

# PLANNING LEGISLATION IN MALTA – A BRIEF HISTORICAL OVERVIEW

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## 1.1 THE SITUATION PRE-1992

The planning system, as witnessed today, is a result of the legislative developments which took place in 1992.<sup>1</sup> There are records which indicate that attempts at setting up a planning authority and the drawing up of a national plan regarding development planning have existed as early as 1945.<sup>2</sup> However, up until the year 1962, land was essentially allotted for development by government according to the exigencies of the day.<sup>3</sup> This explains the building boom in the aftermath of World War II.

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<sup>1</sup> The Planning Authority was set up by virtue of Chapter 356 of the Laws of Malta enacted by Act I of 1992. This Act was passed by the House of Representatives at Sitting No. 611 on the 15th January 1992.

<sup>2</sup> Gauci, P. in "Structure Planning in the Maltese Islands: An Assessment of Contemporary Endeavours in the Establishment of a Policy-led Planning System in Malta, Volume I & II. School of Architecture, Planning and Landscape", England, University of Newcastle upon Tyne 2002, discusses proposals by Harrison and Hubbard (in 1945), Windyer Morris (in 1959) and Italconsult (in 1964), among others.

<sup>3</sup> Gauci, P., "Structure Planning in the Maltese Islands: An Assessment of Contemporary Endeavours in the Establishment of a Policy-led Planning System in Malta, Volume I & II. School of Architecture, Planning and Landscape.", England, University of Newcastle upon Tyne 2002.

From 1962 onwards, prospective developers were required to engage an architect and civil engineer to obtain permission from the Director for Public Works prior to '*constructing or closing a street, or erecting any building or increasing the height or otherwise modify any existing building or change the use of any land or building*'<sup>4</sup>. Once an application to carry out such development reached the Department of Public Works, it had to be assessed on three levels:

The sanitary engineer officer (SEO), acting on behalf of the Superintendent of Public Health, was entrusted with assessing whether submitted applications were in line with the sanitary regulations found in the Police Code<sup>5</sup> and the Construction of Houses and Drains Regulations.<sup>6</sup> Applications were assessed in terms of the required levels of natural light and air ventilation, which could vary, depending on the nature of the development and height of a given building. For example, the SEO had to assess whether, in the case of dwellings, a backyard was provided along the entire length of the façade.<sup>7</sup> Applicants who felt aggrieved by the SEO's decision were entitled to request the General Services Board (GSB), chaired by the Superintendent himself, to review the case. Ultimately, the decision of the Board could be appealed before the Court of Appeal, on points of merit together with points of law.

When, on the other hand, the envisaged interventions affected the external appearance of a building<sup>8</sup>, the application was also assessed by the Aesthetics Board<sup>9</sup> which was established by virtue of the Aesthetic Building Ordinance of 1935. The members of the Aesthetics Board, who were chosen directly by the Minister, exercised their discretion in deciding whether to accept, amend or reject a proposal. When the Board intended to reject a design proposal, it was obliged to inform the applicant of its intentions at least four days prior to the scheduled hearing during

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<sup>4</sup> Code of Police Laws, s 3(1). This provision was eventually repealed by Act I of 1992.

<sup>5</sup> Code of Police Laws, s 97. This provision was never repealed from the statute, notwithstanding the Development Planning (Health and Sanitary) Regulations, 2016 took effect in 2016.

<sup>6</sup> Government Notice 110 of 1934. Construction of Houses and Drains Regulations.

<sup>7</sup> Code of Police Laws, s 97(n)(1)(i).

<sup>8</sup> With the exception of religious buildings.

<sup>9</sup> Aesthetics Building Ordinance, s 45.

which the application was going to be discussed.<sup>10</sup> On the day of the hearing, applicants had an option to be assisted by an architect and civil engineer whereas interested third parties could attend upon a request being made and accepted *a priori*. The decision of the Aesthetics Board had to be supported by reasons and a copy of the decision had to be sent to both applicant and interested parties present during the sitting.<sup>11</sup> The Board's decision could be reviewed before the First Hall, Civil Court, in which case the Director of Public Works had to be a party to the proceedings in order to defend the decision taken by the Board.<sup>12</sup>

The views of the SEO and the Aesthetics Board were then communicated to the Planning Area Permits Board (PAPB). The PAPB was established by virtue of Legal Notice 10 of 1962. Initially, this Board was appointed by the Governor of Malta in line with Section 19 of the Code of Police Laws to act as the delegate of the Principle Secretary, whose duties were later conferred on the Minister responsible for Public Works.<sup>13</sup> It is important to highlight that the PAPB was the delegate of the Minister, who remained legally responsible for the decisions taken by the PAPB. In fact, the PAPB could only recommend to the Minister responsible for Public Works whether the permit should be granted or not.<sup>14</sup> On the other hand, the final decision whether to issue the permit was in the hands of the Minister for Public Works, whose decision was also subject to judicial review before the First Hall, Civil Court and in such cases, the Minister would be a party to the proceedings.<sup>15</sup>

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<sup>10</sup> Aesthetics Building Ordinance, s 8.

<sup>11</sup> See for example: *Alfred Aquilina -vs- Architect Keith Cole noe et.* Decisions of the Superior Courts, Volume LXXIV,1990, Pt. II, p.379, writ of summons [220/1990].

<sup>12</sup> Aesthetics Building Ordinance, s 9.

<sup>13</sup> Aquilina, K., "Development Planning Legislation – The Maltese Experience", Mireva Publications 1999, p. 112.

<sup>14</sup> See for example: *Michael Axisa ghas-socjeta Lay Lay Co. Ltd -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* decided on 14<sup>th</sup> January 2015 by the Court of Appeal (Inferior Jurisdiction) - [44/2013].

<sup>15</sup> See for example: *Mary Grech vs Minister for Works et.*, decided on 29<sup>th</sup> January 1988 by the Court of Appeal (Superior Jurisdiction) - [Ap. No. 342/1988].

## 1.2 THE SITUATION POST-1992

With a change of the administration in 1987, the planning system took a completely different turn. The incoming Government decided to publish a draft Temporary Provision Scheme (TPS) delineating the boundaries within which built development could take place. Eventually, the Development Planning Act (DPA) was promulgated in 1992<sup>16</sup>, paving the way for the setting up of the Planning Authority as we know it today. The DPA was closely modelled on British pre-1991 town and country planning legislation with the cardinal difference being that in the United Kingdom, the powers were delegated to local and central government officials whereas locally, the said powers were vested in a centralised authority, known as the Planning Authority (PA). The latter, unlike its British counterpart, was not accountable to the electorate.

According to the DPA, the PA was vested with three key functions, namely:

- (i) development planning – that is, the formulation and approval of statutory national, local and sectoral development policies together with the preparation and maintenance of subsidiary plans formulated within the framework of a Structure Plan;
- (ii) development control – specifically, the power to issue development planning permissions, schedule properties and issue conservation as well as preservation orders;
- (iii) enforcement control – particularly, the monitoring of development, the issuance of enforcement and discontinuance orders as well as compliance certificates.

Through the DPA, the meaning of ‘development’ embraced *‘the carrying out of building, engineering, mining or other operations for construction, demolition or alterations in, on over or under any land or the making of any material change of use of land or building...’*<sup>17</sup> Unless otherwise expressly provided in the DPA, development could only take place once full development planning permission was issued by the PA. Another novelty was that applicants who felt aggrieved by the Authority’s decision could lodge an appeal before an independent

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<sup>16</sup> The Planning Authority was set up by virtue of Chapter 356 of the Laws of Malta enacted by Act I of 1992. This Act was passed by the House of Representatives at Sitting No. 611 on the 15th January 1992.

<sup>17</sup> Development Planning Act 1992, s 30 (2).

board designated as the Planning Appeals Board (PAB) established under the same Development Planning Act.<sup>18</sup> This was later transformed into the Environment and Planning Review Tribunal (EPRT) by the Environment and Development Planning Act.<sup>19</sup> Furthermore, the decisions of the PAB (and later, the EPRT) could be contested before the Court of Appeal, however only on points of law decided by the said board.<sup>20</sup>

This meant that building permits were no longer handled by the Aesthetics Board and the PAPB, which were previously directly answerable to the Minister. Sanitary considerations, on the other hand, were still examined by the SEO, *qua* delegate of the GSB, in terms of the Code of Police Laws and remained so until the Development Planning (Health and Sanitary) Regulations, 2016 were enacted on the 10<sup>th</sup> June 2016. Consequent to the said regulations, sanitary issues are now assessed by the Planning Authority with the possibility of an appeal before the Environment and Planning Review Tribunal.

It has been argued that the Planning Authority provided a public forum where spatial and environmental issues, previously under the exclusive control of politicians, had now to be justified.<sup>21</sup> Cassar, a former Director General of the Planning Authority, described the transition from the PAPB to the PA as significant when stating the following:

*“Perhaps the most fundamental departure is in the transparency, openness and accountability of the plan preparation and decision-making processes, and in the extensive range of responsibilities, which are now tackled in a comprehensive, holistic and integrated manner.”<sup>22</sup>*

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<sup>18</sup> Development Planning Act 1992, s 15.

<sup>19</sup> Environment and Development Planning Act.

<sup>20</sup> Development Planning Act 1992, s 15(2).

<sup>21</sup> Gauci, P., “Structure Planning in the Maltese Islands: An Assessment of Contemporary Endeavours in the Establishment of a Policy-led Planning System in Malta, Volume I & II. School of Architecture, Planning and Landscape.”, England, University of Newcastle upon Tyne 2002, p.502.

<sup>22</sup> Cassar, G., “2009b. Developing a New Planning System” in Cassar, G., “Planning Matters: A collection of essays and other writings”, 1985-2008, Malta 2009, p.199.

The DPA was subsequently amended in 1997 after a new government was installed in 1996. The changes were perceived as increasing government's involvement in land use policy-making, but at the same time, on a positive note, also as increasing the accountability of Authority officials and addressing the real and perceived inefficiencies of the Authority.<sup>23</sup> Of particular note is the fact that these changes introduced the principle that any third party who registered an interest at the outset of a planning application was officially recognised as part of the application process and granted certain rights, including the right to appeal the Authority's decision without the need to prove a juridical interest. This was a big legislative step which reflected court judgments being meted out at the time.<sup>24</sup>

Another major change followed in March 2002, when the PA and the Environment Protection Department (EPD) were merged into a single Authority, christened as the Malta Environment and Planning Authority (the MEPA).

In July 2009, government spearheaded another reform which was based on four pillars – consistency, transparency, efficiency and enforcement.<sup>25</sup> As a result, the DPA was substituted with the Environment and Planning Development Planning Act (EPDA). The role of the PAB was taken over by the Environment and Planning Review Tribunal (EPRT) established under the new Act. It could be said that the term 'review tribunal' was rather a misnomer, giving the impression that the role of the said tribunal was limited to reviewing decisions when in actual fact, its role was that of an appellate tribunal having jurisdiction on both the merits and legality of Authority decisions.

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<sup>23</sup> Gauci, P., "Structure Planning in the Maltese Islands: An Assessment of Contemporary Endeavours in the Establishment of a Policy-led Planning System in Malta, Volume I & II. School of Architecture, Planning and Landscape.", England, University of Newcastle upon Tyne 2002, p.317.

<sup>24</sup> *Austin Attard Montaldo -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* decided on 20<sup>th</sup> August 1996 by the Court of Appeal (Superior Jurisdiction) - [434/1994].

<sup>25</sup> *Office of the Prime Minister, A Blueprint for MEPA's Reform* (2009) <<https://opm.gov.mt/mep>> accessed 25<sup>th</sup> July 2009.

During the run up to the Malta General Elections of 2013, the then Labour Opposition had pledged its intent on undertaking another major overhaul in the planning system.<sup>26</sup> The core idea was to transform MEPA and set up two independent authorities instead – the *Awtorita` għall- Ambjent u r-Riżorsi*<sup>27</sup> and the *Awtorita` għall-Ippjanar u l-Izvilupp Sostenibbli*.<sup>28</sup> After a new administration was installed in March 2013, the planning portfolio was taken over by the Parliamentary Secretariat for Planning and Simplification of Administrative Processes within the Office of the Prime Minister. Notably, the remit of the Secretariat included the setting up of a new Authority for Planning and Sustainable Land Use<sup>29</sup> to regulate development planning. On the other hand, the Ministry for Sustainable Development, the Environment and Climate Change was entrusted with the establishment of a new Authority for the Environment and Resources<sup>30</sup> to serve as an environment regulator.

In March 2014, the Parliamentary Secretariat for Planning and Simplification Processes published a consultation document entitled '*For an Efficient Planning System*',<sup>31</sup> 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. The consultation document was followed by the publication of two Bills – namely, the Development Planning Act, 2015, which foresaw the establishment of a Planning Authority responsible for '*sustainable planning and management of development*' and the Environment and Planning Review Tribunal Act, 2015, contemplating an independent tribunal, whose role was to 'review' decisions taken by the Planning Authority and the Malta Environment Authority.

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<sup>26</sup> *Partit Laburista, Malta Taghna Lkoll, Manifest Elettorali* (2012) <<http://3c3dbeaf6f6c49f4b9f4-a655c0f6dcd98e765a68760c407565ae.r86.cf3.rackcdn.com/082d10b0fed6c04d78ced4e7836e1dc11067452380.pdf>> accessed 1<sup>st</sup> September 2018.

<sup>27</sup> Authority for the Environment and Resources.

<sup>28</sup> Authority for Planning and Sustainable Land Use.

<sup>29</sup> As it was named in the consultation document issued by the Parliamentary Secretariat for Planning and Simplification Processes, *For an Efficient Planning System – A consultation Document* (Auberge de Castille, Malta, 2014).

<sup>30</sup> As it was named in the consultation document issued by the Parliamentary Secretariat for Planning and Simplification Processes, *For an Efficient Planning System – A consultation Document* (Auberge de Castille, Malta, 2014).

<sup>31</sup> Parliamentary Secretariat for Planning and Simplification Processes, *For an Efficient Planning System – A consultation Document* (Auberge de Castille, Malta, 2014).

Subsequently, the Development Planning Act, 2016 and the Environment and Planning Review Tribunal Act were passed by the House of Representatives in December, 2015.

Although it is undeniable that different governments have put their efforts to improve legislation regarding development planning, there are still a number of legal gaps which are of concern to the author and other practitioners in the field. It can be said that these gaps are a direct result either of a failure on the part of the legislator to address given issues or of the legislator dealing with them however in an unclear or incomprehensive manner.