

Is planning permission required for expressing one's feelings?¹

Robert Musumeci

Dr Robert Musumeci was conferred with a Doctorate of Philosophy Degree (PhD) in Development Planning Law from the University of Malta. His PhD dissertation was entitled 'Judicial Interpretation of Maltese development planning law. Eliciting the added value' after previously being selected by the Faculty of Laws (University of Malta) for the prize of Best Doctor of Laws Thesis Award 2016 for his work entitled 'The Development Planning Act 2016 - A critical Appraisal'. Prior to being admitted to the Maltese Bar after graduating as a lawyer, he graduated as a perit and obtained a Masters Degree in Conservation Technology in Masonry Buildings after having graduated as a perit in 1997. Dr Musumeci has published several academic articles related to the field of administrative law and planning legislation. He is a former chairperson of the Building Industry Consultative Council (BICC). Dr Musumeci was directly involved as a lego technical adviser in the reforms which led to Malta Environment and Planning Authority's demerger and the establishment of the Lands Authority in 2016. He is also involved in the legislative setting up of the new Building and Construction Authority. Dr Musumeci is the first to hold a warrant to practice as an advocate and a perit in Malta. Currently, Dr Musumeci lectures administrative law and development planning legislation at the University of Malta.

What is 'development'?

According to Article 70(2) of the Maltese Development Planning Act (DPA), any new 'development', that is to say, *"the carrying out of 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"*² requires full development planning permission.³ A wide interpretation is commonly given to this definition of development. The same conclusion was drawn, for example, by the Planning Appeals Board in the case **Raymond Vella vs L-Awtorita' Ta' L-Ippjanar (1994)**⁴. In this case, the Planning Appeals Board held that *"... t-tifsira tal-espressjoni 'zvilupp' ghandha tifsira wiesgha hafna."*

¹ This contribution shall form part of the 2021 publication *'Id-Dritt'* published by Ghaqda Studenti tal-Ligi.

² Development Planning Act 2016 Article 70(2).

³ *ibid*

⁴ *Raymond Vella vs L-Awtorita' Ta L-Ippjanar*, decided on 11 November 1994 by the Planning Appeals Board – [Ap. No. 160/97 KA. ECF 339/94].

Odd as it may seem, full development permission may be also issued after development has already taken place.⁵ In other words, one can carry out development and seek permission later. The only difference in such case would be that the applicant would be subjected to a fine, the amount of which varies depending on the nature and scale of the sanctioned development.⁶

The same Development Planning Act, however, also specifies a number of instances where one is exempted from the need of obtaining planning permission, despite the works, or use, appearing to qualify within the ambit of 'development'. Such examples would include those '*maintenance operations which do not materially affect the external appearance of the building*'⁷ as well as the use of land for agriculture, animal husbandry and forestry (including afforestation), except where such use entails the erection of buildings and, or the reclamation of land by the deposit of material on such land.⁸ In other words, planning permission would still be required if one would want to build a room for storage or a greenhouse on agricultural land.

Since 2016, the list of exemptions has been widened to include emergency works carried out by government⁹, uses which subsisted continuously from a period when such use was not considered illegal and did not require a permit¹⁰, land reclamation carried out before 1994,¹¹ as well as pre-1967 development.¹² As will be discussed later, several exemptions also apply in the case of the placement of advertisements as per Legal Notice 103 of 2018.

'Advertisements' require planning permission

As already noted, the definition of 'development' contained in the DPA includes '*the placing of advertisements*'. This implies that full development permission is required to place an advertisement. The party concerned would thus need to first engage an architect to file a

⁵ Development Planning Act 2016 Article 70(1).

⁶ Ln 277 of 2012.

⁷ Development Planning Act 2016 Article 70(2)(a).

⁸ Development Planning Act 2016 Article 70(2)(b).

⁹ Development Planning Act 2016 Article 70(2)(d).

¹⁰ Development Planning Act 2016 Article 70(2)(e).

¹¹ Development Planning Act 2016 Article 70(2)(b)(ii).

¹² Development Planning Act 2016 Article 97(1).

full development application to the Planning Authority, and then proceed with the works once permission is obtained and a commencement notice filed.

To reinforce the idea that planning permission is needed regardless where an advertisement is placed, the Act felt the need to clarify that *'the use for the display of advertisements on any external part of a building that is not normally used for that purpose, involves a material change in the use of that building or land.'*¹³ This way the Act is emphasising that the placement of signs on the facades of buildings amounts to a change of use, which according to Article 70(2), requires planning permission.

Article 2 of the DPA then contains a comprehensive definition of 'advertisement', namely *"any word, letter, model, sign, placard, board, notice, device or representation, whether illuminated or not, in the nature of and employed wholly or in part for the purposes of advertisement, announcement or direction, including any boarding or similar structure used or adapted for use for the display of advertisements."* What is interesting, here, is that 'advertisements' are not taken to only include the promotion of a product or service but also an 'announcement', hence a public statement about a fact, occurrence, or intention.

The Billboards and Advertisements Regulations, found in Legal Notice 36 of 2018, lay down further guidelines which need to be complied with when billboards and advertisements are concerned. Regulation 3(1) of the said Legal Notice notes that *"...no advertisement shall be displayed in any place which is visible from the road... without the permission of the Authority unless such an advertisement falls within the provisions of regulation 4."* Indeed, Regulation 4 lists several situations where the Planning Authority need not be informed about the placement of an advertisement. Such situations include the following:

- (i) unroofed areas within commuter terminals, as long as the advertisement is displayed on enclosed land and is not visible from any road;

¹³ Development Planning Act 2016 Article 70(3)(c).

(ii) Advertisements which are displayed on or in a vehicle which is normally employed as a moving vehicle is also exempt. This does not include for an advertising vehicle, which would require a development permission;

(iii) Political advertisements, that is to say any advertisement, including a billboard, which is used for the display of material, which relates exclusively to a general election or to a referendum or a European Parliament election or to an election for local councils and which is displayed not earlier than three months before the date on which such election or referendum is to be held and not later than one week from the official announcement of the result of such election or referendum;

(iv) An advertisement required by any law, or ordered by a competent court, as well as an advertisement for a town or village feast, which may include sponsored advertisements, as long as it is displayed not more than 30 days prior to the date of the feast, do not require a development permission;

(v) A traffic sign, a sign announcing the name of any city, town or village displayed by a government or a local council;

(vi) The national flag of any country or international organisation or other locality flag, provided there is no advertising of any commercial activity related to it;

(vii) Any advertisement displayed inside a roofed building;

(viii) An advertisement in the form of a flag displaying a company logo or name on the roof of any commercial building;

(ix) An advertisement forming part of the Traffic Island Embellishment Scheme, provided it complies with set specifications;

(x) An advertisement which forms an integral part of an aperture;

(xi) A billboard which has consent of the President of Malta and used exclusively for activities and events of the office of the President, provided a set conditions are met, up to two billboards advertising public and/or EU funded projects, again with set conditions being met and up to 10 billboard advertising activities organised by NGO's, which billboards are to be provided by Transport Malta and their used decided by a committee set up by the Minister.

Does expressing one's feelings require planning permission?

The key aim of this academic contribution – something which we should perhaps have unveiled earlier – is to understand whether an exemption from the need to obtain permission to display a '*word, letter, model, sign, placard, board, notice, device or representation*' manifesting one's feelings subsists under when freedom of expression is enshrined in Malta's *grundnorm*, the Constitution, as well as the European Convention of Human Rights and the United Nations Declaration on Human Rights, of which Malta is a signatory.

At which point, the question to ask is whether '*words, letters, models, signs, placards, boards, notices, devices or representations*' to announce a message should be subjected to the need of obtaining prior planning permission in the first place.

Prima facie, the intentions of the legislator seem to be very clear, in that the DPA requires that the placement of '*words, letters, models, signs, placards, boards, notices, devices or representations*' not only apply for the promotion of a product or service but also for an 'announcement' which would certainly include a public statement about a fact, occurrence, or intention, whether political or otherwise. In fact, when it comes to political advertisements, a specific exemption from the need to obtain permission only exists when the display is set up not earlier than three months before the date on which an election or referendum is to be held. The Nationalist Party, for example, had to submit a number of full development applications so as to be able to permanently erect a number of billboards in all year long. Incidentally, these applications were refused permission by the Planning Authority

and are currently awaiting a decision from the Environment and Planning Review Tribunal after appeals were lodged.¹⁴

Notwithstanding so, this article shall delve into three notable occasions, having all occurred in recent months, dealing with the idea of expressing one's feelings and the requirement to obtain a planning permission. On these occasions, the requirement for permission for the placement of '*words, letters, models, signs, placards, boards, notices, devices or representations.... for the purposes of announcements*' was completely overlooked or disregarded.

ONE: The Emanuel Delia case

In the constitutional case, **Emanuel Delia vs L-Onorevoli Ministru tal-Gustizzja, Kultura u Gvern Lokali Owen Bonnici u d-Direttur Generali tad-Divizjoni tat-Tindif u l-Manutenzjonu Ramon Deguara**¹⁵ the plaintiff, along with a number of anti-government activists, placed a banner on the hoarding that was shielding the Great Siege monument in Republic Street, Valletta. The banner included the Maltese flag, along with the word "Gustizzja" and an image of the assassinated journalist Daphne Caruana Galizia. Flowers, candles, and other related objects were placed in front of the hoarding. There should have been little doubt that the banner qualified under the definition of an advertisement since it consisted of a '*word, letter, model, sign, placard, board, notice, device or representation*' used '*for the purposes of announcements*'.

The banner and objects were subsequently removed by government workers. The plaintiff asked the defendant, Ramon Deguara, to return the items, following a report made at the Valletta police station. The items were indeed returned to the plaintiff, who then proceeded to place them again in front of the monument. Still, the placing and removal of the objects, however, are reported to have happened 17 times.

¹⁴ PA/10706/17 ; PA/10710/17 ; PA/10099/17 ; PA/10701/17 ; PA/10705/17 ; PA/10709/17 ; PA/10087/ ; PA/10704/17 ; PA/10103/17 ; PA/10700/17 ; PA/10707/17.

¹⁵ Emanuel Delia kontra L-Onorevoli Ministru tal-Gustizzja, Kultura u Gvern Lokali Owen Bonnici u d-Direttur Generali tad-Divizjoni tat-Tindif u l-Manutenzjonu Ramon Deguara u b' digriet tal-14 ta' Jannar 2019 l-Av. Dr. Joseph Brincat kien ammess jintervjeni fil-kawza in statu et terminis decided by the Firrst Hall Civil Court (Constitutional Jurisdiction) on the 30th January 2020.

On his part, the plaintiff claimed a breach of his fundamental rights, specifically Article 10 of the European Convention of Human Rights (ECHR) and Article 41 of the Maltese Constitution, which both allow for the protection of freedom of expression. He claimed that his rights to freedom of expression were breached, as placing the banner and other objects was his way of expressing his right.

Article 10 of the ECHR, in actual fact, states that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

In response, the Court noted that the defendant made reference to Chapter 445 of the Laws of Malta (the Cultural Heritage Act) as well as the Criminal Code but went on to observe that since the banner and other items were placed in front of the hoarding, and not on the monument, this law could not be applied. Also, reference was also made by the plaintiff and the defendant to Subsidiary Legislation (S.L.) 549.40 which is entitled *Abandonment, Dumping, Disposal of Waste in Streets and Public Places or Areas (Amendment) Regulations, 2018*. Here, the Court found that the items could not be considered as 'waste', and therefore, this legislation did not apply.

In its conclusions, the Court also pointed out that plaintiff had a right to freedom of expression, so much so that protests carried out by the plaintiff were freely held. The Court further noted that the removing of the objects by the government entity did not have the aim of protection of the Monument but disrupt the ongoing protests. Also, the Court argued that although the ECtHR has stated several times that the national authorities do have discretion to establish what is necessary, and to do what is necessary to make sure this aim is reached, *“finally it remains with the Court only the right and obligation to decide if there is proportionality between the aim and exercise of the right.”* According to the Court, there was no legitimate scope in terms of Article 10(2) of the ECHR. Against this backdrop, the Court found the defendants guilty of violating fundamental human rights in terms of Article 10 of the ECHR and Article 41 of the Maltese Constitution.

Nevertheless, what the Court has failed to comment upon is whether the banner fell within the definition of *‘words, letters, models, signs, placards, boards, notices, devices or representations’* to make an ‘announcement’ and therefore required planning permission.

TWO: The Caruana Galizia case

The constitutional case of **Dr Peter Caruana Galizia, Matthew Caruana Galizia u Andrew Caruana Galizia vs L-Awtorita’ tal-Ippjanar**¹⁶ preceded that of **Emanuel Delia (2020)**, notably carrying similar traits. Here, the plaintiffs mounted a banner on private property in Valletta, with the questions *“Why aren't Keith Schembri and Konrad Mizzi in prison, Police Commissioner? Why isn't your wife being investigated by the police Joseph Muscat? Who paid for Daphne Caruana Galizia to be blown up after she asked these questions?”* A few days following the placement of the banner, the Planning Authority issued an enforcement notice for the banner to be removed alleging a breach of Legal Notice 36 of 2018. The banner was subsequently removed and reported as stolen since the plaintiffs were not aware it had been removed by the authorities. Another banner was erected, with additional wording, and again removed by the Planning Authority.

¹⁶ L-Avukat Peter Caruana Galizia, Matthew Caruana Galizia, Andrew Caruana Galizia u Paul Caruana Galizia vs L-Awtorita’ tal-Ippjanar decided by the First Hall Civil Court (Constitutional Jurisdiction) on the 16th July 2019

The Courts did recognize the responsibility on the part of the Planning Authority to control the placing of advertisements since planning permission was required for such development, Nevertheless, the Court reasoned out that, in the instant case, the banner was not a billboard, nor an advertisement intended to sell a product, service or object. It thus found the defendants guilty of violating fundamental human rights, in terms of Article 10 of the ECHR and Article 41 of the Maltese Constitution after holding to the principle that *'freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment.'* The Court also pointed out that messages that *"offend, shock or disturb"* should be tolerated in a *"democratic society"*. Impliedly, the Court concluded that there were no strong reasons for justifying the removal of the banners.

What is interesting, this time round, is the restrictive interpretation of the term 'advertisement' given by the Court, when it said that the Planning Authority was only entitled to ask for permission if the banner was intended to sell a product. The reality, however, is that the definition of 'advertisement' in Article 2 of the DPA covers not only business-related content but any *"announcement"*. This is all the more obvious since Regulation 4 of Legal Notice 36 of 2016 specifies the exact times when political advertisements are exempted from the need to obtain permission.

THREE: The Mellieha cross case

Another recent example whereby the display of a *'device'* and freedom of expression came to loggerheads concerns the Mellieha Cross case. The Mellieha Fireworks organisation, Marija Bambina, each year places a cross during holy week, on a Mellieha hill. It should be obvious that the organizers were required to notify the Planning Authority (through a development notification order (DNO)) even if the cross was to be removed before 30 days. This is because Legal Notice 211 of 2016 requires a DNO to be submitted when a non-permanent structure or use lasts *'for a limited time not exceeding thirty days... and does not involve any non-reversible intervention.'*¹⁷

¹⁷ Class 10 of LN 211 of 2016.

To complicate matters, this time around (in 2020), the cross was left idle on the hill because of the COVID-19 pandemic. Eventually, a report was filed to the Planning Authority alleging that the structure was not covered by a neither a DNO, nor a planning permit. In response, the Planning Authority issued an enforcement notice for the cross to be taken down. Public outcry immediately ensued bringing forth once again the discussion on planning rules versus the principle of freedom of expression, only for the cross to be reinstated following public statements made by government, not least the Prime Minister, as well as opposition members of Parliament.¹⁸

Albeit, in the instant case, there was no need to take the matter to court for it to declare that the Planning Authority's issuing of the enforcement notice was in violation of Article 10 of the ECHR and Article 41 of the Maltese Constitution, there is no doubt that Article 70(2) of the DPA was, once again, relegated to a dead letter.

Conclusions

It would seem that subjecting the display of '*words, letters, models, signs, placards, boards, notices, devices or representations*' to obtaining prior approval from the Planning Authority is finding opposition from both the courts and sitting politicians, at least when political or religious messages are concerned. This, notwithstanding the fact that, unlike the impression given by the Court in the Caruana Galizias case, the current DPA makes no distinction between displays intended to sell a product or service and those for the purposes of announcements. From a reading of the DPA, it follows that both types of 'advertisements' qualify as 'development', and are not exempted from the need to obtain planning permission. So much so that, as highlighted earlier, Regulation 4 of Legal Notice 36 of 2016 specifies the exact three-month period during which political advertisements can be set up without the need to obtain permission.

¹⁸ <https://www.independent.com.mt/articles/2020-08-19/local-news/Mellieha-s-symbolic-cross-removed-following-complaint-6736226238>

What needs to be clarified at this juncture is whether expressing oneself through '*words, letters, models, signs, placards, boards, notices, devices or representations*' to get a message through, so long as such message is not intended to sell a product, should, from now on, be exempted from obtaining planning permission. This, of course, in the name of freedom of expression. The problem with this *raison d'être*, however, could be that expressions of beauty or taste should equally go unchecked, rendering current building design rules and guidelines a dead letter.