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### **THE ENVIRONMENT AND DEVELOPMENT PLANNING BILL: PROPOSALS FOR IMPROVEMENT**

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# **THE ENVIRONMENT AND DEVELOPMENT PLANNING BILL: PROPOSALS FOR IMPROVEMENT<sup>1</sup>**

**Kevin Aquilina**

## **ABSTRACT**

The Environment and Development Planning Bill will codify, with amendments, the Environment Protection Act and the Development Planning Act into one law. This paper studies this Bill from the perspective of development planning legislation. It sets out the contribution this Bill will make to Administrative Law, Human Rights Law and the Law of Procedure. In certain respects, the Bill introduces novel concepts aimed at strengthening transparency and accountability in the workings of the Malta Environment and Planning Authority (MEPA). In places, the Bill does not go far in strengthening democracy in the development planning process. The paper thus suggests how the Bill can provide for a better application of the constitutional doctrine of the separation of powers, and for the human right of a fair hearing before an independent and impartial tribunal, whilst guaranteeing the institutional autonomy of MEPA from governmental interference in policy making and decision making.

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## **INTRODUCTION**

This paper discusses the Environment and Development Planning Bill<sup>2</sup> (hereinafter ‘the Bill’) from a development planning perspective. It identifies the salient changes being proposed by this Bill to development planning law, their impact on Administrative Law and consequential implications which such changes pose to other branches of the Law such as the Law of Procedure and the Law of Human Rights. It concludes by making proposals for improvement in the light of the previous parts of this paper aimed at strengthening democracy, providing for a better application of the constitutional doctrine of the separation of powers and the human right of a fair hearing before an independent and impartial tribunal established by law, and guaranteeing the institutional autonomy of the Malta Environment and Planning Authority (hereinafter ‘MEPA’) from governmental interference in policy making and decision making.

### **An Overview of the Legislative Provisions of the Bill**

As the Bill is a codification of two extant laws, it is necessary to compare and contrast the provisions of the Development Planning Act (hereinafter the ‘DPA’) with the development planning provisions of the Bill.

### **Provisions concerning Development Planning Law**

#### **The Definitions**

Article 2 of the Bill is the interpretation provision and sets out the definition of the key terms used in the Bill. When one compares the DPA with the Bill the following terms in the DPA have not been included in the Bill’s interpretation provision: “action plan”, “advertisement regulation order”, “building levy”, “conservation order”, “the Committee”, “development”, “development brief”, “development plans”, “development order”, “the Director of Planning”, “enforcement notice”, “exempt works”, “financial year”, “House”, “local plan”, “the Mediator”, “official manual”, “planning policy”, “structure plan”, “subject plan”, “tree preservation order” and “Users’ Committee”.

It is correct for Government to argue that the vast majority of the above expressions in the Bill are not actually defined in the interpretation provision but are so defined in the text of the provisions of the Bill itself. Therefore there might not be any pressing need to provide a cross reference in the interpretation provision itself to the other provisions contained in one and the same Bill. However, from the point of view of the reader of the Bill, cross references in the interpretation provision to the actual text of the Bill where those expressions are defined will assist the reader in finding the exact provision where the term is defined. This is important since the Bill is a lengthy one aimed at codifying two extant laws into one enactment even if it does not go so far as to propose an Environment and Development Planning Code. Such a Code goes beyond the simple amalgamation of two extant laws into one Act of Parliament. Such cross references in the interpretation provision are like a book index making the reading of the Bill more user

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<sup>2</sup> Bill No 43 published in *The Malta Government Gazette* of 15 January 2010.

friendly especially to the layman who might not possess the same expertise that a lawyer has in navigating through legal documents. In order for the public administration to plead *ignorantia juris neminem excusat*<sup>3</sup> against the citizen, the laws have to be written in such a way as to make them easy for a layman to find, read and understand them easily. In other jurisdictions there are various attempts being made at simplification of the law, to quote the European Court of Human Rights, to make it accessible to one and all.<sup>4</sup>

I do understand also why certain terms such as that of “Audit Officer” has been removed altogether from the Bill. In the case of this expression, the Audit Officer will be regulated under the Ombudsman Act in terms of a House of Representatives Select Committee report<sup>5</sup> and Bill No. 48 entitled the Ombudsman (Amendment) Act, 2010.<sup>6</sup>

Other noteworthy points which should be made with regard to the interpretation provision are the following:

(a) “Agency of Government”<sup>7</sup> – this definition needs updating in the light of the enactment of the Public Administration Act (Chapter 497 of the Laws of Malta)<sup>8</sup>. This latter enactment lists Government agencies in its Fourth Schedule. At the time when the Development Planning Act was enacted in 1992 by Act No. I of 1992, there was no other law in Malta which listed, let alone regulated, Government agencies. Now the situation has changed with the Public Administration Act 2009<sup>9</sup> and, so far as is possible, the same terminology throughout the statute book should be given the same meaning so as not to confuse the reader.<sup>10</sup>

(b) “application”: Whilst in the DPA, “application” was defined as a ‘development planning application’, in the Bill it is defined as a ‘permission or licence application’. The fact that the term ‘development’ has been removed from qualifying the term ‘permission’ now means that the term ‘application’ refers to all types of applications, not necessarily only development permission applications as is the position in the DPA. Such applications include planning control applications as well as

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<sup>3</sup> Ignorance of the law is no excuse.

<sup>4</sup> *Sunday Times v. United Kingdom*, European Court of Human Rights, 26 April 1979, paragraph 49 (‘the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case’).

<sup>5</sup> House of Representatives, Select Committee on the Strengthening of Democracy, *Second Interim Report*, 14 December 2009.

<sup>6</sup> Bill No. 48 was published in *The Malta Government Gazette* on 12 March 2010. Clause 5 is the relevant clause to the discussion on the abolition of the office of Audit Officer.

<sup>7</sup> This term is also used in article 6(6)(b) of the Bill which uses different terminology from that used in the Public Administration Act thereby creating confusion as to whom is excluded from MEPA membership.

<sup>8</sup> ‘Agency of the Government’ is defined in article 2 of the DPA as meaning ‘a body corporate established by law and a company in which the Government or such body corporate, or a combination thereof has a controlling interest or which is a subsidiary of such a company’. An identical definition is found in clause 2 of the Bill. Article 2 of the Public Administration Act defines a ‘government agency’ or ‘agency’ as meaning ‘a body listed in the Fourth Schedule to that Act. The Fourth Schedule, to date, lists as government agencies the Management Efficiency Unit and the Office of the Attorney General. Articles 36 to 45 provide for more detailed regulation of government agencies including the power granted to the Prime Minister to amend the Fourth Schedule aforesaid (article 36(1)(e)).

<sup>9</sup> Act No I of 2009, now Chapter 497 of the Laws of Malta.

<sup>10</sup> See also clause 68(1) which refers to ‘a department of government or a body corporate established by law’.

applications relating to environmental matters, amongst others. When used in the context of the Bill, especially in the context of Part V, the term as now defined to include non-development planning applications might not be appropriate within the context of the provisions in question. This is because such provisions were originally conceived, intended and applied to a development control context not to a development planning context (e.g. a planning control application) or to an environmental protection licence application context.

(c) “development permission”: Whilst article 2 uses the term “development permission” there are references in the Bill to “development permits”. What is the difference between these two terms? I understand that both terms are intended to be co-terminus and that this is a drafting oversight. If this is the case, then the term ‘development permission’ should continue to be used through the Bill. Otherwise the reader might think that both nomenclatures have different meanings when this is not the case.

(d) Interestingly enough the definition of “subsidiary plans” has been retained but the definition of a “development plan” – which includes subsidiary plans – has been removed from the interpretation provision of the Bill.

### **Provisions concerning Administrative Law The Malta Environment and Planning Authority**

Clause 6 of the Bill establishes the Malta Environment and Planning Authority (MEPA). However the MEPA has already been created by the Development Planning Act. Hence, from an Administrative Law viewpoint, it does not make sense to create a second MEPA. What the law should say is that the Bill is re-establishing the same MEPA that has existed hitherto under the DPA and that the rights and obligations which MEPA had under the DPA will continue to subsist in the MEPA established by the Bill. In this respect I have in mind the learned judgment delivered by Mr. Justice Giannino Caruana Demajo<sup>11</sup> where he had correctly held that the Planning Authority (as MEPA was then known prior to the enactment and entry into force of the Cultural Heritage Act, 2002 (Chapter 445 of the Laws of Malta), before the Planning Authority and the Environment Protection Department were fused together to form the MEPA) was not the legal successor of the Planning Area Permits Board. The judgment was followed by Mr. Justice Carmelo Farrugia Sacco in a string of decisions he delivered on the same point when presiding the Tribunal for the Investigation of Injustices.<sup>12</sup> Now the law should take the opposite view stating that the MEPA established under the DPA and the MEPA established under the Bill are one and the same organ and that the MEPA as re-founded by the Bill will assume all the same rights and duties hitherto enjoyed by the MEPA under the DPA. Interestingly

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<sup>11</sup> *Annunziato Mifsud v Director of the Districts Office et*, Civil Court, First Hall, 14 November 1997 per Mr. Justice Giannino Caruana Demajo. For a summary of this judgment vide Aquilina, K. (1999: 334-335).

<sup>12</sup> *Emmanuel Mallia v. Planning Authority*, 12 December.2000; *Anthony Cassar vs. Department of Works et*, 29 March.2001, application no. 1176/97; *Dr. Emmanuel George Cefai LL.D. vs. Hon. Prime Minister et*, 10 July 2001, applications nos. 1025/97, 1028/97, 1029/97, 1030/97 and 1033/97; *Victor Abela vs. Chairman Planning Authority et*, 28 February 2002, application no. 192/97.

enough on this point, when the Bill in clause 8(2)(a) refers to the competent authority performing environment protection duties under the extant Environment Protection Act,<sup>13</sup> it uses the following terminology: “*to perform and succeed in the functions of the Competent Authority established under the provisions of article 3 of the Development Planning Act and article 6 of the Environment Protection Act.*”

Could not the same terminology be used in clause 6 both for consistency’s sake and for the avoidance of doubt to make it clear that the MEPA being established by the Bill is one and the same MEPA established hitherto by the DPA?

### **MEPA Board Membership**

Whilst the numerical membership of the MEPA will not change in terms of the Bill in the sense that it will still continue to be composed of between thirteen and fifteen board members, the number of public officers who sit on the MEPA has been reduced from 5 to 3.<sup>14</sup> The two Chairpersons of the Environment and Planning Commission (previously known as the Development Control Commission under the DPA but now with extended environmental functions under Clause 6(3) of the Bill will be *ex officio* MEPA board members. This provision thus gives the impression that there will be only two (not three as is currently the position) divisions of the Environment and Planning Commission. However, clause 35(1) of the Bill reproduces the current provision of the DPA (article 13(1)) which empowers the Prime Minister to prescribe by order in the Government Gazette the number of divisions of the Commission. This means that, as is the situation to date, if there continues to be in terms of the Bill three Environment and Planning Commissions, one of the chairmen of this Commission will not be appointed as a MEPA board member. In addition, once the Environment and Planning Commission will be assigned environmental functions by the Bill, the likelihood is that a fourth division (if not more) of the said Commission will need to be established to deal with environmental matters. The law is silent as to which criteria will be used to determine whom of the Commission Chairmen will be appointed *ex officio* MEPA board members and whom not. Irrespective of this, however, should not all the chairmen of the Commission be appointed *ex officio* MEPA board members instead of only two of them? On the other hand, if there is no limit set to the number of *ex officio* Chairmen to be appointed to the Commission, then this may be used as a way to theoretically increase the number of Chairmen to exceed the other board members.

### **Conflict of Interest**

An innovative provision in the Bill concerns the regulation of conflict of interest of MEPA board members. Although clause 16 of the Bill and paragraph 6 of the First Schedule to the Bill have a provision regulating conflict of interest, clause 6(6)(e) of the Bill subjects such conflict to Ministerial review. In fact, clause 6(6)(e) provides that a MEPA board member (this terminology includes also the Chairman and Deputy

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<sup>13</sup> The said competent authority was originally the Environment Protection Department and, subsequently, following the enactment and entry into force of the Cultural Heritage Act, the MEPA.

<sup>14</sup> Clause 6(2)(a) of the Bill.

Chairman) may not remain in office if he or she “*has a financial or other interest in any enterprise or activity which is likely to affect the discharge of his functions as a member of the Authority*”. The Minister may, nevertheless, “*determine that the person’s interest is not likely to affect the discharge of his functions and upon such determination that person shall be qualified to hold the office of member of the Authority provided that the declared interest and the Minister’s determination are published in the Gazette*”.

Although an attempt is being made to introduce more transparency and accountability in MEPA’s operations and to curtail conflict of interest by not leaving it up to the person concerned to determine whether s/he has a conflict of interest thereby embarrassing the competent Minister in certain situations bearing in mind the doctrine of individual ministerial responsibility, the solution being adopted by the Bill to do away with such conflict leaves this decision within the competence of the executive branch of the state. I think that it should not be the competent Minister nor the Cabinet of Ministers who should decide this matter but an independent authority which has no real or apparent interest in the matter. This could be the Commission for the Administration of Justice or the Court of Appeal. Another option could be to entrust the Standing Committee on Development Planning with the determination of such disputes even if this might have its drawbacks in a two party system as in the Malta due to the potential politicization of the whole issue on party political grounds.

### **Other categories of persons excluded from MEPA Board Membership**

Other categories of persons who have been included in the Bill that cannot be appointed MEPA board members are:

- (a) a Minister;
- (b) a Parliamentary Secretary;
- (c) a Member of the European Parliament;
- (d) a judge or magistrate of the courts of justice;
- (e) interdicted or incapacitated persons;
- (f) persons convicted of an offence affecting public trust, or theft, or fraud, or of knowingly receiving property obtained by theft or fraud, or of bribery, or of money laundering;
- (g) persons subject to a disqualification under article 320 of the Companies Act.

Interestingly enough no prohibition is made as to the appointment of the two Members of Parliament on MEPA from the recently appointed Parliamentary Assistants. Although one understands that such Assistants should perform parliamentary not government business, their close relationship to a Minister – especially if the Minister happens to be the Minister responsible for the environment and development planning – makes them just as inappropriate for such appointment on the MEPA board as a Member of Parliament.<sup>15</sup>

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<sup>15</sup> See the Code of Ethics for Parliamentary Assistants available at <http://parliament.gov.mt/file.aspx?f=103>

## **The Constitutional Doctrine of the Separation of Powers and MEPA Membership**

When the Development Planning Act was enacted in 1992 it provided that two MEPA board members were to be appointed from amongst members of the House of Representatives. One such board member is appointed by the Prime Minister and another board member by the Leader of the Opposition (see article 3(3) of the DPA). The position has not changed between 1992 and 2010; nor will the Bill be proposing any changes in this regard (see article 6(4) of the Bill).

The problem with this provision is that it flouts the constitutional doctrine of the separation of powers: two Members of Parliament, one from each side of the House, are appointed on a public corporation which to a great extent takes orders from the Government of the day. The doctrine of separation of powers requires that these two members of Parliament should not sit and partake in decision making in another organ of the state when these two MEPA board Members of Parliament have already participated in the MEPA's deliberations and decision making. Yet these two MPs, now in their parliamentary role, have to take cognizance of MEPA's annual report, financial estimates, audited accounts and other matters concerning MEPA, in the House of Representatives and/or in a Committee of the House such as the Public Accounts Committee and the Standing Committee on Development Planning. What if one or both MPs who sit on the MEPA board end up being members of the PAC or the Standing Committee? What is the situation when the whole House is taking cognizance of MEPA affairs or matters related thereto such as the approval of Structure Plan amendments? Does this not run counter to the doctrine of separation of powers? Members of Parliament should thus confine themselves to membership of the House of Representatives and its committees and should no longer sit on the MEPA board.

## **Further Curtailment of MEPA's Independence**

When the MEPA was established in 1992, it was established as an independent authority. Nevertheless, as time passed by, MEPA lost its independence becoming more of a government department than a public corporation which has final decision making powers as to its own affairs. The first onslaught at MEPA's independence goes back to the 1997 amendments introduced by a Labour administration; the second assault was in 2001 where MEPA lost considerable powers it previously enjoyed under the same Nationalist Government which had granted them to it but which now decided to take them back; the final attack is the present Bill. For instance, clause 8(5) of the Bill provides that "*In the execution of its functions under Part III and Part IV of the Act,<sup>16</sup> the Authority shall consult with the Minister*". This means that MEPA is subject to more Government scrutiny, control and interference when exercising its lawful functions. Another limitation on MEPA's independence is found in clause 8(8) which reads as follows: "*The Authority shall execute its duties, functions and responsibilities in*

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12. Last accessed on 26 March 2010. Of particular relevance, although it does not address the point raised here, are paragraphs 63 and 66.

<sup>16</sup> Part III of the Bill (clauses 6 to 46) deals with the institutional structures established by the Bill whilst Part IV of the Bill (clauses 47 to 65) deals with Environment and Development Planning.



*accordance with Government's policies relating to development and the environment as well as such policies relating to the environment as are applicable to Malta."*

This is a strange provision. To which Government policies is reference being made? Why is no cross reference being afforded to a provision of the DPA whereby Government is authorized to approve policies relating to development and the environment? What if such policies run counter to the Structure Plan? Will there not be a conflict between clause 69(1)(a) of the Bill and this aforementioned provision?<sup>17</sup> Which provision should MEPA apply once there are two provisions in the same law requesting MEPA to apply different policies, that is, the Structure Plan versus Government policies relating to development and the environment? Furthermore, is there any other provision in any other law to which reference is being made and, if so, which law?

An analysis of the Bill's clauses indicates that the Minister's powers are being extended considerably. Each time that the DPA is amended (or re-enacted as in the present case), the Minister's powers keep on increasing drastically to such an extent that it is beginning to embarrass Louis XIV and his autocratic style of governance epitomized in his infamous expression *l'état, c'est moi*. Although Government has opted to bark up the wrong tree – and who is this humble unassuming professor of law to convince the Government not to do so? – the Government should legislate to establish MEPA not as a public corporation but as a government agency created under the Public Administration Act. Otherwise the distinction between the two organizations (a public corporation and a government agency) ends up being blurred from an Administrative Law viewpoint. In this way the Government should call a spade a spade rather than giving the impression, when it suits it, that the MEPA is an independent and autonomous body from Government when it is no longer so.

### **Appointment of MEPA Chief Executive Officer and Directors to head the four MEPA Directorates**

The Bill establishes the office of Chief Executive Officer and a number of Directorates. The current position is that there is a MEPA Director-General whose office was not established by law but on an administrative basis. The office of a chief officer is now being established by law and is being correctly re-designated as Chief Executive Officer. The term 'Director-General' is normally reserved for the public service whilst the words 'Chief Executive Officer' are used in conjunction with a public or private corporation. Again, today there are three directorates: Planning, Environment Protection and Corporate Services. The Bill is proposing in its Third Schedule that there should be a fourth directorate on Enforcement. I fully subscribe to this proposal as one of the main problems with MEPA since 1992 has been the lack of an efficient and effective enforcement mechanism.

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<sup>17</sup> See *Natalino Debono vs. MEPA*, decided by the Court of Appeal, Inferior Competence, per the Hon. Mr. Justice Raymond C. Pace, 25.2.2010, appeal no. 12/2009. See also the case law cited at pp. 23 and 24 of this judgment.

On the other hand, I fail to understand why in clause 13(1) the MEPA Chief Executive should be appointed “*with the approval of the Minister*”. Are not the members of the MEPA competent enough to deal with this issue? Why does the decision need to be endorsed by the Minister? What if the Minister disagrees with the Selection Board’s recommendations? Does this not constitute an unwarranted interference in the day-to-day running of the corporation? Nor do I see any valid reason why in clause 12(4) it is stated that the directors to head each directorate have to be appointed by MEPA “*with the approval of the Minister*”. Unfortunately, MEPA has become too much of a government agency rather than a public corporation. The distinction between the two is nearly non-existent insofar as Ministerial control over MEPA is concerned, and yet MEPA has not been established as an agency of the Government under the Public Administration Act.

### **Internal Audit Functions**

In terms of clause 14(3) of the Bill, a MEPA officer will be appointed Internal Auditor. This function should not be confused with that of the Audit Officer. In terms of the DPA, the latter is neither an Internal Auditor nor an External Auditor. Indeed, under the latter enactment, the office of Audit Officer was assigned ombudsman duties and not financial auditing. On the other hand, and correctly so, the internal auditor is assigned financial auditing duties and not administrative investigations relating to the running of MEPA and its decision making processes. It therefore makes a lot of sense if, as stated in clause 14(4) of the Bill, the Internal Auditor reports “*directly and exclusively to the Authority in accordance with procedures established by the Authority*”.

In addition, there is no reference to the Audit Officer in the Bill. This is because such reference is found in Bill No. 48 where the definition of Audit Officer in article 2 of the DPA and the provision regulating the Audit Officer in article 17C of the DPA are proposed to be repealed. Of course, if the Bill is enacted before the Ombudsman (Amendment) Act (Bill No. 48) then one has to ensure that the provisions in the DPA referring to the Audit Officer cited above are not repealed unless and until a Commissioner for the Environment is appointed under the Ombudsman Act and that the complaints pending before the Audit Officer are transferred to the new Commissioner taking over the duties of Audit Officer.<sup>18</sup>

### **Detailing of Public Officers with MEPA and the Bleak Future of its Employees**

Clauses 18 to 20 deal with detailing of public officers with MEPA as well as their pension rights. Whilst these provisions made sense in 1992 when the then Planning Authority was established, it is standard procedure in Maltese Administrative Law when a new public corporation is established, to include provisions regulating the detailing of

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<sup>18</sup> See speech by the Hon. Mario de Marco delivered on 14 January 2010 available at [https://opm.gov.mt/mdm\\_mepa](https://opm.gov.mt/mdm_mepa). Last accessed on 19 March 2010. On the same point see speech delivered by the Hon. Dr. Lawrence Gonzi on 14 January 2010 at [https://opm.gov.mt/mepa\\_bill](https://opm.gov.mt/mepa_bill). Last accessed on 19 March 2010.

public officers with the new public corporation, in our case MEPA, where such is the case. However, one asks whether these provisions are still relevant today, eighteen years after the enactment of the DPA? Are not eighteen years more than sufficient for the MEPA and the Management and Personnel Office within the Office of the Prime Minister to make up their mind as to whether such detailed public officers should take up permanent employment with MEPA in lieu of their public office employment or else be reassigned duties in the public service? It would be interesting to know what is the exact number of public officers who are still detailed with MEPA, if such still exist, why is this the case. It would also be interesting to learn why the Management and Personnel Office and the MEPA have allowed such a situation to continue over such a long period of time and why have the detailing provisions of the 1992 Act not been implemented fully? If there is no reasonable justification for this state of affairs, one would be correct to criticize the public administration on the grounds of lethargy in giving full effect to Parliament's will. If there are still public officers detailed with MEPA, a decision as to whether they should be recruited with MEPA or else reassigned to perform duties in the public service should be taken not later than one year from the enactment of the Bill.

Worse still, what will be the fate of MEPA employees who are not public officers? Presumably, today, the bulk of MEPA employees fall in this category. In terms of the Bill there is no commitment envisaged on the part of the MEPA established by the Bill to re-employ the employees of the MEPA established by the DPA. Once the Bill is enacted into law and comes into force, the MEPA established under the DPA will die a legal death. The new MEPA will then take over but with no obligations regarding the tenure of existing MEPA's employees. When the provision establishing MEPA comes into force, MEPA will start from a clean slate, a *tabula rasa*, once it is not the legal successor of the MEPA established by the DPA. Its only servants will be those public officers, if any, whom the Prime Minister will detail to work at the MEPA. I would not want to be in the situation of MEPA employees on the entry into force of the provision establishing MEPA as the law will bring about their *ex lege* consequential termination of employment. The much required transitory provision, if it is Government's intention to retain MEPA employees, is conspicuously absent. In terms of the Bill, a new recruitment process will have to embarked upon unless a transitory provision is added to the effect that the MEPA established by the Bill will assume all rights and obligations hitherto bestowed upon the MEPA established by the DPA and that, for all intents and purposes of law, MEPA employees employed in terms of the DPA will be considered to continue to be MEPA employees for the purposes of the Bill.

### **Setting up of the Registration Board**

In terms of clause 42, a Registration Board is being set up “to evaluate applications for registration in the Register of Consultants eligible to carry out environment assessments and other assessments”. The Board was already established by regulation 36 of the Environmental Impact Assessment Regulations, 2007 (subsidiary Legislation 356.09). A similar provision existed in regulation 36 of the Environment Impact Assessment Regulations, 2001 (also Subsidiary Legislation 356.09). This is the third attempt at

establishing such a Board by law. Hopefully, this third time round, the Registration Board will be appointed and start to function.

### **Abolition of Certain Committees**

The Planning Consultative Committee and the Inter-departmental Planning Committee will be abolished. Whilst I see sense in the abolition of the Planning Consultative Committee as it, to a certain extent, replicated the functions of the Users' Committee and hence it is a good idea to fuse both committees into one, I do not understand why the Inter-departmental Planning Committee has been abolished. This Committee, in terms of article 17D of the DPA was entrusted with the functions of:

(a) monitoring the implementation of the functions conferred upon a department of the Government or a body corporate under the DPA or under any development plan or planning policy; and

(b) coordinating the workings of the said departments and bodies corporate in performing their functions as aforesaid and to advise and assist them.

Perhaps such duties will now be carried out by the Office of the Prime Minister?

### **Development Planning Issues**

Part IV of the Bill deals with environment and development planning. Clause 47 refers to plans, policies and regulations but, through an oversight, forgets to include in the list orders made in terms of clause 63 through which the environment is also managed and planned.

### **Imprecise Drafting: Wrong Cross-Reference**

Clause 8(2)(e) contains a wrong cross-reference to clause 8(2)(b) and (c). The correct cross reference is clause 8(2)(c) and (d).

### **Provisions concerning Human Rights Law**

On a more positive note, and this has to be commended, are the highly interesting provisions in the Bill which bring administrative law within the fold of human rights law. I have here in mind the provisions regulating the Environment and Planning Review Tribunal (hereinafter 'the Tribunal'), the new name being given to what has since 1992 been called the 'Planning Appeals Board'.

### **Tribunal's Funds to be a Charge on the Consolidated Fund**

As a quasi-judicial body – like the Rent Regulations Board, the Agricultural Leases Control Board, the Administrative Review Tribunal, etc. – the expenses incurred in

connection with the operation of the Tribunal should be a charge on the Consolidated Fund and not a charge on MEPA (the latter being one of the parties appearing before the Tribunal). The Planning Appeals Board (hereinafter ‘the Board’) has been embroiled in unnecessary constitutional court litigation - simply because of the provision contained in article 15 (8) of the DPA which states that the expenses of the Board (including the honorarium payable to the Chairman and Members of the Board) has to be met by MEPA. The independence of the PAB has been challenged on this basis in the Kunsill Lokali Kirkop (Multigas) case<sup>19</sup> and in the Kunsill Lokali Marsaskala (Sant’Antnin Recycling plant) case.<sup>20</sup> The former case has been decided in favour of the Board but on a point of procedure whereby it was declared that the applicant Local Council did not have the *locus standi* under the European Convention for the Protection of Human Rights and Fundamental Freedoms to institute proceedings alleging a violation of human rights and fundamental freedoms, and not on the merits. The other case is still awaiting judgment. In order to do away with such unnecessary litigation, the Bill is thus correctly proposing to substitute the provision now contained in article 15(8) of the DPA by the following in clause 40:

(7) The expenses incurred in connection with the administration of the Tribunal, including the payment of the honorarium to the Chairman and members of the Tribunal and the salary of the Tribunal’s Secretary and the Tribunal’s staff, shall be paid out of the Consolidated Fund without the necessity of any further appropriation.

### **Removal of the Tribunal’s Chairman and Members**

As article 14(5) of the DPA currently obtains the Minister responsible for planning may remove the Chairman and Members of the Planning Appeals Board. This is however not acceptable at law as it must be borne in mind that this Board is not a public corporation (like MEPA) or any other administrative board but is a judicial body which decides ‘civil rights and obligations’ in terms of Article 6 of the European Convention of Human Rights and Fundamental Freedoms and article 39 (3) of the Constitution of Malta. Hence, it is an “*independent and impartial tribunal established by law*” and as such should enjoy the relative human rights safeguards entrusted to it by the case law of the Strasbourg court. Moreover, the Government has to apply for development permission and it is not the first time that the Government (Ministries, departments, agencies, etc.) ends up a party before the PAB. The Bill is thus proposing to substitute article 14 (5) of the DPA<sup>21</sup> with a provision in clause 40 whereby the grounds of removal of a member of the Board

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<sup>19</sup> *Kunsill Lokali Kirkop vs. Avukati Generali et* (amongst the respondents were the Chairman and members of the Planning Appeals Board) decided by the Civil Court, First Hall, per Mr. Justice Geoffrey Valenzia, on 20 October 2008 (application number 4 of 2001).

<sup>20</sup> *Kunsill Lokali Marsascale vs. Avukat Generali et* (once again, amongst the respondents were the Chairman and members of the Planning Appeals Board). This case is pending before the Civil Court, First Hall, Constitutional Competence (Mr. Justice Gino Camilleri, application number 5/2006).

<sup>21</sup> This provision reads as follows:

“A member of the Board may be removed from office by the President acting on the advice of the Minister on grounds of gross negligence, conflict of interest, incompetence, or acts or omissions unbecoming a member of the Board.”

are equated to those for the removal of a member of the judiciary. This is a positive measure. The new clause reads as follows:

(5) In the exercise of their functions under this Act, the Chairman and the members of the Tribunal shall not be subject to the control or direction of any other person or authority, and may be removed from office by the President acting on the advice of the Minister for the reasons provided in article 97(2) of the Constitution.<sup>22</sup>

## **Innovations concerning the Law of Procedure**

### **Summoning Witnesses before the Tribunal**

The Third Schedule to the DPA empowers the Appeals Board to summon witnesses and to administer the oath to any person appearing before it but does not contemplate the case where the witness, notwithstanding the fact that s/he is duly notified, does not enter an appearance to give evidence before the Board. This problem is now being remedied in the Bill. Hence paragraph 4 of the Second Schedule of the Bill provides as follows:

(5) The Tribunal shall have the power to summon witnesses and to administer the oath to any person appearing before it. Should a witness duly notified by a summons signed by the Chairman of the Tribunal fail to enter an appearance before the Tribunal, such person shall be guilty of an offence and liable, on conviction, to a fine (*multa*) of not less than five hundred euro and not more than five thousand euro.

### **The Demise of the Doctrine of Juridical Interest in Planning Appeals**

It is necessary to clarify in the law that aggrieved parties (who are appellants) do not need to prove that they have an interest in the appeal proceedings in terms of the doctrine of juridical interest as applied by the courts of civil jurisdiction to court litigation. What they have to submit to the Appeals Board are only the “*reasoned grounds based on planning considerations*”. The Bill thus introduces a new paragraph in the Second Schedule which reads as follows:

*“When an appeal has been lodged by a person other than the applicant, such a person need not prove that he has an interest in that appeal in terms of the doctrine of juridical interest which doctrine shall not apply to such proceedings, but he shall submit reasoned grounds based on environmental and, or (sic) planning considerations to justify his appeal.*”

This will free the Tribunal from having to deliver a number of time consuming preliminary decisions together with having to devote a number of sittings simply to establish whether such parties comply with the doctrine of juridical interest. By removing

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<sup>22</sup> The said reasons are: “*proved inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour.*”

this requirement the appeal procedure is expedited. This doctrine is irrelevant for proceedings before the Tribunal more so that the Tribunal's jurisdiction has been widened to include environmental appeals. What is relevant for the Tribunal is whether the MEPA has applied correctly the law and development plans and planning policies to the development permission application in question.

### **Increased Rights to Interested Third Parties in Appellate Proceedings before the Tribunal**

Whilst bearing in mind that in terms of article 15(10) read in conjunction with article 33(1) of the DPA, the PAB has to consider during its deliberations the written submissions of registered objectors with MEPA, the law has never been quite clear as to the role of interested third parties. Hence this matter requires legislative regulation. Paragraph 11 of the Second Schedule of the Bill has settled this legal quandary as follows:

11. A registered third party in terms of article 68 (4) of this Act shall be informed by the Tribunal that an appeal has been filed and he may request the Secretary of the Tribunal to register him as an interested third party in such an appeal. Such a person shall have a right to address the Tribunal and may be requested by the Authority or Commission to give evidence in the appeal proceedings concerning the said appeal. Unless the Tribunal decides otherwise, such a person may be present during all sittings of the Tribunal. Such a person may not attend site inspections where the Tribunal enters upon the property of the appellant if the appellant objects to the presence of such a person entering upon his property. Such a person shall have a right to be given a copy of the Tribunal's decision with regard to those appeal proceedings for which he has been registered with the Secretary of the Tribunal as interested third party. Such a person may not file an appeal from a decision of the Tribunal before the Court of Appeal (Inferior Jurisdiction).

To a certain extent, the *Boris Arcidiacono et vs. Salvu Schembri et* judgment recently delivered by the Civil Court, First Hall, takes this approach when it grants a power of audience to interested third parties.<sup>23</sup> Although the judgment metes out justice it goes beyond the strict provisions of the law and in this case the judiciary is legislating rather than applying the strictures of the law.<sup>24</sup>

### **Tribunal to issue Suspension Orders in Certain Cases**

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<sup>23</sup> *Boris Arcidiacono et vs. Salvu Schembri et*, Civil Court, First Hall, per Mr. Justice Joseph Azzopardi, 26 October 2009, writ of summons number 1825/2001. This judgment is still subject to appeal.

<sup>24</sup> The landmark development planning law judgment of *Austin Attard Montaldo vs. Chairman Planning Authority* (Court of Appeal, 20 August 1996, appeal no.433/94) is a case in point. In order to apply the principles of justice rather than the strictures of the law, the Court of Appeal interpreted the DPA in a way which went beyond what the legislator intended. In this respect the judiciary was legislating thereby running counter to the doctrine of the separation of powers. The good thing with this judgment, however, is that the Legislature codified in the DPA, with certain modifications, what the Court of Appeal had decided in this case.

In terms of clause 41(3) of the Bill, the Tribunal may issue a warrant of prohibitory injunction even if the law does not refer to it by such name. An order to suspend the execution of development in terms of the Bill is regulated as follows:

‘In case of a development in an area which falls outside areas designated for development as defined in the Structure Plan or in any other plan or in a scheduled property grade 1 or 2 or in a property containing archaeological remains, or in the case of demolition within Category A Urban Conservation Areas which includes demolition of façade or in a Special Area of Conservation, at the request of the appellant made concurrently with the application for the appeal, through a partial decision, the Tribunal may suspend the execution of the development, in whole or in part, as approved by the development permit subject of the appeal, under those terms, conditions and other measures it may deem fit:

Provided also that the application is not for a strategic development which, in the opinion of the Minister is of strategic significance or of national interest, related to any obligation ensuing from a European Union Directive, affects national security or affects interests of other governments.

In terms of Clause 41(4), this suspension order is for a maximum period of three months and “*shall be deemed to have elapsed ipso jure after the lapse of such a period*”.

One has to be very wary when drafting such provisions which encroach upon the Court’s jurisdiction.

First, there is going to be an overlap between the Civil Court’s jurisdiction to issue a warrant of prohibitory injunction and the Tribunal’s jurisdiction to issue a suspension order.

Second, as the law is drafted, both procedures may be exercised concurrently and not to the exclusion of one another.

Third, the suspension order is for a maximum duration of three months. What happens if the Tribunal delivers its decision on the merits of the appeal within the three month period but the party cast lodges an appeal to the Court of Appeal and the said Court takes a further three months to decide the appeal? During the three month period within which the Court is hearing the appeal, there is no suspension order in force as this would have elapsed *ipso jure*. Will not the appellant, who might have won the appeal before the Tribunal, remain unprotected until the appellate proceedings before the Civil Court, First Hall, come to an end? Should s/he request the Civil Court to issue a warrant of prohibitory injunction till the Court of Appeal decides the appeal? What if the Civil Court declines such application? Even if the Civil Court were to accede to applicant’s request to issue a warrant of prohibitory injunction, will the appellant have to bring the action within twenty days in respect of the right stated in the warrant?<sup>25</sup> There is case law to the

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<sup>25</sup> Article 843(1) of the Code of Organization and Civil Procedure as applied by article 876A of the said Code.



effect that if there is a constitutional case instituted by an applicant and such applicant requests the Civil Court, First Hall, to issue a warrant of prohibitory injunction, then such person need not file a fresh action before the Civil Court, First Hall, in terms of article 843(1) of the Code.<sup>26</sup> But will the Court of Appeal be willing to extend this jurisprudential doctrine to an appeal lodged before it from a decision of the Tribunal?

Fourth, what is the situation where the Court of Appeal annuls a Tribunal decision remitting it back for rehearing? Will the appellant have a second opportunity to request the Tribunal to reissue a second suspension order? As the provision is drafted (the request for a suspension order has to be made concurrently with the application of appeal before the Tribunal) the answer seems to be in the negative unless this is requested concurrently with the filing of the application of appeal. But will it cross an appellant's mind that s/he has to make such request to safeguard his/her interests in such an initial stage of the proceedings?

Fifth, the proviso to clause 41(3) of the Bill is ill drafted. The Minister is given the discretion to select certain types of applications to which it is not possible to issue a suspension order in relation thereto. But how will the Tribunal know which appeals pending before it are of such a nature? The provision does not provide a procedure to the effect that when a request for an issue of a suspension order is filed with the Tribunal, the Tribunal's Secretary is to inform the Minister of such a request and the Minister will decide within a certain short prescribed time whether or not the application in question "*is of strategic significance or of national interest, related to any obligation ensuing from a European Union Directive, affects national security or affects interests of other governments.*" Moreover the terminology used in this proviso is very loaded: what is 'national interest'? Is it the interest of the political party in Government? Our Courts over time have struggled to define what constitutes 'public interest' in expropriation cases. Will they have to pass through the same saga to define what is the 'national interest', 'national security' and development of a 'strategic significance'? Furthermore, why is reference being made only to a European Union Directive and not to EU Regulations and Council Decisions which are also binding instruments in European Union Law? Would not the European Union Act instead constitute a more all embracing cross reference to the different forms of European Union Law?

Sixth, there is no right to appeal from a suspension order to the Court of Appeal until such time that the Tribunal would have reached its final decision on the merits of the appeal. This final decision has to be taken within three months from the date of the first hearing of the appeal. According to case law it is not possible to appeal from decrees delivered by the PAB.<sup>27</sup> Furthermore, clause 41(6) of the Bill provides that, an "*appeal from a partial decision of the Tribunal may only be filed together with an appeal from the final decision of the Tribunal.*" Hence, an aggrieved party from the Tribunal's partial

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<sup>26</sup> *Kunsill Lokali Kirkop vs. Avukat Generali et*, Civil Court, First Hall, per Mr. Justice Joseph R. Micallef, 3 July 2002, writ of summons 311/01.

<sup>27</sup> *Emanuel Morguello v. Chairman, Planning Authority*, Court of Appeal, 28 February 1997, appeal no. 607/94.

decision relating to a suspension order has to wait the Tribunal's final decision before having the opportunity to challenge such decision before the Court of Appeal.

Finally, it is to be borne in mind that clause 41(3) of the Bill does not affect article 55A(3) of the DPA which, in the Bill, will be renumbered as clause 90(3).<sup>28</sup> The latter provision addresses the MEPA and not a holder of a development permission. So whilst article 55A(3) of the DPA prohibits a court of civil jurisdiction from issuing a warrant of prohibitory injunction against the MEPA (except in human rights and fundamental freedoms cases),<sup>29</sup> the suspension order envisaged in clause 41(3) of the Bill will be issued against the development permission holder. Of course, should the MEPA itself be the applicant for development permission (and there have been such instances in the past), no warrant of prohibitory injunction may be issued against it but nonetheless a suspension order may be authorised by the Tribunal in the case of a third party appeal from a development permission approved in favour of the MEPA.

### **Other Amendments Regulating Procedure Before the Tribunal**

The Second Schedule of the Bill is introducing innovative procedures which are very much needed to regulate the proceedings before the Tribunal:

- (a) Clarifying that the time-limit within which the Authority is to file its reply to an appeal is not peremptory in nature and thus can be extended by the Tribunal up until, for instance, the date of the first sitting (*primo appuntamento*) without the Authority's reply being declared null and void. This new procedure is contained in paragraph 1 of the Second Schedule of the Bill. The relevant part reads as follows: "*The Authority shall file its reply within thirty days of service upon it or within such time as established by the Tribunal.*"
- (b) Although it is possible for the Authority not to take further cognizance of an application lodged before it where the applicant no longer entertains an interest therein (article 32(7) of the DPA), there is no comparable procedure in the DPA so far as the PAB is concerned. In such case, the Board still has to write a decision and cannot declare the appeal abandoned. A new provision has thus been included in paragraph 13 of the Second Schedule of the Bill which reads as follows: "*The Tribunal may deem an appeal as abandoned if the appellant shows no interest in the appeal submitted by him.*"
- (c) There are instances where frivolous and vexatious appeals are filed before the Planning Appeals Board simply for the appellant to gain time, especially in cases of stop and enforcement notices. The need has thus been felt in the past that it

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<sup>28</sup> Clause 90(3) of the Bill reads as follows: 'Notwithstanding the provisions of any other law and saving the provisions of article 46 of the Constitution and Article 4 of the European Convention Act (Chapter 319 of the Laws of Malta), no precautionary act may be issued by any court against the Authority restraining it from the exercise of any of the powers conferred upon it by this article.'

<sup>29</sup> See *Rose Marie Stagno vs. Chairman of the Planning Authority et*, Civil Court, First Hall, per Mr. Justice Godwin Muscat Azzopardi, 26 May 1994, application number 915/94.

should be possible for the Board to impose a fine on the appellant in such cases. The Board should declare such proceedings frivolous or vexatious and in such cases the Board's decision will be final with no possibility of judicial review or appeal before the Court of Appeal. The relevant provision in paragraph 14 of the Second Schedule of the Bill caters for this eventuality. It reads as follows: "*The Tribunal may impose a fine of € 2,500 in such cases were (sic) it declares such proceedings frivolous or vexatious and in such cases the Tribunal's decision shall be final without any redress before the Court of Appeal (Inferior Jurisdiction).*" The provisions of article 166A of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta) will then apply so that the said fine may be collected by the Tribunal.

- (d) As the Board incurs expenses when holding a site inspection, the Planning Appeals (Fees) Regulations (Subsidiary Legislation 356.02) should be updated to provide for a fee for site inspections payable by the party requesting such inspection. This measure will also ensure that parties will be more careful when requesting the holding of a site inspection so that they will not incur additional costs once it is they who will foot the bill. Should the Tribunal decide to hold such inspection at its own motion, it will be the appellant who will incur the fee. This is now rectified in paragraph 15 of the Second Schedule of the Bill which reads as follows: "*The Tribunal may impose such fees on the party making the request as established for the carrying out of site inspections. Should the Tribunal decide to hold such inspection at its own motion, it will be the appellant who will incur the fee.*"<sup>30</sup>
- (e) An appellant should be obliged to file together with the appeal a copy of the application form and plans submitted for approval together with all documentation which is relevant for the grounds of appeal, including a copy of the Authority's decision appealed from. This is because the Tribunal, as is the position today with the Board, does not have access to such information. Paragraph 1 of the Second Schedule of the Bill in relevant part reads as follows: "*The application shall contain the grounds for the appeal and the request of the appellant, and, in the case of an appeal from the refusal of a permission or licence, it should include a copy of the application form and documents and plans submitted for approval together with all documentation which is relevant for the grounds of appeal, including a copy of the Authority's decision appealed from. A copy of the appeal and the ancillary documentation shall be communicated to the Authority before the appeal is heard.*"
- (f) The administrative penalty established by law for sanctioning an illegality should be increased as it is too low, especially for major projects. The DPA was amended to this effect in 2001 but for some unknown reason, the 2001 amending provision increasing the administrative penalty from Lm 1,000 to Lm 10,000 was never

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<sup>30</sup> A better worded provision could read as follows: 'The Tribunal may establish such fees to be paid by the party making the request for it to hold a site inspection. Should it be the Tribunal that decides *ex proprio motu* to hold a site inspection, the appellant shall pay such fee as the Tribunal may establish.'

brought into force by the Minister responsible for planning. Clause 93(1) of the Bill is increasing the said administrative penalty to fifty thousand euro.

## **Conclusion**

Overall the Bill makes positive inroads in upgrading the DPA to today's present needs. *Inter alia*:

- it brings administrative law more in line with human rights law;
- it merges in a more harmonious manner the DPA with the Environment Protection Act;
- it establishes administrative structures which have both environmental and development planning functions;
- it reduces time consuming procedures thereby expediting processes and proceedings;
- it grants more rights to interested third parties;
- it removes overlap between extant committees;
- it enhances accountability of MEPA's structures through establishing internal audit functions and relocating the Audit Officer within the Ombudsman's Office thereby increasing his independence from MEPA.

The Bill does however have its pitfalls:

- it continues to perpetuate and increase Government's hold over MEPA thereby reducing the little autonomy and independence it still enjoys from Government, turning it into a government agency rather than a public corporation;
- it dismantles what hitherto has taken years to build within the Planning Directorate by hiving off several of its indispensable functions to other government entities foremost amongst which are forward planning functions: these are assigned to the Office of the Prime Minister – perhaps the biggest mistake which the Bill commits when firing a barrage of incessant onslaughts on MEPA's independence;<sup>31</sup>
- it removes climate change from amongst the responsibilities of the Environment Protection Directorate on the pretext that it is not part of MEPA's core functions –

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<sup>31</sup> Unfortunately with this reform MEPA will be the end loser: it will not only lose its forward planning functions, but other functions which have worked well, such as transport planning, minerals and climate change.

I cannot conceive of an environmental authority which is not tasked with addressing what is considered today to be the most serious environmental threat facing humanity: climate change. Yet the Government is proposing to dismember climate change issues from MEPA's portfolio.

### **References**

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