

## OPINION

# On Mepa reform

Much has been written and will continue to be written on Mepa and its reform. As a start, a reform at Mepa needs to address four aspects: The institutional, enforcement, transparency and sanitary. I will not go into the details of how the Development Planning Act ought to be amended due to lack of space and because I have already addressed that point in various other writings on the subject. So I will restrict myself to discussing the four points in brief.

As to the institutional structure, the main problem I see is in the decision-making process. Mepa and the DCC, to my amazement, have on a number of occasions taken decisions against Planning Directorate recommendations made in the development planning application report without giving any cogent and justifiable reason, in writing, for not abiding by such recommendations drawn up by experts in planning. Here, in my opinion, lies the problem. Of course, from a planning viewpoint there might be a handful of cases where it might be justifiable to overturn Planning Directorate recommendations but these must be sparse, far between and should never constitute the rule, especially where the development in question lies outside the development zone or within a green area in a development zone.

Many have been the cases where Mepa and the DCC have thrown overboard development plans (such as Policy SET 11 of the Structure Plan) and planning policies (such as Policy PLP 20) to give the green light to a development outside the development zone, which should otherwise have never been approved. Hence, the real problem lies not much in the bureaucracy adopted by the Planning Directorate – which still needs to be addressed – but in certain unexplainable decisions of Mepa and the DCC.

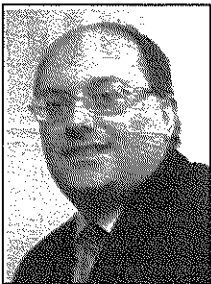
In 2001, the Development Planning Act was specifically amended to request the chairmen of Mepa and DCC to enter a minute in the respective file jotting down the reasons for overturning a Planning Directorate recommendation. It appears that this amendment has not reached its desired purpose.

Once a problem is identified then it is easier to seek a solution thereto. The draft code of ethics which the Prime Minister has recently circulated for public consultation is a step in the right direction. Hopefully, modifications to be made to it will oblige Mepa and DCC members to retain their distance from the developers and third party objectors, thereby remaining impartial from all parties involved throughout the development planning process.

The draft code attempts to sensitise Mepa and DCC members to a set of ethical behaviour by which they will be judged; it ensures that they have no conflict of interest, whether potential or actual; that they act fairly and comply with the provisions of development plans and planning policies as the law directs them to do and requires them to refrain from undertaking unethical behaviour apart from establishing a mechanism to guarantee compliance therewith.

Needless to say, the best solution of all is to inculcate in decision makers a sound and judicious managerial ethos – that of ensuring that the persons appointed on the Mepa and the DCC are honest, upright and persons of integrity as well as being well versed in planning. If the government gets these ingredients right, then Mepa and DCC members will not subject themselves, willingly or otherwise, to any perceived or real outside pressures from wherever they might originate – ranging from the minister responsible for planning or his or her peer ministers, their respective staff members in private secretariats, high-ranking public officers, members of Parliament, including opposition MPs, seeking the interests first and foremost of their constituents, rather than that of the public, peers, colleagues in the profession, acquaintances, friends, etc.

Members of the judiciary are required by their oath of office to perform their duties without favour or partiality, according to justice and right, and in accordance with the laws and customs of



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Malta. Moreover, judges cannot hold, either directly or indirectly, any communication with any suitor, his/her advocate or legal procurator except in open court and, should such case arise, they are by law obliged to inform the President of Malta accordingly. Why should not Mepa and DCC members be bound by a similar oath of office, adapted to their circumstances, or to a comparable obligation in their respective code of ethics to ensure that they carry out their duties in an upright and honest manner and with due integrity?

My second point is enforcement. I have made several suggestions as to how enforcement procedures can be strengthened both in a book I authored and in a contribution to a board of inquiry report appointed under the Inquiries Act by the minister responsible for planning regarding a site at St Paul's Bay.

That report made several recommendations for legislative change aimed at empowering Mepa to take the necessary enforcement action but none of these legislative amendment proposals have been taken on board. Although some parts of that report have been given effect to, it has not, however, been implemented in its entirety. One example which comes to mind is the administrative penalty of Lm1,000 (equivalent to circa €2,329), which was increased in 2001 to Lm10,000 (equivalent to circa €23,293). To date, seven years after the enactment of the 2001 amendments, the minister responsible for planning has not issued a legal notice to bring this revised updated administrative penalty into force. This penalty would surely serve as a better deterrent against illegal development even if that penalty needs to be revised upwards to a more realistic sum.

Transparency needs to be introduced throughout the whole development planning process. Enacting a Whistleblower Act is not, by itself, enough. Indeed, in a participatory democracy, the public should be involved in the entire development planning process. Take, for instance, the case of the Environmental Impact Assessment Regulations, 2007. The public is involved in an environment impact statement and an environmental planning statement only when the draft report has been completed by the assessors. But this should not be the case. The public should be involved right from the very beginning such as when a project description statement and an environmental scoping statement are submitted by the developer to Mepa and when draft terms of reference for an environmental impact assessment are the subject

of a consultation exercise by Mepa with departments and agencies of the government. The same argument holds for traffic impact assessments.

In addition, the decision to exempt a developer from not commissioning an environment planning statement should not be taken by the Director of Environment Protection within Mepa but by Mepa itself.

As with regulations made under the Environment Protection Act, regulations to be made under the Development Planning Act should first be published in draft form so as to permit the members of the public to give their views.

A thorough review needs to be carried out of the Development Planning Act to empower third party objectors to make submissions on any amendments filed to development permission applications at any stage of the development planning process and to be able to appeal before the Planning Appeals Board without having to encounter the various legal hurdles in-built in the law and which render ineffective the participation of third party objectors in the development planning process. Indeed, one must recognise that the Development Planning Act as originally drafted in 1992 was never conceived to give any rights to third parties. It was the Court of Appeal's progressive judicial law-making approach which recognised such right. However, although the legislator did try to incorporate the court's judgment both in the 1997 and 2001 amendments to the Development Planning Act, Parliament has not managed to successfully revise the enactment accordingly to iron out difficulties encountered by third parties in the development planning process and, where possible, to provide them with equality of arms with the other contending parties, the developer and Mepa.

The enactment of the Development Planning Act in 1992 was a historical milestone. Its contribution lies perhaps not in its novelty for Parliament had already enacted a similar law in 1969 – the Town and Country Planning Act which, unfortunately, never came into force, drafted by none other than the world-famous British expert on town and country planning law, Sir Desmond Heap. The contribution of the 1992 enactment lies in the fact that, for the first time since Independence, we have a law on the statute book that addresses town and country planning issues in a holistic manner. Malta had been, even under colonial times, struggling to enact such an important law. But still our sanitary laws are crying for updating. The Development Planning Act, in article 33, provides that Mepa should consider sanitary aspects in the decision-making process but our sanitary laws need to be revisited by the legislator.

Undoubtedly, there are other reforms that need to be carried out to the law which cannot be discussed in this short contribution. However, the above four points, to my mind, are of the essence and should be addressed without delay. If implemented, they will assist in the progressive development of Maltese environmental, sanitary and planning law, ensure more consistency and coherency in the decision-making process, strengthen the democratic aspect in the development planning process, thereby rendering it more open to public scrutiny, inculcate within the planning system more transparency, render the planning process less susceptible to certain misconceptions, prejudices, preoccupations and doubts which the public might otherwise entertain and, finally, work towards a robust, vigilant, effective and efficient enforcement machinery.

A senior lecturer, Dr Aquilina lectures on environmental and planning law at the University of Malta. He served as chairman of the Planning Appeals Board between October 1992 and November 2003 and is author of *Development Planning Legislation: The Maltese Experience* (Mireva Publications, 1999, xciii + 616pp), *Deċiżjonijiet Dwar l-Ippjanar*, 8 vols., xiv + 1208pp (Legal Publishing Enterprises Ltd 1995-1998) and other writings on environmental and planning law.

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