally, this chapter deals with the Agriculture Advisory Committee and the Design Advisory Committee, both committees being novel to local legislation.

In Chapter Two, the focus is shifted on the permitting process. Those developments which are today exempted from the prior need of obtaining a planning development permission are first highlighted. The discussion then shifts on the different types of planning development permissions available under the new legal regime. The idea to remove the need for applicants to obtain the owner’s consent at the outset of the application, eventually aborted by Parliament, is also discussed. Emphasis is then shifted on the rules governing the development permission decision process. Finally, this chapter deals with revocations along with the legal effects following the removal of the Sixth Schedule previously found in earlier legislation.

Chapter Three concentrates on the Environment and Planning Review Tribunal, now found in the Environment and Review Tribunal Act, 2016. The role and composition of the Tribunal are discussed in detail whilst the author examines the jurisdiction enjoyed by the new Tribunal as well as the instances when an appeal may be lodged thereto and from a decision therefrom. Further on, this chapter focuses on the principles of good administrative behaviour, now clearly identified in the said Act. The final part of this chapter is dedicated to the workings of the Tribunal and the role of the Court of Appeal (Inferior Jurisdiction) in relation to Tribunal decisions.

In each and every chapter, the research questions are constantly revisited and elaborated on.
The last chapter consists of a conclusion which outlines the envisaged impact resulting from an analysis of the previous three chapters.

It should be noted that a number of equally relevant topics, also touched upon by the new legislation, were not tackled in this thesis since the maximum word count was set to 35,000 words as per Faculty of Laws regulations.

4 Method of research

In conducting this research, the author made particular reference to the parliamentary debates which preceded the Development Planning Act, 2016 and the Environment and Planning Review Tribunal Act, 2016, established case law, authoritative text books, academic articles and the public’s criticism consequent to the publication of the Bills.

This thesis states the position on the 4th April 2016.

6Topics which were not dealt with in this thesis include the following: New powers enjoyed by the Minister, changes in enforcement procedures, changes in the procedures regulating approval of plans and policies and the elimination of mediators and various committees previously found in the Environment and Development Planning Act.

7The day on which the new Planning Authority was established.
Chapter 1: Scope, Functions, Boards and Committees

1.1 Introduction

The Development Planning Act, 2016 (also referred to as ‘new Planning Act’ or ‘2016 Planning Act’), the Environment Protection Act, 2016 (also referred to as ‘new Environment Protection Act’) together with the Environment and Planning Review Tribunal Act, 2016 (also referred to as ‘Tribunal Act’) repealed the previous Environment and Development Planning Act.\(^8\)

Article 3 of the new Planning Act puts the onus on government ‘to enhance the quality of life for the benefit of the present and future generations, without compromising the ability of future generations to meet their own needs, through a comprehensive sustainable land use planning system.’ To achieve this aim, Part II of the said Act sets out six principles,\(^9\) described as ‘fundamental to the Government of Malta’. The following Article states that these principles are ‘not directly enforceable’ in a Court of Law but should nonetheless be ‘employed in the interpretation’ of the Act.\(^10\)

On the other hand, the Environment Protection Act, 2016 aims ‘to protect the environment and to assist in the taking of preventive and remedial measures to protect the environment and manage natural resources in a sustainable manner.’\(^11\)

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8Chapter 504 of the Laws of Malta - The Environment and Development Planning Act.
9The six principles, found under Article 3 of the Development Planning Act, 2016, are as follows:
(a) to preserve, use and develop land and sea for this and future generations, whilst having full regard to environmental, social and economic needs;
(b) to ensure that national planning policies are unambiguous, accessible and clear to the general public;
(c) to deliver regular plans in accordance with the needs and exigencies from time to time;
(d) to identify regional planning shortcomings and address any problems found in relation thereto;
(e) to apply scientific and technical knowledge, resources and innovation for the effective promotion of development planning;
(f) to consider public values, costs, benefits, risks and uncertainties involved when taking any decisions.’
Consequently, the new Planning Act is concerned with the use of the land whereas the new Environment Protection Act deals primarily with the management of our environment and natural resources. Simply said, the responsibilities previously assumed by a single Authority – the Malta and Environment Planning Authority (the MEPA) – will henceforth be handled by two Authorities which shall work independently from each other, namely the Environment and Resources Authority and the Planning Authority.

1.2 The Planning Authority

Article 5 of the Development Planning Act, 2016 provides that ‘the Planning Authority shall consist of the Executive Council and the Planning Board’. The Executive Council and the Planning Board are vested with different functions and their respective roles are highlighted in Articles 38 and 64 of the Act.

The new Planning Authority was designed ‘to perform and succeed to the functions which were previously assigned to the Malta Environment and Planning Authority’ in as far as planning legislation is concerned. At the same time, the scope of the Authority was widened to embrace new functions. Indeed, ‘the functions which were previously assigned to the Building Regulation Board and the Building Regulation Office under the provisions of the Building Regulation Act’ have now been also assigned to the new Planning Authority though at Committee stage, Parliament decided that such functions ‘shall only come into force from such dates as may be established by notice in the Gazette, as prescribed by the Minister.’ This signifies that building regulations are still temporarily governed by the Building Regulations Act.

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12 Article 7(2)(a) of the Development Planning Act, 2016.
14 Article 35(5) of the Development Planning Act, 2016 states that ‘The provisions of Articles 33(2)(c), 38(1)(a), 62, 64 (1)(b), (c), (d) and (e), 77(4), 86, 87, 88, 89, 90, 91 and 92 shall come into force from such dates as may be established by notice in the Gazette, as prescribed by the Minister.’
15 Chapter 513 of the Laws of Malta – Building Regulation Act.
On the other hand, the new Planning Authority immediately took over the role of the General Services Board, in so far as sanitary regulations previously found in Part V of the Code of Police Laws are concerned. This is possible now since the Development Planning Act, 2016 confers upon the Minister or Parliamentary Secretary under whose portfolio the Planning Authority is included with a power to make regulations, *inter alia* providing for any ‘sanitary’ matter\(^{16}\) and concurrently he may also ‘amend, substitute or repeal any of the provisions of Part V of the Code of Police Laws…. by order in the Gazette’ without the need to go to Parliament.\(^{17,18}\)

Indeed, the Development Planning (Health and Sanitary) Regulations, 2016\(^{19}\) shall eventually replace the corresponding provisions in the Code of Police Laws. Certainly, the new sanitary regulations are considered to mark a step forward in our planning system for different reasons. First of all, sanitary regulations were long overdue, some of which dated back to the nineteenth century. Moreover, the new regulations respond better to today’s socioeconomic realities, making use of ‘recognized standards as established from time to time’\(^{20}\) while having regard to technological advancements such as mechanically automated ventilation systems.\(^{21}\) Another positive aspect to this change is that unlike what previously happened, the development application process need no longer be stalled until a controversy on sanitary matters is settled before the General Services Board because such sanitary issues are now dealt straightaway by the Planning Authority with reservation to an eventual appeal before the Environment and Planning Review Tribunal should the need arise.

\(^{16}\) Article 85(2)(e) of the Development Planning Act, 2016.
\(^{17}\) Article 93(1) of the Development Planning Act, 2016.
\(^{18}\) Article 61(2)(o)(i) of the Environment and Development Act already provided the Minister with the power to ‘regulate buildings and the construction, demolition or alteration thereof, as well as any other matter relating thereto, taking account of all relevant considerations, including safety, aesthetics, health, environment and sanitation’. Therefore, the Minister could possibly enact sanitary regulations under previous legislation, even though such power was never utilized.
\(^{19}\) Bill entitled Development Planning (Health and Sanitary) Regulations, 2016 – Published April 2016.
\(^{20}\) Article 10(1) of the Bill entitled Development Planning (Health and Sanitary) Regulations, 2016 – Published April 2016.
\(^{21}\) Article 18 of the Bill entitled Development Planning (Health and Sanitary) Regulations, 2016 – Published April 2016.
The new Planning Authority will assume another role which, pending the introduction of the Development Planning Act, 2016, has been alien to our legal system. Today, the Authority has a role to ‘facilitate and coordinate the permit granting process for projects of common interest’. These ‘projects of common interest’ are rooted in Regulation (EU) No 347/2013 which in April 2013 was included to form part of the so called Energy Infrastructure package previously proposed by the European Commission in October 2011. The said Regulation is *inter alia* aimed to promote accelerated licensing procedures regarding the provision of electricity interconnections and gas pipelines that connect an EU Member State to an Energy Community Contracting Party. In fact, Article 8 of the said Regulation committed all EU Member States, including the Maltese Government, to ‘designate one national competent authority which shall be responsible for facilitating and coordinating the permit granting process for projects of common interest’ by not later than 16th November 2013. Consequently, as a result, the Planning Authority was identified in the 2015 Planning Bill as the ‘competent authority’ to this effect. During public consultation which was triggered following the publication of the 2015 Planning Bill, the Kummissjoni Interdjocesana Ambjent maintained that “facilitating and granting permits at the same time points to a confusion of roles and functions which would lead to abuse.” On the same subject, planning consultant Dr. John Ebejer stated that “the role of the Planning Authority is to process applications for development and not to ‘facilitate’ any ‘permit granting’”. At Committee stage, the Hon. Marlene Farrugia eventually moved an amendment to delete draft Article 7(2)(d) altogether and introduce the text ‘to safeguard the common good and to ensure that permits issued for land development are so issued in the

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24 Article 8 of Regulation (EU) No. 347/2013 which relates to organization of the permit granting process.
interests for the whole community’. But still, the Hon. Farrugia lost sight of the principal purpose behind the said Article and came up with no alternative as to who should instead oversee such role. Naturally, the said amendment would have eliminated the possibility for government to meet the obligations set out in Regulation (EU) No 347/2013 and this latter amendment failed to make it through the final Act. The author is of the firm opinion that no one else but the Planning Authority is equipped with the necessary resources to ‘organize the permit granting process’. The alternative, which however would have made little sense in the circumstances, was to set up another ‘competent authority’ in keeping with the obligations of the said Regulation.

1.3 The Executive Council

Part V of the Development Planning Act, 2016 is dedicated entirely to the Executive Council. The various functions of the Executive Council are listed in Article 38(1) of the current Act and include inter alia the provision of a centralized office where all development applications are duly processed by case officers and recommended for either approval or refusal. The Council is also responsible for the carrying out of national mapping together with street alignments/levels. The said roles were previously assumed by the Planning Directorate within the MEPA. Moreover, the Council handles the coordination of enforcement complaints and enforcement operations, which functions were previously handled by the Enforcement Directorate.

Although the Executive Council is now directly responsible for the said functions, it is obvious that such functions would still need to be delegated to a duly equipped technical set up. The only difference is that under the previous legislation, the Directorates and their respective functions were specified in the law whereas, under the new Planning Act, the relative Directorates are set up by the Council.
Additionally, the Council has the power to issue discontinuance and removal orders\textsuperscript{27} as well as to issue scheduling and conservation orders.\textsuperscript{28} Plans and policies\textsuperscript{29}, minor modifications including planning control applications\textsuperscript{30} and development orders\textsuperscript{31} are also formulated by the Executive Council. In the past, it was the MEPA Board who was responsible for these functions.

Article 36 of the Development Planning Act, 2016 details the composition of the Executive Council. The Council is headed by an Executive Chairperson appointed by the Minister ‘for a period of three years which may be extended for further periods of three years each’\textsuperscript{32} as envisaged earlier in the Planning Bill. Subsequently, a provision was added at Committee stage so that ‘a member who has ceased to be a member of the Executive Council shall be eligible for reappointment, but no person shall be a member of the Executive Council for more than six years.’\textsuperscript{33} It follows that now the Executive Chairperson can have his initial three year appointment extended only once.

The Executive Chairperson is joined by six other members – the chairperson and deputy chairperson of the Planning Board \textit{ex officio}, two independent members ‘who shall be appointed by the Minister’ and two members appointed by the Environment and Resources Authority. The latter shall only be present ‘whenever the Executive Council is considering matters related to policies, scheduling and planning control applications’. The Superintendent of Cultural Heritage shall be called in when the Council is considering ‘scheduling, conservation orders and emergency conservation orders’.\textsuperscript{34} Moreover, the ‘Executive Council at the discretion of the Executive Chairperson’ may call in any of the observatory members listed in the Fourth Schedule of the Act to participate in any appointed Council meeting.

\textsuperscript{27}Article 56 of the Development Planning Act, 2016.
\textsuperscript{28}Article 57 of the Development Planning Act, 2016.
\textsuperscript{29}Article 41 of the Development Planning Act, 2016.
\textsuperscript{30}Article 63(2) of the Development Planning Act, 2016.
\textsuperscript{31}Article 55 of the Development Planning Act, 2016.
\textsuperscript{32}Article 37(1) of the Development Planning Act, 2016.
\textsuperscript{33}Article 36(5) of the Development Planning Act, 2016.
\textsuperscript{34}Article 36(2) of the Development Planning Act, 2016.
Initially, the 2015 Planning Bill proposed that the independent members would be ‘two permanent members who shall be well versed in matters related to building construction or health and safety or building services’. More so, Dr. John Ebejer had also suggested that these two same members should be “appropriately qualified” and insisted further that the law should establish “the minimum qualifications for such members”. Considering that the Executive Council deals primarily with technical matters, the latter suggestion appears to have been well founded. Having said that, the Act did away with the suggestion that these two members are required ex lege to have any specific expertise and in the final Act, the said members are merely described as ‘independent’. Clearly, this indicates that the legislator wanted to have a wider option as to the eventual appointees.

It is to be noted that the presence of Environment and Resources Authority members on the Executive Council was also the subject of a long debate. The Dean of the Faculty of Laws, Professor Kevin Aquilina, termed the status of these two members as “second class members”. The issue arose due to the fact that Article 36(2) of the 2015 Planning Bill provided that only four of the six members would be ‘permanent members’. Ebejer also questioned whether “the MEA representatives are permanent, supplementary or called in at the whim of the Executive Chairperson” though the Hon. Dr. Michael Falzon had already given an answer in Parliament:

“Fuq dan il-kunsill qed nagħmluħa ċara li se jkun hemm żewġ membri tal-awtorità l-ġdida tal-ambjent. Mhux li se jiġu konsultati okkażjonalment jew at whims and wishes tal-membri l-ohra tal-kunsill eżekuttiv kif hawn min qed jifhem imma se jkun hemm żewġ membri permanenti li jirrappreżentaw lill-awtorità tal-

38Sitting No. 287 held on 8th July 2015 - House of Representatives, Malta.
In order to dispel any doubts as to whether the ERA members would only be “called in at the whim of the Executive Chairperson” as previously thought, Parliament eventually amended Article 36(2)(d), so that it is now more evident that the two ERA members ‘will always be called in and without fail, to attend meetings of the Executive Council by the Executive Chairperson whenever the Executive Council is considering matters related to policies, scheduling and planning control applications’. Clearly, government wanted to convey the message that all planning policies would still be vetted from an environmental point of view during the actual formulation. Nonetheless, it may be equally argued that such ‘assurance’ is open to abuse as it lies in the absolute discretion of the Executive Chairman to decide whether the matters under consideration are related to policies, scheduling or planning control applications.

Furthermore, the 2015 Planning Bill had envisaged the possibility for the Executive Chairperson to call ‘any other supplementary member’ representing any one of the entities listed in the Fourth Schedule of the Act ‘to attend meetings of the Executive Council’. Here, the idea was to also involve other government stakeholders in the actual formulation of planning policies. The Hon. Dr. Michael Falzon quoted the outside catering policy as a test example, which policy was being revisited by an ad hoc committee involving the MEPA, the Lands Authority, the Malta Tourism Authority and Transport Malta. This committee was incidentally set up a few weeks
prior to the current Planning Act was discussed in Parliament and the Hon. Dr. Michael Falzon took the opportunity to explain that the Executive Council would now provide a permanent framework where similar policies may be drawn up with the joint participation of various government stakeholders:


During public consultation, Dr. John Ebejer had underlined that it was not clear “which of the Council Members will have voting rights”, and asked whether the supplementary members would also be given such voting rights. This position was later clarified in the final Article 36(2)(e), which confirmed that the supplementary members who ‘shall be amongst those listed in ‘the Fourth Schedule’ enjoy merely an ‘observatory’ status and therefore are entrusted with no voting powers.

On the same subject, Perit Simone Vella Lenecker positively pointed out that “even with the best of intentions, it may be very easy for the Executive Chairperson to fail to call in members who are affected by a decision or a policy”. Apart from the two ERA members, who ‘will always be called in and without fail’ with a right to vote and the Superintendent of Cultural Heritage

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39Sitting No. 287 held on 8th July 2015 - House of Representatives, Malta.
who, following an amendment at Committee stage, shall ‘always’ be called in as an observatory member ‘when the Executive Council is considering scheduling and conservation orders and emergency conservation orders’, it is correct to assert that the other members are only called in “at the whim” of the Executive Chairperson.

It should be further highlighted that the Environment and Resources Authority, which was initially listed in Schedule Four of the 2015 Planning Bill, was eventually removed from the list since its status on the Council was already dealt with in Article 36 of the new Planning Act. More so, Heritage Malta, which was previously identified as one of the supplementary members (this term was eventually replaced by ‘observatory members’) is now substituted by the ‘Superintendent of Cultural Heritage’. Indeed, it was Din L-Art Ħelwa who during public consultation insisted that “the list of supplementary members of the Executive Council should refer to the Heritage regulator, that is, the Superintendence for Cultural Heritage and not the heritage agency (Heritage Malta).”

1.3.1 The Executive Chairperson

The role of the Executive Chairperson is specifically dealt with in Article 37 of the new Planning Act. As discussed above, the Executive Chairperson’s appointment by the Minister may not exceed an aggregate of six years in total. Initially, the Kummissjoni Interdjocesana Ambjent opposed the idea that the Executive Chairperson could be dismissed by the Minister, insisting that such proposal “flushes down the drain all sense of organizational governance in the Authority”. The Kummissjoni argued that “if the Executive Chairperson in his/her conscience cannot accede to a request by the Minister, then he/she may be simply dismissed.”

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44Article 37(3) of the Bill entitled Development Planning Act, 2015 – Published July 2015.
matter under examination, Din L-Art Helwa\(^{45}\) reiterated that “the appointment/dismissal of the Executive Chairperson should rest with the Parliamentary Committee for the Environment and Development.” To counteract this criticism, Article 37(3) of the Planning Act was eventually amended by Parliament so that today the Executive Chairperson may be only be dismissed by a Resolution of the House of Representatives ‘at any time for a just cause.’ This signifies that the Minister would still be able to take action against the Executive Chairperson should the latter fail to meet his expectations. The apparent difference is that the Minister would have to get Parliament on board prior to the Chairperson’s dismissal. In reality, today, this could be much easier since the Prime Minister has within his portfolio the responsibility of the Planning Authority and it is unlikely that the Members of Parliament of his own party would cross swords with him.

The responsibilities of the Executive Chairperson are delineated in Articles 38(2)(a)-(f) of the Act. These same responsibilities are principally directed to ensure ‘the implementation of the objectives of the Authority as set by the Executive Council’\(^{46}\) and include inter alia the supervision and control of the Directorates and departments ‘for the proper functioning of the Authority’.\(^{47}\) Directorates, along with the respective responsibilities, are established by the Executive Council.\(^{48}\) On the other hand, departments may, unlike the Directorates, be set up directly by the Executive Chairperson.\(^{49}\) At face value, it is possible to argue that all the executive power of the Authority is now concentrated in one office – the Executive Council. Certainly, this idea does not bode well with those who fear that ‘power corrupts and absolute power corrupts absolutely’. The situation was very different under the Environment and Development Planning Act since the Directorates were then specifically established by law.


\(^{46}\) Article 37(2) of the Development Planning Act, 2016.

\(^{47}\) Article 37(2)(a) of the Development Planning Act, 2016.

\(^{48}\) Article 39(1) of the Development Planning Act, 2016.

\(^{49}\) Article 39(2)(a) of the Development Planning Act, 2016.
In addition, the Executive Chairman shall ‘establish and co-ordinate working groups that are set up from time to time to formulate policies, plans or regulations’.\(^{50}\) This implies that the Executive Chairperson may choose to handle such working groups without prior endorsement from the Council, although failure to do so, in my opinion, would not be desirable. Incidentally, the Opposition spokesman on the MEPA Board had in 2013 publicly objected to the setting up of a number of working groups appointed by the then MEPA’s Chief Executive Officer to formulate policy proposals without the Board’s prior endorsement. Today, such an issue is unlikely to crop up particularly on two grounds. In the first place, members of the House of Representatives are not represented on the Executive Council. In the second place, the Executive Chairperson, as already indicated, is not bound to seek any direction prior to the appointment of working groups.

1.4 The Planning Board

The functions of the Planning Board\(^{51}\) are set out in Article 64(a)–(e) of the new Planning Act. Essentially, the Planning Board shall be responsible for the issuing of development permissions, taking over the decision role of the MEPA Board. Similarly as in previous legislation, planning decisions would still be subject to an appeal before the Environment and Planning Review Tribunal, whose decision shall be final unless an appeal is made to the Civil Court (Inferior Jurisdiction) ‘on a point of law decided by the Tribunal or on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal’.\(^{52}\) This goes to show that Front ODZ’s\(^{53}\) statements to the effect that “government's demerger of MEPA will also give too much power to the respective Minister, who can override Planning Authority decisions” were ill founded.

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\(^{50}\)Article 37(2)(b) of the Development Planning Act, 2016.

\(^{51}\)Article 63(2) of the Development Planning Act, 2016.


\(^{53}\)Reactions to the proposed MEPA Demerger from Front Harsien ODZ downloadable from [here](http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf) - August 2015.
Moreover, the Planning Board is now tasked with additional powers which previously fell outside the parameters of the MEPA’s competence. These include the ability to dispense with or allow the relaxation of a requirement of building regulations and the examination of applications for the issuing of licenses of masons and consultants in the building industry. Nevertheless, the Planning Board shall be empowered to decide on such matters once the Minister so decides.\textsuperscript{54}

The Planning Board will, on the other hand, no longer assume certain functions which the MEPA Board previously enjoyed. As already stated in the previous section, plans and policies,\textsuperscript{55} minor modifications including planning control applications,\textsuperscript{56} development orders,\textsuperscript{57} discontinuance and removal orders\textsuperscript{58} as well as scheduling and conservation orders\textsuperscript{59} are now decided by the Executive Council - the policy making organ within the new Authority.

The Planning Board consists of a chairperson chosen from amongst five independent members ‘of known integrity and with knowledge and experience’ in different areas of interest. The other Board members are as follows: one member chosen from amongst the chairpersons of the Planning Commissions,\textsuperscript{60} two members of the House of Representatives nominated by the Prime Minister and the Leader of the Opposition respectively, a member representing the Environment and Resources Authority, a member nominated by environmental NGOs (eNGOs), three public officers and a member chosen by the Local Council who shall sit on the Board when a major project application lies within its boundary.

The independent members and the eNGOs representative shall hold office for ‘a period of not less than three years’\textsuperscript{61} and ‘may not be removed from office except by a resolution of the

\textsuperscript{54}Article 35(5) of the Development Planning Act, 2016.
\textsuperscript{55}Article 41 of the Development Planning Act, 2016.
\textsuperscript{56}Article 63(2) of the Development Planning Act, 2016.
\textsuperscript{57}Article 55 of the Development Planning Act, 2016.
\textsuperscript{58}Article 56 of the Development Planning Act, 2016.
\textsuperscript{59}Article 57 of the Development Planning Act, 2016.
\textsuperscript{60}The Planning Commissions shall be dealt with later.
\textsuperscript{61}Article 63(5) of the Development Planning Act, 2016.
House of Representatives on the ground of misconduct or inability to perform the duties of their office. Likewise, members representing the Local Council have their term of appointment expired once the Board decides the relative application whereas the two Members of Parliament do not remain Board members once they are no longer elected members of the House. On the other hand, the three public officers may be removed by the Minister’s whim at any time. Clearly, this undermines the perceived ‘autonomy’ of the Board. The legislator should have therefore considered whether such appointees are guaranteed the same security of tenure entrusted to the independent members. In all cases, however, no member may serve on the Planning Board for an aggregate period exceeding six years.

Although the composition of the Planning Board appears to be the equivalent of the MEPA Board, there are remarkable differences which shall be identified. Namely, Mr. Alex Vella, a member of the Malta Ramblers Association, sat on the MEPA Board as an independent member despite the fact that government was not then legally obliged to appoint a member representing the interests of eNGOs. Today, the situation is different since the Planning Board shall specifically have ‘a member representing the interests of environmental NGOs’ and who shall be also nominated by the eNGOs themselves, although the said nomination would still need to be endorsed by government.

For the first time, Local Councils are also represented in the permitting process, even though in limited circumstances, namely ‘when the Planning Board is deliberating and deciding a major application between the boundaries of that particular local council’. The Act also envisages situations where a major project lies within multiple boundaries in which case the respective Local Councils shall choose between themselves one person to represent them. In that case, the members shall be nominated by the different Local Councils but then subsequently chosen.

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63 Article 63(7) of the Development Planning Act, 2016.
64 Article 63(8) of the Development Planning Act, 2016.
65 Article 63(8) of the Development Planning Act, 2016.
66 Article 63(9) of the Development Planning Act, 2016.
by the Minister. It is pertinent to point out that the Act simply states that the member must be ‘chosen’ by the Local Council and fails to mention whether such member must be an elected local councilor.

The environment regulator, namely the ERA, is also represented on the Planning Board and has a vote on planning decisions. By contrast, the role of the former environment Directorate within the MEPA was limited to recommending planning applications for a decision without having a say in the final permit. Of course, this was understandable since the Environment Directorate, then MEPA’s technical arm on environmental matters, could not act as a judge and jury within one and same Authority. Following the MEPA’s demerger, the environment regulator gained its autonomy and thus now may have a direct say in planning decisions.

In this respect, Front Harsien ODZ was therefore incorrect to conclude that “the proposed legislation weakens civil society participation in decision-making processes”. If anything, the direct presence of Local Councils and environmental organizations on the Planning Board reflects a wider representation of civil society. Nevertheless, it must be recalled that both Local Councils and the Malta and Environment Authority are ‘external consultees’ in terms of Schedule Three of the proposed application regulations and are thus formally consulted during the processing of each development application. So what would be the position if the Local Council would have already expressed its objection to the application during its processing? Would the Local Council representative be still eligible to sit in judgment? There is no clear reply in our law. Such hypothetical scenarios are catered for under section 25 (2) of the UK Localism Act (2011) which provides that ‘a decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because the decision-maker had previously done anything that directly or indirectly indicated what view the

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68 Article 63 (2)(h) of the Development Planning Act, 2016.
70 Bill entitled Development Planning (Procedure for Applications and their Determination) Regulations, 2016 – Published April 2016.
decision-maker took, or would or might take, in relation to a matter, and the matter was relevant to the decision.’ Nevertheless, no equivalent provision finds solace in our current legislation. Thus, the legal situation where members express themselves prior to a planning decision remains nebulous.

1.5 Does separation of powers really exists?

During the second reading in Parliament, the Hon. Dr. Michael Falzon\(^{71}\) justified the establishment of the Executive Council and the Planning Board as follows:


The Hon. Dr. Michael Falzon asserted that shifting the policy/executive functions away from the permit realm reflects the doctrine of separation of powers embraced in our administrative laws, though, in effect, the ‘separation of power’ is not complete as contended. Indeed, the chairperson and the deputy chairperson of the Planning Board both sit permanently on the Executive Council where planning policies are formulated whereas the ERA is represented on both the Executive Council and the Planning Board. Consequently, the Executive Council is more akin to a subset of the Planning Board which answers to a chief executive officer, who in turn has ‘no say’ in permit decisions.

\(^{71}\)Sitting No. 287 held on 8th July 2015 - House of Representatives, Malta.
In practice, having an Executive Council consisting of six members (at times, seven once the Superintendent for Cultural Heritage is called in) focusing on policy formulation should augur well in terms of a more efficient planning system. This should be seen in the light that the MEPA Board used to dedicate most of its time debating controversial planning decisions and thus giving minimal attention to policy making. This can be confirmed from the fact that the MEPA Board used to meet only once a week and its agenda was mainly directed to decision taking on pending applications. As already pointed out, the Executive Council has also the possibility to bring other stakeholders to assist it in policy making - a situation which was previously alien to our planning system. Also, since the chairpersons of the Planning Board and the Commission are both well versed with the issue of permits, their experience can be of great benefit to all and sundry.

As clearly anticipated, the current composition of the Council was met with substantial disapproval from both eNGOs and the Nationalist Opposition. In their reaction to the Planning Bill, the Kummissjoni Interdjocesana Ambjent\(^\text{72}\) asserted that “the Council’s composition is weak and should have had a wider representation on the same line of the MEPA Board.” The NGO Din L-Art Ħelwa\(^\text{73}\), described the Executive Council as “the Planning Authority’s main board” and further argued that the Executive Chairperson who “will assume all the functions of the current Chief Executive Officer together with all the duties of the current MEPA Board and some duties of the current Director of Planning” will be subjected to “reduced accountability given the absence of an independent Board”. Din l- Art Ħelwa further warned that the “proposed system is manifestly less transparent, with far too much power vested in a smaller, politically appointed executive body and executive chairman” and went on to suggest that “the membership should be increased to include at least five independent members, at least one member representing eNGOs”. As an alternative, Din L-Art Ħelwa had suggested a rather complicated structure.


where a chief executive officer would be answerable to the Executive Council headed by another chairperson.

In my view, the above criticism is not entirely justified. To begin with, the idea that “the Executive Council is the Planning Authority’s main board”\textsuperscript{74} is a complete misnomer once the Planning Board has the ultimate say in planning decisions. It is to be emphasized that the Executive Chairperson has only a ‘right to be present and participate at all its meetings’ (of the Planning Board), without the right to vote.\textsuperscript{75} Likewise, the interests of the environment are amply safeguarded since two out of the six members sitting on the Council actually represent the Environment and Resources Authority.

1.6 The Planning Commissions

The Planning Commissions\textsuperscript{76} are the equivalent of the former Environment and Planning Commissions. The Commissions may determine all planning applications delegated to it by the Planning Board, except for those listed in Article 75 of the 2016 Planning Act.\textsuperscript{77} There may be as many number of divisions dealing with different type of applications as the Minister may from time to time prescribe. In contrast with the former Environment and Planning Commission, the number of sitting members shall be reduced from five to three. The members are appointed for a period of four years which may be further extended to another four years and may be dismissed in the same manner as the independent members sitting on the Planning Board. The quorum of the Commission shall be two, in which case the Chairperson has a second or casting

\textsuperscript{74}Comments on the proposed MEPA Demerger from Din L-Art Helwa downloadable from http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015\-\%20final.pdf - August 2015.

\textsuperscript{75}Article 11(2) of the Development Planning Act, 2016.

\textsuperscript{76}Article 65 of the Development Planning Act, 2016.

\textsuperscript{77}Article 75 of the Development Planning Act, 2016 provides as follows: ‘(a) applications in respect of an activity or development of a national or strategic significance or affecting matters of national security or other national interests; (b) applications in respect of an activity or development which could affect the interests of other governments; (c) applications in respect of development which is subject to an environmental impact statement; (d) requests for reconsideration where the decision to be reconsidered was taken by the Planning Board itself.’
vote.\textsuperscript{78} To avoid situations wherein a casting vote would be necessary, the legislator included a supplementary member concurrently with the other three permanent members but who shall only take part in the deliberations when any of the permanent members ‘cannot for any reasonable cause, properly fulfill his duties’.

1.7 Other Committees

The Development Planning Act, 2016 saw the introduction of two Committees – the Agricultural Advisory Committee\textsuperscript{79} and the Design Advisory Committee.\textsuperscript{80} Indeed, an Agricultural Advisory Committee had already been set up in August 2014 following the promulgation of the Rural Policy and Design Guidance\textsuperscript{81} but was not included in the previous Environment and Development Planning Act. The Committee’s mandate was in fact clearly spelt out for the first time in the Development Planning Act, 2016\textsuperscript{82} whereby, presently, the Committee is not only expected to evaluate proposals and provide expert advice in terms of sustainable agriculture, but also to ‘collate information regarding applications related to agriculture.’\textsuperscript{83} This Committee is therefore expected to collect information from the relative Government Departments on behalf of applicants, which information may be required throughout the application process. The Hon. Dr. Michael Falzon\textsuperscript{84} made the following observation in respect of the Agriculture Advisory Committee:

\begin{quote}
“Xi haġa ġdida li se titwaqqaf ukoll bis-saћha tal-liġi l-ġdida hija l-AAC, l-Agriculture Advisory Committee..... din il-liği se tipprovdi għal kumitat ta’ konsulenza dwar l-agrikoltura. Ovvjament mhemmx dubju - u hekk ghandu jkun - li l-ġhan ewlien tięgħu se jkun li jassisti applikanti bdiewa u raħħala fil-ġbir tal-informazzjoni fejn ikun hemm bżonn, imma wkoll ghandu - u nahseb li huwa hawnhekk fejn irrirdu nagħmlu l-quantum leap ikoll kemm ahna - jhares ukoll lejn żvilupp agrikolu aktar sostenibbli u li jagħmel aktar sens.”
\end{quote}

\textsuperscript{78}Second Schedule Development Planning Act, 2016.
\textsuperscript{79}Article 66 of the Development Planning Act, 2016.
\textsuperscript{80}Article 67 of the Development Planning Act, 2016.
\textsuperscript{81}The said policy stipulates that certain rural development applications are required to be referred to the said committee.
\textsuperscript{82}Article 66(4) of the Development Planning Act, 2016.
\textsuperscript{83}Article 66(4) of the Development Planning Act, 2016.
\textsuperscript{84}Sitting No. 287 held on 8\textsuperscript{th} July 2015 - House of Representatives, Malta.
The Design Advisory Committee (DAC) is another novelty in the new Planning Act. Nevertheless, prior to 1992, planning permits were issued by the Planning Areas Permit Board (PAPB) subject to the endorsement of an Aesthetics Board. The role of the DAC is to make recommendations in relation to design in development applications related to urban conservation areas and major projects and, unlike the aesthetics board, their recommendations may be overruled by the Planning Board or Planning Commission as the case may be. The Hon. Dr. Michael Falzon explained that the idea behind the setting up of this Committee was to instill a culture in favour of better aesthetic design. These were his observations in Parliament:


Although one should praise the legislator’s efforts, the role of the Design Advisory Committee should have been extended to include sites within the development scheme and outside the development zone, thus eliminating the possible impression that aesthetic quality is not of major importance in such zones.

The Development Planning Act, 2016 concurrently saw the elimination of the Cultural Heritage Committee which consisted of two panels – the Cultural Advisory Panel and the Nature Advisory Panel. Din L- Art Ħelwa reacted to this by stating that “the removal of the Heritage Advisory Committee reduces transparency in the processing of development applications.” Nevertheless, Din l- Art Ħelwa’s concerns are not necessarily factual since all development applications will now be referred to the Superintendent of Cultural Heritage and the Malta

85 Sitting No. 287 held on 8th July 2015. House of Representatives, Malta.
86 Article 37 of the Environment and Planning Development Act.
Environment and Resources Authority for consultation at the outset of the application process.\textsuperscript{88}

\textsuperscript{88}Regulation 8(1) of the Bill entitled Development Planning (Procedure for Applications and their Determination) Regulations, 2016 – Published April 2016.
Chapter 2: Permitting and enforcement

2.1 What is development?

As a general rule, ‘any person, including a department of government or a body corporate established by law’ wishing to carry out a ‘development’ is still required to obtain permission from the Planning Authority, unless the Development Planning Act, 2016 provides otherwise.

The question that often arises amongst practitioners is the following: what constitutes ‘development’? The answer is found in Article 70 of the Development Planning Act, 2016 which defines ‘development’ as follows:

‘Building, engineering, quarrying, mining or other operations for the construction, demolition or alterations in, on, over, or under any land or the sea, the placing of advertisements or the making of any material change in use of land or building and sea’.

Essentially, the above definition is a reproduction of Article 67(2) of the Environment and Development Planning Act. In Raymond Vella vs L-Awtorita’ Ta’ L-Ippjanar, the Planning Appeals Board had held that the meaning of ‘development’ should, in any case, be given an extensive interpretation. The Board observed inter alia:

“…..t-tifsira tal-espressjoni ‘zvilupp’ kif definita f’dan is-subartikolu ghandha tifsira wiesgha hafna”

2.2 Developments specifically exempted from the need to obtain a permit

Under the previous planning laws, certain types of development were already exempted from the need of obtaining planning permission. These are ‘maintenance operations’ subject to certain parameters, ‘the use of land for agriculture, animal husbandry and forestry (including afforestation)’ as well as the change of use of buildings or other land within the same class specified in the use classes order. Additionally, developments orders which did not necessitate a reply were equally exempted. In furtherance to the promulgation of the Development Planning Act, 2016, the list has been widened to include emergency works carried out by government, uses which subsisted continuously from a period when such use was not considered illegal and did not require a permit, land reclamation carried out prior to 1994 as well as pre 1967 development.

2.2.1 Maintenance Operations

As above indicated, maintenance operations ‘which affect only the interior of a building or which do not materially affect the external appearance of the building…. and do not include demolition and rebuilding works, irrespective of the location where such demolition and rebuilding works are carried out’ were already considered exempted from permit requirements. Nevertheless, experience has shown that it is not always an easy task to assess whether a particular intervention falls within the said definition. Consequential to this, there are a number of conflicting judgments. For example, in Annunziato Bonello Bianco kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u I-Ippjanar, the Environment and Planning Review Tribunal (EPRT) concluded that the structural removal of a wall to pave way for a beam amounts to ‘demolition and rebuilding works’ which go beyond simple ‘maintenance operations’ exempted from development.

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In *Godfrey Gialanze kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* the EPRT, on the other hand, concluded that the ‘rebuilding’ of a concrete platform was exempted from the need to obtain a permit after it held that the structure was in urgent need of repair. The Tribunal found that the external appearance of the platform was to remain unchanged and the repair works thus qualified as ‘maintenance works’ that do not necessitate a permit.

Although the approach taken by the Tribunal in *Gialanze* may appear sound on the face of it, it is submitted that the Tribunal should have adhered to the letter of the law and dismissed appellant’s claim on the premise that ‘rebuilding’ works require a permit despite any urgency.

Nevertheless, the legislator should explore the possibility of exempting applicants from the need to obtain a permit for the reinstatement of dangerous structures in those cases where the engaged perit ensures that a similar construction methodology would follow. This certainly would be in line with the reasoning of the Tribunal in the *Gialanze* judgment.

### 2.2.2 Use of land for agriculture, animal husbandry and forestry

In the new Planning Act, ‘the use of land for agriculture, animal husbandry and forestry (including afforestation), except where such use consists of the erection of buildings or amounts to intensive raising or crops or animals’ shall equally remain exempted from the need to obtain a permit. Since this part of the definition remained unchanged, there is still a quandary as to whether animals can be kept in each and every niche on the island. It should be noted that the terms ‘land’ and ‘buildings’ are used interchangeably as defined in the introductory definitions of the Act. From the above definition, it follows – at least, in the author’s view - that the management and care of animals should be exempted from planning permission, regardless of location, provided that there is no ‘intense’ activity.

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However, in *John Paul Grech kontra L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar*\(^{92}\) the Tribunal observed that the keeping of a horse in a residential garage still required a planning permit since it constitutes a change of use in terms of law.

In this case, the Tribunal appears to have sought a practical solution to address the concerns of the neighbourhood at the expense of disregarding the letter of the law. To avoid further confusion, the law should identify those species which could be kept within a residential area without the need to obtain a development permit.

Moreover, it is opportune to point out that ‘*the reclamation of land for agriculture by the deposit of material on such land which can be proven to have subsisted prior to 1994*’ has now been exempted from the need of obtaining a planning permit. It is however important to note that the deposit of soil material should have ‘subsisted’ since a time prior to 1994. A new permit is on the other hand required if the soil has been washed away over a period of time as held in *Angelo Abela kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar*.\(^{93}\)

### 2.2.3 Change of use within the same use class order

Uses carried out on ‘*buildings or other land*’ falling within the same ‘*class specified in an order made by the Minister*’ remained exempt from the need of a development permit. The various classes are now defined in Legal Notice 74 of 2014.\(^{94}\) That stated, certain uses, such as take away outlets and auto dealers, are specifically excluded from any class category and thus require a

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\(^{93}\)Angelo Abela kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar. Kristian Fenech Soler u Pierre Nani vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 29\(^{st}\) March 2012 by the Environment and Planning Review Tribunal - [Ap. No. 334/10 CF. PA 4939/08].

\(^{94}\)Regulation 3(2) of Legal Notice 74 of 2014 provides that a change of use within the same class category is ‘permitted development’ subject to prior development notification ‘in the case when there is a change of use from either: (i) Class 3B to Class 3A or Class 4B to Class 4A or Class 4C to Class 4A or Class 4C to Class 4B or Class 4D to Class 4A or Class 4D to Class 4B or Class 4D to Class 4C or Class 4D to Class 4B or Class 4D to Class 4C or Class 5B to Class 5A or Class 5C to Class 5A or Class 5C to Class 5B, or (ii) when activities identified under Class 1(c) or Class 1(d) are undertaken in addition to those activities identified under Class 1(a) and/or Class 1(b)*’.
permit despite the previous approved on site use being similar.  

Although the effects of the above definition appear quite straightforward, it has been the subject of contrasting interpretations. For example, in Kristian Fenech Soler u Pierre Nani kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar\(^95\), the Tribunal insisted that the change of use from a store to a kitchen within a licensed catering establishment still required a permit.

In the author’s opinion, the Tribunal gave a wrong judgment in search of a safe approach. Although the respective room designations were indeed changed, the use of the building as a whole remained the same, namely a catering establishment. Thus, I beg to differ with what the Tribunal ruled in the aforementioned case, in particular that such intervention required a permit on the basis that the approved plans showed different designations. For some reason, decision makers always appeared hesitant to give an extensive interpretation of this provision and the law as amended still fails to address this issue.

### 2.2.4 Pre 1967 Developments

‘Illegal works’ are defined as ‘any works on, in, over or under land, carried out after 1967 and not covered by a development permission issued by an authority related to development’. A contrario sensu, it ensures that works carried out prior to 1967 without a development permission are construed as ‘legal’. Although there was no equivalent provision in previous legislation, the MEPA had already on a number of occasions considered that buildings constructed prior to 1967 were ‘legally established’. In Joe Cassar kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar\(^97\), the Authority submitted that the farmhouse forming the merits

\(^{95}\text{Regulation 4 of Legal Notice 74 of 2014 - Environment and Development Planning Act (Cap. 504) - Development Planning (Use Classes) Order.}\)

\(^{96}\text{Kristian Fenech Soler u Pierre Nani vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 2\textsuperscript{nd} May 2013 by the Environment and Planning Review Tribunal - [Ap. No. 93/12E CF. ECF 472/11].}\)

\(^{97}\text{MEPA submission in Joe Cassar vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 13\textsuperscript{th} March 2014 by the Environment and Planning Review Tribunal - [Ap. No. 49/12 CF. PA 3679/09].}\)
of the appeal was ‘legally established’ on the basis that its construction dated prior to 1967. Moreover, the MEPA used to issue compliance certificates with regards to pre 1967 development without the need for applicants to submit any permit documentation.

For a time, it was equally uncertain whether developments carried out prior to 1978 were equally exempted from the need of a planning permit. This is because the Rural Policy and Design Guidance 2014\(^{98}\) introduced in 2014, provided that ‘any intervention, including land-use change and land reclamation covered by development permission or that which is visible on the 1978 aerial photographs’ is considered to be ‘legally established’. This issue was eventually clarified by the EPRT in Carmela Muscat kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar\(^{99}\) wherein it was concluded that such definition applies to pre-1978 development forming part of a planning application which is assessed in terms of the Rural Policy. Hence, it does not automatically follow that all pre-1978 buildings are ‘legal’.

Notwithstanding the aforesaid, one should note that all buildings that constitute an injury to amenity by reason of their ‘appearance or structural condition’ are not immune from an enforcement action in spite of their age.\(^{100}\)

2.2.5 Display of advertisements

As with previous Acts, advertisements still require a planning permit unless specifically exempted by way of Legal Notice of 171 of 1993, which legal notice saw no amendments to it.


\(^{100}\)Article 99(1) of the Development Planning Act, 2016.
2.2.6 Development Orders

Development orders which do not require a reply remained exempt from the need to obtain a planning permit. From the other side of the coin, those development orders which require notification within 30 days may not be proceeded with prior to the issue of a notification. Whatever the case, the Planning Authority should be very cautious to ensure that notifications are issued in strict adherence with the law as these are otherwise deemed null and without effect. This principle was clearly outlined by the EPRT in Charles Debono kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar.101

2.3 Types of permissions

The Development Planning Act, 2016 contemplates four types of permissions – namely, outline development permissions, full development permissions, non-executable full development permissions and regularization permissions.

2.3.1 Outline Development Permissions

Outline development applications were introduced by way of the 1992 Development Planning Act and eventually abolished in 2010, only to be reintroduced six years later in the 2016 Planning Act. The current definition of an ‘outline development permission’, previously found in the Structure Plan, is as follows: an ‘approval in principle to the proposed development’ subject to ‘reserved matters which need to be included in a full development permit application or applications.’ In an outline development permission, one is given a permit for a specified period of time constituting a binding obligation on the Authority. This principle was evidenced particularly in the judgment delivered by the Civil Court (Inferior Jurisdiction) in the names Dr. Gerard Spiteri Maempel kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat

It is established case law that an outline permit is tantamount to a ‘vested right’ which eventually overrules any emergent conflicting policy. Additionally, the reserved matters highlighted in the outline permit should not be construed as a stumbling block for the issuance of the full permit. These principles were highlighted in Eucharist Bajada ghan-nom tas-socjeta’ Baystone Ltd vs L-Awtorita’ta’ Malta dwar l-Ambjent u l-Ippjanar and remain equally valid under the current Planning Act.

Several eNGOs expressed dismay towards the reintroduction of outline development permits. Front Harsien ODZ argued that ‘the Mistra experience has shown that commitments taken at outline stage are difficult to revoke at a later stage’ adding that ‘it does not make sense to first approve something in principle without providing the full details.’ The Kummissjoni Interdjocesana Ambjent argued on the same lines, insisting that ‘when details are then worked out and a full application is presented, the succeeding planning commissions express dismay that their hands are bound because of a previous decision relating to an outline permit.’ By contrast, the GRTU took a totally different approach, expressing satisfaction at government’s decision to reintroduce outline permits. The GRTU however insisted that once the Authority issues an outline development permit, it should subsequently bind itself to issue the corresponding Full Development Permit. Their views on this subject matter were as follows:

102 Dr. Gerard Spiteri Maempel vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza l-Avukat Dottor Joseph Zammit Maempel LL.D decided on 22nd October 2003 by the Planning Appeals Board - [Ap. No. PAB 393/02 TSC. PA 0598/02].

103 Eucharist Bajada ghan-nom tas-socjeta’ Baystone Ltd vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 31st May 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No.36/2011].


“GRTU notes that the possibility to obtain an Outline Permit is being re-introduced. Whilst GRTU views this as a positive move, it has reservations regarding the weight being given to such permits. GRTU believes that once an outline permit is issued, this should become binding. The difference between the outline permit as proposed and a full development permit is just the fees paid to the PA. Therefore once an outline permit is issued, a permit upon which entrepreneurs might base important and costly decisions such as the acquisition of property, it should become irrevocable and the applicant should only be asked to pay the PA fees.”

In the author’s view, outline development applications must be viewed against the fact that development briefs,\(^\text{107}\) previously introduced as an alternative to outline development applications in 2010, proved to be largely unsuccessful. As a fact, the MEPA did not approve one single development brief put forward by an individual applicant in the last six years. Undoubtedly, however, as rightly pointed out by the GRTU, outline development applications are considered to be an effective tool with which applicants may establish, with much a lesser expense, whether the Authority would eventually issue the full development permit. Having said that, the author tends to agree that outline permits should contain sufficient details and reserved matters be clearly spelt out with a view to overcome potential ambiguities at a later stage. In Parliament, the Hon. Dr. Michael Falzon\(^\text{108}\) was of this same opinion. He argued as follows:

\[\begin{align*}

\(^{107}\)Article 65(1) of the Environment and Development Planning Act.  
\(^{108}\)Sitting No. 287 held on 8\textsuperscript{th} July 2015 - House of Representatives, Malta.

The legislator also deemed fit to limit the validity of outline permits to a period not exceeding five years. In my view, such a period should have been restricted to two years since planning policies are likely to change with time. As much as possible, one should avoid a situation where decision makers are bound by an outline permit governed by a different policy regime.

### 2.3.2 Full Development Permissions

The Development Planning Act, 2016 deals with full development permissions in an identical manner as seen in previous legislation. A full development permission is required before any development can commence, whether or not preceded by an outline development permission. Today, applicants may also obtain a full development permission through a ‘summary Procedure Application’ which is in turn determined by the Chairperson of the Planning Board or his delegate within six weeks from the publication of the application.

Summary procedures are only applicable to development included in Schedule Two of the Development Planning (Procedure for Applications and their Determination) Regulations, 2016, provided further that the proposal complies with all relevant applicable plans, polices and regulations. It must also be pointed out that when representations are received within the consultation period and the Chairperson of the Planning Board or his delegate deems that such representations carry planning merits, the application would then undergo the entire planning process and not be decided summarily. It should be noted that several developments, which

previously qualified under the Notification order regime, now need to be processed ‘summarily’.\textsuperscript{110} In turn, this implies that interested third parties may now appeal against such developments, previously approved without the possibility of a third party appeal.

\subsection*{2.3.3 Non Executable Permissions}

For the first time, the definition of ‘non executable permits’ was identified in a local piece of legislation through the current Planning Act although the MEPA already had already issued these type of permits. A non-executable full development permission is defined as a permit ‘\textit{which approves the development but imposes conditions to be adhered to before a full development permission is issued.’}\textsuperscript{111} Typically, non executable permits are issued when the applicant is required to effect a contribution towards the Urban Improvement Fund, an enforcement fine or a bank guarantee within a set time frame and such payment is not made within the stated period. On this particular matter, the Hon. Dr. Michael Falzon\textsuperscript{112} made the following observations:

\begin{quote}
“Punt ieħor innovattiv tal-liġi huwa li se jiġi for malizzat il-konċett ta’ dak li huwa magħruf bhala non-executable permit. Dan huwa mezz kif ikun jista’ jinhareg il-permess imma x-xogħlijiet ma jkunux jistghu jibdew sakemm l-applikant ikun irregola ruhu mal-kondizzjonijiet li jkollu dak in-non executable permit. Dan mhux qed nagħmluh b’kapriċċ imma ghax ukoll fl-interess ta’ kulhadd ghax hija xi ħaġa li tista’ twassal ghal aktar ċertezza legali.”
\end{quote}

It should be noted that the validity of non executable permits runs from the publication of the non executable decision and republication does not take place when the full development permit is eventually issued.\textsuperscript{113} As a consequence, the time to lodge an appeal before the Environment and Planning Review Tribunal starts running from the date of publication in the

\textsuperscript{110}Regulation 18 of the Bill entitled Development Planning (Procedure for Applications and their Determination) Regulations, 2016 – Published April 2016.
\textsuperscript{111}Article 71(2)(c) of the Environment and Planning Development Act.
\textsuperscript{112}Sitting No. 287 held on 8\textsuperscript{th} July 2015 - House of Representatives, Malta.
\textsuperscript{113}Regulation 6(6) of the Bill entitled Development Planning (Procedure for Applications and their Determination) Regulations, 2016 – Published April 2016.
Government Gazette.

2.3.4 Regularization Permits

Article 101(1) of the new Planning Act introduced the possibility for the Minister to make regulations setting parameters by way of which an illegal development may be subsequently regularized by the Authority subject to a fine. It should be noted that in drawing up such parameters, the Minister is not bound by any other provisions found in the Act - the Minister may for example decide that certain types of illegal development be regularized by way of a regularization application regardless of the fact that such development does not conform to sanitary regulations. Friends of the Earth\textsuperscript{114} described the said proposal as “a form of amnesty for illegal development which is unacceptable.”

No similar provision was made in the Environment and Development Planning Act. Indeed, it was only possible to obtain a ‘concession’ for certain types of illegal development which were listed under Category B of Schedule Eight of the said Act and on the basis of which one was then entitled to have a supply of water and electricity\textsuperscript{115} and further claim that an enforcement notice should not be executed.\textsuperscript{116} That said, a concession was not tantamount to a sanctioning permit as commonly misconceived.

Category A developments under the same Schedule Eight were also immune from enforcement action if one were to claim such right. On the other hand, applicants having Category A developments were still not eligible to be given water and electricity supply, unless such development was first sanctioned. In fact, an application for ‘development permission requesting amendments, alterations, additions or extensions’ relative to a site featuring a Category A illegality had to have the illegality either sanctioned upon application or removed


\textsuperscript{115}Article 92(2) of the Environment and Planning Development Act.

\textsuperscript{116}Article 91(1) of the Environment and Planning Development Act.
prior to the application.

Under the new legislation, there no longer is any reference to previous Schedule Eight developments. Nonetheless, applicants will have an option to obtain a regularization permit which carries the same legal standing of a full development permit once regularization policies are in place. Eventually, a regularization permit would be immune from any possible enforcement action and applicants holding such permits would be equally eligible to the issuance of a compliance certificate.

Though this could be interpreted as a reward to past abuse, in reality it is my opinion that this would give more positive results due to the explanation given above on account of the legal uncertainties which shadow previous Schedule Eight developments.

2.4 Owner consent

The 2015 Planning Bill proposed that the owner’s consent at the onset of the application process would no longer be required though applicant would still be obliged to inform the site owner/s about his intentions to submit a planning application by way of a registered letter.\(^\text{117}\) Such proposal was deemed to be sensible particularly due to the fact that planning permits are, in any event, issued ‘without prejudice to third party rights and shall not in any manner constitute or be construed as a guarantee in favour of the applicant as to the title to the property.’\(^\text{118}\) In *Rebecca Darmanin Kissaun vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar*\(^\text{119}\) had indeed held that a permit remains valid regardless of any real rights attached to the property. In *Joseph Apap et vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-*

\(^\text{117}\) Article 71(4) of the Bill entitled Development Planning Act, 2015 – Published July 2015.

\(^\text{118}\) Article 72(1) of the Bill entitled Development Planning Act, 2015 – Published July 2015.

\(^\text{119}\) Rebecca Darmanin Kissaun vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 26th March 2014 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 47/13 MC.].
kjamat in kawza Maria Debattista ghan-nom ta’ Tourist Services Limited\textsuperscript{120}, the Court of Appeal (Inferior Jurisdiction) went a step further and reiterated that the Authority is not a Court of Law and should thus distance itself from handling issues relating to legal title.

Regardless of the above, planning applications were still thrown out once it transpired that applicants failed to obtain the relative consent from the relative site owner. In Savio Spiteri kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar\textsuperscript{121}, the Court was presented with a court judgment attesting that the owner of the property was not the one notified by applicant at the outset of the application process. On the basis of such document, the Board concluded that the application could not be processed further after finding that applicant notified a wrong owner.

In Franco Debono kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Carmelo Borg\textsuperscript{122}, the question relating to title was clearly not in dispute, so much so that applicant himself notified appellant, the owner, with a ‘certificate B’. Yet, the applicant still failed to obtain the relative consent from the owner. In turn, the Court of Appeal (Inferior Jurisdiction) held that the Tribunal was obliged to assess whether applicant obtained the relative owner’s consent so that applicant could proceed with his planning application.

The Debono and Spiteri judgments had established the principle that when a title is not in dispute, the Authority (or the Tribunal as the case may be) are obliged to ensure that the owner released his consent at the outset of the application. In the opinion of the author, such an obligation should not be necessary once planning permits are issued ‘\textit{without prejudice to third party rights and shall not in any manner constitute or be construed as a guarantee in favour of}

\begin{flushleft}\\textsuperscript{120}Joseph Apap, Carmelo Zammit, John Attard, Rita Fenech vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Maria Debattista ghan-nom ta’ Tourist Services Limited Franco Debono vs l-Awtorita’ ta’ Malta dwar l-Ambjent decided b on 9\textsuperscript{th} July 2015 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 16/15 MC.].\\textsuperscript{121}Savio Spiteri vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 25\textsuperscript{th} July 2008 by the Planning Appeals Board - [Ap. No. 222/04 ISB. PA 6293/01].\\textsuperscript{122}Franco Debono vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Carmelo Borg decided on 5\textsuperscript{th} November 2015 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 42/15 MC. PA 164/13].
\end{flushleft}
the applicant as to the title to the property.\textsuperscript{123} It was positive to see the 2015 Planning Bill doing away with the need of such consent at the outset of the application. Nonetheless, Perit Simone Vella Lenicker\textsuperscript{124} begged to differ, maintaining that “the system whereby the applicant must declare that he has obtained the owner’s consent to submit an application for development permission has cut out a significant amount of abuse.” It is not all that clear what sort of abuse Vella Lenicker had in mind because, as held above, a planning permit does not prejudice one’s title. However, government eventually decided to change track and reintroduce the prior Article 68(1) of the Environment and Development Planning Act in its entirety as Article 71 (4)(i) of the Development Planning Act, 2016 which inter alia provides that when the applicant is not the owner of the site, he must notify the owner ‘of his intention to apply by registered letter of which a copy has been received by the Authority and that the owner has granted his consent to such a proposal’.

2.5 Determination of planning permits

Article 72(2) of the Development Planning Act, 2016 provides the mechanism of how planning applications are to be determined. The corresponding section in the Environment and Planning Development Act, namely Article 69, specifically provided that decision makers ‘shall apply plans and policies’ and ‘shall have regard to material considerations and representations’. In the new Planning Act, the previous text ‘shall apply plans and policies’ was substituted with the words ‘shall have regard to plans and policies’. Also, decision makers shall likewise have regard to ‘regulations made under the Act’, ‘any other material consideration, including surrounding legal commitments, environmental, aesthetic and sanitary considerations, which the Planning Board may deem relevant’, ‘representations made in response to the publication of the development proposal’ and ‘representations and recommendations made by boards, committees and consultees in response to notifications of applications.’

\textsuperscript{123}Article 72(1) of the Bill entitled Development Planning Act, 2015 – Published July 2015.

Consequently, it follows that decision makers are now bound to take cognizance of plans and policies on an equal footing as regulations, material considerations and external representations or recommendations (including those promoted by the public).

Looking at decided Court judgments, it transpires that the effect of the text ‘shall apply plans and policies’ in previous Acts was not always tantamount to laying primary importance on plans and policies. For many years, certain decision makers, not least the Court, showed a tendency to first assess whether there were any material considerations which could have a bearing on planning matters, such as surrounding commitment, and were it to result in the affirmative, the permit would be approved regardless of policy stipulations.\(^{125}\) For example, in Charles Bugeja vs Kummissjoni ghall-Kontroll tal-Izvilup,\(^{126}\) the then Planning Appeals Board ordered the Authority to issue a permit for additional floors over and above the policy height limitation once it was established that the street was committed with similar development. Although the policy was clearly being violated, the permit was justified on the premise that the design was in keeping with the streetscape.

The same approach was adopted in Joseph Muscat kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar.\(^{127}\) The Planning Appeals Board acknowledged that the proposal was not in line with policy requirements and despite, still ordered the Authority to issue the permit on the basis that similar permits were issued in the vicinity. In this case, the Board held that appellants should receive equal treatment even though the site was located outside the development zone and there was no specific policy at the time to justify infill development in such locations. Consequently, the Board reasoned out that ‘equal treatment’ was tantamount

\(^{125}\)It should be noted that on a number of occasions, the Planning Appeals Board has reasoned out differently, giving preference to plans and policies over any other consideration - vide for instance Pacifico Agius vs l-Kummissjoni ghall-Kontroll ta’ l-Izvilupp decided by the Planning Appeals Board on 23rd March 2001 - [Ap. No. 468/99].

\(^{126}\)Charles Bugeja vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 19th July 2000 by the Planning Appeals Board - [Ap. No. PAB 627/98 SMS PA 0656/98].

\(^{127}\)Joseph Muscat vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 18th May 2005 by the Court of Appeal (Inferior Jurisdiction).
to a ‘material consideration’ which could not be omitted from the decision equation.

The same legal reasoning was adopted by the Court of Appeal (Inferior Jurisdiction) in a number of subsequent judgments. In Joseph Tonna vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar. The Court held that the Tribunal was bound to first and foremost assess whether there was similar industrial commitment in the area, even more once the Authority had admitted in a previous case that the area under consideration was ‘committed with industrial use, including a concrete batching plant’. Consequently, the Court ordered the Tribunal to assess the effect of commitment in the light of the Local Plan.

In a string of judgments which were given prior to the enactment of section 69 of the Environment and Development Planning Act, the Court maintained that decision makers had the ‘setgha guridizzjonali’ to depart from established local plan height limitations on the basis of surrounding commitment. For instance, in Grace Borg vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, it was held that:

“Din il-Qorti jidhrilha li kemm l-Awtorita’ ta’ l-Ippjanar kif ukoll il-Bord ta’ l-Appell dwar l-Ippjanar, it-tnejn ghandhom is-setgha, minghajr ma jbiddlu it-Temporary Provision Schemes li jevalwaw kull kaz fuq il-mertu u fuq il-fattispecie proprji tieghu. Inoltre, fejn ikun jirrizulta car li hemm cirkostanzi specjali ta’ commitment, kemm l-Awtorita’ u kif ukoll il-Bord ghandhom is-setgha guridizzjonali li johorgu permess ta’ zvilupp li jkun jiddipartixxi, per ezempju mill-maximum height limitation imposti fit-temporary provision schemes.”

Nonetheless, this “setgha guridizzjonali” was eventually curtailed after the enactment of the Environment and Development Planning Act, once section 69 of the said Act established that ‘no such material consideration including commitment from other buildings in the surroundings

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129Grace Borg vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 29th October 2009 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 6/2009].
may be interpreted or used to increase the height limitation set out in a plan.’ But, one would naturally ask: were decision makers still bound by ‘other’ material considerations, not being commitment above the set height limitation? The answer was given in Roger Vella vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar. Here, the Court of Appeal (Inferior Jurisdiction) maintained that commitment considerations were to be ignored only in as far as height limitations are concerned, reiterating that decision makers were still required to have full regard to ‘other’ material considerations. The Court observed as follows:

“In l-commitment gie eskluz (ghall-applikazzjonijiet li dahlu wara li gie in vigore l-Kap. 504) ghal dak li huwa massimu ta’ gholi permessibbli, izda l-legislatur ma’ estendiex dan ghal kull konsiderazzjoni ohra.”

In a number of subsequent judgments, the Court reiterated that decision makers could not choose to ignore ‘commitment’ from the decision equation and instead limit their assessment solely on what is provided in the Local Plans.

The above decisions established an unequivocal principle – namely, that decision makers may not rely on plans and/or policies and set aside ‘material considerations’. But in actual fact, the Court’s raison d’etre gave rise to a great deal of uncertainty. For instance, how could one apply the relative rural policy, which inter alia militates against further urban sprawl, and concurrently have regard to the surrounding built commitment?

Indeed, the more recent case law which immediately preceded the Development Planning Act, 2016 discarded the above reasoning altogether. Particularly in the case Emanuel Formosa vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 29th November 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 7/2012].

Roger Vella vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 31st May 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 7/2011].
Awtorita‘ ta’ Malta dwar l-Ambjent u l-Ippjanar,⁷ the Court of Appeal highlighted that plans and/or policies should take precedence over ‘material considerations’, adding that the said ‘material considerations’, particularly surrounding ‘commitment’, should be taken into account only in circumstances where the policy was either silent with regard to the merits of the proposal or where specific leeway was given to decision makers. The following was reached by the Court:

“din il-Qorti taghmel distinzjoni bejn is-sahha ta’ pjan jew policy u kwistjonijiet ta’ sustanza bhal ma hu ‘commitment’ fost affarijiet ohra. Il-Qorti taqbel perfettament ma’ dak li qal it-Tribunal illi ebda kwistjoni ta’ commitment ma tista’ tmur kontra dak esplicitament promulgat fi pjan jew policy u kwistjonijiet ta’ sustanza ghandhom importanza fejn il-pjan jew il-policy hi siekta jew thalli element ta’ diskrezzjoni.”

In a subsequent judgment delivered in the names of Anne Marie Agius vs L-Awtorita‘ ta’ Malta dwar l-Ambjent u l-Ippjanar⁸ the Court concluded that ‘equal treatment’ is not tantamount to a material consideration. Additionally, the Court highlighted that ‘commitment’ should be relied upon only in those limited instances where the policy is silent on a particular issue.

The same principles were upheld by the Court of Appeal in Marquis Dott. Anthony Cremona Barbaro u Chief Justice Emeritus Prof. John J. Cremona vs L-Awtorita‘ ta’ Malta dwar l-Ambjent u l-Ippjanar u kjamat in kawza Martin Camilleri.⁹ In this latter judgment, the Court insisted that decision makers must, first and foremost, ‘apply’ the relative plans/policies and resort to ‘material considerations’ only where the relative policies are contradictory to each other.

The above cited judgments highlight the problem that existed with interpreting Article 69 of the

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⁷Emanuel Formosa vs L-Awtorita‘ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 26th June 2014 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 82/2013 MC].
⁸Anne Marie Agius vs L-Awtorita‘ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 12th November 2014 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 71/2013].
Environment and Development Planning Act. It is perplexing to have a Court stating that material considerations need to be given ‘regard’ only in qualified circumstances, namely when the policies so dictate, and at the same time, the same Court is highlighting that ignoring material considerations is tantamount to ‘bad law’. In the author’s view, ‘commitment’ should have never been used as a basis for justification if it ran counter to a plan or policy since, under previous legislation, ‘material considerations’ were subordinate to plans and policies.

The matter is now different under the new law since ‘material considerations’ can have the upper hand over a plan or policy. Indeed, Article 72(1) of the Development Planning Act, 2016 has codified what was previously being wrongly interpreted by the Courts. Decision makers must now give ‘equal’ regard to plans, policies, regulations, material considerations and external representations or recommendations. Ultimately, it is up to the decision makers to decide whether any given material considerations are strong enough to prevail over policy requirements. At face value, this may be seen as a practical approach in terms of urban planning since very often, particular site circumstances are not always necessarily reflected in print. On the other hand, one may counter argue that such an open ended approach would open a gateway to arbitrary assessments since decision makers are now ‘free’ to give consideration to extraneous matters at the expense of a plan or planning policy.

The same Article 72(1) provides that ‘a valid police or trading license issued prior to 1994’ now constitutes a vested right which may not be affected adversely by emerging policy. In my opinion, the introduction of this latter provision was long overdue since previously it was not clear whether and, under which circumstances, a valid trading license would legitimize an ongoing use. That said, the author is by no means implying that trading licenses were not taken into account during the determination of a permit. In Biagio Muscat kontra l-Kummissjoni ghall-Kontroll ta’ l-Izvilupp\textsuperscript{136}, the Planning Appeals Board ordered the Commission to issue a permit for the ‘change of use from garage into a vehicle registration testing (VRT) garage

\textsuperscript{136}Biagio Muscat vs l-Kummissjoni ghall-Kontroll ta’ l-Izvilupp decided on 2\textsuperscript{nd} March 2001 by the Planning Appeals Board - [Ap. No. 224/00 KA PA 952/00].
facilities’ after appellant submitted a copy of a Trading License which was issued by the Police on 27th June 1987 showing that the premises could operate as an industrial venue.

Likewise, in the application number PA 991/06 submitted ‘to sanction change of use from garage to Class IV shop’ the Development Control Commission upheld the request despite the Directorate’s negative recommendation after it confirmed that applicant was in possession of a trading license which was issued prior to 1992.

Similarly, in Jimmy Aquilina kontra l- Awtorita’ ta’ Malta dwar l- Ambjent u l- Ippjanar Appell137 the Tribunal held that the Authority could not clamp down a commercial outlet after it was established that such activity was covered by a trading license, which was issued prior to 1992.

Unexpectedly, in John Micallef kontra l-Awtorita’ ta’ Malta dwar l-Ambjent138, the Tribunal took a different approach and held that a trading license must necessarily be preceded by a planning permit. In this case, appellant produced a valid trading license for a car auto dealer and notwithstanding this, the Tribunal still concluded that the valid license did not exempt appellant from first obtaining a planning permit.

The amendments to Article 72(1) should therefore be enough to address the above conflicting interpretations since it is now clear that any valid trading license which was issued prior to 1994 is equivalent to a planning permit covering such use. It should however be noted that the trading license should be valid at the moment of the decision.

Moreover, a provision was made to the effect that ‘the Planning Board shall only refer to plans, policies or regulations that have been finalized and approved by the Minister or the House of Representatives, as the case may be, and published’. In other words, decision makers may not

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rely on plans and policies which, at the moment of decision, are either in draft form, deleted from the statute books or pending formal Minster’s approval. Albeit no similar provision was expressly made in previous legislations, our Courts and Tribunal consistently acknowledged the aforementioned principle. In *Godwin Gauci vs L-Awtorita’ta’ Malta dwar l-Ambjent u l-Ippjanar Appell*\(^{139}\) the Court expressed itself in the following manner:

“**Illi kwantu ghall-aplikazzjoni tal-Pjan Lokali ma hemm l-ebda dubju li bhala regola generali il-principju skond il-gurisprudenza nostrali hija li l-policies applikabbli ghal kaz huma dawk ezistenti fil-mument li tkun ser jigi deciz il-kaz**”.

In another judgment delivered in the names *Angelo Camilleri kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar,*\(^{140}\) the Tribunal declared that the fine imposed by the Development Control Commission found no basis at law since the decision to fine applicant was based on an express provision contained in previous legislation, which legislation had since been replaced.

In the previous Article 69, decision makers were already bound to have regard to ‘representations made in response to the publication of the development proposal’. In the new law, the text ‘representations and recommendations made by Boards, Committees and Consultees in response to notifications of applications’ was also added. Although this may appear as a minor detail, decision makers are subjected to even more pressure to ensure that all incoming representations are included in the decision equation.

Furthermore, it is now certain when a planning permit takes effect. Notwithstanding that applicants were previously bound to send the relative commencement notice at least five days prior to commencement of works, failing to adhere to such a requirement was not tantamount to the non utilization of the permit. Today, the legal situation is quite different since Article 69...

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\(^{139}\) *Godwin Gauci vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar Appell* decided on 31\(^{st}\) May 2011 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 14/2010].

\(^{140}\) *Angelo Camilleri vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar* decided on 31\(^{st}\) July 2012 by the Environment and Planning Review Tribunal - [Ap. No. 647/11 CF.PA 0235/11].
72(4) of the Development Planning Act, 2016 states in unequivocal terms that ‘if the applicant fails to submit the commencement notice relative to the permission, such development permission shall be considered as never having been utilized.’ It follows that works covered by a full development permit and subsequently undertaken without the prior lodging of the commencement notice are now considered ‘illegal’. Matters could get all the more complicated for applicants were they to choose to proceed with the ‘permitted’ works without submitting the notice within the valid time period, particularly if the relative policies change in the interim.

2.6 Revocation of permits

Since the enactment of the Development Planning Act in 1992, there were five versions of the law regulating permit revocations. As rightly pointed out by Professor Kevin Aquilina,141 ‘the first two attempts verged in opposite extremes of the pendulum’, whereas the third version, namely Article 39(a) of the 2001 Act tries ‘to achieve Aristotle’s golden mean’. Article 39(a) was later substituted by way of Article 77 of the 2010 Environment and Development Planning Act, though the practical ramifications remained unchanged.

Indeed, Article 77(1) of the Environment and Planning Development Act provided that both ‘the Authority or the Tribunal’ could entertain a request to revoke a planning permit. A request for revocation could thus be filed directly with the Tribunal, though such request could not be made before the Tribunal concurrently with an appeal against the decision stemming from that same permit.142 In my opinion, this was not necessary since there was never a legal impediment on the part of the Tribunal to treat both considerations concurrently.

142Cristiano u Daniela konjugi Bagnaschi, Violet Mifsud, Ivan u Maria konjugi Micallef, Maria Stella Callus, Katia Satariano, Ivan Mifsud Bons. kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, u l-kjamat in kawza Frank Mifsud decided by the Environment and Planning Review Tribunal on 17th December 2015 - [Ap. No. 198/14 MS. PA 0712/14].
In the new Act, permit revocations are regulated by Article 80. As a rule, the basis on which a permit or a clearance may be revoked or modified, remained the same – namely, ‘fraud’, ‘the submission of any information, declaration or plan which is incorrect or does not reflect the situation on site’, ‘where there is an error on the face of the record’ and also ‘where public safety is concerned’. Although the Act clearly states that the permission, clearance or order must be ‘granted under this Act’ for it to be revoked, one must bear in mind that those permits which were issued in consonance with the previous Act, whose five year validity period is still in vigore, are likewise exposed to potential revocation.

Like in previous legislation, revocation proceedings must ‘commence’ within ‘five years from the date of issuing of the development permission, clearance or Order.’ Therefore, if the permit is eventually renewed for a consequent five year term, such permit may not be then revoked on the basis of this Article. This reasoning was held in Kenneth Bartolo et al. kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar.

In contrast with previous legislation, it is now incumbent on the Executive Chairperson to ‘prepare his recommendations to the Planning Board as to whether the development permission should be revoked or modified and invite both the applicant and the person making the request, if any, to make written submissions.’ Prior to the enactment of the new Act, a public hearing was not held if the Authority found that there was no prima facie case for revocation. Today, all requests are heard by the Board and both applicant and the person filing the request are asked to attend the hearing and make their submissions.

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144Article 35(3) of the Development Planning Act, 2016 expressly provides that ‘Any licence, permission, order, notice or certificate, or any prosecution or charges, granted or made under or kept in force under any of the provisions of the Environment and Development Planning Act, the Building Regulation Act and the relevant provisions of the Code of Police Laws and still in force immediately before the date of coming into force of this Act, shall as from such date continue in force as if it were a license, permission, order, notice or certificate, or prosecution or charges, granted or made under a corresponding provision of this Act.’
The definition of ‘fraud’ and ‘incorrect information, declaration or plan’ remained essentially the same. Interestingly, the definition of an ‘error on the face of the record”, previously styled ‘an error on the face of a record which offends against the law’, amounts to ‘an error made by the Planning Board in reaching a decision and such error is apparent from the records of its proceedings.’ Primarily, the amended definition provides that the error must be made by the Planning Board. Secondly, the error must be attached to a specific time line, namely ‘in reaching a decision’. Thirdly, the error must be visible in the records of the file.

Previously, the term ‘an error on the face of a record which offends against the law’ embraced a much more extensive interpretation. Essentially, any error that offended the law resulting from a simple examination of a document constituted such error. In Emmanuel Busuttil Dougall vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar146 the Court confirmed that the site notice was affixed in a wrong location as could be visibly attested from documented evidence. The said evidence purported to show that the affixation of the site notice had not been done according to law and the Court proceeded to confirm the Tribunal’s decision to revoke the permit in terms of the then Article 39(a).

In most probability, today, the Court would have decided otherwise since an error should not only result from the records of the file but such an error should be one taken by the Planning Board at decision stage.

2.7 The removal of the Sixth Schedule

Article 73(1) of the Development Planning Act, 2016 provides that ‘the Planning Board may grant permission for the retention on land of any buildings or works constructed or carried out thereon, or for the continuance of any use of land, without permission under this Act or after such permission has ceased to be valid or operative’. This means that the Authority is no longer

146Emmanuel Busuttil Dougall (bil-karta tal-identita` numru 848754M) vs L-Awtorita´ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 24th February 2011 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 3/2010].
bound by the limitations imposed in Article 70 of the Environment and Development Planning Act, which \textit{inter alia} provided that illegal interventions (specifically the ones listed under the Sixth Schedule of the same Act\textsuperscript{147}) could not be regularised solely through a sanctioning application even though such illegalities could possibly be sanctioned in terms of the relative plans and policies.

During the first months which followed the enactment of the Environment and Development Planning Act, the MEPA was very adamant to scrupulously follow Article 70 of the said Act to the letter. Initially, the Planning Directorate even refrained from processing requests asking for sanctioning where it resulted at a \textit{prima facie} level that Schedule Six illegalities were present. The matter was eventually clarified by means of a judgment delivered by the Court of Appeal (Inferior Jurisdiction) in the names \textbf{Mary Psaila vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar}.\textsuperscript{148} In this case, the Planning Directorate had issued a screening letter\textsuperscript{149} stating that applicant’s request could not be processed since the proposal had included a number of illegalities which fell under the Sixth Schedule. The Directorate’s decision was confirmed by the Tribunal despite applicant’s insistence that he had every right to have his application processed and formally decided by the Environment and Planning Commission. The Tribunal’s decision was eventually appealed before the Court of Appeal (Inferior Jurisdiction) and the Court held that the \textit{prima facie} conclusions reached in a screening letter did not remove the applicant’s right to have any type of sanctioning application duly processed.

\textsuperscript{147}Schedule Six of The Environment and Development Planning Act \textit{of the Laws of Malta provided as follows: ‘An application to regularise a development which exceeds the approved footprint or, increases the approved volume of the building and is not part of a registered livestock farm and is carried out after May 2008 in an area which falls outside areas designated for development as defined in the Structure Plan or in any other plan; or
2. An application to regularise a development in a scheduled property; or
3. An application to regularise a development carried out after May 2008 in an area protected under the provisions of this Act or any regulation made thereunder.’}

\textsuperscript{148}Mary Psaila vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided by the Court of Appeal (Inferior Jurisdiction) on 26\textsuperscript{th} March 2015 - [Ap. No.6/13].

\textsuperscript{149}Under The Environment and Development Planning Act, a screening letter was issued prior to the submission of a full development application. The letter would contain a preliminary opinion with respect to the proposed development.
With time, experience has shown a general tendency where the Environment and Planning Commission started to overlook the importance of Article 70 and planning applications were sanctioned notwithstanding the presence of illegalities listed under Schedule Six. For example, in the application PA 8241/05, To sanction use of site as meeting place for prayers and worship by Moviment Madonna tal-Konsagrazzjoni, to sanction alterations and additions and to erect bronze statue of Jesus, decided on the 7\textsuperscript{th} March 2012, the Environment and Planning Commission gave a permit for structural interventions which had taken place illegally, despite the location being a scheduled area. Evidently, the Commission went ahead with the decision as it envisaged no planning or environmental benefit in having the construction removed and reinstated in furtherance of a new application. If anything, the prospect itself of mobilizing demolition equipment on such a sensitive site would have envisaged more environmental harm. Having said that, in my opinion, the Commission’s decision was illegal regardless.

In a separate instance, the Tribunal went even a step further and held that Article 70 is “counterproductive”. In the case Stefan Vella kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar,\textsuperscript{150} applicant made an attempt to sanction a canopy which was already fixed to an old scheduled building. In his submissions, the appellant’s architect argued that the illegal extension “improved the visual appearance of the building and provided a consistent neat/bold outline to the building frontage avoiding a setback in the projecting slab which would have otherwise looked too busy”. The Authority rightly rebutted ‘that the provisions of the Sixth Schedule are quite specific and categorical”, adding that “if a proposal falls within these provisions no sanctioning may be permitted – no ifs or buts” and thus requested the Tribunal to dismiss the application on the basis of Article 70. Although the Authority was certainly correct in its legal interpretation, the Tribunal reasoned that the old building would risk being damaged should the illegal canopy be dismantled and consequently ordered the Authority to issue the permit.

\textsuperscript{150}Stefan Vella vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided by the Environment and Planning Review Tribunal on 15\textsuperscript{th} October 2013 - [Ap. No. 214/12 CF. TR. No. 147273. PA1996/08].
While the Tribunal may have been technically correct in its assertions, the legal reasoning is quite baffling since no such a leeway was granted by law. At a particular point in time, MEPA itself had even published a series of Frequently Asked Questions on its official website\textsuperscript{151}, providing \textit{inter alia} that “Article 70 and the Sixth Schedule of the Environment and Development Planning Act apply only to applications submitted after 1st January 2011” despite it being very obvious that such statement ran counter to the legal provisions of Chapter 504. In \textit{Grezzju Zahra kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar}\textsuperscript{152} appellant relied on the said website information in his defense, only to find strong opposition from the same MEPA who published the information. In fact, MEPA’s legal counsel rebutted appellant’s defense and observed the following in his reply to the appeal:

\begin{quote}
\end{quote}

It is therefore evident that the Schedule Six experience is laden with continuous contradictions and all things considered, government’s decision to revisit Article 70 was duly warranted even though Din L-Art Ħelwa held that the deletion of Article 70 was tantamount to “\textit{a retrograde step}”.\textsuperscript{153}

Although it may still be argued that the removal of the Sixth Schedule may give rise to rampant illegal development, it is to be noted that a daily fine is today imposed for every day after sixteen days from the date of notification of the enforcement notice until the permit is...
approved or until the illegality is removed.\textsuperscript{154} Indeed, daily fines are now inflicted for any illegal development which took place after 24\textsuperscript{th} November 2012 by virtue of Legal Notice 276 of 2012 and such legislation was not in force when the Sixth Schedule came into effect. Consequently, it would thus be most daring to state that the elimination of the Sixth Schedule is tantamount to uncontrollable abuse. It could be argued further that abuses which took place between May 2008 and November 2012 may today be regularised, and possibly against a hefty fine, whereas under the previous law, such interventions were destined to remain illegal without the imposition of a fine once sanctioning thereof was not possible.

On a practical note, the author sees no benefit in having a building demolished simply to have a similar or identical building being reconstructed following a new application or, worse still, having the Authority acting illegally in circumventing the Sixth Schedule by searching for practical solutions to sanction illegalities against the law. The Stefan Vella case and the Girgenti application are just two examples where decision makers embraced their good intentions at the expense of breaking the law. Against this background, the author rebuts the idea that “the removal of the Sixth Schedule implies that the ‘no tolerance’ policy previously adopted no longer applies”.\textsuperscript{155}


Chapter 3: The Environment and Planning Review Tribunal

3.1 General

Most decisions taken in virtue of the current Development and Planning Act may be subjected to a ‘review’ before the Environment and Planning Review Tribunal (EPRT). The said Tribunal was established for the first time under the Environment and Development Planning Act in 2010 when it took over the role of the Planning Appeals Board. Following the demerger of the MEPA into two separate Authorities, the Environment and Planning Review Tribunal was reconstituted, however under an independent piece of legislation entitled the Environment and Planning Review Tribunal Act, 2016.

As highlighted by the Hon. Dr. Owen Bonnici in Parliament, the newly established Tribunal has jurisdiction to review decisions taken by both the Planning Authority and the Environment and Resources Authority:

“Ta’ min jghid li se jkollna liġi ad hoc li twaqqaf tribunal indipendenti – din fiha nnifisha digà hija xi ħaġa pożittiva – li se jisma’ appelli minn deċiżjonijiet ta’ żewġ Awtoritajiet, sew ta’ dik li se tkun l-awtorità l-ġdida tal-ambjent, kif ukoll tal-awtorità l-ġdida tal-ippjanar.”

Really and truly, we were already accustomed to this approach because the previous Tribunal was competent to review both planning and environment related decisions taken by the MEPA.

156 Article 41 of the Environment and Development Planning Act.
157 Sitting No. 292 held on 17th July 2015 - House of Representatives, Malta.
3.2 An ad hoc Tribunal

It is evident that both the Nationalist administration, under whose tenure the EPRT was established, and the current Labour administration appear to be confident with having an ad hoc Tribunal dealing with planning and environment related matters, rather than having such matters decided by the Administrative Review Tribunal (ART). As a fact, the Minister of Justice, Culture and Local Government argued in Parliament that planning and environment related matters are better handled by a specialized Tribunal, citing the possibility of the EPRT to engage experts as a key advantage.\(^{158}\) The Minister also remarked that the EPRT is better positioned to deliver more timely decisions at a lesser cost:


Indeed, the above assertions are not necessarily well founded. If one were to make a comparison between the EPRT and the Administrative Review Tribunal (ART),\(^{159}\) it follows that the Magistrate or Judge presiding over the ART is also accompanied by two assistants being persons who have expertise within the specific field being dealt with. Moreover, the ART may appoint additional experts ‘depending on the subject matter’. In so far as expenses are concerned, the setting up of an ad hoc Tribunal would probably entail additional costs in its constitution, considering that the ART already operates within an established organizational setup.

Having said that, practicing periti would probably object to the idea of having to assist their clients before the ART within a formalized Court setup. Moreover, in as far as decision time frames are concerned, the EPRT is bound by stipulated, and rather strict, time frames within which their decisions are to be delivered whereas the ART is only bound to deliver its decisions

\(^{158}\)Sitting No. 292 held on 17\(^{th}\) July 2015 - House of Representatives, Malta.  
\(^{159}\)Chapter 490 of the Laws of Malta – Administrative Justice Act.
‘as soon as possible’. From the other end, it is correct to state that a specialized tribunal whose jurisdiction is restricted, such as the EPRT, may be more proactive and focused for its purpose.

The idea of having the EPRT set up under another piece of legislation was however met with disapproval by the Dean of the Faculty of Laws, Professor Kevin Aquilina, who described the new laws with doing ‘away completely with codification’. He saw ‘no added benefit of having three distinct laws when they could have been easily integrated into one’. On the other hand, in Parliament, the Hon. Dr. Michael Falzon was of a totally different opinion:


The author is more inclined to agree with Falzon’s belief in that it is more practical to have an independent legislative Act which regulates appeal procedures that are common to different pieces of legislation, such as in this case. Additionally, the establishment of the EPRT and the Planning Authority under separate pieces of legislation should convey the message that these organs are entirely distinct from each other.

160 Article 3(2)(b) of the Administrative Justice Act.
162 Parliamentary Sitting No. 292 held on 17th July 2015 – Parliament of Malta.
3.3 Functions of the Tribunal

Article 3(1) of the Environment and Planning Review Tribunal Act, 2016 states that the role of the EPRT is ‘to review the decisions of the Planning Authority and the Malta Environment Authority’, further providing that the EPRT is to ‘hear and determine .... appeals’. Clearly, the role of the EPRT is to ‘review’ a planning decision in terms of law and fact within the parameters set out in the appeal application. This principle was upheld in Frans Mamo vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar:164

‘Dan hu Tribunal ta’ Revizjoni ta’ decizjonijiet mehuda mill- Awtorita’. It-Tribunal ma ghandux joltrepasa l-limitu li minn Tribunal revizur isir Awtorita’ li tezamina applikazzjoni mill-gdid minn rajha jekk dak li tezamina u tiddecedi dwaru ma jkunx ingieb a konjizjoni u attenzjoni taghha b’aggravju specifiku, kemm jekk ikun kontra rifjut jew approvazzjoni ta’ permess.”

This reasoning was reiterated by the Court of Appeal (Inferior Jurisdiction) in Emmanuel Muscat et. al vs L-Awtorita’ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Ghaqda Socjali Muzikali Kristu Sultan.165 In this case, a number of objectors appealed against the issue of a permit for the change of use from a residence to a band club, basing their reasoning on unacceptable noise levels. The Tribunal anulled the permit whilst giving an extensive definition of a ‘modern band club’. Indeed, the Tribunal went to great lengths to make a distinction between a ‘traditional’ band club and a ‘modern band club’. It observed inter alia that contemporary band clubs are more akin to bars and restaurants and hence went on to revoke the permit. Subsequently, the applicant appealed the decision before the Court of Appeal (Inferior Jurisdiction), claiming that the Tribunal delved into the definiton of a ‘band club’ though such definition was not in dispute. In turn, the Court held that the EPRT may not

164Frans Mamo vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 4th December 2013 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 193/2012].
165Emmanuel u Rita Muscat u Pauline Borg u b’digriet ta’ din il-Qorti datat 29 ta’ Novembru 2011 stante l-mewt ta’ Pauline Borg il-gudizzju gie trasfuz f’isem Rita mart Emmanuel Muscat, Joseph Borg, Paul Borg u Raymond Borg bhala eredi tal-istess kif indikat b’nota taghhom datat 8 ta’ Novembru 2011. vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Ghaqda Socjali Muzikali Kristu Sultan, decided on 31st May 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 5/2011].
express itself on a matter which was not being contested and ordered the Tribunal to reassess its decision. When the case was referred back to the Tribunal, the latter simply concluded that the proposed activity would be creating a nuisance to neighbors due to the envisaged noise. The Tribunal went on to revoke the permit without making any attempt to enquire on matters which were clearly not under contestation and this time round, its decision was confirmed by the Court on appeal.\textsuperscript{166}

Having said that, the Court recently observed that any matter in breach of planning laws or policies qualifies as a matter of public order\textsuperscript{167} and the Tribunal is thus obliged to flag any such concern \textit{ex officio} regardless whether any reference thereto was made by the parties to the appeal. This principle was confirmed in \textbf{Angiolina Buttigieg vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar},\textsuperscript{168} where the Court of Appeal (Inferior Jurisdiction) concluded:

\begin{quote}
\end{quote}

Although, the Court stressed that in such cases, the file must be reverted to the Authority for reassessment in order for the appellant not to be deprived of his right to a ‘doppio esame’ (unless the parties jointly decide that the Tribunal proceeds with the judgment), there is still a

\textsuperscript{166}Emmanuel u Rita Muscat u Pauline Borg u b’sentenza tal-Qorti tal-Appell tal-31 ta’ Mejju 2012 l-atti gew trasfuzi fl-eredi ta’ Pauline Borg vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Ghaqda Socjali Muzikali Kristu Sultan, decided on 26\textsuperscript{th} June 2014 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 72/2013].

\textsuperscript{167}Like with previous legislation, the new Environment and Planning Review Tribunal Act, 2016 does not specify which matters fall under the ambit of ‘public order’ and consequently it may be useful to look at case law.

\textsuperscript{168}Angiolina Buttigieg vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 11\textsuperscript{th} December 2014 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 55/2014]
practical problem since the Tribunal would have already expressed its bias should an appeal be eventually filed against the reassessed decision. All things being equal, it is my firm opinion that the Tribunal should not raise and decide issues which would not have been indicated in the refusal since this would amount to the Tribunal deciding in violation of the ‘audi alteram partem’ rule.

As regards to the non adherence to the stipulated time frames within which an appeal must be filed, these too are considered as a matter of public order.169

3.4 Composition of the Tribunal

The 2015 Tribunal Bill provided that the Prime Minister ‘may by order establish panels of the Tribunal, and may designate the categories of cases to be assigned to each panel and may by subsequent order amend, revoke or substitute such order.’ Each panel would consist of three members, all of who are appointed by the Prime Minister - one such member is a Chairperson and another member, the deputy Chairperson, assumes the functions of the Chairperson in the former’s absence. Furthermore, the 2015 Tribunal Bill provided that for each panel, a member shall be an advocate and the other two members shall be respectively ‘well versed in development planning legislation and environmental legislation.’

In his reaction to the proposed 2015 Tribunal Bill, Professor Aquilina170 was quite critical of the proposed composition, asserting that ‘the Tribunal will have three lawyers with no planners, nor environmentalists as members’. Aquilina went on to suggest that ‘the new Tribunal should instead be constituted with two chambers: a Development Planning Chamber and an Environment Protection Chamber. The Development Planning Chamber should be presided by

169 Pasquale Catuogno vs L-Awtorita’ ta Malta dwar l-Ambjent u l-Ippjanar, decided on 10th December 2015 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 45/2015].

three full-timers: an advocate versed in development planning as chairperson and two persons versed in planning as members.’

Parliament did not take up these suggestions although the words ‘development planning legislation’ and ‘environment planning legislation’ were eventually substituted with ‘development matters’ and ‘environment matters’, thus making it clear that now only one out of these three members should be an advocate. Upon insistence from the Hon. Marthense Portelli, Parliament unanimously decided that the advocate moreover ‘shall have practiced the profession of advocate for at least four years’ to be eligible to sit on the Tribunal.171

At Committee stage, it was further decided to qualify the instances where the Deputy Chairperson may preside over the Panel instead of the Chairperson, namely in cases where a ‘valid reason’ subsists. Nonetheless, the Act does not define what constitutes a ‘valid reason’,172 although it subsequently provides that a ‘a member of the Tribunal shall be disqualified from hearing an appeal in terms of Article 734 of the Code of Organization and Civil Procedure and in any such case, such member shall be substituted by another person either appointed for the purpose by the Prime Minister, or chosen by the Secretary from the members of the other panel or panels so appointed.’173 Bearing in mind the complexity of the legal issues raised before the Tribunal, the author is however of the opinion that four years experience leave much to be desired.

The words ‘shall be disqualified’ suggest that a panel member has no option but to abstain from hearing a case should any of the circumstances listed in Article 734 of Chapter 12 of the Laws of Malta subsist. This is not exactly the situation with the Courts since the decision to abstain or otherwise ultimately rests with the individual judge or magistrate.

The effects of Article 4(6) of the Environment and Planning Review Tribunal Act, 2016 are thus wide ranging considering that the breach to the said Article would be tantamount to a ‘point of law’ which in turn would be subject to an appeal before the Court of Appeal (Inferior Jurisdiction). Possibly, this could lead to the summoning of Tribunal members before the Court of Appeal and challenged as to whether they were ‘qualified’ to sit in judgment.

On the other hand, what if such a plea is raised for the first time by a party to the appeal before the Court of Appeal? Will the court throw out the appeal given that “biex appell ikun ammissibbl, il-kwistjoni trid tkun necessarjament dwar kwistjoni ta’ dritt, li tkun qamet kontroversja dwarha, li tkun giet diskussa u elucidata fil-motivazzjoni u li tkun giet definita fid-decijoni appellata”\(^\text{174}\)

Initially, the Tribunal Bill also provided that EPRT members should be appointed directly by the Prime Minister. On this point, Professor Aquilina\(^\text{175}\) argued that the Prime Minister, “entertains a huge conflict of interest” once he is “responsible for the execution of all government related projects”. Eventually, Parliament decided that Tribunal members shall now be appointed by the ‘President acting on the advice of the Prime Minister’.\(^\text{176}\) In practice, this amendment is only ‘cosmetic’ since the President would in practice assent to the directions given by the Executive. Adopting the recommendations highlighted by the Bonello Commission,\(^\text{177}\) as suggested by the Opposition at Committee Stage, would have certainly been akin to a more transparent selection process once the EPRT members would be identified following an open expression of interest and a thorough assessment. Although in such a situation the ultimate decision would still rest

\(^{174}\)Max Zerafa vs Kummisjoni Kontroll Zvilupp, decided on 12\textsuperscript{th} January 2004 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 20/2002].


\(^{176}\)Article 4(4) of the Environment and Planning Review Tribunal Act, 2016.

\(^{177}\)Kummissjoni ghal Riforma Holistika fil-Qasam tal-Gustizzja: Ir-Rapport Finali tal-Kummissjoni ghal riforma holistika fil-qasam tal-gustizzja. Report dated 30th November 2013. Paragraph 3.1.1. - Downloadable from https://0d2d5d19eb0c0d8c8c6a655c0f6dcd98e765a68760c407565ae.ssl.cf3.rackcdn.com/d1b90f63704c357de556e6eeb68302fa4065089817.pdf. Paragraph 3.1.1 of the said report recommends the setting up of an autonomous Authority styled as Awtorità dwar l-Għażla għas-Servizzi Gudizzjarji, would be set up to make recommendations to the Minister with regard to the selection of Magistrates and Judges.
with the Minister, it would still be difficult on his part to act in defiance of the Committee’s recommendations.

With regard to the removal of EPRT Members, the 2015 Tribunal Bill initially provided that these ‘may only be removed from office by the President acting on the advice of the Prime Minister for the reasons of proved inability to perform functions of his office (whether arising from infirmity of body or mind or any other cause), proved misbehaviour, gross negligence or for a just cause and it shall be a just cause if the member does not achieve the targets and objectives set in relation to his duties.’ Essentially, Article 50 (4) of the Environment and Development Planning Act provided a similar procedure, since EPRT members could be removed from office ‘by the President acting on the advice of the Minister for the reasons provided for in article 97(2) of the Constitution.’

Although the words ‘it shall be a just cause if the member does not achieve the targets and objectives set in relation to his duties’ did not make it through the final Act, Tribunal members today may still be removed at the Prime Minister’s discretion on the basis of whatever he deems a ‘just cause’.\footnote{Article 4(8) of the Environment and Planning Review Tribunal Act, 2016.}

When all is taken into consideration, it is disturbing to see that Tribunal members, who at the end of the day may overrule Planning Board decisions, enjoy less security of tenure than the members of the Executive Council and the Planning Board who may only be removed by a Parliament Resolution.
3.5 Jurisdiction

From an examination of section 11 of the current EPRT Act, an appeal may now be lodged from those decisions which are specifically listed in the law whereas under the previous Act, an appeal was indeed possible ‘on any matter of development control’ unless the law provided otherwise.\(^{179}\)

Under the present legislation, the EPRT has jurisdiction to hear and determine ‘all appeals made by the applicant from a decision taken following an application’ for:

- A full development permission;
- A permission under a development notification order;
- A permission under a regularization process;
- A change in alignment under a planning control application;
- A permission for a project of common interest (PCI);
- Registration by the Registration Board;
- Screening letters, insofar as a request for additional submissions, studies, assessments and documentation and/or fees and/or contributions required to be paid to the Authority before submission of the application are concerned;
- A request for modification or revocation of permission.

An appeal before the EPRT can, in turn, be made by any person who feels ‘aggrieved’ in the following instances:

- When a notice is issued under the provisions of Part IX of the Development Planning Act, 2015;
- When a decision is given in relation to scheduling and conservation orders;

\(^{179}\)Article 41(1)(a) of the Environment and Development Planning Act.

\(^{180}\)For example, decisions from planning control applications and decisions on sanitary issues escaped the jurisdiction of the Environment and Planning Review Tribunal.
• A decision on a request for modification or revocation of permission.

Any person or institution or any department or agency of Government having a direct interest and aggrieved may file an appeal in the following instances:

• Any decision, ruling or direction in relation to Building Regulations and Building Control Regulations, even where such a decision does not emanate from a development application process.

An appeal may be made by an interested third party who had submitted written representations within 30 days from the date on which the application is published in the local Government Gazette\(^{181}\), when a decision relates to:

• Application for development permission;
• A planning control application relating to a change in alignment.

An appeal before the EPRT can be made by an interested third party from a decision concerning:

• Scheduling and conservation orders.

An appeal before the EPRT can be made by a statutory external consultee who, during the application process, lodges a recommendation within the consultation period, either indicating that the application should be approved subject to conditions or that the application is objectionable stating the reasons, in the following instances:

• A development permission;

\(^{181}\)The period as established by the Planning Authority in terms of Article 71(6) of the Development Planning Act, 2016 is equivalent to 30 days.
• A change in alignment following a planning control application;
• A permission for projects of common interest (PCI).

On the other hand, an appeal before the EPRT can be made by the Attorney General on behalf of the Government and any department, agency, authority or other body corporate wholly owned by the Government and who are not statutory consultees, notwithstanding that no written representations have been submitted during the application process.

3.5.1 New powers enjoyed by the EPRT

It should be immediately observed that the jurisdiction of the EPRT has been widened to include applications related to ‘a change in alignment under a planning control application’, ‘projects of common interest’ and ‘permissions under a regularization process’. Furthermore, the EPRT has been granted the power to decide appeal with regard to ‘any decision, ruling or direction in relation to Building Regulations and Building Control Regulations, even where such a decision does not emanate from a development application process’.

It must be pointed out that the EPRT is now competent to determine appeals from planning control decisions in so far as ‘changes in street alignments’ are concerned. On the other hand, ‘changes in zoning’ remain immune from appeal proceedings. The situation was altogether different under previous legislation since all types of planning control applications could not be appealed before the Tribunal. For example, in Joseph Cuschieri kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, delivered on the 2nd May 2013, the EPRT highlighted that it was prevented from determining appeals involving planning control applications.

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182 Decisions on such applications are taken by the Executive Council as per Article 54 of the Development Planning Act, 2016.
Prior to the enactment of the new laws, sanitary matters were also considered to be extraneous to the planning fora and had to be reviewed by the General Services Board. This principle was confirmed in Godwin Abela u Lorraine Grech kontra L-Awtorita’ ta’ Malta għall-Ambjent u l-Ippjanar u l-kjamat in kawza Edward Damato.184

The EPRT is now also competent to determine appeals from sanitary decisions. This is due to the fact that the Planning Authority has simultaneous jurisdiction to decide sanitary matters whereas under previous legislation, sanitary decisions were taken by a Sanitary Engineering Officer who, in turn, was answerable to the Superintendent of Public Health. Essentially, this means that the application process need no longer be suspended once a sanitary dispute arises. The Authority may now pronounce itself on any sanitary matter without having to wait for the outcome of the General Services Board (GSB) or the Court of Appeal, should an appeal be subsequently presented against the GSB decision. With the introduction of the present law, an appeal before the EPRT may hence incorporate aggravations on both sanitary and planning merits subsequent to a decision of the Planning Board or the Planning Commission.

Although the EPRT is now also competent to determine an appeal from ‘any decision, ruling or direction in relation to Building Regulations and Building Control Regulations, even where such a decision does not emanate from a development application process’, it should be remarked that the operative article in the Planning Act was held in abeyance. It follows that appeals concerning building regulations shall, at least for the time being, continue to be regulated by the Building Regulations Act.

3.6 Who and when one may appeal

3.6.1 Instances when applicants may appeal

The instances when an applicant may file an appeal have been listed in Article 11(1) of the Environment and Planning Review Tribunal Act, 2016 and limited to ‘decisions taken following an application’ for:

- A full development permission;
- A permission under a development notification order;
- A permission under a regularization process;
- A change in alignment under a planning control application;
- A permission for a project of common interest (PCI);
- Registration by the Registration Board;
- Screening letters, insofar as a request for additional submissions, studies, assessments and documentation and/or fees and/or contributions required to be paid to the Authority before submission of the application are concerned;
- A request for modification or revocation of permission.

But is ‘a decision taken following an application’ necessarily tantamount to the final ‘refusal’ or ‘approval’ subsequent to an application? Or does it refer to any decision which is taken once the application process has been initiated? This matter was raised in Ray Bugeja kontra L-Awtorita’ ta’ L-Ippjanar.\(^\text{185}\) In this latter case, the Development and Control Commission requested appellant to revise the submitted drawings to show one habitable unit instead of two. Subsequently, applicant filed an appeal against the contents of the said letter but the Authority argued that the Planning Appeals Board had no jurisdiction to decide since the appealed document was not akin to a formal decision. Nonetheless, the Planning Appeals Board decided that, according to the appealed letter, the proposal ‘as submitted’ was clearly being

rejected. The Appeals Board rightly concluded that the contents of the letter amounted to a decision, and thus applicant was certainly entitled to appeal. In fact, the Planning Appeals Board held as follows:

“Ghalkemm hu accettat li l-itra tat-13 ta’ Mejju, 1994 m’ghandhiex l-format li solitament jintuza biex jigi kkomunikat r-rifjut lill-applikant, m’hemmx dubbju li l-istess ittra tinkorpora deċizjoni li effettivament qed tichad l-applikazzjoni kif giet proposta.”

From the said judgment, it ensues that a ‘decision’ takes effect once the following elements concurrently subsist:

- An application which is specifically listed in Article 11 is made to the Authority;
- Application is either approved, rejected or applicant was constrained to act in a manner, failure which his application would be rejected.

According to this line of thought, not each and every single controversy arising during the application process is thus tantamount to ‘a decision taken following an application’. For instance, a request by the Planning Directorate to amend the drawings ‘as submitted’ is not tantamount to a decision in terms of Article 11(1) since the planning application would still have not reached determining stage. On the other hand, a ‘request for additional submissions, studies, assessments and documentation and/or fees and/or contributions required to be paid’ is construed to be a direction from the Authority to act in a manner, failure which the application would be rejected. Using the above logic, an appeal may be lodged against such direction regardless whether such request is accompanied with a screening letter as provided in Article 11(1)(b) of the Environment and Planning Review Tribunal Act, 2016.
3.6.2 Instances when a third party may appeal

As already seen, there are a number of instances when a third party may also file an appeal. In all these instances, a third party is not required to prove a personal interest in the appeal in terms of the doctrine of juridical interest but it is enough to submit ‘reasoned grounds based on environmental and, or planning considerations to justify the appeal’.

Essentially, a third party has a right to appeal in the following circumstances:

- When a notice is issued under the provisions of Part IX of the Development Planning Act, 2016;
- A decision on a request for modification or revocation of permission;
- Any decision, ruling or direction in relation to Building Regulations and Building Control Regulations, even where such a decision does not emanate from a development application process;
- A decision following an application for development permission;
- A decision following a planning control application relating to a change in alignment;
- When a decision is given in relation to scheduling and conservation orders.

With regards to non executable permits, these are equally considered as a ‘decision on an application for a development permission’ and thus may be appealed before the Environment and Planning Review Tribunal. Having said that, the EPRT Act is silent as to whether a third party could lodge an appeal once the full permit is eventually issued following a non executable permit. A third party could possibly have an interest to appeal against a full permit that was allegedly issued despite the fact that applicant did not adhere to the conditions laid down in the non executable permit.

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186 Article 22(1) of the Environment and Planning Review Tribunal Act, 2016 states: ‘When an appeal has been lodged by an interested third party in terms of this Act, such a person need not prove that he has an interest in that appeal in terms of the doctrine of juridical interest, which doctrine shall not apply to such proceedings, but such a person shall submit reasoned grounds based on environmental and, or planning considerations to justify his appeal.’
Furthermore, it should be noted that third party appellants are required to have submitted ‘written representations as established by the Planning Authority in terms of Article 71(6) of the Development Planning Act, 2016’ at the onset of the application process in order to be entitled to appeal the eventual decision. In fact, Article 11(e)(i)-(iii) provides that ‘an interested third party who had submitted written representations as established by the Planning Authority in terms of Article 71(6) of the Development Planning Act, 2016’ may appeal ‘(i) from a decision on an application for development permission, (ii) from a decision on a planning control application relating to a change in alignment and (iii) from a decision on scheduling and conservation orders.’ It is also very important that the written representations reach the Authority within the time frame stipulated by law. In Chris Vassallo et. Kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Leonard Cassar, the appeal from third party objectors was immediately thrown out after the Tribunal found that the said objectors had failed to make written representations within the stipulated sixteen day representation period at the onset of the application process.

On the other hand, third parties may not appeal before the EPRT against decisions from applications where the law does not provide for the possibility of written representations at the onset of the application. For example, in Annamaria Spiteri Debono kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar et. the Tribunal dealt with a third party appeal against a permit issued for the removal of danger in terms of Legal Notice 258 of 2002. The Tribunal held that a third party has no right to appeal a permit decision unless the right to register one’s interest at the onset of the application process is specifically provided in the law. Using the same reasoning, third parties are not entitled to appeal before the EPRT from development

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188Annamaria Spiteri Debono f’isimha propju u ghan-nom ta’ Caren Preziosi vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Martin Testaferrata Moroni Viani f’ isem il-familja Testaferrata Moroni Viani, decided on 13th June 2013 by the Environment and Planning Review Tribunal - [Ap. No. 18/13 CF. DS 116/12].
notification orders and regularization applications given that there is no possibility for objectors to make written representations during the application process in such instances.

Nevertheless, an interested third party may inevitably institute an action before the Civil Court to ‘enquire into the validity’ or declare such acts null in terms of Article 469A of Chapter 12 of the Laws of Malta due to the fact there is no alternative mode of contestation or of obtaining redress provided elsewhere. This principle was highlighted in the seminal judgment delivered in the names Bunker Fuel Oil Company Ltd vs Paul Gauci et.:\(^\text{189}\)

> “L-eskluzjoni tal-gurisdizzjoni tal-Qrati li jistha rrgu ghemil amministrattiv ghandha tkun gustifikata biss jekk il-Qorti tkun soddisfatta li, fil-prattika, persuna kellha rimedju effikaci u xieraq disponibbli ghaliha u hija naqset li tirrikorri lejh bla raguni tajba.”

Nevertheless, in contrast to proceedings before the Tribunal, the person instituting an action in terms of Article 469A must \textit{ab initio} satisfy the threshold of judicial interest and prove to the Court that he would suffer a prejudice in the enjoyment of his property as a direct result of the Authority’s decision. Having said that, the interest of a third party does not have to be \textit{stricto senso} but a mere interest would suffice as elaborated upon in Ġustu Debono vs Emanuel Buħaġiar:\(^\text{190}\)

> “Biex jissejjes l-interess ġuridiku, jeħtieġ li l-parti attriċi turi li bittitligh tal-bini li hija tjaqs li sar b’mod abbużiv, hija tkun ġarrbet ḥsara fit-tgawdija tal-ġid tagħha, kemm bil-holqien ta’ servitu’ jew b’kull mod ieħor.”

It is pertinent to note that ‘an interested third party who had submitted written representations as established by the Planning Authority in terms of Article 71(6)’ include the external consultees which are listed in the Third Schedule of the Development Planning (Procedure for Applications and their Determination) Regulations, 2016. The list includes the Environment and Resources Authority, which took over the role of the Environment Directorate within MEPA. As rightly highlighted by the Hon Owen Bonnici in Parliament, this is the first time that planning

\(^{189}\)Bunker Fuel Oil Company Ltd vs Paul Gauci et. decided on 6\textsuperscript{th} May 1998 by the First Hall, Civil Court.

\(^{190}\)Ġustu Debono vs Emanuel Buħaġiar, decided on 21\textsuperscript{st} October 2002 by the Civil Court of Appeal.
decisions may be appealed by a statutory environmental entity, since the Environment Directorate within the previous MEPA was legally prohibited to file an appeal against MEPA’s own decisions. In Parliament, the Hon. Bonnici\textsuperscript{191} had indicated the following:

“Infakkar ftit li għall-ewwel darba, quddiem dan it-tribunal se jkun possibbli li meta jinħareġ permess ta’ żvilupp mill-awtorità tal-ippjanar, dak il-permess se jkun jista’ jiġi appellat mill-awtorità ambjentali. Infakkar li minn meta jidħlu fis-sehħ dawn il-liġijiet ‘il quddiem, se jkollna żewġ Awtoritajiet on the same footing u m’aħniex se nibqghu fis-sitwazzjoni li għandna llum, fejn l-ambjent huwa biss direktorat fil-MEPA, imma se jaghti hafna iktar aċċess għall-ġustizzja.”

Article 11c(i)–(iii) further provides that ‘any person aggrieved’ may appeal against a ‘a notice issued under the provisions of Part IX of the Development Planning Act, 2016’, ‘a decision in relation to scheduling and conservation orders’, as discussed above, and ‘a decision on a request for modification or revocation of permission’. In this sub section, there is indeed no reference for appellant to have registered a prior interest. Consequently, Article 11(e)(iii), which makes reference to prior written representations in the case of scheduling and conservation orders, appears to be superfluous.

On the matter under examination, the author thinks that ‘any person aggrieved’ could include ‘anyone’ with an aggrievance since Article 22(1) of the Environment and Planning Review Tribunal Act, 2016 clearly states that an interested third party need not prove that he has an interest in an appeal before the EPRT in terms of the doctrine of juridical interest.

In the case of ‘notices’ one would also need to refer to Articles 16 and 36(1) of the EPRT Act. Article 36(1) expressly refers to ‘any person who feels aggrieved by any stop or enforcement notice served on him in terms of Article 97, 98 and 99 of the Development Planning Act, 2015’ whereas Article 16 provides that ‘an appeal from an enforcement notice or other notice shall also include a copy of the enforcement notice or other notice being appealed from’.\textsuperscript{192} When taken together, these two sections \textit{prima facie} suggest that, in order to appeal an enforcement

\textsuperscript{191}Parliamentary Sitting No. 292 held on 17\textsuperscript{th} July 2015 – Parliament of Malta.

\textsuperscript{192}Article 16 of the Environment and Planning Review Tribunal, 2016.
or stop notice, the aggrieved must be formally ‘served’ with the said notice. By analogy, it follows that persons who may feel equally ‘aggrieved’ because of their interest in the property, such as a bare owner who was not equally served with the notice which was served, say, only to the usufructuary, are not entitled to appeal.

The right of appeal in so far as decisions concerning revocation of permits, on the other hand, appears to be unrestricted. Any person who simply feels aggrieved by such a decision may therefore appeal, even if not having registered any prior interest during the application process. In my view, such right could be abused and should have been limited to the person making the request, the applicant whose application is being considered and any interested party who formally registers his interest at the onset of the application process as identified above.

Moreover, it should be noted that any person or institution or any department or agency of Government ‘having a direct interest’ and aggrieved by ‘any decision, ruling or direction in relation to Building Regulations and Building Control Regulations’ has a right to appeal such decision before the EPRT ‘even where such a decision does not emanate from a development application process’. Although for the time being, appeals from these rulings shall not be decided by the EPRT, the words ‘having a direct interest’ appear to be in conflict with the spirit of Article 22(1) which provides that interested parties who lodge an appeal in terms of the Act are not required to prove that they have an interest in that particular appeal in terms of the doctrine of juridical Interest.

It is interesting to note that under previous legislation, no appeal was possible ‘by an interested third party from any development control decision concerning a development which is specifically authorized in a development plan’. This article, although rarely invoked, served to dismiss a third party appeal against an approved development or use which was expressly allowed in the relative Local Plan. For example, in Kunsill Lokali Xewkija kontra l-Awtorita’ ta'

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193Article 15(1)(d)(ii) of the Development Planning Act (Chapter 356 of the Laws of Malta), which was eventually replaced by Article (1)(c)(ii) of the Environment and Development Planning Act (The Environment and Development Planning Act of the Laws of Malta).
the Planning Appeals Board threw out an appeal by the Xewkija Local Council who objected against a permit for the increase of industrial activity within an established factory situated in close proximity to a residential area. The Planning Appeals Board held that, in this case, no appeal should lie by an interested third party since the approved industrial use was expressly authorized in the relative Local Plan.

Under the Environment and Planning Review Tribunal Act, this provision has been done away with. It follows that interested third parties are no longer restricted from appealing against planning decisions pertaining to a development or use which is specifically authorized in the planning policies. Undoubtedly, this is understandable since planning decisions are no longer solely determined on the basis of planning policies. More so, the possibility for the EPRT to turn down an application for a particular project which conforms to a ‘development plan’ having gone through Parliamentary scrutiny is equally dangerous, since the EPRT would thus be ignoring the will of the democratically elected representatives of the people.

3.6.3 Special rights enjoyed by the Attorney General

It should be noted that, specifically in the case of appeals from a decision on an application for development permission, a decision on a planning control application relating to a change in alignment and on a decision on scheduling and conservation orders, the Attorney General may appeal on behalf of the Government ‘notwithstanding that he has not submitted representations in writing’. In the 2015 Tribunal Bill, it was proposed that the Attorney General could only appeal when the ‘department, agency, authority or other body corporate wholly owned by the Government’ was not ‘an external consultee’. This provision was eventually done away with. Further on, the Act today provides that ‘any department, agency, authority or other body corporate wholly owned by the Government, not being an external consultee which had been consulted and had not objected shall always be deemed for all

194 Kunsill Lokali Xewkija vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 24th July 2009 by the Planning Appeals Board - [Ap. No. PAB 46/06 ISB. PA 6039/05].

intents and purposes of law to be an interested third party notwithstanding that it shall not have submitted representations in writing'.

Against this background, external consultees are as a general rule, required to submit their representations in writing in order to be eligible to submit an eventual appeal. Should an external consultee, on the other hand, fail to submit the representations within the stipulated time frames, an appeal may still be filed though through the office of the Attorney General. As for the remaining ‘departments, agencies, authorities or other body corporates wholly owned by the Government’ not being external consultees but who were consulted during the process and failed to react, an appeal may be filed which, unlike in the case of external consultees, need not be signed by the Attorney General. Really and truly, it may be argued that there might be a discrimination in the law in that the Attorney General and third parties are not treated on the same footing due to the fact that an ordinary citizen loses his right to appeal if he does not file his written representations within the statutory 30 day period.

3.6.4 Powers which were intended to be given exclusively to Environmental Non Government Organizations (eNGOs)

The 2015 Tribunal Bill also provided that ‘an Environmental NGO shall always be deemed for all intents and purposes of the law to be a registered interested person or party, provided that the appeal is related to an Environmental Impact Assessment or an IPPC permit’. Essentially, this meant that eNGOs were to be given the opportunity to file an appeal against an Environmental Impact Assessment or an IPPC permit without the need to have formally registered any prior objection. Eventually, this provision was substituted to the effect that ‘all persons having sufficient interest shall have access to a review procedure before the Tribunal to challenge a substantive or procedural legality of any decision, act or omission relating to a development or

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an installation which is subject to an environmental impact assessment (EIA) or an integrated pollution prevention and control permit (IPPC) permit’.  

The effects of the amended provision go to show that ‘anyone having sufficient interest’ - therefore not only Environmental NGOs - has a right to appeal any decision consequential to a decision relating to ‘development or an installation which is subject to an environmental impact assessment (EIA) or an integrated pollution prevention and control permit (IPPC) permit’. Hence, it should be observed that the appeal must relate to the decision relating to the development which is subject to the EIA and not the contents of the EIA per se.

Moreover, the words ‘having sufficient interest’, once again, should not be taken to mean that an appellant must satisfy a certain threshold of interest. It must be constantly recalled that all appeals made in terms of the Act are admissible once appellant provides ‘reasoned grounds based on environmental and, or planning considerations to justify the appeal’ without the need to prove that he has an interest in that appeal in terms of the doctrine of juridical interest. Therefore, it is not clear why the legislator felt that he should adopt the ‘sufficient interest’ principle.

3.6.5 Special Powers enjoyed by the Superintendent of Cultural Heritage

A new provision was introduced by Parliament at Committee Stage to the following effect: ‘The provisions of this Act shall be without prejudice to the provisions of the Cultural Heritage Act and in particular they shall not affect the powers of the Superintendent of Cultural Heritage under that Act and the exercise of the Special Powers of the State under Part VII of the said

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199 Article 22(1) of the Environment and Planning Review Tribunal Act, 2016 states: ‘When an appeal has been lodged by an interested third party in terms of this Act, such a person need not prove that he has an interest in that appeal in terms of the doctrine of juridical interest, which doctrine shall not apply to such proceedings, but such a person shall submit reasoned grounds based on environmental and, or planning considerations to justify his appeal.’
Act.\textsuperscript{200} This article must be read in conjunction with Article 38(1) of the Environment and Planning Review Tribunal Act, 2016 which \textit{inter alia} states that ‘The decisions of the Tribunal shall be binding on the Planning Authority, external consultees, registered interested third parties and any other person and, or entity affected by the decision.’ Essentially, this means that a decision of the EPRT should bind all external consultees with the exception of the Superintendent of Cultural Heritage whose special powers stemming from Part VII of the Cultural Heritage Act are not compromised.

To illustrate this point by way of an example, the National Commission Persons with Disability cannot invoke enforcement action in terms of Part VI of Chapter 413\textsuperscript{201} should it consider that a development approved by the EPRT fails to satisfy the ‘justifiable hardship’ thresholds to enable derogation from the relative ‘access for all standards’. On the other hand, where the development relates to a scheduled property, the Superintendent of Cultural Heritage may still impose restrictions in terms of Article 44(3) of Part VII of the Cultural Heritage Act.

3.6.6 Cumulative Appeal

The possibility of having a number of multiple appeals by external consultees is now greater in view of the possibility of the various consultees which may file an appeal. Nonetheless, case law suggests that a cumulative appeal is not possible and individual appellants are in any case required to submit a separate appeal.\textsuperscript{202}

\textsuperscript{200}Article 2(2) of the Environment and Planning Review Tribunal Act, 2016.
\textsuperscript{201}Chapter 413 of the Laws of Malta – Equal Opportunities (Persons with Disability) Act.
\textsuperscript{202}Anthony Borg \textit{et nomine vs l-Kummissjoni ghall-Kontroll ta’ l-Izvilupp}, decided on 18\textsuperscript{th} April 1997 by the Planning Appeals Board - [Ap. No. 102/94 KA].
3.7 Principles of good administrative behavior

The Environment and Planning Review Tribunal Act, 2016 introduced a set of rules styled as principles of good administrative behaviour, which the Tribunal ‘shall adhere to and apply.’ Although no express provision was ever made in any of the previous planning legislations, it is acknowledged that these principles were long known to our justice system. In Parliament, the Hon. Dr. Michael Falzon maintained that the incorporation of the principles of good administrative behaviour in the new planning legislation reinforce such requirement.


Professor Kevin Aquilina questioned whether “there is a need to list these principles in the Tribunal’s law when these are already listed elsewhere”, referring of course to Article 2 of the Administrative Justice Act (AJA). At face value, this assertion appears well founded since Schedule One of the AJA already provides that these principles should be respected by the Planning Appeals Board, now the EPRT. Nevertheless, decision makers with no legal background are not necessarily familiar with such fundamental concepts. For example, a former chairman of the EPRT, who is a perit by profession, argued recently that “the role of the EPRT is not to deliver ‘justice’ to one side or the other (the courts do that) but to decide on the planning merits of a case in the public interest based on a final technical interpretation of existing plans and policies”. This assertion came when least expected, considering that the person concerned
was responsible himself for the conduct of quasi-judicial proceedings. This only goes to show that the principles of natural justice warrant wider recognition. At the same time, one could argue that such cases should be dealt with administrative courts presided by members of the judiciary who after all benefit too from a security of tenure.

3.7.1 The first principle of good administrative behaviour – fair hearing

The first principle of good administrative behaviour refers to the long established notions that ‘a man may not be a judge in his own cause and that a man’s defense must always be fairly heard’\(^\text{209}\). Indeed, the first principle of good administrative behaviour reads as follows:

‘The Tribunal shall respect the parties’ right to a fair hearing, including the principles of natural justice, namely: (i) nemo judex in causa sua, and (ii) audi et alteram partem’.

In the past, the principle of ‘audi alteram partem’, or ‘right to be heard’, was raised time and again before the Tribunal by appellants who alleged that this right was being infringed. In Nicholas Cutajar kontra L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar,\(^\text{210}\) the appellant made specific reference to the principle of ‘audi alteram partem’ and requested the Tribunal to summon the enforcement officer Brian Borg who had issued an enforcement notice in relation to works which the latter himself had allegedly authorized during a site inspection. Appellant made a written application to the following effect:


\(^\text{210}\)Nicholas Cutajar vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 15\(^\text{th}\) May 2014 by the Environment and Planning Review Tribunal - [Ap. No. 200/13E. ECF 231/13.].
The Tribunal nonetheless turned down appellant’s request, maintaining that there was no need for the witness to be heard, notwithstanding the principle of ‘audi alteram partem’:

“The Tribunel kellu dovut lill-Appellanti u r-rifrenzi ghall-massimu legali audi alteram partem, kliem il-ligi huma cari.....inutili li tigi milqogha t-talba tal-Appellanti li tinstema x-xhieda ta’ Brian Borg.”

Clearly, the appellant was in this case ‘denied what he regarded as an adequate opportunity to put to the administration in the appropriate way facts, opinions, arguments, etc. which he thought were necessary for the protection of his interest’. 211 In my view, the Tribunal was under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties ‘without prejudice to its assessments of whether they are relevant to its decision.’ 212

Unfortunately, this case was not pursued further since no appeal was lodged before the Court of Appeal. Thus, it remains unclear whether the Court would have reasoned out that appellant was in this particular case denied the opportunity of a fair hearing.

For certain, the current Environment and Planning Review Tribunal Act, 2016 specifically provides that all parties may produce witnesses as evidence provided their details and the facts they intend to establish through their evidence are stated in the appeal or in the reply to the appeal. 213 At least, the Tribunal is now fully aware that the legislator wanted to give any party to the appeal ‘the opportunity he desires to influence the decision-maker’ 214 and such opportunity may not be denied arbitrarily.

In the meantime, there were other instances where the Court has ruled that the Tribunal acted in breach of the ‘audi alteram principle’, although no express reference was made to such principle in previous planning legislation. In *George Attard vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar*, the Court held that appellant was denied the right of fair hearing since he was not duly notified of the sitting and notwithstanding that both his architect and lawyer were present during the sitting.

The principle of ‘*nemo judex causa sua*’ is, on the other hand, to ensure that Tribunal members do not have any conflicting interest which might lead someone to suppose that there is bias involved or that the Tribunal would have otherwise acted differently. Article 40(3) of the Environment and Development Planning Act already provided that ‘*a member of the Tribunal shall be disqualified from hearing an appeal in such circumstances as would disqualify a judge in a civil suit*’. This principle has been reaffirmed in Article 4(6) of the EPRT Act, which expressly provides that ‘*a member of the Tribunal shall be disqualified from hearing an appeal in terms of Article 734 of the Code of Organization and Civil Procedure*’. The difference is that specific reference to the relative Code of Organization and Civil Procedure article regulating disqualification of judges in hearing a suit is now being made.

But who shall decide that a member of the Tribunal should be disqualified? The Environment and Planning Review Tribunal Act, 2016 is silent on this particular point and one would therefore need to rely on the Code of Organization and Civil Procedure for guidance. Consequently, it follows that it is the member himself who should ‘*decide on the ground of challenge*’ and ‘*where there is any reason to doubt as to whether an alleged ground of abstention is a good ground or otherwise all the judges (in the case of the EPRT, members), including the judge (the EPRT member) alleging such ground, shall decide on such ground.*’

*George Attard vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar* decided on 26th June 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 51/2011].
The Environment and Planning Review Tribunal Act, 2016 is also silent as to how a challenge is made. Before a Court of Law, any objection raised by the parties must be made in ‘open court’ and supported with reasons, which need to be proved where necessary.

Furthermore, it is pertinent to ask: At which stage can a member be challenged by a party to the appeal? Once again, the Environment and Planning Review Tribunal Act, 2016 is silent on this matter. Article 739 of the Code of Organization and Civil Procedure however provides that both the plaintiff and defendant may file a challenge only at preliminary stage ‘unless the ground of challenge shall have arisen subsequently, or unless the party raising the objection, or his advocate, shall declare upon oath that he was not aware of such ground, or that it did not occur to him at the time.’ Having said that, a member of the Tribunal ‘shall be disqualified’ in contrast with judges who, on the other hand, ‘may be challenged’. The words ‘shall be disqualified’ are unequivocal and tantamount to a matter of public order. It follows that a plea of challenge before the EPRT may thus be raised at any stage during proceedings as well as before the Court of Appeal (Inferior Jurisdiction) in terms of Article 39 of the EPRT Act.

### 3.7.2 The second principle of good administrative behaviour – timely decisions

The second principle of good administrative behaviour reads as follows:

‘The time within which the Tribunal shall take its decisions shall be reasonable depending on the circumstances of each case. The decision shall be delivered as soon as possible and for this purpose the tribunal shall deliver a single decision about all matters involved in an appeal before it whether they are of a preliminary, substantive or procedural nature’.

Time considerations have been always an issue in so far as planning applications are concerned. Apart from financial stakes, applicants often do encounter a situation where the pertinent planning policies are changed by the time their application is determined. In Michael Axisa
ghas-socjeta Lay Lay Co. Ltd vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar the Court dismissed appellant’s arguments that the Tribunal was bound to apply the policies which were applicable at the onset of the application process once the Authority and the Tribunal took a long time long to process his application. In fact, the Court reiterated the principle that planning decisions must be taken in line with the applicable polices at the time of the decision. Consequently, processing time is of essence, all the more since policies can change to one’s detriment during the course of an application process.

Indeed, the Environment and Planning Review Tribunal Act, 2016 has introduced various provisions with a view to avoid delaying tactics together with strict time frames within which the Tribunal is bound to decide. In fact, the Tribunal shall now hold its first hearing within two months from the lodging of the appeal application whereas under the previous legislation, the first hearing was held within three months from receipt of the appeal. As shall be seen hereunder, if an appeal is accompanied by a request for suspension of the execution of a permission, the primo appuntamento shall be held within a shorter time frame, namely a month.

Moreover, the idea is that both the appellant and the Authority are required to have made their respective preliminary submissions before the first sitting. In fact, the Authority is made aware of the appeal application and the ancillary documentation within 5 working days from when the date for the first sitting is set and the Authority is in turn obliged to formally reply within 20 days. This will make sure that appellant is made aware of the Authority’s defence prior to the first hearing. In previous years, the Authority’s submissions were rarely communicated to appellant before the first sitting even though, strictly speaking, ‘a copy of the appeal and the ancillary documentation was to be communicated to the Authority before the appeal is heard’.217

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216 Michael Axisa ghas-socjeta’ Lay Lay Co. Ltd vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 14\textsuperscript{th} January 2015 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 44/2013].

What would happen if the Authority fails to make a reply within 20 days? The Act fails to provide a definite answer. Nonetheless, in the absence of an express provision in the EPRT Act, the Tribunal may not pronounce a state of *contumacia*, in which case the Authority would be unable to produce evidence in its favour, be unable to file pleas and be unable to cross-examine evidence brought by appellant. On the other hand, the Tribunal may once again choose to examine whether the defendant Authority had a justification not to file a statement of defence, in which case, an extension of time could be granted.

In any case, appeals against decisions of the Planning Authority will now be decided within a stipulated time frame, depending on the nature of appeal. Appeals against planning decisions and enforcement notices shall in fact be determined within a year from the date of the first hearing, which period may be extended by a further 6 months ‘in exceptional cases, in the interests of justice’ but ‘no evidence or submissions shall be lodged during the extension period’. There is no clear cut definition for the term ‘interests of justice’ in the law. It is my opinion that this was purposely done so that the interpretation to be given should not be a restrictive one but extensive in its applicability.

In the case of summary applications and DNOs, an appealed decision needs to be determined within three months from the first hearing of the appeal and no provision is made whereby the said three month period may be extended ‘in the interests of justice’.

But what if the said time frames are not adhered to? The Act provides a practical solution ‘in the event that a final decision is not granted within the time-frames above indicated’. In that case, ‘the appeal shall be assigned by the Secretary to another panel’. In fact, a similar provision already exists in the Code of Organization and Civil Procedure, notably Article 195(5)(a) which provides that any party to the case may present an application to the Chief Justice, asking for the case to be assigned to another member of the judiciary ‘where a cause

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218 Article 35(a) of the Environment and Planning Review Tribunal Act, 2016.
219 Article 35(c) of the Environment and Planning Review Tribunal Act, 2016.
has been pending before a particular court for three or more years or where a cause has been pending for judgment before a particular court for eighteen months or more’. In the case of the EPRT, the appeal would be however assigned *ex lege* to another panel, without the need of any of the parties making the relative request. However it is to be noted that in such circumstances there is no time frame within which the new panel shall then determine the case. Therefore, it is not clear whether shifting the caseload before another panel would necessarily result in more timely decisions.

When a request for suspension is made concurrently with the appeal application, the Tribunal must now hold the first hearing within 30 days from the receipt of the application and state whether the works should remain suspended depending whether ‘the prejudice that would be caused would be disproportionate when compared with the prejudice caused by the staying of the actual execution of the permit’ and ‘the development may not be easily removed or reversed.’ In any event, the time frame within which the Tribunal must then deliver its final decision is equivalent to a maximum of three months, regardless of the type of application.

More so, ‘an application subjected to an Environmental Impact Assessment and, or to an IPPC permit, which in the opinion of the Minister responsible for the Planning Authority is of strategic significance or of national interest, related to any obligation ensuing from a European Union Act, affects national security or affects the interests of the Government and, or of other governments’ needs to be determined within one month.222

It is interesting to note that in the case of appeals accompanied by a request for suspension, no such provision is made to allow for an extension ‘*in the interest of justice*’. Moreover, there is neither a provision to suggest that the appeal shall be assigned *ex lege* to another panel in case of non adherence with the above time frame, although a suspension order lapses *ipso jure* after three months.


Finally, witnesses who are duly notified and yet fail to appear before the Tribunal ‘without just cause’ still risk being fined between two hundred euro (€200) and five thousand euro (€5,000).\textsuperscript{223} Moreover, the Tribunal is now empowered to consider an appeal as abandoned if the appellant shows no interest in the appeal by failing to appear before the Tribunal on two consecutive sittings without good cause.\textsuperscript{224} Of course, both measures are aimed to do away with deliberate delaying tactics. Furthermore, the Act now provides that the Tribunal must hold its first hearing within shorter time frames while decisions shall, for the first time, be delivered within stipulated frames.

### 3.7.3 The third principle of good administrative behaviour – procedural equality

The third principle of good administrative behaviour is the following:

‘Each party shall be given an opportunity to present its case, whether in writing, or orally, or both, without being placed at a disadvantage.’

Essentially, one’s right to present his case without being placed at a disadvantage also reflects the general principle of the ‘right to a fair hearing’.

### 3.7.4 The fourth principle of good administrative behaviour – availability of information

The fourth principle of good administrative behaviour is as follows:

‘The Tribunal shall ensure that the Planning Authority makes available to the parties to the proceedings, the documents and information relevant to the appeal.’

The ‘documents and information relevant to the appeal’ may include documents or information contained in the file and which the public is otherwise not entitled to view if no appeal procedures were initiated. Oddly enough, Article 33(2) of the Development Planning Act, 2016

\textsuperscript{223} Previously, the same provision was found in Article 4 of Second Schedule of the Environment and Development Planning Act.

\textsuperscript{224} Article 42 of the Environment and Planning Review Tribunal Act, 2016.
limits public access to ‘that part of the file’ containing the application report, the decision and reasons for such grant or refusal together with the relative plans and document, environmental impact statements, environmental planning statements, traffic impact statements and all alternative site assessments and cost-benefit analysis. In appeal proceedings, a party may, by contrast, request the Tribunal to have access to any other recorded information that would have been exchanged between officers of the Authority during the actual application process. Nevertheless, a practical difficulty could arise if a party to the appeal proceedings insists on seeing a professional legal advice given to the Planning Authority due to the fact that such advice would have been given under professional secrecy unless the Authority decides to waive same.

Once the entire file is accessible to the appellant after the first sitting held by the Tribunal, the scope of limiting access to the public of the same file at an earlier stage as provided in Article 33 of the Development Planning Act, 2016 finds little solace.

3.7.5 The fifth principle of good administrative behaviour – evidence admitted to be available

The fifth principle of good administrative behaviour provides the following:

‘Proceedings before the Tribunal shall be adversarial in nature. All evidence admitted to the tribunal shall, in principle, be made available to the parties with a view to adversarial argument.’

Once again, the right of the parties to have full access to all evidence admitted during proceedings is in keeping with the general principle of the ‘right to a fair hearing’.

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3.7.6 The sixth principle of good administrative behaviour – Tribunal in a position to examine all factual and legal issues

The sixth principle of good administrative behaviour is the following:

‘The Tribunal shall be in a position to examine all of the factual and legal issues relevant to the appeal presented by the parties in terms of the applicable law.’

This article makes express reference to ‘applicable law’. The term ‘applicable law’ may be construed that the Tribunal is bound by the laws which are applicable at the time of the decision in line with the general principle that ‘il-ligijiet procedurali ma ghandhomx jigu applikati retroattivament.’\textsuperscript{226}

3.7.7 The seventh principle of good administrative behaviour – deliberations open to the public

The seventh principle of good administrative behaviour reads as follows:

‘Save as otherwise provided by law, the proceedings before the Tribunal shall be open to the public’

Although giving an impression that there are circumstances where the Tribunal may conduct proceedings behind closed doors, the Environment and Planning Review Tribunal Act, 2016 provides for no such situations. In fact, the said Act states further on that ‘all decisions of the Tribunal’ shall be delivered also in public.\textsuperscript{227}

\textsuperscript{226}Carmel Pullicino vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 31\textsuperscript{st} May 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 6/2011].

\textsuperscript{227}Article 38(2) of the Environment and Planning Review Tribunal Act, 2016.
3.7.8 The eighth principle of good administrative behaviour – duty to give reasons

The eighth principle of good administrative behaviour relates to the ‘duty to give reasons’ and states the following:

‘The Tribunal shall indicate, with sufficient clarity, the grounds on which it bases its decisions. It shall not be necessary for the tribunal to deal with every plea raised, provided that where a plea would, if accepted, be decisive for the outcome of the appeal, such a plea shall require a specific and express consideration.’

It is acknowledged that the majority of Tribunal decisions which have been annulled by the Court were found to violate this same said principle. In June Laferla vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, the Court of Appeal (Inferior Jurisdiction) ruled that the Tribunal, although dealing with each and every plea, failed to support its reasoning with sufficient motivation.

In Reverendu Joseph Tabone vs L-Awtorita’ta’ Malta dwar l-Ambjent u l-Ippjanar, the Court ruled on the same lines. Here, the Court found that the Tribunal cited a number of planning policies in support of its conclusions and yet failed to state how such policies interact with the aggravations of the appellant. For this reason, the Court concluded that the Tribunal’s decision was not adequately ‘motivated’ as required by law.

3.8 Time to submit an appeal

Appeals to the Environment and Planning Review Tribunal are required to be filed within the time periods stipulated by law. Indeed, the time periods within which appeals submissions are required to reach the Tribunal have remained practically unchanged. In the case of decisions

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228 June Laferla vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 26th March 2014 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 36/2013].
229 Reverendu Joseph Tabone vs L-Awtorita’ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 26th June 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. 58/2011].
which need to be published according to the Planning Act, the time period has remained 30 days from the date on which the decision is published on the Department of Information website. Appeal submissions in relation to decisions which need not be published are required to reach the Tribunal within thirty days from date of notification of the decision. On the other hand, appeals against notices must still be lodged within ‘fifteen days from the service of the notice or within fifteen days from the publication of the said notice on the Department of Information website, should the Planning Authority deem fit to make such a publication.’

When a reconsideration is submitted by applicant concurrently with a third party appeal, the time period shall restart from the date of receipt by the Tribunal of the reconsidered decision so that third party appellant may make further submissions to the Tribunal if he deems it necessary. It is important to highlight that failing to adhere to the above time frames would render the appeal ‘fuori termine’ and hence null and void.

In Joseph Debono kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, the Tribunal found that the appellant did not file the appeal against the enforcement order within 15 days from the serving of the enforcement notice. The Tribunal added that the period is extended until the next working day when the last day is on a weekend or a public holiday. In this case, the Tribunal found that the appeal was filed way beyond the 15 day period and held that the appeal was submitted ‘fuori termine’.

It is equally important to ensure that the appeal reached the Tribunal’s registry (which now replaces the Tribunal’s secratariat). In OSA Services Ltd kontra l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, the Tribunal held that the appeal was fuori termine once it found that the submissions were erroneously filed at the offices of the Authority. The Tribunal observed

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231 Article 13(1) of the the Environment and Planning Review Tribunal Act, 2016.
234 OSA Services Ltd vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 14th November 2013 by the Environment and Planning Review Tribunal - [Ap. No. 177/13 MS. ECF 408/12].
that it was the responsibility of the appellant to ensure that the appeal submissions reach the right location.

3.9 Appointment of experts

For the first time, ‘the Tribunal may appoint an expert or more than one expert to draw up a report on any matter which the Tribunal deems relevant to the appeal’.\textsuperscript{235} Essentially, a similar system already exists in our Courts. Nonetheless, the idea was rejected by Professor Aquilina\textsuperscript{236} who described it as ‘a wrong move as it will contribute only to increase expenses to parties who appear before it and delay the decision making process.’ Although, the appointment of experts during a process would definitely increase expenses, it is equally acknowledged that certain technical aspects may require the input of specialised expertise, all more so since the competence of the Tribunal has increased. Being a ‘planner’ sitting on a Board is not necessarily tantamount to being an expert, for example, in aspects of fire safety and ventilation systems which now fall under the competence of the Tribunal. Even more so, the envisaged expenses related with experts would be probably minimal when compared to the huge investment which is typically associated with construction projects. On the other hand, the appointment of experts may be considered as an unnecessary added expense and consequently have an adverse effect in disheartening third parties, including eNGOs, from filing an appeal.

3.10 Power to make corrections

Section 46 (1) of the Environment and Planning Review Tribunal Act, 2016 introduced the possibility for the Tribunal to correct mistakes arising from an oversight or omission. Indeed, the Tribunal may, prior to the decision, allow the modification, adding or striking of names of any parties as well as the correction of ‘any other mistake’ at the request of any of the parties.

\textsuperscript{235}Article 30(2) of the Environment and Planning Review Tribunal Act, 2016.

\textsuperscript{236}Kevin Aquilina: Twenty reasons against MEPA’s demerger. Article published on maltatoday.com.mt. 29th July 2015.
The Tribunal may also out of its own motion remedy ‘any administrative omission or mistake in an act’ until it delivers the decision. Once a decision is delivered, the Tribunal has the power to amend only ‘an error of calculation incurred in the decision’ or correct ‘an error in the wording of the decision’ or ‘an expression which is equivocal, or which may be construed differently from that evidently intended by the Tribunal’. In any event, the Tribunal must act within 20 days from the date of the decision and the 20 day period within which one may appeal the ‘corrected’ decision before the Court will restart from the date of the notification of the decree given on the demand for the amendment.

On the other hand, the parties may also request the Tribunal during proceedings to ‘make further submission of fact or of law by separate note as long as such changes do not change the substance of the action or of the defence on the merits of the case.’

These provisions are clearly intended to avoid situations where a Tribunal decision may not be implemented in practice or even annulled by the Courts due to some simple omission in the decision such as an error in the name of the parties.237

3.11 The role of the Court of Appeal (Civil Jurisdiction)

Under the previous legislation, it was already an established principle that ‘the decisions of the Tribunal shall be final’ and an appeal from such decisions could be made by the appellant or any of the appellate parties to the appeal before the Court of Appeal (Inferior Jurisdiction) ‘on a point of law decided by the Tribunal or on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal.’238 Such an appeal had to be lodged within twenty days from when the decision of the Tribunal was delivered in public and the Court was in turn bound to conclude ‘in a timely manner’239 even though no provision was made to enforce a timeframe

237Louise Anne Sultana vs Kummissjoni għall-Kontroll ta’ l-Izvilupp, decided on 14th April 1997 by the Court of Appeal (Inferior Jurisdiction).
239Article (41)(16) of the Environment and Development Planning Act.
within which the Court was required to deliver judgment. In the previous law, it was also established that ‘an appeal from a partial decision of the Tribunal may only be filed together with an appeal from the final decision of the Tribunal.’ Moreover, the Secretary of the Tribunal was vested with all legal and judicial representation of the Tribunal in all judicial proceedings instituted against the same Tribunal, including, of course, proceedings following a Tribunal decision.

All the above features were in fact retained under the current Environment and Planning Review Tribunal Act. Moreover, today Article 39 of the said Act further provides that, apart from ‘points of law decided by the Tribunal’, decisions of the Tribunal may also be appealed on ‘any matter relating to an alleged breach of the right of a fair hearing before the Tribunal’. Really and truly, this was already the case under previous legislations because the principles of natural justice were always deemed to qualify under the ambit of ‘law’ by our Courts. In point of fact, the implications resulting from the non observance of such rules should now seem very obvious, since these rules are now listed as rules of good administrative behaviour, which the Tribunal ‘shall apply’.

In *Max Zerafa vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjana* the Court of Appeal (Inferior Jurisdiction) maintained that it had no jurisdiction to reassess the evidence and technical facts which led to the Planning Appeals Board’s conclusions. A decision which is based on the ‘wrong’ interpretation of facts is not tantamount to a point of law and thus falls outside the competence of the Court. Consequently, the Court was precluded from ascertaining whether the Tribunal was correct in interpreting the facts leading to its conclusions. The Court held:

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240 Article (41)(3) of the Environment and Development Planning Act.
243 Max Zerafa vs Il-Kummissjoni ghall-Kontroll ta’ l-Izvilupp, decided on 12th January 2004 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 20/2012].

On the other hand, in **Joseph Tonna vs L-Awtorita’ta’ Malta dwar l-Ambjent u l-Ippjanar,**\(^{244}\) the Court found against the Planning Appeals Board because the latter failed to give regard to the ‘surrounding commitment’ in determining whether the permit should have been issued as required by the relevant section of the law. In its conclusions, the Court held:

“Illi fl-opinjoni ta’ din il-Qorti, din hija aplikazzjoni hazina tal-Ligi, u dan peress li dak li l-Bord kellu jaghmel kien fl-ewwel lok jara jekk kienx hemm commitment ghal tali tip ta’ zvilupp, u dan fil-mument li kienet ser tittiehed id-decizjoni.”

Although, in recent judgments, the Court gave a different interpretation as to how this particular section of the law should be applied by decision makers, it reiterated the idea that the wrong application of any section of the law is subject to its scrutiny.

Similarly, the Court declared that it has jurisdiction ‘on a point of law’ after it found that the Tribunal adduced extraneous requisites to a particular planning policy. In **Carmel Gauci vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar,**\(^{245}\) the Tribunal found against appellant after concluding that Policy PLP20\(^{246}\) required applicants to furnish evidence which attests that the building was occupied as a residence until the date of application. Nonetheless, the Court observed that no such requirement was made in the said policy PLP20 and thus concluded that that the Tribunal made a wrong application of the law.

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\(^{244}\)Joseph Tonna vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 24\(^{th}\) February 2011 by the Court of Appeal ( Inferior Jurisdiction) - [Ap. No. 6/2010].

\(^{245}\)Carmel Gauci vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 4\(^{th}\) December 2013 by the Court of Appeal ( Inferior Jurisdiction) - [Ap. No. 28/2013].

\(^{246}\)Policy PLP 20 regulated structural extensions to residences situated outside development zones at the time.
On the other hand, the Court consistently held that it had no jurisdiction to decide whether the Tribunal made a wrong appreciation of the facts before it, in consequence of which, the wrong policies were ‘applied’. In *Joseph Tanti vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar et* 247 the Court held:

“In... *id-decizjoni bazikament tikkontjeni semplici applikazzjoni ta’ diversi policies tal-Pjan ta’ Struttura ghall-fatti tal-kaz kif rahom u apprezzahom il-Bord. Apprezzament tehniku dan li jisfuggi l-mansjoni revizjonali ta’ din il-Qorti. Jidher car ghalhekk mal-ewwel illi l-appellant qieghed jappella fuq fatti. Dan ... ma huwiex possibbli legalment.”

Nevertheless, the Court has held in recent judgments, that it would also evaluate ‘points of facts’ in exceptional circumstances where it results that the Tribunal’s conclusions are based on a manifest injustice or a gross error of fact. This was the conclusion of the Court in *Martin Baron vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar et* 248:

“Dan l-aggravju biex jinqara bhala appell fuq punt ta’ ligi deciz mit-Tribunal ma jistax jittiehed fil-perspettiva ta’ apprezzament tal-provi da parti tat-Tribunal li fuqhom din il-Qorti ma ghandhiex poter tissindaka hlief f’kazijiet eccezzjonali ta’ manifesta ingustizzja jew zbali grossolan ta’ fatt liema fatt kien dak li ddetermina d-decizjoni tat-Tribunal.”

Should the Court decide to annul the Tribunal’s decision, the case is sent to the Tribunal for reassessment. As held in *Costa Brava Company Limited vs Dormax Promotional Printing Limited*, 249 the Tribunal has no option but to follow the Courts directions.

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247 Joseph Attard vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 28th October 2002 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 13/01].
248 Martin Baron vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Mario Farrugia f’isem il-Fondazzjoni Wirt Artna, decided on 22nd January 2014 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 54/2013].
The approach taken by the Court in Paul Polidano vs l-Awtorita’ta’ Malta dwar l-Ambjent u l-Ippjanar\textsuperscript{250} is perhaps more intriguing, although legally questionable. In this case, the Court quoted from a previous judgment in the names of Martin Debrincat vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar et and warned the Tribunal that it would pronounce judgment on the merits, should the Tribunal persist in ignoring the directions given by the Court.

All the above judgments go to show that questions of law may take various forms. It is therefore not surprising that the legislator has once again steered away from defining ‘a point of law’.

\textsuperscript{250}Paul Polidano vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 31\textsuperscript{st} May 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No. 13/2011].
Chapter 4: Conclusive remarks

4.1 Reconsideration of research questions

This thesis was presented in the following order – Chapter One dealt with the administrative setup of the new Planning Authority, Chapter Two delved into the permitting process dictated by the new provisions and Chapter Three focused on the new Environment and Planning Review Tribunal.

At each and every stage of the study, the author made an attempt to address the following research questions:

- What are the changes brought about by the new legislation?
- How do the said changes reconcile with the aims of the legislator?
- How do these changes ‘interact’ with established case law?
- To what extent do these changes reflect the public’s criticism in furtherance to the published Bills?
- Could the legislative product be better?

4.2 Evaluation of thesis

The answers to the above questions may be rounded up as follows:

- **What are the main changes brought about by the new legislation?** One of the major changes envisaged in the new legislation and which drew up substantial criticism relates to the setting up of the Executive Council. All things considered, better cooperation between the planning regulator and other regulatory stakeholders, who in turn may give their input during policy formulation, should however be envisaged. The situation was certainly different under
previous legislation, since the MEPA Board was primarily focused on permit decisions rather than creating new policies. In addition, it is expected that planning policies would hopefully be revisited more often.

The envisaged changes, whereby the Planning Authority has now been entrusted to also decide on sanitary matters instead of the General Services Board should translate to a swifter application process. Similarly, having external statutory consultees being jointly consulted at the onset of the application process should equally contribute to quicker processing. The introduction of the Agriculture and Advisory Committee, whose role includes the collation of information from the relative Government Departments on behalf of applicants, should likewise save a lot of time for farmers who were previously obliged to obtain the required information themselves prior to submitting an application.

On a similar note, the jurisdiction now enjoyed by the EPRT, covering planning control applications and sanitary matters, should lead into a more effective remedy being given to prospective applicants. Moreover, it should be observed that the Tribunal must now comply with stricter procedures, including a timetable for action. Having said that, the author is of the firm opinion that the notion of ‘fair hearing’, now codified in the Tribunal Act, should under no circumstance be diluted at the expense of fleetness.

It was further argued that the new legislation seeks to enhance the ‘connection’ between stakeholders/citizens and the planning process. The presence of the ERA on both the Executive Council and the Planning Board signifies *prima facie* a stronger voice for the environment in both the policy and decision process. Likewise, the direct representation of Local Councils and eNGOS on the Planning Board denotes a wider representation of civil society in the decision making process. However, as expounded upon in this thesis, having Local Councils and the ERA expressing their position with regard to an application in their capacity as a statutory consultee and eventually participating in the decision process could form the basis of a legal dispute. Furthermore, the environment regulator is amongst the list of external consultees and thus also
enjoys a right of appeal before the EPRT for the first time since prior to MEPA’s demerger, the environment Directorate had no legal standing before the Tribunal and/or the Courts. Nevertheless, the success in the relationship between the Authority and consultees solely depends on whether the latter are ultimately equipped to deal effectively with the thousands of referred planning applications.

It was further stated that any person filing a request for the revocation of a planning permit is now automatically entitled to a public hearing and the Planning Directorate may no longer choose to block any such request on the basis of lack of *prima facie* evidence. Once again, this goes to show that the rights given to third parties are being strengthened. Similarly, the ‘summary’ regime introduced in the latest legislation hosts a number of developments which previously qualified under a simple DNO and thus could be carried out without third parties being informed about the proposed works. It follows that those orders which have been migrated to the summary framework are subject to external consultation for the first time. In turn, the decision of a summary application can be appealed by interested third parties before the EPRT. This novel move is once again directed to enhance third party rights.

From the above, it transpires that the rights of third parties have been ‘widened’, possibly even excessively. On the down side, the result of these changes could lead to a myriad of requests for revocation of planning permits together with frivolous and vexatious litigation before the Tribunal.

It was also observed that the new law gives a lot of discretion to decision makers since they need to achieve a balance in ‘trade offs’ between policy requirements and material considerations. In the past, such latitude was exercised occasionally by decision organs, including the Court, even though the law clearly provided otherwise. It appears that the new Article 72(1) is the right answer to achieve optimal planning solutions, enabling decision makers to take regard to circumstantial ‘context’ which is not necessarily reflected in the actual plans.
and policies without breaking the law. This is in line with the principle that ‘meta qed tiehu decizjoni fuq applikazzjoni, trid tqis ic-cirkostanzi kollha’. 251

The author also made reference to the removal of the Schedule Six, whose effectiveness was hampered by a number of challenges. It was explained that the said Schedule was enacted when illegal activities were still financially ‘viable’ because the daily fine regulations were still not in force. More so, its removal was seen positively since decision makers need no longer defy the law – as happened very often - by not requesting the removal of post-2007 illegalities outside the development zone prior to their sanctioning.

It was clear from the onset that the legislator intended to give more legal certainty where it was due. The replacement of Category B developments with the regularization framework is a prime example. Likewise, the definition of ‘illegal development’ together with a clearer explanation as to what constitutes a vested right in a planning decision as well as the revised definition of ‘error on the face of the record’ should lend a hand to address the various conflicting interpretations given to date. Also, the instances when an appeal may be lodged before the EPRT have been better defined, leaving little doubt as to when and who has a right to appeal. Likewise, the principles of good administrative behaviour, the legal imposition of time frames within which the Tribunal is bound to deliver its decisions together with the power of the Tribunal to appoint experts should also contribute to a better ‘legal’ environment.

- How do the said changes reconcile with the aims of the legislator? From a reading of the previous subsection it transpires that the legislator’s aims could be summed up as follows: First, to cut red tape, promote a streamlined approach and speed up the planning application process. Secondly, to give a stronger voice to the ordinary man in the street as well as other statutory stakeholders, particularly the environmental regulator and the Superintendent of

251 Concluding speech by the Hon. Deborah Schembri, Parliamentary Secretary for Planning and Simplification of Administrative Processes. Conference organized by the MEPA for its employees about the MEPA Demerger. Conference was held at the Dolmen Hotel, Qawra on 12th March 2016.
Cultural Heritage. Thirdly, to provide concrete and enforceable ways in response to past legal anomalies.

- **How do these changes ‘interact’ with established case law?** It is evident throughout that case law wielded its effect on the legislator. A number of provisions which are now found in the law mirror the directions given by the Court in past decisions. (For example, the principles of good administrative behaviour are now found in the Tribunal Act, thus rendered more evident). Equally so, certain amendments were carried out with a view to provide ‘neat’ legal solutions in response to past ‘illegal’ trends. (For example, the removal of the Sixth Schedule which was very often overlooked by decision makers).

- **To what extent do these changes reflect the public’s criticism in furtherance to the published Bills?** It would be safe to state that the majority of the proposals put forward during public consultation were not taken on board by Parliament. For example, Parliament proceeded with the removal of the Sixth Schedule, the reintroduction of the outline permit and the setting up of the Executive Council, amongst other new provisions which had been highly criticized by the environmental lobby. However, Parliament embraced some of the suggestions put forward. These include the veto given to the Superintendent of Cultural Heritage over planning decisions. On the other hand, on a number of occasions, such as with ‘issues of ownership’, as shall be seen in the next subsection, government succumbed to public pressure at the expense of legal uncertainty. Finally, it was observed that certain suggestions, such as the proposal to delete any reference to ‘projects of common interest’ from the law were *ab initio* frivolous.

- **Could the legislative product be better?** Although the legislator made an evident attempt to address many of the past legal inconsistencies, the author still thinks that a number of issues were overlooked. As observed earlier on, section 33 (2) of the Development Planning Act, 2016, which restricts public access to only certain ‘parts’ of an application file, serves little scope. This is particularly so since a party to an appeal may eventually request the Tribunal to
gain access to all recorded information. Moreover, the Civil Court\textsuperscript{252} has recently decreed that an objector should have the opportunity to view the minutes contained in the relative application file prior to the planning decision. Thus, in light of what was just explained, such a provision does not really hold water.

On other occasions, the legislator simply succumbed to media pressure. This was particularly so with regard to ownership issues since government withdrew from what was previously provided for in the 2015 Planning Bill. This could be easily done away with since the legislator has introduced a concurrent safeguard stipulating that permits do not ‘in any manner constitute or be construed as a guarantee in favour of the applicant as to the title to the property.’\textsuperscript{253}

### 4.3 Areas for further analysis

In no time, the Planning Authority would be running in full force.\textsuperscript{254} Like any other law, planning legislation cannot remain static. Before long, it could be time to revisit the current legislation with a view to meet upcoming challenges arising from new situations. For sure, the more planning legislation is discussed, the less the risk of one losing perspective.

One can safely foresee, even at such early stage, that there is room for further study in certain key areas. As highlighted in the introduction of this thesis, a number of themes were given no consideration by the author in view of the set word count. Having said that, it will soon be important to revisit the topics focused upon in this study and assess their short term effect ‘on the ground’ before long.

\textsuperscript{252}A decree given on 29th December 2016 by the First Hall, Civil Court in the Acts of the Warrant of Prohibitory Injunction in the names of Jonathan Buttigieg vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar - [46/2016 AE]. The said decree read as follows: ‘M’huwiex maghruf x’tghid minute 14. Fil-fehma tal-q orti r-rikorrent ghandu jkollu access ghal din il-minuta biex ikun jaf il-motivazzjoni wara din l-opinjoni.’

\textsuperscript{253}Article 72(1) of the Bill entitled Development Planning Act, 2015 – Published July 2015.

\textsuperscript{254}The new Planning Authority started to function on the 4\textsuperscript{th} April 2016.
The following is a list of topics that one could possibly consider for further analysis, after the law has been in operation for a few years:

- The interaction between the Executive Council and the Planning Board, particularly whether a separation between the policy and decision regime was needed in the first instance and whether planning policies and decisions are of now of a better ‘planning’ quality;

- The effect of demerging the environment from the planning regime and whether the Planning Authority is living to the country’s environmental expectations;

- The interaction between the various organs – external and internal consultees, the Executive Council, the Planning Board and the EPRT;

- The effect of incorporating sanitary legislation within the planning regime;

- The introduction of the Agricultural Advisory Committee and the Design Advisory Committee and on the other hand, the elimination of the Heritage Advisory Panels as well as planning mediators from the Planning Act;

- A comparative analysis between Article 72 of the new Planning Act and Article 69 of the Environment and Planning Development Act. In particular, one should establish whether a balance in ‘trade offs’ between policy requirements and material considerations is in effect being achieved. At the same time, one could examine whether applicants and/or objectors are now at the mercy of unfettered discretion of decision makers;

- The effect of the regularization permits and the removal of the Sixth Schedule on the environment;
• The performance of the EPRT, particularly whether the right of appeal has been widened excessively and is now being abused;

• The rights of third parties in the planning process - one should analyze whether such rights are being abused or whether there are any areas demanding a better access to justice;

• The role of the Court of Appeal, with particular emphasis on its interpretation of the new legal provisions.
Appendix A: Cases linked to Chapter 2


‘Illi f’zona ta’ konservazzjoni urbana, xogholijiet ta’ twaqqieh ta’ hitan u t-tnehhija ta’ pilastro biex jitpogga travu bil-konsewenza li jitwessa l-access ghal sala, ma jaqghux taht il-provizzjoni ta’ refurbishment jew maintenance, izda jitqiesu bhala xogholijiet interni.’


‘Illi l-Artikolu 67(2) tal-Kap. 504 jaghti definizzjoni ta’ f’hiex jikkonsisti zvilupp u hu car li bdil ta’ uzu ta’ proprijeta’ huwa zvilupp. Ghaldqstant biex wiehed jaghmel bdil ta’ uzu minn garaxx ghal stalla jinhtieg permess tal-izvilupp.’


‘Ghalkemm bhala fatt, hu veru li bdil ta’ uzu fl-istess klassi ma jirrikjedix permess ulterjuri, barra dak originali, il-kontravenzjoni allegata fl-Avviz m’hijiex bdil ta’ uzu fl-attivita’ gestita fil-fond mill-appellanti, izda li dak li hu ndikat fil-pjansi approvati bhala store, gie konvertit u qed jintuza bhala kcina; u cioe’ li l-uzu prezenti mhux konformi mal-pjansi approvati fl-imsemmi permess..... Billi l-uzu prezenti, cioe’, l-kcina fil-basement, m’hijiex indikata fil-pjansi approvati, skond l-Artikolu tal-ligi fuq citat, l-appell ma jistax jigi kkunsidrat favorevolment.’

127


Dr. Gerard Spiteri Maempel vs l-Awtorità ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza l-Avukat Dottor Joseph Zammit Maempel LL.D decided on 22nd October 2003 by the Planning Appeals Board. [Ap. No. PAB 393/02 TSC. PA 0598/02]

‘Fil-fatt, il-hrug tal-permess ‘outline’ jorbot kemm l-Awtorità kif ukoll l-applikant fis-sens illi l-‘full development permission’ ghandu jigi approvat, dejjem sakemm l-applikazzjoni tkun saret fl-isfond ta’ dak illi jkun gie approvat fi stadju ‘outline’ u sakemm dawk il-materji riservati jkunu accettabbli ghall-Awtorità.’

Eucharist Bajada ghan-nom tas-Socjeta’ Baystone Ltd vs L-Awtorità ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 31st May 2012 by the Court of Appeal (Inferior Jurisdiction) [Ap. No.36/2011]

‘……. kwistjoni ta’ reserved matters hija ntiza sabiex isiru decizjonijiet riservati ghall-FDP li jalimentaw u jostnu l-ODP u mhux li jannulawh jew irenduh inesegwibbli ghaliex otrimenti l-kuncett ta’ ODP jigi rez ghal kollox inekwu u rrelevanti…….la darba li bl-ODP l-appellant ghandu dritt akkwizit hekk rikonoxxut mill-Ligi u mill-Awtorita’ li fuq kollox hargitu…..kull riferenza ghal dak li t-Tribunal ghamel fid-decizjoni hawn appellata ghal dawk li huma l-policies tal-ippjanar vigenti huma ghal kollox irrelevanti u dan proprju minhabba l-portata legali tal-ODP.’

Rebecca Darmanin Kissaun vs L-Awtorità ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 26th March 2014 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 47/13 MC.]

‘Il-kwistjonijiet dwar titolu, nuqqasijiet jew ripensamenti bazati fuq kwistjonijiet civili ma jbiddlu xejn mill-effett ta’ permess li hu validu sakemm m’hemmx lok ta’ revoka skond il-ligi, jew nuqqas ta’ zvilupp fit-terminu preskritt jew nuqqas ta’ proroga wara li jiskadi t-terminu ta’ validita’ tal-permess.’
Joseph Apap, Carmelo Zammit, John Attard, Rita Fenech vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Maria Debattista ghan-nom ta’ Tourist Services Limited Franco Debono vs l-Awtorita’ ta’ Malta dwar l-Ambjent decided on 9th July 2015 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 16/15 MC.]

‘…. fejn hemm kontestazzjoni dwar it-titolu fuq il-proprjeta’ jew xi dritt reali jew anki personali fuq l-istess proprjeta’ li fuqha tkun mibnija l-proposta, l-Awtorita’ m’hix fdata tiddtermina l-kwistjoni ta’ natura civili hi, izda ghandha tindirizza l-applikazzjoni biss mill-lat ta’ ipppjanar u kull permess li talvolta jesta’ jigi approvat, hu attwabbli biss fin-nuqqas ta’ oppozizzjoni minn min ikun qed jivvanta dritt fuq il-proprjeta’ li fuqha jkun inhareg il-permess ta’ zvilupp. Altrimenti kull min irid ifixkel lil Awtorita’ milli taqdi d-dover primarju li tikkonsidra proposita ta’ zvilupp mill-lat tal-ligijiet ta’ ipppjanar u jista’ facilment jistultifika l-process billi jivvanta dritt fuq is-sit u jwaqqaf il-procedura ta’ ippjanar.’

Savio Spiteri vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 25th July 2008 by the Planning Appeals Board. [Ap. No. 222/04 ISB. PA 6293/01]

‘F’dan il-kas, jirrizulta mhux kontestat illi l-applikant mhux is-sid u jirrizulta ulterjorament li gie notifikat persuna illi m’hix is-sid b’dana illi s-sidien propji, ossia, John u Pauline konjugi Cefai baqghu qatt ma gew notifikati b’Certificate of Ownership B. B’dawn ir-rizultanzi, il-Bord ta’ l-Appell huwa propens illi jilqa’ l-eccezzjoni ulterjuri ta’ nullita’ sollevata mill-Awtorita’ bin-nota ta’ l-14 ta’ Marzu 2005.’


‘F’dan il-kaz irrizulta b’mod car illi l-applikant iddikjara f’korrezzjoni maghmula fl-applikazzjoni illi fuq parti mill-izvilupp ma kiexn proprjetarju assolut izda koproprjetarju [....] Hi l-fehma tal-Qorti illi ladarba, nonostante l-kontestazzjoni li semma t-Tribunal, l-istess applikant ghogbu jiddikjara kemm bi jew minghajr pregudizzju, li m’hux l-uniku proprjetarju ta’ almenu parti mis-sit li fuqu qed jintalab l-izvilupp, it-Tribunal kellu jsiegwi l-precetti tal-Artikolu 68(3) ad litteram. M’hemmx il-permess tal-koproprjetarju li l-istess applikant ex admissis jirrikonoxxi.
Din m’hix semplici kontestazzjoni fuq titolu jew aspett ta’ titolu izda ammissjoni tal-applikant li hemm haddiehor li hu sid mieghu u illi jirrizulta mill-atti li dan il-koproprjetarju fil-persuna tal-appellant qed joggezzjona ghall-izvilupp. It-Tribunal ma setax f’dan il-kaz jelimina l-problema billi jiddikjara li l-permess hu soggett ghal third party rights. Kellu invece jara jekk il-parti li fuqha hemm id-dikjarazzjoni ta’ koproprjeta’ hux qed tigi jvilata b’talba ghal zvilupp kontra r-rieda tal-koproprjetarju ai termini tal-Artikolu 68(3). Dan ma sarx mit-Tribunal u ghal din ir-raguni biss, l-appell jisthoqqlu jigi milqugh.’

Charles Buġeja vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 19th July 2000 by the Planning Appeals Board. [Ap. No. PAB 627/98 SMS PA 0656/98]


Joseph Muscat vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 18th May 2005 by the Court of Appeal (Inferior Jurisdiction).


Roger Vella vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 29th November 2012 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 7/2012]

‘Kuntrarjament ghal dak sottomess mill-Awtorita’ appellata fir-risposta taghha f’dan l-appell, dan il-Bord mhux biss m’ghamlux izda adirittura applika l-ligi hazin billi elimina l-applikazzjoni tal-kuncett ta’ committment minhabba l-hrug tal-Pjan Lokali u dan huwa legalment skorrett u jikkostitwixxi ‘bad law’.’
Anne Marie Agius vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 12th November 2014 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 71/2013]

‘Fit-tieni lok kif gja qalet din il-Qorti ebda kwistjoni ta’ sustanza, kemm jekk hi commitment jew trattament ugwali ma qatt jistghu jiehdu s-sopravent fuq l-applikazzjoni rigorusa ta’ ligi, pjan jew policy jekk dan il-fattur ma jistax jigi dezunt mill-istess ligi, pjan jew policy jew fejn l-istess ligi, pjan jew policy huma siekta fuq xi kwistjoni partikolari u allura l-Awtorita’ u t- Tribunal ghandha certa diskrezzjoni fl-operat taghha. F’dan il-kaz jekk hemm policy cara trid tigi applikata rigorosament bla ebda eccezzjoni. Kwistjonijiet ohr a li bihom l-appellant jista’ jhossu li gie pregudikat ghandhom jittiehdu quddiem il-forum opportun.’


‘illi l-Awtorita’ u t-Tribunal huma marbutin l-ewwel u qabel kollox illi josservaw il-ligijiet, pjanijiet u policies rilevanti ghall-izvilupp in kwistjoni. Ghandhom ukoll, jekk l-istess pjanijiet, ligijiet jew policies jippermettu illi jikkonsidraw kwistjonijiet ta’ sustanza li jistghu jinfluixxu fuq l-izvilupp. Dan jaghti certu liberta ta’ diskrezzjoni lil Awtorita’ u t-Tribunal li fejn hemm diversi pjanijiet jew policies rilevanti ghal kaz, jisiltu dawk li huma l-aktar addattati ghal kaz in ezami. Pero tali diskrezzjoni trid tintuza bi prudenza u cirkospezzjoni kbira u b’maturita’ u rispett lejn il-kelma tal-ligi. Ebda diskrezzjoni m’hi mhollija meta hemm pjan, ligi jew policy li tirregola esplicitament zvilupp rikjest ghaliex fil-fehma tal-legislatur tali pjan jew policy ghandu jirregola zvilupp fiz-zona koncernata u dan fl-interess generali tal-izvilupp edifikabbli tal-pajjiz b’rispett lejn l-ambjent naturali jew storiku tal-istess pajjiz.’
Biagio Muscat vs l-Kummissjoni ghall-Kontroll ta’ l-Izvilupp decided on 2nd March 2001 by the Planning Appeals Board. [Ap. No. 224/00 KA PA 952/00]

‘Il-Bord huwa propens li jilqa’ l-appell wara li acceda fis-sit mertu ta’ dan l-appell u seta’ jikkonstata li l-garaxx in kwistjoni jifforma parti minn internal development, mimli b’garaxxijiet, inkluz b’garaxxijiet ohra ta’ l-istess appellant li huma koperti bil-licenzji relattivi mahruga mill-Kummissarju tal-Pulizija.’


‘Pero’ ghandha tinghata d-debita importanza ghac-cirkostanza partikolari li hawn si tratta ta’ hanut – Class 4 li ilu s-snin validament licenzjat mid-Department of Trade. Il-projbizzjoni ghal stabilimenti ta’ negozju fil-paragrafu 4.4.4 Residential Priority Areas, in fatti tirreferi ghall-negozji godda u mhux dawk li kien ilhom s-snin joperaw b’mod legittimu – f’dan il-kaz l-attivita’ kummercjali kienet debitament awtorizzata mill-Licenzja tad-Dipartiment tal-Kummerc.’


Mary Psaila vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided by the Court of Appeal (Inferior Jurisdiction) on 26th March 2015. [Ap. No.6/13]

‘It-Tribunal qies, fil-fehma tal-Qorti, b’mod zbaljat, illi l-Artikolu 70 tal-Kap. 504 jaghti dritt utlerjuri lil Awtorita’ li jistroneka applikazzjoni fil-fazi ta’ screening meta dan ma jirrizultat mill-istess Artikolu u lanqas ma jista’ jigi dezunt mill-Avviz Legali 514/2010. Il-fatt illi r-regolament jaghti d-dritt ta’ appell lil applikant mill-iscreening letter a bazi ta’ punti (b), (d) u (f) f’regolament 3(3) fosthom ghax l-Awtorita’ tkun dikjarat li li-zvilupp jaqa’ fis-Sitt Skeda, ma jfissirx b’daqshekk li l-Awtorita’ ghandha d-dritt li taghlaq il-bieb ghal applikant li jinsisti b’applikazzjoni regolari. L-iscreening hu ndikazzjoni ta’ dak li ghandu jistenna applikant jekk jipersisti b’applikazzjoni u appell fic-cirkostanzi specifikament imsemmija fil-ligi qabel l-istadju tal-prezentata jew processar ta’ applikazzjoni hi xelta moghtija lill-applikant li ghandru dritt jaghzel li l-kwistjoni jistroneka f’dan l-istadju permezz ta’ appell specifiku fuq il-punt deciz, jew altrimenti jipersisti bl-applikazzjoni u jipprocedi b’appell wara decizjoni finali fejn allura l-applikant ikun gia pprezenta l-provokolliha in sostenn tal-applikazzjoni mehuda b’mod holistiku.’

Grezzju Zahra vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 7th February 2012 by the Environment and Planning Review Tribunal. [Ap. No. 207/09 CF. PA 3907/06]

Appendix B: Cases linked to Chapter 3


‘..l-istess Tribunal ta u mmotiva d-decizjoni tieghu fuq punti li kienu jesorbitaw mill-aggravji u punti li ssolevaw quddiemu l-partijiet u ghalhekk dan irendi l-istess decizjoni nulla u bla effett, proprju ghaliex l-istess Tribunal kellu jiddeciedi biss fuq l-aggravji mressqa quddiemu mill-appellanti quddiemu li kienu fid-dawl tal-policies hemm vigenti, u huwa fuq dan li kellu jiddeciedi.’

Angiolina Buttigieg vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 11th December 2014 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 15/2014]

‘In linea ta’ principju t-Tribunal hu marbut bl-aggravji mressqa u r-risposta li tkun saret ghal tali aggravji sakemm il-kwistjoni gdida li titqajjem mill-partijiet jew it-Tribunal ex officio m’hix wahda ta’ ordni pubbliku fost cirkostanzi eccezzjonali ohra.’

Pasquale Catuogno vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 10th December 2015 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 45/2015]

‘Ma hemm ebda eccezzjoni jew diskrezzjoni ghax it-termini legali huma ta’ ordni pubbliku.’

‘Dan huwa appell minn PC application li saret biex jinbidel building alignment. In vista tal-fatt li dan it-Tribunal m’għandux gurisdizzjoni fejn jidhlu issues ta’ alignment, dan it-Tribunal ma’ jistax jiddeċiedi finalment din l-applikazzjoni. Kif jirrizulta mill-fatti li hargu fil-kors tas-smieh ta’ dan l-appell, billi l-proposta in ezami tikkonsisti f’ appell minn Planning Control application li tirrikjedil tibdil fl-alignment ezistenti li mhux fil-kompetenza ta’ dan it-Tribunal, dan l-appell ma jistax jigi milquh.’


‘Illi a bazi ta’ skorta ta’ decizjonijiet ta’ dan it-Tribunal u l-Bord tal-Appell precedenti, huwa gja stabbilit li dan it-Tribunal m’għandux il-kompetenza li jiddediedi kwistjonijiet ta’ sanita’ jew b’xi mod jirrevedi decizjoni tal-Awtorita’ sanitarja. Dan gie konfermat b’decizjoni tal-Qorti tal-Appell fl-ismijiet ‘Pater Holding Co. Ltd vs Development Control Commission’ fejn gie konkluz li kwistjonijiet ta’ sanita’ ma jaqghux fil-kompetenza tal-Bord ta’ l-Appell dwar l-Ippjanar, illum sostitwit minn dan it-Tribunal, fejn tali kompetenza taqqa’ fi hdan il-GSB, bi dritt ta’ appell fuq punt ta’ ligi quddiem il-Qorti ta’ l-Appell. Illi f’dan il-kaz dan it-Tribunal seta’ jinnitus li l-proposta fl-applikazzjoni giet approvata mis-Sanitary Engineering Officer, u ghaldaqstant mhux il-kompitu ta’ dan it-Tribunal li jirrevedi tali decizjoni.’


‘Billi irrizulta li l-oggezzjonijiet ta’ l-appellanti ma waslux ghand l-Awtorita’ entro t-terminu stabbilit, l-eccezzjoni ta’ l-Awtorita’ li l-appell hu null billi l-oggezzjonijiet maghmula mill-appellanti ibbazati fuq ragunijiet ta’ ippjanar ma sarux entro t-
terminu impost mill-ligi, tirrizulta fondata. It-Tribunal ghalhekk qed jiddisponi minn dan l-Appell, billi jichad l-istess u jiddikjara l-appell null, billi l-appellant bhala third party objector ma ssodisfax ir-rekwiziti legali billi naqas li jipprezenta l-oggezzjonijiet tieghu fit-terminu perentorju stabbilit mill-ligi.’


‘In oltre, peress li l-koncessjoni kif regolata bl-imsemmi Avviz Legali ma’ tirrikjedix pubblikazzjoni (bhalma normalment jigri f’ applikazzjoni ghall-permess ta’ l-izvilupp), lanqas ma jezisti d-dritt ta’ terzi li jkunu per ezempju registered objectors – jew li jappellaw minn tali koncessjoni bhalma fil-fatt qed jigri. Isegwi ghalhekk li lanqas ma jezisti d-dritt t’appell minn terzi mill-hrug dan it-tip ta’ permess.’

Kunsill Lokali Xewkija vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 24th July 2009 by the Planning Appeals Board. [Ap. No. PAB 46/06 ISB. PA 6039/05]


Anthony Borg et nomine vs l-Kummissjoni ghall-Kontroll ta’ l-Izvilupp, decided on 18th April 1997 by the Planning Appeals Board. [Ap. No. 102/94 KA]

‘Fid-decizjoni ta’ il-Bord kien laqa’ l-eccezzjoni ta’ l-Awtorita’ li ladarba appell konguntiv mhux permess, kull appellant kellu jappella separatament u jhallas id-dritt ta’ l-appell rikjest mill-Avviz Legali 7 ta’ l-1993.’
George Attard vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 26th June 2012 by the Court of Appeal (Inferior Jurisdiction) [Ap. No. 51/2011]


Michael Axisa ghas-socjeta Lay Lay Co. Ltd vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 14th January 2015 by the Court of Appeal (Inferior Jurisdiction) [Ap. No. 44/2013]


June Laferla vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 26th March 2014 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 36/2013]

Reverendu Joseph Tabone vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 26th June 2012 by the by the Court of Appeal (Inferior Jurisdiction) [Ap. 58/2011]


‘Billi l-appell kellu jigi prezentat fi zmien 15 -il gurnata minn notifika, dan ifisser li kellu jigi prezentat mhux aktar tard mill-Erbgha, 3 ta’ Ottubru 2012. Gie konsistentement ritenut li dan it-terminu hu wiehed perentorju u ta’ decadenza; ma jippermetti l-ebda estensjoni hlief eccezzjonalment u mhux f’dan il-kas, meta l-ahhar gurnata tat-terminu tkun is-Sibt, il-Hadd jew festa pubblika. L-appell gie prezentat fid-9 ta’ Ottubru 2012, kif konfermat mit-timbru ta’ dan it-Tribunal u ghalhekk jirrizulta li gie prezentat ‘fuori termine’.’

OSA Services Ltd vs L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar, decided on 14th November 2013 by the Environment and Planning Review Tribunal [Ap. No. 177/13 MS. ECF 408/12]


Carmel Gauci vs L-Awtorita’ ta’ Malta dwar l-Ambjen t u l-Ippjanar, decided on 4th December 2013 by the Court of Appeal (Inferior Jurisdiction). [Ap. No. 28/2013]


‘……meta jigi deciz punt mill-Qorti tat-Tieni Istanza ma ghandux jerga jinfetah jew ghar minn hekk jigi injorat minn Qorti tal-Ewwel Istanza jew f’dan il-kaz mill-Bord jew Tribunal u dan ma jistax issir u ma ghandux jithalla jsir ghaliex b’hekk ikun

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