DETERMINING A PLANNING PERMISSION
From Act I of 1992 to Act III of 2016

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1. INTRODUCTION

Development planning applications are determined according to a set of rules and statutory directions which decision makers are obliged to follow. Today, these rules are found in Article 72 of the Act III of 2016.[1] However, it is worth bearing in mind that Act III is a relatively recent piece of legislation, which came into force on the 4th April 2016. Prior to that, Article 72's counterparts were introduced by virtue of the following Acts:

- Act I of 1992, which established the Development Planning Act, 1992;[2]

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[1] Development Planning Act 2016. Passed by the House of Representatives at Sitting No. 338 on the 9th December 2015.

[2] Passed by the House of Representatives at Sitting No. 611 on the 15th January 1992.

- Act XXIII of 1997, which amended the Development Planning Act, 1992;[3]
- Act XXI of 2001, which amended the Development Planning Act, 1992;[4]
- Act X of 2010, which established the Environment and Development Planning Act;[5]

This paper explores the fundamental changes which have occurred to date since the enactment of Act I of 1992. In particular, the following standpoints shall be assessed:

- The substantive rules which decision makers are obliged to follow;
- The rights which an applicant may claim in his favour at the point of determining a planning application;
- The effect of illegalities on the outcome of planning decisions;
- The procedural rules which decision makers are bound to follow;
- The validity status of permissions;
- The interaction between a permission and those who have an interest in the land.

2. ACT I OF 1992[6]

2.1. ARRIVING AT A DECISION

Under Act I of 1992, in deciding a development planning application, the Planning Authority had to adhere with Article 33(1) which was worded as follows:
'… the Authority shall have regard to development plans, to representations made in response to the publication of the proposal and to any other material consideration, including aesthetic, sanitary and other considerations.'

'Development plans' were to include 'the structure plan, subject plans, local plans, action plans and development brief'[7] whereas 'material considerations' were not statutorily defined.

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[3] Passed by the House of Representatives at Sitting No. 115 on the 30th July 1997.
[4] Passed by the House of Representatives at Sitting No. 597 on the 17th September 2001.
[5] Passed by the House of Representatives at Sitting No. 249 on the 30th June 2010.
[6] Development Planning Act 1992.
[7] Development Planning Act 1992. Definitions.

With regard to third party representations, the Act made it amply clear that such representations had to reach the Authority following the publication of the proposal in the press and the fixing of a notice on site.[8]

The term 'shall have regard to' followed by a list which presented no order of priority, strongly suggested that decision makers were obliged to give equal importance to plans, representations and material considerations.[9]

The opinion of the author, practicality dictated that applicable plans be identified and analysed prior to seeing whether the applicant's proposal met the objectives of the said plan. If, on the other hand, the applicable plans were not given such importance, were ignored or misinterpreted, the final decision would be defective.

At the same time, the decision maker was to take stock of 'any other material consideration, including aesthetic, sanitary and other considerations', assuming that such considerations were pertinent. Several planning textbooks[10] define the term 'material considerations' by referring to the prominent case in the names Stringer v Minister of Housing and Local Government, whereby the court held that 'any consideration which relates to the use and development of land is capable of being a planning consideration'.[11] However, the given definition is vague and lacks clarity and precision. This is being said, due to the fact that one could easily allege that a particular matter qualified as a material consideration, but was not considered in the ultimate decision or that particular regard was paid to considerations which, after all, were not material to the matter at hand.

Moreover, third party representations had to be considered, if these had been validly registered. Whether a third-party individual had to prove that he had a juridical interest as applied by the courts of civil jurisdiction to court litigation, remained an open question.

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[8] Development Planning Act 1992, s 32(4).

[9] *Grandsen (E.C.) & Co. v Sec. of State* [1986] JPL 519.

[10] See for example Victor Moore and Michael Purdue, *A practical approach to Planning Law* (12th edn, Oxford University Press 2012) 196; See also Baeey Denyer-Green and Navjit Ubjhi, *Development and Planning Law* (3rd edn, Estates Gazette, London 1999) 91; Michael Purdue and Vincent Fraser, *Planning Decisions Digest* (2nd edn, Street & Maxwell, London 1992) 149.

[11] *Stringer v Minister of Housing and Local Government* [1971] 1 WLR 1281.

Ultimately, it appeared that it was within the discretion of the decision makers to proceed with a decision on their own accord. In other words, it was up to decision makers to see where their priorities should lie, that is, whether on development plans, material considerations or third party representations.

One of the obvious consequences with this approach was that the term 'any other material considerations' remained open to a subjective interpretation, whereas the examination of plans presented the decision maker with more of an objective test. Thus, there is little doubt that the development plan could ultimately be overruled at any time by 'any material consideration' or, for that matter, by third party representations with little effort.

The new approach to dealing with deciding planning applications must also be seen in the political context at the time. Act I of 1992 was aimed at overhauling the Maltese planning system, which had been left at a standstill since 1969.[12] Prior to Act I, it was the Minister who decided whether to grant or refuse planning permission, whereas Article 33 shifted such role to an independent Authority entrusted with taking planning decisions without political interference.

To a certain extent, Article 33 of Act I was quite similar to that in existence in the United Kingdom until 1990, namely in the Town and Country Planning Act, 1990[13]. In fact, Section 70(2) of the said Act provided that in dealing with application for planning permissions, the local Planning Authority 'shall have regard to the provisions of the development plan, so far as material to the application, and to any other material consideration.' In 1990, Section 54A was added at the end of Part II of the 1990 Town and Country Planning Act, directed to increase the emphasis to be given to the development plans. In fact, Section 54A read as follows:

'Where, in making any determination under the Planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise'.

[12] Kevin Aquilina, *Development Planning Legislation – The Maltese Experience* (MP 1999).
[13] *Ibid*.

Incidentally, Section 54A was enacted some time prior to the promulgation of the first Development Planning Act in Malta and yet, Article 33(1) of Act I of 1992 was modelled on the repealed Section 70(2). A possible explanation for this is that Act I was promulgated without the legislator having had time to digest the new Section 54A. Another possible explanation would be that the legislator saw both versions and preferred the old one.

In view of this, the effects of Article 33(1) could be better understood from the standpoint of Section 70(2) as held by the English Courts.

Take, for example, the view taken by Lord Guest in *Simpson v Edinburgh Corpn*[14] who said that the duty 'to have regard to' the development plan does not mean to 'slavishly adhere' to it and that planning permission which departs from policies in the plan could thus be granted.

Moreover, in *Enfield L.B.C. v Sec State for Environment*, the Court[15] it was similarly held that the requirement 'to have regard to' the development plan does not make adherence to the plan mandatory. As a matter of fact, a grant of permission by the Secretary of State was upheld on appeal, despite the proposed development being in clear breach of the development plan.

Grandsen (E.C.) & Co. v Sec. of State[16] is another straightforward case wherein it was held that as long as a policy is properly considered, the decision does not have to adhere rigidly to it, but clear-cut reasons must be given for not doing so.

These UK judgments are in line with the opinion taken by the author, as explained earlier on, namely that Malta's decision makers were to proceed with a decision by determining the weight that should be attached to the different criteria set out in the law, as they deemed fit without the need to give an explanation as required in *Grandsen*.

Hence, it could be safely stated that the meaning of the phrase 'having regard to' was not intended to have the same definition as 'the decision shall be consistent with' or 'the decision

[14] *Simpson v Edinburgh Corpn.* [1961] S.L.T. 17.

[15] *Enfield L.B.C. v Sec. of State for Environment and Westminster C.C.* [1977] 35 P. & C.R. 259, DC.

[16] *Grandsen (E.C.) & Co. v Sec. of State* [1986] JPL 519.

shall conform with'[17] but lay somewhere on the scale that stretches from 'recite them then ignore them' to 'adhere to them slavishly and rigidly'.[18]

2.2. RIGHTS CONFERRED TO THE APPLICANT BY THE ACT

The Planning Authority was also responsible to prepare subsidiary plans[19] which could be subsequently reviewed 'as frequently as may be necessary'[20], however not less frequently than every two years.[21] It is widely acknowledged that any planning system cannot do away with regular policy updates[22], although it is often alleged that planning policies are continually changing to suit *'greedy developers'*.[23]

Whichever way one looks at the issue, planning policies may be perceived as an 'interference with the right to property'[24], restricting landowners the absolute right to exploit their property as they please. Nonetheless, there are considerable agreements in the ECtHR judgments, that the 'control of use of property in accordance with the general interest, by enforcing such laws as they deem necessary'[25] is compatible with the spirit of Article 1 of Protocol No. 1 to the European Convention on Human Rights. The present understanding is that individual states should be recognized as the 'sole judges', enjoying a wide margin of

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[17] Dennis H. Wood Assisted by: David Berney, '"Have Regard To", "Shall Be Consistent With" and "Shall Conform With": When Do They Apply and How Do You Apply Them?' (February 2007) < http://www.woodbull.ca/docs/default-source/publications/have-regard-to-shall-be-consistent---paper> accessed 1st September 2018.

[18] *Concerned Citizens of King Township Inc. v. King (Township,)* [2000] 42 O.M.B.R.3 (Div. Ct.).

[19] Development Planning Act 1992, s 23 defines subsidiary plans as Subject plans, local plans and action plan which were intended to compliment the Structure plan.

[20] Development Planning Act 1992, s 23.

[21] Development Planning Act 1992, s 28(1).

[22] Dr. Deborah Thomas, 'The Importance of Development Plans/Land Use Policy for Development Control By Land Use Planning Consultant, Development Control Authority.' (Prepared for the USAID/OAS Post-Georges Disaster Mitigation Project, Workshop for Building Inspectors, January 15 - 26, 2001) < http://www.oas.org/pgdm/document/bitc/papers/dthomas.htm > accessed 1st September 2018.

[23] Astrid Vella, 'Planning System Breakdown' *The Times of Malta* (26 Jan. 2018) <https://www.timesofmalta.com/articles/view/20180126/opinion/Planning-system-breakdown-Astrid-Vella.668907> accessed 1st September 2018.

[24] Article 1 of Protocol No. 1 protects individuals or legal persons from arbitrary interference by the State with their possessions. It nevertheless recognises the right of the State to control the use of or even deprive of property belonging to individuals or legal persons under the conditions set out in that provision.

[25] *Galtieri vs Italy (dec.),* No. 72864/01, 24 January 2006.

appreciation with respect to the law on which property restrictions are based,[26] which laws include planning policies that are 'evolutive' by nature.[27] The prevailing view taken by the ECtHR is that states should seek to achieve a 'fair balance' founded on 'a reasonable relationship of proportionality between the means employed and the aim pursued'.[28] The point is surely that states are entitled to enact planning policies and carry out subsequent updates provided it is of benefit to the general interest.

An important point to bear in mind is that changes in a development plan could take place after a planning application is validated but before it is decided. It is certainly possible that the changes therein are incompatible with the development proposal as originally planned. This raises the issue as to whether the relevant development plan that is to be considered is the one which was *in vigore* at the time of the decision or the one that was *in vigore* at the time when the application was validated. Unfortunately, Act I of 1992 offered no insight on this issue.

2.3. DEALING WITH ILLEGALITIES

The 'owner' or 'occupier' of a land risked facing enforcement action had any development, which required planning permission, been carried out on land without a valid permit or in breach of the conditions subject to which a permit was issued.[29] Nevertheless, planning permission could still be issued for development which had taken place without prior authorization or after a permission ceased to be valid or operative. In such cases, applicant was obliged to desist 'forthwith' from carrying out further unauthorized works if so required by the Authority.[30]

2.4. RULES OF PROCEDURE

[26] *Fredin vs Sweden*, No. 20/1993/415/494, 25 January 1994.
[27] *Fägerskiöld vs Sweden (dec.),* No. 37664/04, 26 February 2008.
[28] *Depalle vs France (dec.),* No. 34044/02, 29 March 2010.
[29] Development Planning Act 1992, s 52.
[30] Development Planning Act 1992, s 34(1)(a).

Under Act I of 1992, the Planning Authority, or the Development Control Commission[31] had to ultimately decide whether to grant or refuse permission. As a rule, both the Authority and the Commission could regulate their own procedures[32] and unlike the Planning Appeals Board[33], there was no obligation on the Authority or the Commission, at least on paper, to hold its meetings in public, although it is a well-known fact that such meetings were always, in fact, held in public. The Authority was further obliged to clearly state the reasons for refusing an application or for imposing conditions annexed to a permit.[34] By contrast, there was no similar requirement to explain the reasons which led to approving an application.[35] This technically meant that the Commission was not obliged to provide an explanation when it overturned a negative recommendation and issued permission. This is very ironic since overturning a studied recommendation should always be supported by a justification for the decision taken.

2.5. VALIDITY TIMEFRAMES

A development permission could be granted for 'a limited period or in perpetuity'.[36] In any event, for a permission to remain operative, it was necessary for it to be 'acted upon' within twelve months of issue.[37] Once a permission was no longer operative, any works carried out from that point onwards were deemed to have been undertaken illegally. Interestingly, once a permission was not '*acted upon*' and therefore rendered inoperative, applicants could not renew their permission for further periods and a new application was required.

A potential problem, however, was with the definition of the term 'acted upon' since no satisfactory explanation was given as to the degree of input required by the developer to

[31] The Planning Authority Board focused on the determination of major projects whereas the seven-member Development Control Commission, constituted by way of Article 13(1) of the Development Planning Act 1992, were assigned the remaining case load which was delegated to it by the Planning Authority Board under those same terms established by the Board.

[32] Development Planning Act 1992, First Schedule para. 8.

[33] Development Planning Act 1992, Third Schedule para. 9.

[34] Development Planning Act 1992, s 33(2).

[35] Development Planning Act 1992, s 33(2).

[36] Development Planning Act 1992, s 33(3).

[37] *Ibid.*

claim that the permission was indeed 'acted upon'. Whether the term 'acted upon' implied that the site had to be committed with physical works remained an open question.

The difficulties presented by the choice of words in this particular clause extended to the notion of due diligence since the law besides imposing a twelve-month time-frame within which a permission had to be acted upon, also stated that this had to be done with 'due diligence'.[38] Again, the implications of this term were by no means clear. Take for example a situation where a permission was acted upon within the twelve-month time frame, but the imposed conditions were not adhered to? Would that have automatically implied that works done were not pursued with due diligence and hence permission ceased to be operative? Interestingly, the Planning Appeals Board had held to the principle that the notion of due diligence was equivalent to acting as a bonus paterfamilias as envisaged in the Maltese Civil Code.[39]

2.6. OWNERSHIP OF PERMISSIONS

Development permissions were deemed to 'ensure for the benefit of the land and for all persons for the time being interested therein'[40] except as otherwise provided in the permission. It is a known fact, however, that the Authority granted planning permissions for the benefit of a named person or persons which seems to be in contrast with the notion that permissions ensure for the benefit for all persons that could potentially have an interest on the land. A classic example is when a permit for a dwelling was granted to an applicant on account of his being a fulltime farmer, in which case, a condition was normally included to limit the use to such farmer and his family. Such restrictions were obviously imposed to deter property speculation, particularly outside the development zone.

3. ACT XXIII OF 1997

3.1. ARRIVING AT A DECISION

[38] Op.cit.

[39] Kevin Aquilina, *Development Planning Legislation – The Maltese Experience* (MP 1999).

[40] Development Planning Act 1992, s 33(4).

Four years following its promulgation, Act I of 1992 was amended by virtue of Act XXIII of 1997. As a result, Article 33 was slightly modified so as to add that regard had to also be given to 'policies emanating from existing structure plan and from any subsidiary plans'.[41] That meant that from that moment on, decision makers had to take stock of important details which, very often, were not included in the more generic subsidiary plans.

Furthermore, the Authority had to still have regard to those material considerations which the Authority deemed 'relevant'.[42] Unfortunately no light was shed on whether, as held in Stringer,[43] material considerations had to have a connection with 'the use and development of land' and the question as to what constituted 'material considerations' thus remained unaddressed. Although it is possible to argue that such flexibility could be susceptible to unwarranted procedures, it is equally acknowledged that in allowing such approach, decision makers could, in reality, be more responsive to the particular circumstances in issue.

Another novelty was the fact that 'any person' was entitled to file representations objecting to a proposed development, provided that such objection was in writing and based on reasoned justifications.[44] The term 'any person' suggested that third party individuals were no longer required to prove a juridical interest, namely an interest which is personal, actual and immediate, to participate in the planning process. Moreover, it became understood that the system was only open to third parties who had a reason to object, though it was not clear whether such reason had to be based on a particular premise.

3.2. RIGHTS CONFERRED TO THE APPLICANT BY THE ACT

A new proviso was added to Article 33(1), stating that legislated policies and conditions could not be applied retroactively so as to adversely affect the acquired rights arising from a valid development permit. This gave rise to the principle that a valid development permission amounted to a vested right, whereby landowners expect to be accorded legal protection against subsequent changes in policies. The understanding, however, is that a development

[41] Development Planning Act 1992 as amended by Act XXIII of 1997, s 33(1)(a).
[42] Development Planning Act 1992 as amended by Act XXIII of 1997, s 33(1)(d).
[43] *Stringer vs Minister of Housing and Local Government* [1971] 1 WLR 1281.
[44] Development Planning Act 1992 as amended by Act XXIII of 1997, s 32(5).

permission does not accrue into acquired right once it ceases to be operative. This raises the question whether in fact a planning permission, once completed, would translate itself to a vested right.

3.3. DEALING WITH ILLEGALITIES

Under Act XXIII of 1997, in principle, it was still possible to file a planning application for the regularization of illegal works.[45] On a separate note, it is worth bearing in mind that a year before the promulgation of the Act under review, the Authority had issued circular PA2/96 stating that requests for new development could only be 'considered' for determination provided the illegalities were removed from site[46] or requested to be sanctioned as part of the application.[47] The legislator stopped short of carrying forward these Circular provisions in the amending Act.

3.4. RULES OF PROCEDURE

The Authority was still obliged to state clearly the reasons for refusing an application and attaching conditions to a permit. Yet again, there was no similar obligation where permission was granted by the Authority.

3.5. VALIDITY TIME FRAMES

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[45] Development Planning Act 1992, as amended by Act XXIII of 1997, s 34(1).

[46] Paragraph 3.1 of Planning Authority Circular 2/96 (issued on 29th February 1996) stated as follows: *When existing development on a site is wholly or partly illegal (that is, it is not covered by a development permit), the DCC will not consider a development permit application relating to new development on that site, unless the illegal development is regularised.*

[47] Paragraph 3.2 of Circular 2/96 (issued on 29th February 1996) stated as follows: *The illegal development may either be regularised through a specific application solely for that purpose or through an application which includes it as well as new development. However, in the latter case, it must be made clear in the application what development is covered (both in the description on the application form and in the drawings and plans), in order that the Planning Authority is sure that the unauthorised development does form part of the application.*

When compared with the previous piece of legislation, an important observation that can be made, at this point, is that a development planning permit was no longer valid for perpetuity if 'acted upon, with due diligence', whatever these terms implied. Instead, the default validity period with the new Act was set at three years from the date of issue,[48] at the end of which period, the validity status would have needed to be assessed according to whether or not the site had been committed in accordance with the permission granted.

In one scenario, namely when the site was not committed in accordance with the permit, a new separate planning application was needed to resume works on site. The new application would need to be assessed 'according to the policies in force at the time of the said new application'.[49] In other words, the consequences of the applicant choosing not to follow the provisions of a permit were clear – the applicant would have lost all rights on the previous permit and risked having his subsequent applications assessed according to new policies which could no longer allow the previously approved development, regardless of whether the transgressions were minor or not.

In the other scenario,[50] that is when the site was committed according to permits, the validity of the permit was extended *ipso jure* to four years. At the end of the fourth year, it was possible for the applicant to have his permit extended to 'further period or periods' as the Authority deemed reasonable upon a request.

Having said that, it was not clear whether decision makers had to assess the degree of commitment, that is, whether commitment had reached an extent where applying the new plans and policies would have not made construction sense.

3.6. OWNERSHIP OF PERMISSIONS

In 1997 a provision was introduced, stating that 'the permit shall automatically pass on to new owners upon the notification of the transfer of ownership by simple letter to the Planning

[48] Development Planning Act 1992, as amended by Act XXIII of 1997, s 33(3).
[49] Development Planning Act 1992, as amended by Act XXIII of 1997, s 33(3)(a).
[50] Development Planning Act 1992, as amended by Act XXIII of 1997, s 33(3)(b).

Authority.'[51] However, this provision did not revoke the notion that a permit would still 'ensure for the benefit of the land and for all persons that could have an interest on the land'.Therefore, a landowner, not being the applicant, could on the one hand, make use of a permit which was applied for by a third party, though the law added a requirement that such a person must notify the Authority in writing. In view of the aforesaid, the added requirement of a written notification appeared pointless.

4. ACT XXI OF 2001

4.1. ARRIVING AT A DECISION

Act XXI of 2001 introduced significant changes. One of the most meaningful changes in direction concerned the ranking of development plans and planning policies in relation to material considerations and representations, insofar as decision making was concerned. Up until then, a decision on a planning application was reached after the Authority had regard to development plans, policies, representations made in response to the publication of the proposal and material considerations. This meant that plans and policies were only one of a number of considerations which had to be taken into account.

This situation, however, changed subsequent to Act XXI amendments, as will be discussed shortly. The most notable change being the substitution of the expression 'shall have regard to' with the term 'shall apply' with regard to planning policies and development plans as envisaged in Article 33(1). This notwithstanding that decision makers were still obliged to have regard to material considerations and representations when deciding planning applications.[52]

Decision makers were also required, consequently to this Act, to apply the height limitations shown in the Temporary Provisions Schemes or in local plans, unless such height could be modified by some other policy 'which [dealt] with the maximum building height'.[53]

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[51] Development Planning Act 1992, as amended by Act XXIII of 1997, s 33(4).

[52] Development Planning Act 1992, as amended by Act XXI of 2001, s 33(1)(b).

[53] Development Planning Act 1992, as amended by Act XXI of 2001, s 33(1)(a)(i).

The salient point in this set of amendments was that development plans and policies were to enjoy the force of law, even though it was equally clear that material considerations could not be underestimated. This strongly suggested that decision makers had to identify which policies were applicable, take note of all relevant material aspects, note the least third party representations, and ensure that the material aspects are reflected within the boundaries set up by the relative plans and policies. This is not the same as saying that material considerations could, from then on, be disregarded though, as will be seen in the next Chapter, this view was not always taken on board by the Maltese Courts.

On paper, the approach adopted in the Act under examination should have offered a degree of certainty since citizens should have been put in a better position to envisage what type of development would be likely acceptable. The practical reality, however, remained that citizens were expected to follow policies which in reality could become outdated by the time their decision was taken and thus, in itself, this situation could have been better addressed had Article 33(1) remained in place since plans and policies could be overruled.

It should also be noted that the Maltese legislator did not follow the position adopted in section 54A of the Town and Planning Act 1990[54] which placed a rebuttable presumption in favour of the development plan unless material considerations indicate otherwise.[55] It seems clear that Article 33(1), as amended, contained no such qualification.

4.2. RIGHTS CONFERRED TO THE APPLICANT BY THE ACT

The idea that legislated policies and conditions cannot be applied retroactively so as to adversely affect the acquired rights arising from a valid development permit that was retained.[56] Otherwise, no particular new rights which could potentially be claimed by an applicant were introduced by way of this Act.

4.3. DEALING WITH ILLEGALITIES

[54] '54A: Where, in making any determination under the Planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.'

[55] *St Albans DC vs Secretary of State for the Environment* [1993] JPL 374.

[56] Development Planning Act 1992, as amended by Act XXI of 2001, proviso to s 33(1)(a)(ii).

A new procedure was introduced whereby any person who was served with an enforcement notice after the 1st July 2000 in respect of illegal development carried out prior to the 1st January 1993 within the Temporary Provision Scheme or the development zone as indicated in a Local Plan could claim that such notice was not applicable to his case.[57] However, this was not tantamount to saying that the illegal development was regularised.[58] The obvious consequence was that a compliance certificate[59] could still not be obtained and many of these buildings remained without the provision of water and electricity supply. One of the prime failings in such a situation was that a considerable amount of building stock was allowed to stay, as no enforcement action was taken, without the possibility of being inhabited.

4.4. RULES OF PROCEDURE

Whereas in previous legislations, it appeared that the Authority could do away with giving 'any'[60] reason upon a refusal or imposition of particular conditions, Act XXI provides that reasons should be specific and based on existing development plans and planning policies. A *contrario senso*, followed that an application could not be refused on the basis of material considerations or representations, for all that mattered.

Yet again, there was no similar obligation to provide an explanation when the Authority decided to overturn a negative recommendation and issue permission. As held earlier, such a situation was, to say the least, illogical since overturning a studied recommendation should always be supported by a justification for the decision taken in the name of good administrative behaviour.

4.5. VALIDITY TIMEFRAMES

[57] Development Planning Act 1992, as amended by Act XXI of 2001, s 55B(1).

[58] Development Planning Act 1992, as amended by Act XXI of 2001, s 55B(4).

[59] Compliance certificates were introduced by virtue of Article 61 of Act I of 1992, providing that all new development was to be provided with a service consisting of water or electricity only after applicant obtains a compliance certificate stating that the development was carried out in accordance with the development permission.

[60] Development Planning Act 1992, as amended by Act XXI of 2001, proviso to s 33(2).

By virtue of Act XXI of 2001, the notion that development permissions could be granted for a limited period or in perpetuity was reinstated in Article 33(3) after having been removed by virtue of Act XXIII of 1997.[61] Nevertheless, all permissions ceased to be operative if the approved works were not completed within five years of issue[62] although the Authority could impose tighter time frames, provided it stated the reasons justifying such requirement.[63] The default period, now five years, could be extended 'to such further period or periods as it may consider reasonable'[64] following a renewal application. Unlike the previous Article 33(3), there was no requirement to assess whether the site had been committed in accordance with the permit or not, prior to deciding whether the permit should be renewed at the end of the five year period. What is certain is that the Authority could renew the permit for any other period as it held reasonable. It appears that the legislator wanted to award more discretion to decision makers in renewing valid permissions, rather than have them bound by the principle of site commitment.

4.6. OWNERSHIP OF PERMISSIONS

Act XXI held to the notion that a permit ensured for the benefit of the land and for all persons that could have an interest on the land. As held earlier, this suggested that a landowner, though not being the applicant, could still make use of a permit which was applied for by a third party due to him having an obvious interest in the land. As opined previously, there was hardly any point in stating that a permit automatically passed on to new owners upon the notification of the transfer of ownership by a letter to the Planning Authority. Notwithstanding, Act XXI held to the same idea, further requiring that the letter which was to be sent to the Authority had to be sent by registered post.[65]

5. ACT X OF 2010

[61] Development Planning Act 1992, as amended by Act XXI of 2001, s 33(3).
[62] *Ibid.*
[63] Development Planning Act 1992, as amended by Act XXI of 2001, s 33(3A).
[64] Development Planning Act 1992, as amended by Act XXI of 2001, s 33(3).
[65] Development Planning Act 1992, as amended by Act XXI of 2001, s 33(4).

The Development Planning Act, that is ACT I of 1992 as amended, was abrogated on the 31st December 2010 by way of Legal Notice 512 of 2010 and was substituted on that same day by Act X of 2010, namely the Environment and Development Planning Act.

5.1. ARRIVING AT A DECISION

At this juncture, development planning applications had to be determined according to Article 69 of Chapter 504 of the Laws of Malta. In essence, Article 69 echoed Article 33 as amended in 2001 since decision makers were required to 'apply' plans and policies[66] and 'have regard to' material considerations and representations made following the publication of the proposal in the press.[67] Once again, decision makers were required to apply the height limitations shown in the Temporary Provisions Schemes or in local plans, unless such height could be modified by some other policy 'which deals with the maximum building height'.[68] Another provision stating that 'commitment from nearby buildings could not be used as a material consideration to justify heights which were over and above the height limitations set out in the plan' was also included.[69] A possible explanation to this was that Parliament sought to place further emphasis on the importance of the Local Plans after the Maltese courts had taken the view that height limitations could be overruled where commitment was shown to exist despite it being clear that height limitations could not be modified if not by policy.

It should also be noted that environmental considerations were included in the list of material considerations of which the Authority ought to have regard to. It may well be the case that this move was as a clear attempt to shift emphasis on environmental sustainability.

5.2. RIGHTS CONFERRED TO THE APPLICANT BY THE ACT

As with previous legislation, applicants were protected from the retroactive application of legislation which could negatively affect their acquired rights arising from valid development permissions. Another important development concerned policies which were under review.

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[66] Environment and Development Planning Act, s 69 (1)(a)(ii).

[67] Environment and Development Planning Act, s 69 (2).

[68] Environment and Development Planning Act, Proviso to s 69 (1)(a)(ii).

[69] Environment and Development Planning Act, Proviso to s 69 (2)(a).

Following the introduction of Legal Notice 158 of 2013[70] the applicant (or his architect) could request the Authority to suspend the application for a maximum period of one year, when the Parliamentary Secretary communicated to the Authority that a particular policy was under review in the hope that the eventual revisions would work in his favour. Certainly, the idea behind this Legal Notice was directed in favour of those applicants who, having a pending application, knew that they could not have a favourable decision until a particular policy was changed. This provision could be construed as a move to favour developers, providing breathing space within which one could work around the restrictions imposed by Article 33.

5.3. DEALING WITH ILLEGALITIES

Sanctioning applications were now regulated by Legal Notice 154 of 2010.[71] Reading Regulation 14(1) of the said Legal Notice, one is reminded of paragraph 3.1 of the previously mentioned Circular 2/96[72] whereby applicants had to remove all illegalities prior to submitting a sanctioning application, unless these were not included for sanctioning in that same application, however, it was by no means clear how, in the same Legal Notice,[73] an application containing illegalities not 'indicated for sanctioning' could still be approved subject to the removal of the illegal development within a six month time frame from the issue of permission.

With Act X, it was no longer possible for the Authority to entertain all types of sanctioning applications. In fact, the type of development listed in Schedule 6 of the said Act, that is all irregular development located in protected areas or outside the development zones[74] which took place after May 2008,[75] as well as all illegal interventions in scheduled property, regardless when undertaken[76], were excluded from the possibility of being sanctioned.

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[70] The Development Planning (Procedure for Applications and their Determination) (Amendment) Regulations, 2013, s 9 (2)(b).

[71] The Development Planning (Procedure for Applications and their Determination) Regulations.

[72] '*When existing development on a site is wholly or partly illegal (that is, it is not covered by a development permit), the DCC will not consider a development permit application relating to new development on that site, unless the illegal development is regularised.'*

[73] The Development Planning (Procedure for Applications and their Determination) Regulations, s 14(5).

[74] This provision, however, did not apply registered livestock farms located outside development zones.

[75] Environment and Development Planning Act, s 70.

[76] *Ibid.*.

Nonetheless, one could still submit the sanctioning application, well knowing *a priori* that such application would be dismissed.

The downside with this approach was that there was no point in removing a building which in reality could be permitted by policy. If so, the result of a such a situation would only amount to added construction waste to the detriment of the environment and the wasteful use of new building resources since the building could be rebuilt once the new application was approved.

Article 70 provided another drawback whereby no distinction was made between small and large scale interventions. Take, for example, the case of a small room which was later discovered to have been built out of the permitted alignment. It made no sense to have such room demolished when the changes were minimal and could have been tolerated by policy.

Act X of 2010 also introduced the possibility for owners of certain type of illegalities listed under Category A[77] or Category B[78] of the Eight Schedule of the Act to obtain a concession, on the basis of which, one could subsequently obtain a compliance certificate[79] and also claim immunity from a pending enforcement notice.[80] Nevertheless, the Act made it very clear that these concessions were not tantamount to regularising the illegal development.[81] At the same time, Regulation 14(1) of Legal Notice 154 of 2010 held that Category B illegalities were not to be construed as illegal development in the processing of a planning application. The understanding was that Category B illegalities were not to be indicated in application drawings forming part of new applications for development, as a result of which plans ended up being approved with parts of the property not shown. As a consequence, this had the possibility of presenting problems during the drawing up of contracts dealing with the transfer of property since the attached plans to the contract showed incomplete information.

[77] Under Category A were all unauthorised interventions carried out within the Temporary Provisions Scheme or the Local Plan development boundary, other than developments consisting in a change of use or not built according to the official road or building alignments, which were carried out prior to 1st January1993.

[78] Category B developments consisted of specific interventions which typically fell short of sanitary requirements and thus could not be sanctioned.

[79] Environment and Development Planning Act, s 92 (2).

[80] Environment and Development Planning Act, s 91(1).

[81] Environment and Development Planning Act, s 92 (2).

5.4. RULES OF PROCEDURE

Under the new legislation, the Authority remained obliged to give specific reasons when refusing an application or when imposing particular conditions. The reasons had to be specific and based on 'existing plans, policies and regulations or other material considerations'.[82] Moreover, the Commission was now obliged to 'register in the relevant file the specific environmental and planning reasons adduced by the Authority votes against a recommendation' once it decided to overrule the Director's recommendation.[83] This implied that the Authority's duty to state reasons was no longer limited to when imposing conditions or refusing an application, addressing the author's concerns mentioned previously.

Furthermore, Act X of 2010 introduced a number of key changes in the procedures which had to be adopted by both the Authority and the Commission. It was made clear that although a sitting member of the Authority could request that the deliberations be held in private, the final vote had to be taken in public and no secret vote was allowed.[84]

In what could be interpreted as a bold move to increase efficiency in the application process, the Commission was further obliged to determine a planning application during the first sitting, unless the Commission was intent on overturning the Directorate's recommendation. In that case, the Commission could request any further information, including updating of the plans, provided that the substance of the application remained unchanged. In any case, the application would have had to be determined in the following sitting which was to be held within thirty days.[85]

Considering that applications could, in the past, take years to be decided, the introduction of the thirty-day time frame between one sitting and the next was a step in the right direction. The flaw with this approach was that a decision would need to be given in the second sitting, even if the requested information failed to reach the Commission due to reasons beyond the applicant's control.

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[82] Environment and Development Planning Act, Proviso to s 69 (3).

[83] Environment and Development Planning Act, Schedule 1 clause 10.

[84] *Ibid.*

[85] The Development Planning (Procedure for Applications and their Determination) Regulations, s 5(4).

5.5. VALIDITY TIME FRAMES

The provisions of Article 33(3) of the previous Development Planning Act were carried forward in their totality. Namely, development permissions could be granted for a limited period or in perpetuity, but all permissions ceased to be operative if the approved works were not completed within five years of issue,[86] though the Authority remained entitled to impose tighter time frames, when it could give a justification.[87] Should works not have been completed within the five year period, applicants could be granted extensions 'to such further period or periods as it may consider reasonable' following a renewal application.[88] Once more, there was no indication of any criteria upon which the Authority should decide whether the permission was to be extended or not.

5.6. OWNERSHIP OF PERMISSIONS

Act X held to the notion that permission would ensure for the benefit of the land and for all persons for the time being interested therein, providing for the first time that the permission automatically passed on to new owners once the property changed hands.

6. ACT VII OF 2016

During the run up to the Malta general elections of 2013, the then Labour Opposition had pledged its intent on undertaking a major overhaul in the planning system.[89] The core idea was to divest the Malta Environment and Planning Authority[90] of its regulatory functions and set up two independent authorities instead – the *Awtorita` għall- Ambjent u r-Riżorsi*[91] and the *Awtorita` għall-Ippjanar u l-Izvilupp Sostenibbli*.[92] After a Labour administration was

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[86] Environment and Development Planning Act, s 69 (4).

[87] *Ibid.*

[88] *Ibid.*

[89] *Partit Laburista*, *Malta Taghna Lkoll, Manifest Elettorali* (2012) < http://3c3dbeaf6f6c49f4b9f4-a655c0f6dcd98e765a68760c407565ae.r86.cf3.rackcdn.com/082d10b0fed6c04d78ced4e7836e1dc1106745238 0.pdf> accessed 1st September 2018.

[90] (the MEPA).

[91] Authority for the Environment and Resources.

[92] Authority for Planning and Sustainable Land Use.

elected in March 2013, the planning portfolio was taken over by the Parliamentary Secretariat for Planning and Simplification Processes within the Office of the Prime Minister. Notably, the remit of the Secretariat included the setting up of the new Authority for Planning and Sustainable Land Use. On the other hand, the Ministry for Sustainable Development, the Environment and Climate Change was entrusted with the establishment of the new Authority for the Environment and Resources.

In March 2014, the Parliamentary Secretariat for Planning and Simplification Processes published a consultation document entitled 'For an Efficient Planning System',[93] paving the way forward for the setting up of a new Development Planning Authority which would be responsible for development planning together with building and sanitary regulations.

This consultation document contained several proposals, of which the following were directly relevant to the theme under discussion, indicating clearly that government was intent on moving away from the plan led approach:

- The way how applications would be determined had to be redefined in line with the 'balancing act principle';[94]
- In determining planning permissions, decision makers were to have regard to plans, policies, regulations, material considerations, public expression by the Minister on policy matters that is formally communicated to the Authority and published by the Authority together with public representations. In other words, the term '*shall apply*' insofar as plans and policies were concerned, was being done away with;
- Existing commitments including height of buildings were to be considered as a material consideration;[95]
- No weight was to be afforded to draft policies;[96]

[93] Parliamentary Secretariat for Planning and Simplification Processes, *For an Efficient Planning System – A consultation Document* (Auberge de Castille, Malta, 2014).
[94] *Ibid.*, p. 26 para. 27.
[95] *Ibid.*, p.26 para. 30.
[96] *Ibid.*, p. 26 para. 29.

- Valid police or trading licenses issued before 1992 were to be considered as vested rights;[97]
- The Sixth Schedule was to be deleted;[98]

The consultation document was followed by the publication of a Bill entitled Development Planning Act, 2015 (hereinafter, referred to as 'Bill'), which was discussed in Parliament in July 2015. Subsequently, the Development Planning Act, 2016 was passed by the House of Representatives at Sitting No. 338 of the 9th December 2015 and took effect on the 4th April 2016.

6.1. ARRIVING AT A DECISION

Notwithstanding the introduction of a specific provision stating which policies should prevail over others in case of conflict,[99] Article 72 of the Bill made it clear that government had intended on moving away from the plan led approach and revert to the situation prior to Act XXII of 2001.

According to the proposed Article 72, decision makers were directed to have equal regard to plans, policies, regulations made under the Act, material considerations and representations. Notably, Article 72 omitted any reference to public expressions by the Minister on policy matters, as had been previously suggested in the consultation document.

'Surrounding commitments' were expressly singled out as 'material considerations' which decision makers ought to assess.[100] This, in stark contrast with the idea held in the Environment and Development Planning Act which states that; 'the height limitation could only be modified by applying a policy which deals with the maximum building height which may be permitted on a site'.[101] A more complete explanation of Article 72 is that the requirement 'to have regard to' plans and policies did not make adherence to the plans and policies mandatory.

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[97] *Ibid.*, p. 26 para. 27.
[98] *Ibid.*, p. 26 para. 32.
[99] Bill entitled Development Planning Act, 2015, s.52.
[100] Bill entitled Development Planning Act, 2015, s 72(2)(d).
[101] Environment and Development Planning Act, Proviso to s 69 (1)(a)(ii).

Following the publication of the Bill, various non-government organisations drew attention to Article 72. The General Retail and Traders Union[102] openly questioned the fact that plans and policies were 'no longer binding'. From the Union's perspective, the applicant's position was seen to be weakened since planning applications could be simply rejected on account of material considerations. This view was supported by the Malta Developers Association[103] who asked whether material considerations could adversely affect the benefits emanating from a plan or policy.

Din l-Art Helwa[104] argued that the expression 'have regard to' plans and policies, as opposed to *'shall apply',* had serious implications since it was 'too vague and subjective'. Furthermore, *Din l-Art Helwa* questioned the decision to remove the proviso whereby height limitations could not be modified by decision makers, describing it as 'a loophole with which developments which are higher than the height limitation will be permitted'.

Moreover, the *Kummissjoni Interdjoċesana Ambjent*[105] argued against the idea that surrounding commitment could 'justify a development which would otherwise be undesirable' by policy. In a similar vein, Vella Lenicker[106] was concerned that illegal commitment could be used to justify a proposal which went against policy.

In Parliament, the Honourable Michael Falzon[107], however, held to the idea that planning decisions should be based on a context driven approach. Thus, it was important for decision makers to take stock of the surrounding commitment, rather than adhering blindly to policy

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[102] Reactions to Bill entitled Development Planning Act, 2015 from the General Retailers Traders Union (GRTU) (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 1st September 2018.

[103] Reactions to Bill entitled Development Planning Act, 2015 from the Malta Developers Association (MDA) (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 1st September 2018.

[104] Reactions to Bill entitled Development Planning Act, 2015 from Din l-Art Helwa (DLH) (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 1st September 2018.

[105] Reactions to Bill entitled Development Planning Act, 2015 from Kummissjoni Interdjocesana Ambjent (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 1st September 2018.

[106] Reactions to Bill entitled Development Planning Act, 2015 from Perit Simone Vella Lenicker (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 1st September 2018.

[107] Sitting No. 336 held on 2nd December 2015. House of Representatives, Malta.

requirements. On the other hand, Opposition spokesman Ryan Callus[108] contended that a development proposal could now be accepted despite it being against planning policy or rejected due to the absence of surrounding commitment. This, according to Callus, went against the interest of good planning. Nevertheless, the Opposition ended up voting in favour of Article 72 as proposed by government after Falzon accepted Callus' suggestions to insert the word "legal" before the word "surrounding" in sub-paragraph (2)(d) of Article 72 so as not to give a 'dritt għal commitment illegali'.[109]

6.2. RIGHTS CONFERRED TO THE APPLICANT BY THE ACT

As with all legislation since 1997, applicants were protected from the retroactive application of legislation which could negatively affect their acquired rights arising from valid development permissions.[110] Nevertheless, Act VII of 2016 brought some novelty on board.

Act VII of 2016 acknowledged the long-held principle whereby all development carried out before 1967 is to be considered legal.[111] Likewise, all uses which subsisted continuously from a period when such use was not considered illegal did not require a permission from then on.[112] A case in point is a professional office set up prior to 1992, which, at the time, did not require planning permission. However, the term '*subsisted continuously*' could pose particular problems in cases where the premises were temporarily unoccupied, say, for refurbishing works. In addition, the reclamation of land for agriculture by the deposit of material prior to 1994, from then on, did not constitute an illegality.[113]

Another novelty with the Development Planning Act, 2016 was that subsidiary plans and policies could not be applied retroactively so as to adversely affect vested rights arising from valid policies or trading licenses issued prior to 1994.[114] Today, the only difficulty that arises with this provision is that following the introduction of Legal Notice of 420 of 2016[115], all

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[108] Sitting No. 336 held on 2nd December 2015. House of Representatives, Malta.
[109] A right on illegal commitment.
[110] Development Planning Act 1992, Proviso to s 72(2)(b).
[111] Development Planning Act 1992, s 95(2).
[112] Development Planning Act 1992, s 70(2)(e).
[113] Development Planning Act 1992, s 70(2)(b)(ii).
[114] Development Planning Act 1992, s 72(2).
[115] Trading Licences Regulations, 2016.

major commercial activities became exempted from the need of a trading license[116] as a result of which trading licenses became obsolete. Consequently, it is by no means clear whether an applicant, who until 2016 was in possession of a trading license, could claim to be in possession of a valid license for the purpose of Article 72(2) of the Development Planning Act, 2016.

6.3. DEALING WITH ILLEGALITIES

As anticipated in the Bill, the Sixth Schedule, previously introduced by way of Act X of 2010, was removed. As a result, it was possible to request the sanctioning of illegal interventions in scheduled areas and outside development zones.

Vella Lenicker[117] contended that the removal of the Sixth Schedule implied that 'the *"no tolerance"* policy previously adopted no longer applie[d]'. In a similar vein, *Front Ħarsien ODZ* maintained that the new Planning Authority should be prohibited from approving the '*l*egalisation of ODZ development carried out after 2008 and of any development carried out on scheduled zones irrespective of when it was carried out.'[118]

Din l-Art Ħelwa described the removal of the said schedule as a 'retrograde step',[119] however conceding that amendments may have been required. Nevertheless, no explanation was given as to how this Schedule could have been possibly amended without removing it altogether.

While it may be well true that the Sixth Schedule served as a deterrent, serious questions remained due to the fact that no distinction was made between minor and major unauthorised interventions or works which could be sanctioned in principle and those which were not. Furthermore, it bears to point out that the Sixth Schedule was introduced in a time

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[116] Regulation 5(2) of Legal Notice 420 of 2016.

[117] Reactions to Bill entitled Development Planning Act, 2015 from Perit Simone Vella Lenicker (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 1st September 2018.

[118] Reactions to Bill entitled Development Planning Act, 2015 from Front Harsien ODZ (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 1st September 2018.

[119] Reactions to Bill entitled Development Planning Act, 2015 from Din l-Art Helwa (DLH) (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 1st September 2018.

when the Daily Penalty Regulations,[120] which likewise serve as a deterrent, were not yet in force.

On a separate note, concession certificates[121] on the basis of which, one could subsequently obtain a compliance certificate[122] and claim immunity from a pending enforcement notice,[123] were completely done away with. One problem with concession certificates was that holders thereof, were generally misled to think that in fact they had a planning permission. This is especially so, when home bank loans were issued on the basis of such certificates. Article 101 (1) was introduced to make up for the loss, whereby the Minister could make regulations '*to* regularise development'. In fact, Legal Notice 285 of 2016[124] was eventually introduced, giving landowners the possibility to regularise their irregular development instead of simply obtaining a concession with a very limited scope. These regulations were applicable to development, of which the footprint appeared in the scheme boundaries[125] as shown in the Authority's aerial photographs of the year 2016[126] as well as all irregular development already covered by a Category B concession and located in a Development Zone.[127] According to these same regulations, permission could only be granted if it was shown that the unauthorised development was not tantamount to an injury to amenity and the premises were used as a dwelling, office, retail shop or its use was in conformity with current planning policies and regulations.[128]

6.4. RULES OF PROCEDURE

Once more, the Authority was obliged to give specific reasons when refusing an application or imposing particular conditions, based on 'existing plans, policies and regulations or other material considerations'.[129] As with the Environment and Development Planning Act, specific

[120] Daily Penalty Regulations.
[121] Environment and Development Planning Act, Schedule 8.
[122] Environment and Development Planning Act, s 92 (2).
[123] Environment and Development Planning Act, s 91(1).
[124] Regularisation of Existing Development Regulations, 2016.
[125] Regularisation of Existing Development Regulations, 2016, s 3(a).
[126] Regularisation of Existing Development Regulations, 2016, s 4(6).
[127] Regularisation of Existing Development Regulations, 2016, s 3(b).
[128] Regularisation of Existing Development Regulations, 2016, s 4(5).
[129] Development Planning Act 2016, Proviso to s 72(1).

planning reasons were also to be given when the Board decided to overturn a recommendation.[130] Yet, unlike with the Environment and Development Planning Act, there was no indication whether such reasons had to be based on environmental and planning grounds.[131] A further provision was made to state that a recommendation could be overturned only after the majority of Board members were in a position to express a provisional opinion to substantiate their intent in overturning the recommendation. Such an opinion had to be communicated to the architect, the applicant, the statutory consultees, as well as the registered interested parties prior to the next sitting, which has to be held within six weeks.[132] Nevertheless, the obligation previously found in Environment and Development Planning Act,[133] whereby the deferred application had to be determined in the second sitting was removed. Although this move could at face value imply that the Authority was retracting on its efficiency, it should be pointed out that applicants are often not in a position to adhere to the Commission's request within six weeks. This is especially so when applicants are required to obtain information from Government Departments. In this way, applicants could request further deferrals instead of having their application dismissed due to lack of information.

Furthermore, the Planning Board was now authorised to amend the proposal during the pendency of proceedings, prior to the decision 'so as to better reflect the principle of the development'.[134] This was possible as long as the proposal did not depart from the scope of the development or negatively affect the vested rights of the applicant.[135] Moreover, the notion introduced by way of Legal Notice 158 of 2013 whereby the applicant (or his architect) could request the Authority to suspend the application for a maximum period of one year when the Minister communicated to the Authority that a particular policy was under review, hoping that the eventual revisions would work to his favour, was carried forward.[136]

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[130] Development Planning Act 2016, Schedule 2 clause 10.

[131] Environment and Development Planning Act, Schedule 1 clause 10.

[132] Development Planning (Procedure for Applications and their Determination) Regulations, s 4(a).

[133] Development Planning Act 2016, Schedule 2 clause 9.

[134] Development Planning (Procedure for Applications and their Determination) Regulations, s 13(6).

[135] *Ibid.*.

[136] Development Planning (Procedure for Applications and their Determination) Regulations, s 13(2)(b).

Furthermore, as with previous legislation, the final vote still had to be taken in public and no secret vote was allowed.[137]

6.5. VALIDITY TIME FRAMES

The provisions of Section 69(4) of the Environment and Development Planning Act were essentially carried forward in Article 72(4) of the new Planning Act. Once again, development permissions could be granted for a limited period or in perpetuity. Whereas Article 72(4) stipulated no timeframe within which applications for permissions ceased to be operative, Article 71(1) provided that outline development permissions[138] cannot be valid for a period that exceeds five years. Within this latter statutory period, the full development permit application had to be submitted, failure of which rendered the outline development permit null.[139]

With the 2016 Planning Act, it is still possible to renew full development permissions should works not be completed within the stipulated time frames. Unlike what is provided in Article 69(4), the new Planning Act, provides criteria upon which the Authority should decide whether to extend a full development permission 'to such further period or periods as it may consider reasonable'.[140] Namely, the Authority has to first assess whether the application for renewal was submitted while the previous permission was still operative. Subsequently, the Authority has to decide whether there had been a change in the plans and policies, in which case account has to be given to the new policies unless it is shown that 'the site subject to the application is already committed by the original development permission in relation to these plans and policies'.[141] It is an open question whether this means that the original development permission can only be renewed if the site is committed to an extent that it is not feasible to apply the new policies. Moreover, it is not known whether a request for renewing a valid

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[137] *Ibid.*.

[138] Outline development permissions are defined in Article 71(2) of the Development Planning Act, 2016 as permissions which give approval in principle to the proposed development subject to reserved matters which subsequently need to be included in a full development permit application.

[139] Development Planning Act 1992, s 71(2)(a).

[140] Development Planning Act 1992, proviso to s 72(4).

[141] *Ibid.*.

permission should still be entertained if the committed parts are not strictly compliant with the drawings and/or conditions of permission.

In addition, a new proviso was included in the Act, stating that if 'the applicant fails to submit the commencement notice[142] relative to the permission, such development permission shall be considered as never having been utilised.'[143] In the opinion of the author, it should be clear that the submission of a commencement notice, which legally implies that the permission is being made use of, should not be construed as the site having been necessarily committed 'in relation to the plans and policies'.[144]

6.6. OWNERSHIP OF PERMISSIONS

The notion that a permission would ensure for the benefit of the land and for all persons for the time being interested therein was repealed. Act VII of 2016 however held on to the principle that a planning permission automatically passes on to new owners once the land in question is transferred.[145] This meant that the idea that a permission was site specific was done away with, which resulted in the anomalous situation whereby a planning permission obtained by an applicant, who was not the owner could not technically pass on the said permission to anybody, not even the owner.

7. CONCLUSIONS

From the above it was shown that a number of provisions have changed in a sporadic fashion over the years with the situation, at times, reverting to one which was earlier in place. A classic example being Article 72(1) of the current Development Planning Act, which was

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[142] "commencement notice" is defined in the Development Planning Act, 2016, as a notice submitted by the *perit* on behalf of the applicant to the Authority within the period of five days in advance to the date of commencement of works or utilization of permission, to notify the Authority with the date of commencement of works or utilization of permission, including the name of the licensed builder, the *perit* and the site manager as defined in the site management regulations, indicating their contact details where they can be reached at any time.

[143] Development Planning Act 1992, proviso to s 72(4).

[144] *Ibid.*.

[145] Development Planning Act 2016, s 72(5).

reworded very similarly to Article 33 as held until 2001. Other provisions have been struck off completely from the statute. A case in point is Schedule 6 of the Environment Development Planning Act, which was completely done away with in the current Planning Act.

A few of the provisions not found in the original Development Planning Act were entrenched at a later stage and are still found in the current Planning Act. One such example is the notion introduced in 1997, where applicants are protected from the retroactive application of legislation which could negatively affect their acquired arising from valid development permissions.

On the other hand, a number of provisions found in current legislation are unprecedented. One such case is Article 72(4) of the current Planning Act, which links commencement notices with the utilisation of a full development permission.

Notwithstanding the various amendments which took place over the years with a view to address emerging anomalies, this Chapter has shown that a number of legal gaps, due to lack of clarity or as a result of the legislation not expressly addressing a particular issue, still exist. In particular, the following gaps[146] are identified:

- Whether an application gives rise to a vested right which cannot be impaired or taken away through retroactive legislation;
- Whether in the absence of specific transitory provisions in the law, the Authority is bound to apply the new law when an application is already pending;
- Whether a planning permission pending a third party appeal constitutes a vested right in favour of applicant, though proceedings are still 'open';
- Whether the Authority could impose sanctions which could not be reasonably foreseen at the time when an illegality was committed;
- Whether a planning permission can be said to confer a vested right given that no right seems to ensue when a planning permission is no longer valid, irrespective of the fact that works are completed;

[146] The above gaps are the subject of a PhD research entitled 'Judicial Interpretation of Maltese Development Planning Law – Eliciting the added value' currently being conducted by the author

- Whether ‘planning rights’ are lost once a building perishes;
- The extent of ‘commitment’ in assessing whether a valid full development could be renewed;
- Whether landowners are still protected against retroactive legislation when an approved development is not carried out in strict conformity with planning permission;
- Whether it is correct to hold that prior to the promulgation of Act XXI of 2001, decision makers had a discretion to give priority to plans, material considerations and representations as they deemed fit;
- Whether it was correct to hold that after the promulgation of Act XXI of 2001 up until the introduction of Act X of 2010, decision makers had to decide according to plan and policies, regardless of material considerations and representations;
- Whether it is correct to hold that according to Article 72 of Act X of 2010, decision makers have a discretion to give priority to plans and policies, material considerations and representations as they deemed fit;
- Which criteria should decision makers use in order to assess whether a consideration is deemed material and relevant in a given set of circumstances.

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