UNIVERSITY OF MALTA
FACULTY OF LAWS

JUDICIAL INTERPRETATION OF MALTESE DEVELOPMENT PLANNING LAW. ELICITING THE ADDED VALUE

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ABSTRACT

This dissertation is about the development of new ideas and proposition of solutions in order to bridge the numerous legal lacunae encountered in the course of the decision-making process surrounding planning applications, whether such decisions are taken before the Planning Authority, the Environment and Planning Review Tribunal or the Court of Appeal.

The author points out that the entire process, already complicated as is, is made even more so when there are problems with ambiguous drafting, badly interconnected definitions, incomplete provisions and inconsistent scope of application.

Each time there is a legal quandary, the Maltese courts are the final arbiter who has the final word on what ought to have been done in the given circumstances. Even though the court contributed its fair share to solve many of the arising issues, several fundamental questions remain. This is because the court's reasoning is occasionally flawed or too broad in scope. Occasionally, the judgments are inconsistent with previous ones whereas the court's arguments, at times, simply do not hold water.

This study aims to respond to what the court thus far has been unable to answer. To achieve this, the road that led to Section 72 of the current Development Planning Act, dealing with development permissions, will be discussed first. This will be complemented by an assessment of how the court went about determining whether planning applications should be decided in line with policies in force at the onset of the application process or those *in vigore* at the time of the decision, notwithstanding the applicant being put in a

position he could not previously envisage. The extent to which a developer already in possession of a planning permission can claim to have a vested right should he decide to carry out a new development is also covered. Finally, it shall be seen whether the said Section 72 in view of which decision makers ought to no longer *'apply'* plans and policies but simply *'have regard'* of the same, had any bearing on the court's thinking.

The role of the current EPRT and what led to its current status shall then be assessed with a view to understanding the context within which *'a point of law'* could be reviewed by the Court of Appeal (Inferior Jurisdiction). This will be supplemented by an assessment of concrete situations wherein the Court held itself competent to hear an appeal from Tribunal decisions. Armed with this information, the study moves on to provide a meaningful definition of *'a point of law'*.

TABLE OF ABBREVIATIONS

A.D.2d	New York's Appellate Division Reports
AC	Appeal Cases
All ER	All England Reports
App. Div.	New York Appellate Division
CA	Court of Appeal
CAInf	Court of Appeal (Inferior Jurisdiction)
CC	Constitutional Court
ChD	Chancery Division of the High Court
CLR	Commonwealth Law Reports
CMSJ	Court of Magistrates Superior Jurisdiction (Gozo)
COCP	Code of Organisation and Civil Procedure
dB	Decibels
DCC	Development Control Commission
Div. Ct.	Divisional Court
DLH	Din l-Art Helwa
DPA	Development Planning Act
DPAR	Development Planning Application Report
ECtHR	European Court of Human Rights
EDPA	Environment and Development Planning Act
EIA	Environment Impact Assessments
EPC	Environment and Planning Commission
EPD	Environment Protection Department
EPDA	Environment and Planning Development Act
EPRT	Environment and Planning Review Tribunal
ERA	Environment and Resources Authority
EU	European Union
EWCA Civ	England and Wales Court of Appeal Civil Division
Exch	Exchequer Reports
FCA	Federal Court of Australia

FH	First Hall of the Civil Court
FHCJ	First Hall of the Civil Court (Constitutional Jurisdiction)
GRTU	The General Retail and Traders Union
GSB	General Service Board
H.L.C.	House of Lords Cases, 1847-66
HAC	Heritage Advisory Committee
HCA	High Court of Australia
ICR	Industrial Cases Reports
IPPC	Integrated Pollution Prevention and Control
JPL	Journal of Planning and Environmental Law (UK)
KB	Law Reports, King's Bench Division
Kollezz.	Kollezzjoni Decizjonijiet Qrati Superjuri
LGR	Local Government Reports, United Kingdom
LR	Lloyds Law Reports
MDA	Malta Developers Association
MEPA	Malta Environment and Planning Authority
N.Y.S.	Wests New York Suppliment
NGO	Non-governmental organization
NH	New Hemisphere
NZLR	New Zealand Law Reports
O.J.	Official Journal
O.M.B.R.	Ontario Municipal Board Reports
ODZ	Outside Development Zone
P.2d	Pacific Reporter, 2d series
PA	Planning Authority
PAB	Planning Appeals Board
PAPB	Planning Area Permits Board
PB	Planning Board
PCom	Planning Commission
PLP	Interim Review of Building Heights Pending Local Plan Completion

QBD	Queen's Bench Division
S.L.T.	Scotts Law Times
SEO	Sanitary Engineer Officer
Sup. Ct.	US Supreme Court
TPS	Temporary Provision Scheme
UCA	Urban Conservation Area
UKHL	United Kingdom House of Lords
UKSC	United Kingdom Supreme Court
UOM	University of Malta
Wash	Washington Reports
Wash. 2d	Washington Appellate Reports, 2nd series
WLR	Weekly Law Reports
WN (NSW)	Weekly Notes (New South Wales)

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Fino Lawrence f'isem u in rapprezentanza tas-socjeta C. Fino & Sons Ltd. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [2nd May 2013] (CAInf) (126/2012)

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Formosa Gauci J. f' isem Trident Development Limited v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar [26th March 2009] (CAInf) (4/2008)

Formosa Maurice ghan-nom u in rapprezentanza ta' JMA Ltd, Zammit Ian ghan-nom ta' Mortar Investments Ltd, u Grech Joseph v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [22nd April 2015] (CAInf) (58/2014)

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Galea Jack v Awtorita' ta' I-Ippjanar [19th November 2001] (CA) (213/1999)

Galea Joseph ghan-nom ta' Wied Ghomor Quarry Limited v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) [21st May 2018] (CAInf) (13/2018)

Gatt George v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [2nd May 2013] (CAInf) (146/2012)

Gatt Michael v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [19th November 2001] (CA) (220/2000)

Gauci Carmel v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [4th December 2013] (CAInf) (28/2013)

Gauci Charles Michael v Vella Alfred pro et noe et [10th October 2003] (CA) (248/1999)

Gauci Clyde v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [10th July 2013] (CAInf) (120/2012)

Gauci Francis v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp [24th February 2005] (CAInf) (31/2003)

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Genovese Joseph et v Kummissjoni ghall-Kontroll tal-Izvilupp et [2nd May 2013] (CAInf) (47/2012)

Ghigo Jerry v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [14th November 2013] (CAInf) (187/2012)

Grech Alex f'isem u in rapprezentanza tar-residenti ta' Les Roches, Qui-si-Sana, Sliema v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Noel Agius [5th November 2016] (CAInf) (19/2015)

Grech Dr. Alfred v Awtorita' tal-Ippjanar [31st May 1996] (CA) (93/1994)

Grech Fenech Romina v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [19th February 2014] (CAInf) (194/2012)

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Kunsill Lokali Marsaskala v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Ghany Shaban Abdel [20th November 2017] (CAInf) (21/2017)

Kunsill Lokali Pembroke, Kunsill Lokali San Giljan, Kunsill Lokali Swieqi, Moviment Graffitti, Friends of the Earth Malta, Zminijietna – Voice of the Left, Din l-Art Helwa, Flimkien Ghal Ambjent Ahjar, Pullicino Alison, Tanti Sonya, Zammit Rita, Zammit Norman, Sultana Mario, Grima Adrian, Buttigieg Josef, Buttigieg Stephanie, u Cassola Arnold v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Debono Silvio ghan-nom u in rapprezentanza ta' db San Gorg Property Limited [19th June 2019] (CAInf) (11/2019)

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Kunsill Lokali tax-Xewkija v L-Awtorita` ta' l-Ippjanar et [6th October 2000] (CAInf)

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Saliba John v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [31st May 2012] (CAInf) (9/2011)

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Schembri Charles f'isem u in rapprezentanza tas-socjeta' C & F Enterprises Limited v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [20th June 2013] (CAInf) (131/2012)

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Stivala Michael v L-Awtorita' ta' l-lppjanar (gja L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) [4th March 2019] (CAInf) (69/2018)

Sultana Domenic v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [31st May 2012] (CAInf) (7/2011)

Sultana George v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar [26th June 2012] (CAInf) (50/2011)

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Theuma Charles sive Charlie u Theuma Salvina, Bajada Lorenza u Theuma Christopher, Zammit Joseph u Zammit Diana, Xerri Antonella u Xerri Victoria v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Metters Rodney [19th June 2019] (CAInf) (13/2019)

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Vella Dr Jevon v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar, u l-kjamat in kawza Agius Edmond [17th February 2016] (CAInf) (53/2015)

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Vella Matthew v L-Awtorita' ta' Malta dwar I- Ambjent u l-lppjanar [30th March 2006] (CAInf) (1/2005)

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Vella Roger v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar [29th November 2012] (CAInf) (7/2012)

Vella Saviour f'isem u in rapprezentanza tal-Ghaqda tar-Residenti Santa Maria Estate v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamata in kawza Debono Veronique [4th December 2013] (CAInf) (173/2012)

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Zammit Richard v Chairman ta' l-Awtorita' ta' l-Ippjanar [31st May 2002] (CA) (99/1998)

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CHAPTER ONE
Introduction

1. PLANNING LEGISLATION IN MALTA – A BRIEF HISTORICAL OVERVIEW

1.1 THE SITUATION PRE-1992

The planning system, in its present form, is a result of the legislative developments which took place in 1992.[1] 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.[2] However, in the aftermath of World War II up until the year 1962, land was essentially allotted for development by government in a political context in which there was an acknowledgment of the legitimate role of the state in promoting large-scale reconstruction.[3] This explains the building boom that occurred during that period, at a time when there was little or no public awareness of the value of a comprehensive planning system as we know it today.

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'*.[4] Once an application to carry out any such development reached the Department of Public

[1] The Planning Authority was set up by virtue of the Development Planning Act, 2016 enacted by Act I of 1992. This Act was passed by the House of Representatives at Sitting No. 611 on the 15th January 1992

[2] Paul Gauci, *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 (in1945), Windyer Morris (in 1959) and Italconsult (in 1964), among others

[3] Paul Gauci, *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)

[4] Code of Police Laws, s 3(1). This provision was eventually repealed by Act I of 1992

Works, it then had to go through a number of channels before a decision was taken as to whether to grant permission or not.

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[5] and the Construction of Houses and Drains Regulations.[6] 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.[7] 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[8], the application was also assessed by the Aesthetics Board[9] 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

[5] *Ibid*: s 97. This provision was never repealed from the statute, notwithstanding the Development Planning (Health and Sanitary) Regulations, 2016 took effect in 2016
[6] Government Notice 110 of 1934, *Construction of Houses and Drains Regulations*
[7] Code of Police Laws, s 97(n)(1)(i)
[8] With the exception of religious buildings
[9] Aesthetics Building Ordinance, s 45

prior to the scheduled hearing during which the application was going to be discussed.[10] 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 the applicant and the interested parties present during the sitting.[11] 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.[12]

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.[13] 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.[14] 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.[15]

[10] Aesthetics Building Ordinance, s 8
[11] See for example: *Alfred Aquilina v Architect Keith Cole noe et.* (CMSJ), Volume LXXIV,1990, Pt. II, 379, writ of summons (220/1990)
[12] Aesthetics Building Ordinance, s 9
[13] Kevin Aqulina, *Development Planning Legislation – The Maltese Experience* (Mireva Publications 1999): 112
[14] See for example: *Michael Axisa ghas-socjeta Lay Lay Co. Ltd v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14thJanauary 2015] (CAInf) (44/2013)
[15] See for example: *Mary Grech v Minister for Works et.* [29th January 1988] (CA) (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[16], paving the way for the setting up of the Planning Authority (PA) 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. The latter, unlike its British counterpart, was not directly 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; and

(iii) enforcement control – particularly, the monitoring of development, the issuance of enforcement and discontinuance orders as well as compliance certificates.

[16] The Planning Authority was set up by virtue of the Development Planning Act, 2016 enacted by Act I of 1992 This Act was passed by the House of Representatives at Sitting No. 611 on the 15th January 1992

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...'.*[17] 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 board designated as the Planning Appeals Board (PAB) established under the same DPA.[18] This was later transformed into the Environment and Planning Review Tribunal (EPRT) by the Environment and Development Planning Act (EDPA).[19] 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.[20]

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 10th June 2016. Consequent to the said regulations, sanitary issues are now assessed by the PA with the possibility of an appeal before the EPRT.

[17] Development Planning Act 1992, s 30(2)
[18] *Ibid* : s 15
[19] Environment and Development Planning Act
[20] Development Planning Act 1992, s 15(2)

It has been argued that the PA provided a public forum where spatial and environmental issues, previously under the exclusive control of politicians, have now to be justified.[21] Cassar, a former Director General of the PA, described the transition from the PAPB to the PA as significant when stating that *'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'*.[22]

The DPA was subsequently amended in 1997 after a new government was installed in 1996. The changes were percieved 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 PA officials and addressing the real and perceived inefficiencies of the PA.[23] 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 PA's decision. This was a big legislative step which reflected court judgments being meted out at the time.[24]

[21] Paul Gauci, *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): 502
[22] Godwin Cassar, *2009b. Developing a New Planning System in, Planning Matters: A collection of essays and other writings, 1985-2008* (Malta 2009): 199
[23] Paul Gauci, *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): 317
[24] *Austin Attard Montaldo v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th August 1996] (CA) (434/1994)

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

In July 2009, government spearheaded another reform which was based on four pillars – consistency, transparency, efficiency and enforcement.[25] As a result, the DPA was substituted with the EDPA. The role of the PAB was taken over by the 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 PA decisions.

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.[26] The core idea was to transform MEPA and set up two independent authorities instead – the *Awtorita` għall- Ambjent u r-Riżorsi*[27] and the *Awtorita` għall-Ippjanar u l-Izvilupp Sostenibbli*.[28] 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

[25] Office of the Prime Minister, 'A Blueprint for MEPA's Reform' (2009) <https://opm.gov.mt/mep> accessed 29th March 2020
[26] Partit Laburista, 'Malta Taghna Lkoll, Manifest Elettorali' (2012) <http://3c3dbeaf6f6c49f4b9f4-a655c0f6dcd98e765a68760c407565ae.r86.cf3.rackcdn.com/082d10b0fed6c04d78ced4e7836e1dc11067452380.pdf> accessed 29th March 2020
[27] Authority for the Environment and Resources
[28] Authority for Planning and Sustainable Land Use

Land Use[29] 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[30] to serve as an environment regulator.

In March 2014, the Parliamentary Secretariat for Planning and Simplification of Administrative Processes published a consultation document entitled '*For an Efficient Planning System'*[31], 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, the role of which was to '*review*' decisions taken by the PA and a new entity to be known as the Malta Environment Authority. Subsequently, the Development Planning Act, 2016 and the Environment and Planning Review Tribunal Act, 2015 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

[29] 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)
[30] *Ibid*
[31] *Ibid*

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 in an unclear or incomprehensive manner.

2. SUBJECT AND AIM OF THE RESEARCH

The application process commences once a development planning application is validated by the PA. In essence, there are two types of development applications:

(i) outline development applications[32] which seek an approval in principle to the proposed developments, subject to reserved matters which would need to be eventually addressed in a full development permit application. This means that although outline permissions are granted, development still cannot take place at that point in time;

(ii) full development applications[33] which seek final approval on proposed developments and as a consequence of which development can proceed if an application is granted permission;

Following validation, a planning application is assigned to a case officer who, in turn, prepares a development planning application report (DPAR) recommending whether the applicant's proposal should be accepted or rejected. Depending on the nature of the planning application, the case officer's recommendation is forwarded to either the Planning Commission (PCom) (previously the Environment and Planning Commission

[32] Development Planning Act 2016, s 71(2)(a)
[33] Development Planning Act 2016, s 71(2)(b)

(EPC) and before that, the Development Control Commission (DCC) or the Planning Board (PB) (previously, the MEPA Board)) for a decision.

In determining whether to grant or refuse a planning application, the PCom or the PB may exercise their discretion, however only within the parameters laid out in Section 72 of the Development Planning Act, 2016 which reads as follows:

> *'In its determination upon an application for development permission, the Planning Board shall have regard to:*
>
> *(a) plans;*
>
> *(b) policies:*
>
> *Provided that subsidiary plans and policies shall not be applied retroactively so as to adversely affect vested rights arising from a valid development permission, or a valid police or trading licence issued prior to 1994;*
>
> *(c) regulations made under this Act:*
>
> *Provided that the Planning Board shall only refer to plans, policies or regulations that have been finalised and approved by the Minister or the House of Representatives, as the case may be, and published;*

> *(d) any other material consideration, including surrounding legal commitments, environmental, aesthetic and sanitary considerations, which the Planning Board may deem relevant;*
>
> *(e) representations made in response to the publication of the development proposal; and*
>
> *(f) representations and recommendations made by boards, committees and consultees in response to notifications of applications.'*

The situation today, therefore, is that in determining a planning application, decision makers '*shall have regard to'* plans, policies, regulations made under the Act, any other material consideration and third-party representations, including those by the public and statutory consultees. The said criteria, therefore, play an important part in the outcome of a planning application. In reality, deciphering the intricate nuances of the said criteria has proved to be a mammoth task for decision makers, who are not always well versed in the law.

In particular, there are questions that need to be asked when it comes to deciding whether decisions on planning applications should be determined in line with the policies in force at the onset of the application or those *in vigore* at the time of the decision. This is a sensitive matter because applicants could be put in a position they could not previously envisage when planning their investment prior to proceeding with a planning application.

One other thing is that the point at which a developer in possession of a planning permission can claim to have a vested right rendering him immune to subsequent legislation does not always emerge clearly from the law. Due to this, permit holders ought to know where they legally stand should they decide to submit a new application under a new policy regime.

On top of this, there is another fundamental issue, namely the fact that, today, decision makers are no longer bound to '*apply'* planning policies, as with previous legislation, but simply *'have regard'* thereof. To this end, decision makers may be led to think that paying lip service to planning policies in the course of determining a planning application is sufficient since, as it will be seen shortly, the term '*apply'* seems to imply a duty to implement something whereas the expression '*have regard to'* simply requires '*paying attention to'* without the need to necessarily comply with anything in particular. Even so, once a planning application is decided by the PCom or the PB, the difficulties do not end there. An appeal on grounds of both fact and law is open to both applicants and interested third parties as well as statutory consultants before the EPRT. The process before the EPRT is regulated by no less than fifty-six provisions which make up the Environment and Planning Review Tribunal Act, 2016. Although the said legislation is relatively recent, it is safe to say that there are a handful of dilemmas with the legislative text. These include the method of appointing and removing members of the EPRT, when and who is entitled to lodge an appeal in a number of situations, certain rules of procedure, such as the one giving the possibility to the EPRT to receive fresh drawings before a decision is taken, as well as the powers of the Superintendent of Cultural Heritage who, though being a stakeholder himself, could overrule an EPRT judgment.

Although the decision of the EPRT is final, a further appeal is still possible before the Court of Appeal (Inferior Jurisdiction), limited, however, to *'...a point of law decided by the Tribunal or on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal.'*[34] One major weakness at this stage is that the law provides no definition of '*…a point of law decided by the Tribunal'*. In view of this, legal practitioners often find themselves in a difficult position when trying to predict whether a Tribunal decision is eligible to an appeal before the court.

All these limitations remain despite the various legal amendments that took place since 1992. This dissertation aims to resolve this impasse by first looking at how the judiciary went about appraising and addressing these issues. In particular, this study will critically analyse how the courts has reviewed the legal *modus operandi* of the PA, the PAB and, after that, the EPRT *vis-à-vis* decisions on planning matters.

Of course, one should not expect jurisprudence alone to address all legal quandaries. Apart from the fact that certain issues have not been tackled by the courts up till now, the perspectives held by judges may not necessarily signify an end point in themselves. What is certain, however, is that, over the years, jurisprudential manifestations have provided guidance, paving the way to a discussion by the author aimed at finding solutions to legal ambiguities in Maltese development planning law through the identification of complimentary views to those enunciated in judgements of domestic courts.

After ascertaining how, and to what extent, judicial activity has met the given legal challenges, the author will move on to explore a number of solutions beyond those

[34] Environment and Planning Review Tribunal Act 2016, s 39

offered by the law in its current state and also beyond the interpretation given thereto by the Courts of Justice, these solutions being the *'added value'* which the author of this study seeks to elicit and which, if taken up, should serve as a path to legislation on development planning which is better, clearer and more certain.

3. LITERATURE REVIEW

Locally, the subject of development planning legislation was tackled extensively for the first time by Professor Kevin Aquilina in his book entitled '*Development Planning Legislation – The Maltese Experience'*.[35] Published in 1998, this book remains a very valuable academic referential source, even though the legal framework on the subject matter went through considerable change since then. Without presuming to comment on the appropriateness of the law, Aquilina highlighted no less than forty-five recommendations which the legislator ought to have followed at time of writing.[36] In a number of subsequent self-contained publications, Professor Aquilina took the subject of development planning law to new heights, whilst often being critical of the government of the day for failing in its duty to implement the appropriate legislative changes.[37]

[35] Kevin Aquilina, *Development Planning Legislation – The Maltese Experience* (Mireva Publications 1999)
[36] *Ibid* : 568-574
[37] Kevin Aquilina, 'A new Institutional Framework for Sustainable Development Malta' (Bank of Valletta Review, No. 29 Spring 2004) <http://citeseerx.ist.psu.edu /viewdoc/download?doi=10.1.1.553.6443 &rep=rep1&type=pdf> accessed 29th March 2020;Kevin Aquilina 'Rationalising administrative law on the revocation of development permissions' (Bank of Valletta Review, No. 34 Spring 2006) <file:///C:/Users/User/Downloads/Kevin_Aquilina_ No_34_ Autumn_ 2006%20(3).pdf> accessed 29th March 2020; 'On Mepa Reform' *Times of Malta* (26th April 2008) < https://www.timesofmalta.com/ articles/view/20080426/opinion/on-mepa-reform.205617> accessed 29th March 2020; Kevin Aquilina, 'The Environment and Development Planning Bill: Proposals for Improvement' (Bank of Valletta Review, No. 41 Spring 2010) <file:///C:/Users/User/ Downloads/ Kevin_Aquilina_No_41_Spring_ 2010_Paper_ 2%20(7).pdf > accessed on 29th March 2020;Chamber of Advocates, *The Environment and Development Planning Act, 2010: A Human Rights Impact Assessment* (Law and Practice 2010); 'Twenty reasons against MEPA's demerger' *Maltatoday* (29th July 2015) <https://www.maltatoday.com.mt/comment/ blogs/55519/twenty_reasons_against_mepas_ demerger#.W_uzg-hKiUk> accessed 29th March 2020;Chamber of Advocates, *Enacting legislation establishing a voluntary environmental science:*

Aquilina's contributions mark a very important milestone in the field of Maltese planning law, given the lack of domestic literature on the subject matter.

The subject of development planning legislation was, locally, also tackled in a number of theses written by students reading for a general doctorate degree in Law at the University of Malta.[38]

A number of reports compiled by government appointed consultants have also been published in view of impending changes in legislation at the time. One of these reports was compiled in preparation of the Environment and Development Planning Act (EDPA) in 2010.[39] A similar exercise, was likewise carried out in 2014[40] prior to the planned MEPA demerger.[41] Both reports established a set of general aims and suggestions, many which were actually taken on board in the eventual legislation.

On the foreign front, a good number of literary works on British planning legislation have been written over the past thirty years. These include the works of Barry Denyer-Green

empowering non-governmental environmental organizations at contributing to a participatory democracy (Law and Practice 2004)

[38] Joanne Cuschieri, *Legal features emanating from the jurisprudential activity of the court of appeal in matters relating to development planning* (LL.D. Thesis) (2001) (UOM); Martine Cassar, *Remedies Available to Aggrieved Third Parties from a Development Planning Permission* (LL.D. Thesis) (2008) (UOM); Malcolm Camilleri, *Proceedings Under the Development Planning Act 1992* (LL.D. Thesis) (2004) (UOM); Michael Gauci, *The Effectiveness of Current Maltese Development Planning Legislation in Achieving Sustainable Development* (LL.D. Thesis) (2013) (UOM); Christopher Mizzi, *MEPA Reform: A Critical Appraisal* (LL.D. Thesis) (2011) (UOM); Beverly Pace, *The Contribution of the Court of Appeal in the Interpretation of Development Planning Law* (LL.D. Thesis) (2013) (UOM); Robert Musumeci, The 2015 *Development Planning Act – A Critical Appraisal* (LL.D. Thesis) (2016) (UOM)

[39] See for example: Pace, D., Fenech Vella, A., Axiak, R., Galea, M., *Report Prepared by The Ad Hoc MEPA Policy Reform Commission'* (Office of the Prime Minister January 2010)

[40] Parliamentary Secretariat for Planning and Simplification Processes, *For an Efficient Planning System – A consultation Document* (Auberge de Castille, Malta, 2014)

[41] Authority for Planning and Sustainable Land Use

and Navit Ubhi[42], Victor Moore and Michael Purdue[43], Cullington[44] as well as Michael Purdue in collaboration with Vincent Fraser.[45] Although the said publications present a wide view of the subject, their content is descriptive in nature and does not present much critical evaluation. More so, their relevance to the Maltese reality could be limited due to the fact that our legislation cannot be said to be an exact replica to its British counterpart.

As illustrated earlier on, this study is concerned about the course of the decision process surrounding planning applications, whether it is before the PA, the EPRT or the Court of Appeal. Inevitably, one of the fundamental themes of this work revolves around the discretionary powers of the decision makers in the development planning setting. This is because a planning application is ultimately successful or not depending on how such discretion is exercised.

On the local front, Gauci acknowledges that discretion '…*is essential to the concept of a system of sustainable development…'*[46] but that study still has its limitations because it, itself, admits that *'…it is not clear how much discretion should be given in the interpretation of the plans and policies'*.[47]

As illustrated earlier on, it seems that following the latest parliamentary amendments, Malta has abandoned the '*plan-led approach'*. This is because the *'shall apply plans and policies'* and *'have regard to material considerations'* dichotomy, previously enshrined

[42] Denyer-Green, B., Ubjhi, N., 'Development and Planning Law' (3rd edn. Estates Gazette London 1999)
[43] Moore, V., Purdue, M.,'A practical approach to Planning Law' (12th edn. Oxford University Press 2012)
[44] Cullingworth, B., Nadin, V., 'Town and Country Planning in the UK' (Routledge 2006)
[45] Purdue, M., Fraser, V., 'Planning Decisions Digest' (2nd edn. Street & Maxwell London 1992)
[46] Michael Gauci, *The Effectiveness of Current Maltese Development Planning Legislation in Achieving Sustainable Development* (LL.D. Thesis) (2011) (UOM): 63
[47] *Ibid* : 65

in Section 69 of the Environment and Planning Development Act (EPDA), no longer applies and, instead, decision makers are now expected to have *'like'* regard to plans, policies, material considerations and consultees.[48] Therefore, the current legal situation could, at first glance, be more legally nebulous than it was under previous legislation. For this reason, the legal significance of the phrases '*shall apply'* and '*shall have regard to*', as held in existing literature, will now be explored.

In legal English, the word *'shall' is used to create a right, a duty, a precondition, a requirement, [or] a prohibition'*.[49] Wood similarly argues that *'the word 'shall' is used in legislation to impose a mandatory obligation, such that there is no discretion to decide whether or not to do it'*.[50] Likewise, Garner associates the word *'shall'* with the meaning *'has a duty to'*.[51] Although these propositions appear to be straightforward, Wydrick still maintains that the word ''*shall' is the biggest troublemaker for legal experts and*

[48] Development Planning Act 1992, s 72(2) states the following:
'In its determination upon an application for development permission, the Planning Board shall have regard to:
(a) plans;
(b) policies:
Provided that subsidiary plans and policies shall not be applied retroactively so as to adversely affect vested rights arising from a valid development permission, or a valid police or trading licence issued prior to 1994;
(c) regulations made under this Act:
Provided that the Planning Board shall only refer to plans, policies or regulations that have been finalised and approved by the Minister or the House of Representatives, as the case may be, and published;
(d) any other material consideration, including surrounding legal commitments, environmental, aesthetic and sanitary considerations, which the Planning Board may deem relevant;
(e) representations made in response to the publication of the development proposal; and
(f) representations and recommendations made by boards, committees and consultees in response to notifications of applications.'
[49] Olga A. Krapivkina, *Semantics of the verb shall in legal discourse* (Applied Linguistics Department Irkutsk National Research Technical University Lermontov street 83 Irkutsk Russia, 2017)
[50] Dennis H. Wood, *The Planning Act: Bill 51 What's New, What Remains, What You Must Know – Part II - "Have Regard To, Shall Be Consistent With and Shall Conform With: When Do They Apply and How Do You Apply Them?* (Wood Bull Municipal Planning and Development Law 65 Queen Street West, Suite 1400 2007): 4
[51] Brian A. Garner, *A Dictionary of Modern Legal Usage* (2nd edn, Oxford University Press 1995)

courts'.[52] What seems certain, though, the word *'shall'* appears to leave no choice for decision makers to decide whether to abide or not.

The word '*apply'* is then held to mean *'to use or employ for a particular purpose.'*[53] Consequently, the expression *'shall apply'* implies a duty to implement something.

On the other hand, Soanes equates '*regard to'* to simply '*pay attention to'*.[54] According to Aston, the expression *'have regard to'* is significantly less deferential than *'be consistent with'*.[55] Interestingly, Campbell J. observed that the expression *''have regard to' falls somewhere on a scale that stretches from 'recite them then ignore them' to 'adhere to them slavishly and rigidly'*.[56] Lord Guest, in the case of **Simpson v Edinburgh Corpn**[57], takes the view that the duty '*to have regard to*' the development plan does not mean to '*slavishly adhere'* to it, meaning that planning permissions which depart from policies in the plan could therefore be granted. In the oft quoted **Enfield L.B.C. v Sec State for Environment**[58], the English Courts similarly held that the requirement *'to have regard to'* the development plan does not make adherence to the plan mandatory. In another seminal case relating to development planning law, **Grandsen (E.C.) & Co. v Sec. of State**[59], the English Courts held that as long as a policy is properly considered, the decision does not have to adhere rigidly to it, though clear-cut reasons must be given for not doing so. It would thus seem that the expression *'shall have regard to plans and*

[52] Richard C. Wydrick, *Plain English for Lawyers* (Durham, North Carolina: Carolina Academic Press 1998)
[53] 'The Law Dictionary' <https://thelawdictionary.org/apply/> accessed 29th March 2020
[54] Catherine Soanes, *The Compact Oxford English Dictionary* (2nd edn, Oxford University Press 2002)
[55] *Ottawa (City) v Minto Communities Inc*., [2009] O.J. 4913 (Div. Ct.)
[56] *Concerned Citizens of King Township Inc. v King (Township,)* [2000] 42 O.M.B.R.3 (Div. Ct.) para 16
[57] *Simpson v Edinburgh Corpn.* [1961] S.L.T. 17
[58] *Enfield LBC v Secretary of State for Environment* [197] JPL 15
[59] *Grandsen (E.C.) & Co. Ltd. And Falksbridge v Secretary of State for the Environment and Gillingham BC* [1986] JPL 519

policies' means that although one is required to take plans and policies into consideration together with all the other factors presented by the particular situation, the option remains open not to make use thereof if there are reasonable grounds not to.

The key implication drawn from the above is that the expression *'shall have regard to'* is generally taken to have a softer meaning than the term *'shall apply'*. If you use this yardstick, it would seem that Section 72 has taken away the obligation from decision makers to, first and foremost, rely on planning policies as was the case for preceding legislation. In other words, decision-makers may now choose whether to give priority to material considerations albeit at the expense of disregarding plans and policies.

Having said all this, it seems that not everyone is convinced with the said point of view. Cullingworth, for example, is of the opinion that *'...statutory plans have always made it the starting point for decision making, even when the plan-led system was still not in force'*.[60]

Either way, it is uncontested that plans and policies, material considerations and external representations play an ultimate role in the decision equation given that, as already seen, Section 72 requires decision makers to have 'regard' to all of them in the course of determining a planning application. What is still not clear, however, is to what extent decision makers may, if at all, choose to disregard policy requirements and act according to personal judgment by relying on material considerations, now that Section 72 has replaced the *'shall apply'* plans and policies /*'have regard to'* material considerations dichotomy with *'have regard to'* plans, policies and material considerations.

[60] Barry Cullingworth, Vincent Nadin, *Town and Country Planning in the UK* (Routledge 2006): 161

To complicate matters a bit further, what constitutes a material consideration remains a conundrum since Maltese law provides no exact definition. This is not to say that the situation in other jurisdictions is clearer. Incidentally, when speaking of a similar situation in Hong Kong, Tang *et al.* hold that '*…what factors are regarded as 'material' and how these factors have been weighted against each other by the decision-makers are entirely unknown to the applicants'*.[61] Cullingworth[62] is of the opinion that whether a consideration is material or otherwise depends very much on the circumstances of the case – an assertion which does not contribute much to the debate and leaves one none the wiser. Several development planning textbooks[63] explain the term *'material considerations'* by referring to the prominent case in the names **Stringer v Minister of Housing and Local Government**, whereby the court held that *'...any consideration which relates to the use and development of land is capable of being a planning consideration'*.[64]

Thomas[65], however, went a step further in defining what could be considered as being tantamount to *'material considerations'*. While maintaining that *'...material considerations must be relevant to the development and use of the land',* even if '*indirectly and obliquely',* he went a step further to state that such considerations should be also '*related to the public interest'*. With this in mind, he identified the following specific situations as potential material considerations:

[61] Bo-sin Tang, Choy H. T Lennon, Joshua K. F Wat, *Certainty and Discretion in Planning Control: A Case Study of Of Development in Hong Kong* (Urban Studies Vol. 37, No. 13 2000): 2465– 2483
[62] Barry Cullingworth, Vincent Nadin, *Town and Country Planning in the UK* (Routlidge 2006): 161
[63] See for example Victor Moore, Michael Purdue, *A practical approach to Planning Law* (12th edn, Oxford University Press 2012)
[64] *Stringer v Minister of Housing and Local Government* [1971] 1 WLR 1281
[65] Keith Thomas, *Development Control. Principles and Practice* (Routledge 2004): 96

1. economic and financial considerations (such as economic growth, provision of jobs but not profitability and financial viability);

2. social and cultural matters (such as the provision of reasonable mix to provide affordable housing);

3. design and amenity matters (for instance, design to be such as to mitigate glare, smell and fumes, preservation of public views as opposed to preservation of private views);

4. existing site uses and features (for example, archaeological remains which need to be preserved);

5. requirements of other authorities and undertakers (example, safeguarding the routes of new roads);

6. external environmental factors emanating from outside a planning application (example: deciding whether to give permission for a new use where there is smell from an existing farming activity);

7. public opinion (essentially, representations received from the public, which in the Maltese case, decision makers ought to have regard to under a specific provision contained in Section 72 of the DPA);

8. creation of precedent, provided that applications for development are in similar locations and sites which are sufficiently unique as to the render the risk of parallel situations small;

9. exceptionally, personal circumstances of the applicant (when there is a hardship to occupants such, for example, when a house is burnt down).

Even so, it is good to note that the Stringer criteria were developed even further in latest English jurisprudence.[66] For a consideration to be material for planning purposes, the settled position seems to be that a consideration must display the following two characteristics:

- a planning purpose (i.e. it must relate to the character or the use of land, and not be solely for some other purpose no matter how well intentioned and desirable that purpose may be), and

- it must fairly and reasonably relate to the permitted development (i.e. there must be a real, as opposed to a fanciful, remote, trivial or *de minimis*, connection with the development).

Whichever the case, material considerations have been held to be important to the determination of a planning permission because *'…many issues raised by planning applications will not be addressed in policy, as there is a limit to which governments at any level, can, or wish to, commit policies to paper'.*[67] Booth, in fact, suggests that *'when the plan could not do so alone, material considerations might dictate a specific solution'.*[68] On a similar note, Davies *et al.* justify the importance of *'material considerations'* in decision making because '*…many considerations are not covered by plans and policies and are typically expressed in general ways, and therefore need*

[66] *Aberdeen City & Shire Strategic Development Planning Authority v Elsick Development Co Ltd* [2017] UKSC 66
[67] Barry Cullingworth, Vincent Nadin, *Town and Country Planning in the UK* (Routledge 2006): 161
[68] Philip Booth, *Controlling Development. Certainty and discretion in Europe, the USA and Honk Kong* (Routledge 1996): 101

'translation' into operational terms'.[69] On the local front, surrounding commitment has been considered as one of the foremost material considerations by Pace who acknowledges that there may be situations *'...where the Local Plans or other policies differ from what is the situation in the committed area…'* and '*…the concept of commitment is too important to be done away with'* when reaching a planning decision.[70]

It is therefore not surprising that *'...the broadening of issues which are accepted as part of the role of planning has been matched by a liberal attitude accepted by the Courts in determining what can legitimately be considered as a material consideration'*.[71] Yet, as Cullingworth rightly observes, discretion could be abused if *'...there are no effective safeguards to ensure that discretion is exercised in the proper way'*.[72] For this reason, '*the decision-making criteria of the planning authorities vary substantially under different spatial and temporal circumstances'*.[73] Meanwhile, the *'other material considerations'* clause remains a source of concern in the United Kingdom leading to *'considerable uncertainty about what plans should achieve or what the appropriate form of expression should be'*.[74]

It is thus safe to come to the conclusion that although a lot has been said about '*material considerations*', their role in the decision equation has not been narrowly defined. While

[69] Davies, H.W.E., Edwards, D., Rowley, A., *The relationship between development plans, development control and appeals* (The Planner, 72(10) 1986): 11– 15
[70] Beverly Pace, *The Contribution of the Court of Appeal in the Interpretation of Development Planning Law* (LL.D. Thesis) (2013) (UOM): 80
[71] Michael Purdue, *Material Considerations: an expanding concept?* (Journal of Planning and Environmental Law, 1989 65 Queen Street West, Suite 1400 2007): 11
[72] Barry Cullingworth, Vincent Nadin, *Town and Country Planning in the UK* (Routledge 2006): 161
[73] Bo-sin Tang, Lennon H. T. Choy and Joshua K. F. Wat, 'Certainty and Discretion in Planning Control: A Case Study of Office Development in Hong Kong' (Urban Studies Vol. 37, No. 13 (December 2000)) (Sage Publications Ltd), < https://www.jstor.org/stable/43196509> : 2465-2483 accessed 29th March 2020
[74] *Ibid*

it is true that there have been attempts to single out what considerations ought to be '*material'* in a planning context, the absence of safeguards to ensure that discretion is exercised in a proper way in situations where the plan-led approach has been abandoned could be an issue.

One other thing is that Section 72(2) contains a very important proviso in that applicants can also claim a right against the retroactive application of plans and policies if in possession of '*…a valid development permission, or a valid police or trading licence issued prior to 1994'.*[75]

Inevitably, this brings us to the issue of what happens when a valid development permission expires given that Maltese legislation is silent in that respect. Once works are taken in hand and a permit expires, it is important for investors to know where they stand because '…w*ithout a clear vesting standard, developers are left in an environment of confusion and uncertainty which may discourage future development activity.*[76] Ultimately, as Siemon rightly argues, *'...the existence of a vested right to continue development will often be determinative of whether a project is a success or failure'.*[77]

The situation in the United Kingdom is nowhere clearer since *'...courts are generally split as to whether the issuance of a building permit alone, without commencement of construction, will be enough to vest the permittee's right to continue in the face of a*

[75] Development Planning Act 1992, proviso to s 72(2)(b)
[76] Ralph D. Rinaldi, *Virginia's Vested Property Rights Rule: Legal and Economic Considerations* (2 Geo Mason Law Review 1994): 77
[77] Charles L. Siemon, *Vested Rights: Balancing Public and Private Developments Expectations* (Urban Land Institute 1982): 7

change in law, with a slight majority inclined toward no vesting'.[78] When, on the other hand, works have commenced but not completed within the permit validity time frames, Grayson *et al.*, hold that a landowner will be protected against subsequent legislation only when *'...he has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change'.*[79] Albeit the fact that this criterion seems to provide a reasonable test to follow in such cases, what is tantamount to the term '*substantial'* remains a disputed question. In fact, Delaney acknowledges that there is great confusion and conflict as to the point at which a '…*vested right occurs when a developer has begun a project and a zoning ordinance is changed in the midst of development'.*[80]

Another closely related issue delved into, among others, by Nadel[81] is what happens in the eventuality that substantial works have been carried out, though not in strict conformity with the permission at hand. Would applicant still be able to claim a right against the retroactive application of plans and policies? The said author opines that if work is performed without a permit when one is required, this work is considered to be illegal due it not being performed in good faith and a developer would not therefore have obtained a vested right to complete a project.

A correlated issue regards the position of the applicant whose permit is not one which is in line with the law, though not through his own fault. Dealney's take on the issue is that

[78] John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?* (3 Washington University Journal of Law & Policy 2000): 603
[79] P. Hanes Grayson, P., J. Randall Minchew, *On Vested Rights to Land Use and Development* (46 Washington & Lee Law Review)
[80] John J. Delaney, Kominers, W., *He Who Rests Less Vests Best: Acquisition of Vested Rights in Land Development* (23 St. Louis University Law Journal 1979): 219-220
[81] Paul J. Nadel, *This Land Is Your Land..Or Is It—Making Sense of Vested Rights in California*, (22 Loy. L.A. L. Rev. 791 1989): 812

'*…the holder of a building permit which is unlawfully or mistakenly issued obtains no vested right in same, even where construction has occurred'.*[82] Nonetheless, he still believes there is room for an exception in this regard '*…where there is evidence of good faith and due diligence coupled with substantial expenditures by the permittee'.* [83]

Clearly, one common weakness with the above arguments is that there seems to be no agreement with regard to the moment at which point a permit holder is said to have a vested right arising from a planning permission.

Another interesting quandary presents itself in the circumstance where new policies come into force during the process of the application where an applicant has no valid permission in hand to claim immunity from possible changes in plans and policies. What is the situation for the applicant in such cases? In his doctoral dissertation entitled *'MEPA Reform: A Critical Appraisal',* Mizzi[84] emphasises that goal posts should not be changed once a planning application is validated. He calls on the legislator to provide *'...appropriate provisions catering for vested rights to give a proper recognition to the rights of the applicant'*[85], adding that it is unfair to introduce new policies which were unknown to the applicant when planning his investment. Mizzi[86] also found that various courts had held different interpretations as to when an applicant could claim that he had a vested right which took precedence over the policies in force while a planning application is still pending decision. What is interesting, therefore, is that Mizzi seems to equate a valid planning application to a vested right.

[82] John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?,* (3 Washington University Journal of Law & Policy 2000): 651
[83] *Ibid* : 654
[84] Christopher Mizzi, *MEPA Reform: A Critical Appraisal* (LL.D. Thesis) (2011) (UOM): 96
[85] *Ibid*
[86] *Ibid*

In her assessment of the transition which took place following the replacement of Chapter 356 with Chapter 504, another Maltese author, Pace, observed that the Court had tackled this problem by embracing the position '…*that due to there being no transitory law inserted within Chapter 504, the laws were not to be applied retroactively and it was therefore Chapter 356 that was applicable to applications which had been filed previous to the coming into force of Chapter 504'.*[87] Arguably, Pace's position was, to say the least, questionable since it goes against the provisions of the Interpretation Act which state that once a law is replaced, *'…the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect…'.*[88]

Still, it could be well argued that Mizzi's reasoning, as stated above, is based on well-founded grounds since it is only fair that a person who is planning an investment knows exactly where they stand in relation to his investment project. As Schønberg correctly argues, *'...no one would choose to do business, perhaps involving large sums of money, in a country where the parties' rights and obligations were vague or undecided'.*[89] Hagman similarly holds that '…*investors are less likely to engage in development activity if their property can be taken by frequent [unjustified] changes in the law'.*[90] The great philosopher Raz[91] embraces the same belief, that *'...one's ability to fix long-term goals and direct one's life towards them depends on the existence of stable, secure frameworks.'*[92] Schiemann also agrees that *'...there is value in holding authorities to*

[87] Beverly Pace, *The Contribution of the Court of Appeal in the Interpretation of Development Planning Law* (LL.D. Thesis) (2013) (UOM): 79
[88] Interpretation Act, s 12(1)(c)
[89] Soren Schønberg, *Legitimate Expectations in Administrative Law* (Oxford University Press 2000)
[90] Donald G. Hagman, *The Vesting Issue: The Rights of Fetal Development Vis A Vis the Abortions of Public Whimsy* (7 Envtli. L. 1976-1977): 77, 99
[91] Joseph Raz, *The Authority of Law* (Clarendon 1979): 226-229
[92] Tom Bingham, *The Rule of Law* (Penguin 2011): 38

promises which they have made, thus upholding responsible public administration and allowing people to plan their lives sensibly'.[93] Therefore, the general feeling is that the law should '*…provide certainty as to when a developer will be protected from any new government regulation'*.[94]

This brings us back to the issue whether an applicant, whose planning application is pending decision, should expect to be immune from subsequent new policies introduced in the course of the application process. Could it be said that applicant has a '*legitimate expectation'* to have his application request assessed in line with the policies known to him at the outset of the application? A *'legitimate expectation'* is said to arise where the person responsible for taking a decision *'…induces in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit'*.[95] In fact, Schønberg defines '*legitimate expectations'* as *'…established practices and promises of the administration'* which, however, arise once these are *'…communicated to the private person prior to dispensing with his case, and which generate in him the expectation that his case shall be dealt with in the manner represented to him'*.[96] According to H.W.R. Wade, the instances in which legitimate expectations could be claimed include those where the government had already expressed itself through '*published statements'*.[97]

Having regard to the above, the next logical question to pose is whether an applicant can assume that he will retain the benefit to have his application assessed in line with the

[93] *R (on the application of Bibi) v London Borough of Newham* [2001] EWCA Civ 607
[94] Ralph D. Rinaldi, *Virginia's Vested Property Rights Rule: Legal and Economic Considerations* (2 Geo Mason Law Review 1994): 77
[95] S. De Smith, M. Evans, *De Smith's Judicial Review of Administrative Action* (5th edn, Sweet & Maxwell 1998): 417
[96] Soren Schønberg, *Legitimate Expectations in Administrative Law* (Oxford University Press 2000)
[97] Henry William Rawson Wade, *Administrative Law* (6th edn, Oxford University Press 1988): 424

planning policies or, using H.W.R. Wade's words, '*published statements*', known to him at the outset of the application. Unfortunately, Maltese planning legislation does not offer an answer to this although Section 12(1)(c) of the Interpretation Act clearly states that once a law is replaced, *'…the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect…'*.[98] Moreover, it is a well-established principle that all procedural regulations following new legislation are to apply immediately after promulgation.[99]

Indeed, Attorney General Peter Grech seems to suggest that *'…turn arounds in policy may be entirely 'legal' from a purely formal point of view',* even though he concedes that '*they will hurt fairness if they breach a promise made to an individual who acted in reliance upon it, and incurred some form of expense or detriment as a result'*.[100] Using Grech's logic, in the case of the PA, it is empowered by law to modify and create new policies as it deems fit in the public interest. It could thus be argued that the creation of new policies is tantamount to a result of administrative conduct which, in turn, one should legitimately expect that the Authority upholds in decisions subsequent to a change in policy. The obvious problem with this reasoning, however, is that investors would hardly ever know where they stand.

The application process does not reach finality the moment a decision is given by the PA. All decisions on planning applications are subject to an appeal before the EPRT on both a point of fact and a point of law. Indeed, it is possible for applicant, registered third

[98] Interpretation Act, s 12(1)(c)
[99] Ulf Bernitz, *Retroactive Legislation in a European Perspective – On the Importance of General Principles of Law* (Stockholm Institute for Scandinavian Law 1957-2009): 49
[100] Peter Grech, *Keeping One's Word: The Protection of Legitimate Expectations in Administrative Law* (Id-Dritt Vol. XVIII): 4-5

parties and statutory consultees to appeal the outcome of any decision of the PA on a planning application. According to Section 38(1) of Chapter 551 of the Laws of Malta, the decisions of the EPRT are binding not only on the PA but also on statutory consultees and registered interested third parties who decide to subsequently appeal a decision of the Authority.[101] As already pointed out, once the EPRT delivers judgment, it remains however possible to appeal that judgment in front of the Court of Appeal (Inferior Jurisdiction) *'on a point of law decided by the Tribunal'* or *'on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal'*.[102] Essentially, it means that even though a decision of the EPRT acquires finality, an appeal therefrom could be triggered before the Court of Appeal within twenty days and that decision annulled if found to err on a point of law or procedural fairness.

The problem here is that the Environment and Planning Review Tribunal Act does not provide a definition of a *'point of law'* and this is a common source of difficulty among legal practitioners. As a result, the extent of the power conferred upon the court may sometimes be difficult to ascertain and argument may be possible whether a question falls or not within the jurisdiction of the Court. Still, it is safe to say that a question of law arises when an act prohibited by law is committed. In trying to understand what makes an act '*unlawful*', the following list compiled by Thompson et[103] could be of help. An authority:

[101] Environment and Planning Review Tribunal Act 2016, s 38(1)
[102] Environment and Planning Review Tribunal Act 2016, s 38 states the following:
'The decisions of the Tribunal shall be final and no appeal shall lie therefrom, except on a point of law decided by the Tribunal or on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal.'
[103] Brian Thompson, Michael Gordon, *Cases & Materials on Constitution & Administrative Law* (11th edn, Oxford University Press 2011): 498

— must not exceed its jurisdiction by purporting to exercise powers which it does not possess;

— must direct itself properly on the law;

— must not use its power to improper purpose;

— must take into account all relevant considerations and disregard all irrelevant considerations;

— must not delegate the exercise of its discretion to another unless clearly authorized to do so;

— must not fetter its discretion;

— must not fail to fulfil a statutory duty;

— must not excessively interfere with human rights;

— must not make a mistake of fact.

In a sense, the above list recalls to mind the rules governing judicial review in the field of administrative action which gained momentum with the introduction of Section 469A of Chapter 12 of the Laws of Malta. Section 469A allows the First Hall, Civil Court, to enquire into the validity of administrative acts by public authorities established by law provided that no other judicial remedy is available to potential complainants. Indeed, this provision was largely based on the grounds of review under French Administrative Law with a strong element of English law practice and vocabulary.[104]

In fact, section 469A lists four instances in all when an administrative act is deemed to be considered *ultra vires*, namely (i) when such act emanates from a public authority that is not authorized to perform it, (ii) when a public authority has failed to observe the

[104] Tonio Borg, *Judicial review of administrative action in Malta* (Ph.D. Thesis) (2018) (UOM): 76

principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon, (iii) when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations or (iv) when the administrative act is otherwise contrary to law.[105]

From this, it emerges that, when it comes to administrative action in Malta, the acting for an unlawful purpose, however well intentioned, and the exercising of discretion not in keeping with the objectives of the Act which confers the power as well as using a power for an unauthorized purpose, are therefore considered to be unlawful acts and open to the court's scrutiny.

The same applies to alleged breaches of fair hearing together with the other principles of natural justice which Section 39 of the current Environment and Planning Review Tribunal Act also identifies as one of the grounds, together with '*a point of law decided by the Tribunal'*, that is subject to review by the Court of Appeal (Inferior Jurisdiction).[106]

The non-observance of mandatory statutory procedures are likewise considered to constitute an unlawful act, although a problem could arise in identifying whether a procedure is considered directory only or obligatory under the pain of nullity. Crawford[107] made an attempt to distinguish between mandatory and directory provisions by saying that *'…those provisions whose provisions relate to the essence of the thing to be*

[105] Code of Civil Procedure, s 469A(1)(b)
[106] Environment and Planning Review Tribunal Act 2016, s 39 states the following:
'The decisions of the Tribunal shall be final and no appeal shall lie therefrom, except on a point of law decided by the Tribunal or on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal.'
[107] Earl T. Crawford, *The construction of Statuses* (Pakistan Law House 2014): 104

performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely a matter of convenience rather than of substance, are directory'. Unfortunately, this proposition does not shed light on what is to be considered as a matter of substance and what is not. Perhaps, the rules laid down by Tiwari give a clearer picture of how to assess whether an enactment is mandatory or directory. These rules provide the following:

> *'1.When the legislature uses 'must' instead of 'shall' it uses a word which is most strongly imperative.*
>
> *2.In some cases the word 'must' or the word 'shall' may be substituted for the word 'may' but only for the purpose of giving effect to the clear intention of the legislature.*
>
> *3.Normally, however the word 'may' must be taken in its natural, that is, permissive sense and not in its obligatory sense.*
>
> *4.In matters of procedure, mandatory words may be construed as directory.*
>
> *5.'May' and 'shall' are generally used in contradistinction to each other and normally should be given their natural meaning especially when they occur in the same section. But in phrases like, it 'shall be lawful for the court', 'shall be liable to pay costs' and 'shall be liable to be forfeited', the meaning is not mandatory. The first expression means the court has*

> *discretion; the second expression gives a discretion to the court to award costs or interest, and the third not that there should be an absolute forfeiture but a liability to forfeiture which might or might not be enforced. 6.Similarly, it may happen that in an Act the word 'may' is used in such a way as to create a duty that must be performed.'*[108]

A point of law is also believed to arise when the wrong legal test is applied to the facts found since the decision maker would, at that point, be transgressing the fetter or limit imposed by Parliament.[109] This proposition is aptly put by Baker[110] who asks the question: *'…in exercising his authority, did the decision-maker have the power to take the decision that he did?'* If the answer is a definite *'yes'* or '*no*', it is a question of law. If, on the other hand, the answer to that question could be either a '*yes'* or a '*no*', then it is not. At face value, this would seem to look like a practical formula which courts could seek to apply when attending to a point of law.

Whether, on the other hand, the misinterpretation of a law or policy amounts to a matter of law could be open to question. It has been said that the meaning of words in their own right is taken to be a question of fact whereas the effect to be given to those same words is a question of law.[111] The problem with this proposition is that a wrong meaning of a word, if left unchallenged, could still yield the wrong legal effect as held in **Vetter v Lake**

[108] Sanjeev Kumar Tiwari, 'Interpretation of mandatory and directory provisions in statuses: a critical appraisal in the light of judicial decisions' (undated) < http://ijlljs.in/wp-content/uploads/2015/03/article-on-mandatory-and-directory-provisions.pdf > accessed 20th March 2020
[109] Stanley De Smith, Rt. Hon Lord Woolf, Sir Jeffrey Jowell, *Principles of Judicial Review* (Sweet & Maxwell 1999): 140-144
[110] Keir Baker, 'Jurisdiction and errors of Law in Administrative Law' (31st December 2015) < http://www.keepcalmtalklaw.co.uk/jurisdiction-and-errors-of-law-in-administrative-law/> accessed 20th March 2020
[111] *Collector of Customs v Agfa-Gevaert Ltd* [1996],186 CLR 389

Macquarie City Council.[112] In that case, the High Court of Australia observed that a question of law arises when it is necessary to engage in the process of construction of both the meaning of individual words or a phrase in a statute. This was also the opinion of Aronson *et al*.[113] who opined that misunderstanding the legal meaning of a statutory term is enough to claim an error of law in its own right.

When it comes to whether the wrong application of the law or policy to the facts at issue is a question of law, the situation is even less clear. In the run up to MEPA's demerger, Aquilina[114], who was himself a former chairman of the PAB, held that the application of a law to the facts at issue was a question of fact, hence not subject to review by the courts. In saying that, Aquilina conceded that if a tribunal directed its mind to, say, a purely extraneous or irrelevant matter, the court should let go. This is in line with the reasoning held by Mason J., though in a general legal context, who stated that *'…as long as there is some basis of an inference…'* tying the facts to the legal test, there is no error of law '*…even if that inference appears to have been drawn as illogical reasoning'.*[115] Using Mason's yardstick, it follows that EPRT members entrusted with planning decisions can draw illogical inferences to their heart's content without being challenged.

Clearly, this reasoning goes against the formulation of *'unreasonableness'* originally developed in the seminal Wednesbury case[116] in which Lord Greene MR held that '*…a decision that is so unreasonable that no reasonable person could have arrived at it…'* is

[112] *Vetter v Lake Macquiarie City Council* [2001] HCA 12. 202 CLR 439
[113] Mark I Aronson, Bruce Dyer, Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, Sydney 2009): 213
[114] Kevin Aquilina, 'Twenty reasons against MEPA's demerger' *Maltatoday* (29th July 2015) < https://www.maltatoday.com.mt/comment/blogs/55519/twenty_reasons_against_mepas_demerger#.W_uzg-hKiUk> accessed 29th March 2020
[115] *Australian Broadcasting Tribunal v Bond* [26th July 1990] 170, CLR 321
[116] *Associated Provincial Picture Houses Ltd v Wednesbury Corboration* [1948] 1, KB 223

thought to be legally invalid. The concept of '*Wednesbury unreasonableness'* was later rebranded as *'irrationality'* by Lord Diplock[117] although the eminent writers Wade and Forsyth felt that '*unreasonableness*' was a better term, as they saw irrational to mean devoid of reasons whereas '*unreasonable*' meant devoid of '*satisfactory reasons'*.[118] Whichever of the two it might be, '*unreasonableness*' or '*irrationality'* should, by way of principle, stand on their own feet as matters of law under the premise that assessing whether fully found facts fall within the provision of a statutory enactment properly construed should be held to be a question of law.[119]

This brings us to another crucial question, namely the issue of the consequences of an EPRT judgment based on mistaken facts which, had the correct facts been considered, would not *'legally stand'*. Is such a decision to go unchallenged, given the court's jurisdiction is strictly limited to *'points of law'*, despite the factual errors at issue being glaringly obvious? According to established literature, one distinctive characteristic of a point of law is that of not being a point of fact[120] although the difference between the two could prove, at times, to be *'very fine'.*[121] In a similar vein, Batrouney argues that the difference between a question of law and a question of fact can be *'...subtle and the distinction vexed, obscure and elusive.'*[122] When speaking about the difference between

[117] *Council of Civil Service Unions v Minister for the Civil Service (The GCHQ case)* [1985] AC 374, ICR 14
[118] William Wade, Christopher Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014)
[119] See for example: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [4th May 1993] FCA 456
[120] See Harry Whitmore, *Principles of Australian Administrative Law* (5th edn, 1980): 157-60; Stanley Alexander De Smith, *Judicial Review of Administrative Action* (4th edn, 1980): 126-41; Henry William Rawson Wade, *Administrative Law* (4th edn, 1977): Ch. 9; John Francis Garner, *Administrative Law* (4th edn, 1974): 142-47
[121] Jack Beatson, *Administrative Law, Cases and Materials* (2nd edn, Oxford 1989): 113
[122] Jennifer Batrouney, 'The distinction between questions of fact and questions of law in section 44 appeals to the Federal Court – Tax Bar Association Seminar' (20 May 2014) < http://www.fedcourt.gov.au/digital-law-library/seminars/tax-bar-association/jennifer-batrouney > accessed 29th March 2020

a point of law and one of fact, Aronson *et al.* maintained that *'...no satisfactory test of universal application has yet been formulated'*.[123]

Nevertheless, De Smith *et al.* approach the matter differently and more directly by saying that a '*misdirection in fact'*, '*acting upon the incorrect basis of fact', 'misdirection as to the burden of proof'* or '*wrongful admission or exclusion of evidence'* all amount to a question of law.[124] They also consider '*arriving at a conclusion without any supporting evidence'* as being an error of law[125], which position echoes that of Professor Craig who likewise maintains that failing to take account of '*crucial evidence'* would qualify as a matter of law.[126]

Still, this is not to say that there is consensus on the subject matter. Menzies, for example, takes a completely different view from that of De Smith *et al.* and goes as far as saying that an illogical inference of fact would not disclose an error of law so much so that *'...even if the reasoning whereby the court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record'*.[127] On the same lines, the Australian courts repeatedly held that it is not an error of law to make an error of fact.[128] Similarly, in **Republic of the Philippines**, the conclusions reached by the Supreme Court of the Republic of the Philippines were that '*…a question of law arises when there is doubt as to what the law is on a certain state of*

[123] Mark I Aronson, Bruce Dyer, Matthew Groves, *Judicial Review of Administrative Action* (3rd edn, Lawbook Co 2004): 184
[124] Stanley De Smith, Rt. Hon Lord Woolf, Sir Jeffrey Jowell, *Principles of Judicial Review* (Sweet & Maxwell 1999): 140-144
[125] *Ibid*
[126] Paul Craig, *Judicial review, Appeal and Factual Error* (Public law, ISSN 0033-3565, Nº 4 Winter 2004): 788-807
[127] *Reg v The District Court; Ex Parte White* [9th November 1966] HCA 69
[128] *Minister for Immigration & Multicultural Affairs v Al-Miahi* [25th June 2001] FCA 744

facts, while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts'.[129] The reason behind this was, according to the Supreme court, that assessing the probative value of the factual observations and evidence put forward by the litigants is a question of fact.[130] This same reasoning had already been held in ***W*AGU v Minister for Immigration and Multicultural and Indigenous Affairs**[131], namely that what should be deemed as credible evidence or not is a question of fact. Really and truly, the traditional approach adopted by Maltese Courts to judicial review has been also one which holds that the court is not supposed to involve the substitution of the original decision with its own.

Interestingly, the idea to have appeals from EPRT decisions being limited to points of law has found objection from Pace since it *'…can hardly be said to enable the Court of Appeal to provide the proper checks necessary to prevent abuse in terms of the decisions of the Tribunal'.*[132] It is not clear what Pace had in mind when making such a statement, however it could be that in her view, the Court's jurisdiction over EPRT decisions is seen to be too restricted.

Another interesting point made by Pace was that the phrase *'decided by the Tribunal'* should be removed from the law *'in order that the jurisdiction of the Court of Appeal be unambiguously extended to cover situations when the Tribunal had made an error in*

[129] *Republic of the Philippines v Malabanan* Republic of the Philippines Supreme Court Manila, Third Division, G.R. No. 169067 October 6, 2010
[130] *Ibid*
[131] *WAGU v Minister for Immigration and Multicultural and Indigenous Affairs* [29th August 2003] FCA 912
[132] Beverly Pace, *The Contribution of the Court of Appeal in the Interpretation of Development Planning Law* (LL.D. Thesis) (2013) (UOM): 79

terms of a point of law which arose in its decision of the appeal itself and not decided by the Tribunal'.[133]

On the other hand, Aquilina argues differently, saying that the term '*point of law'* was initially given a restrictive interpretation by the Maltese courts and, with time, the Court of Appeal (Inferior Jurisdiction) abandoned previous jurisprudence, adopting a wider approach.[134] Both Pace and Aquilina, however, made no attempt to identify what qualifies as '*a point of law'* in the Maltese context.

Having considered the above contributions, it is safe to say that many of the fundamental issues touching the decisional process surrounding a planning application have in some way or another been commented upon in established literature. The following questions which this research will seek to answer seem, however, to have not been comprehensively addressed as yet:

- *Could it be said that a mere planning application confers on the applicant a right to freeze the policy regime at the outset of the application?*
- *To what extent does a planning permission confer a right against the retroactive application of plans and policies?*
- *Has Section 72 of Act VII of 2016 reversed the previous approach taken by the Court in terms of Section 69 of the EDPA in that planning policies can now be overruled?*

[133] *Ibid* : 79

[134] Kevin Aquilina, 'Twenty reasons against MEPA's demerger' *Maltatoday* (29th July 2015) < https://www.maltatoday.com.mt/comment/blogs/55519/twenty_reasons_against_mepas_demerger#.W_uzg-hKiUk> accessed 29th March 2020

- *Did the Environment and Planning Review Tribunal Act, 2016, address the legal lacunae which existed prior to its enactment?*
- *How can 'a point of law decided by the Tribunal' be defined in the light of court developments?*

4 RESEARCH METHODOLOGY

This dissertation is about developing new ideas and proposing solutions to bridge the numerous legal lacunae encountered in the course of the decision process surrounding planning applications, whether it is before the PA, the EPRT or the Court of Appeal. Having practiced as an architect and a lawyer in the field of development planning, the salient aspects surrounding the decisional process that require attention were immediately identified by the author.

Still, the five key research questions were formulated after further gaps emerged following an extensive literature review. All five questions deserved to be treated with the same level of importance since these are fundamentally intertwined. For example, it would have been pointless to address the issue of whether a planning application confers a legitimate expectation against retroactive application of plans and policies (research question one) without finding out whether a planning permission confers similar rights once it is no longer valid (research question two). It would also have been futile to come up with a narrow definition of *'a point of law decided by the Tribunal'* (research question five) without first understanding whether the legal setting in which the Tribunal operates is in order (research question four). Also, it was not enough to answer the question as to when immunity against the retroactive application of plans and policies could be claimed (research questions one and two) without looking into the interpretation of Section 72 of Act VII of 2016 (research question three).

In order to answer the research questions, a method that would construct new legal theories, principles and doctrines to add new knowledge in the legal scholarship had to

be found. Clearly, the chosen method had to allow for a constant stream of information, which is readily accessible. Meanwhile, the chosen method had to allow for synthesising all the issues in context with a view to draw a logical explanation to the law. In addition, the method had to continue building on the established scholarly opinions discussed in the literature review in order to highlight the gaps and ambiguities. Of course, one had to keep in mind that much that has been written bears no reference to the Maltese situation.

The obvious thing to do was to, first and foremost, locate the primary material, that being the pertinent legislation and delegated legislation. Statutes were, therefore, the starting point of this research. After all, this study is about offering new formulations and a model statute to replace the existing ones. At the same time, it was felt important to analyse the parliamentary debates that reveal the legislative intent. This can be evidenced in Chapter 2 (which focused on the road map that led to Section 72 of the current DPA) and Chapter 4 (which focused on the evolution of the Planning Appeals Board into the Environment and Planning Review Tribunal as we know it today).

Public commentaries held prior to the promulgation of the current DPA were also analysed with a view to understanding the layman's perspective. This is clearly evident in Chapter 2. It is pertinent to say that these commentaries were generally found to contain cogent arguments. For instance, the concerns expressed by a number of non-governmental organizations about the uncertainty brought about with decision makers now having to 'have regard to' instead 'apply' plans and policies, are surely valid.

To further assist the researcher, academic commentary as well as textbooks and journal articles which go well beyond what was covered in the literature review were also

examined throughout the study. This also helped to offer a wider understanding of the relevant issues.

Critically examining judicial opinions, even if, at times, these were in conflict with each other, was also required to propel the research forward. Court judgments remain a primary source of persuasive authority since *'...it is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them'*.[135] It is equally uncontested that lawmakers tend to deliberately leave some sensitive part of law without interpretation with the view that there are learned judges to interpret the issues if necessary.

The core of this study, therefore, rested on a critical evaluation of the judicial contribution by the Maltese courts over the past twenty-three years followed by an analysis into whether principles enunciated in specific landmark judgements brought about a trend which was thereafter continued or whether the said principles were not solidified at all through subsequent judgements but were modified or discarded instead. The chosen period (1996 – 2020) made it possible to contrast the present scenario with earlier eras, link the contradictions together and develop a timeline that illustrates how the tackled areas fit together. In analysing the judgments, the following issues were kept in mind:

- *How was the issue under discussion dealt with by the court?*
- *To what extent, if any, have past decisions served as a model for later decisions?*
- *Is the substance of earlier decisions reflected in later judgments?*

[135] Thomas Burns, *The Doctrine of Stare Deciris* (Historical Theses and Dissertations Collection Cornwell Law Library 1893): 137

- *Is a particular decision an isolated case which departs from previous teachings? If so, could it be regarded as conclusive in the same degree as previous decisions on the same point were?*
- *Is a decision clearly incorrect due to a misconception or misapplication of the law or misapplication of the law to the facts?*
- *How has the court's position influenced the planner and the legislator?*
- *Is there any position held by the courts which could be regarded as conclusive? Or is the principle, though consistently recognised by the court, still inadequate at law?*

As the study progressed and the analysis intensified, the general legal principles emerged more clearly and the ambiguities and criticisms became even more apparent. Where appropriate, the judicial opinions in other jurisdictions holding to similar laws were also evaluated to assess whether the explanation offered by Maltese courts is anything different. This was critical, for example, when trying to understand whether the expression 'have regard to plans and policies' found in section 72 of the current DPA should, as with the English courts, imply that adherence to the Local Plan is no longer mandatory. Engaging with the current views held by the English courts insofar as identifying what is a relevant material consideration was equally vital.

This dissertation states the position at 1st April 2020.

5 OVERVIEW OF THE PARTS

The chapters shall be divided as follows:

- *Chapter Two: The road to Section 72 of the Development Planning Act, 2016*
- *Chapter Three: Determining a planning permission – the rules as interpreted by domestic courts*
- *Chapter Four: From the Planning Appeals Board to the Environment and Planning Review Tribunal*
- *Chapter Five: A point of law decided by the Tribunal*
- *Chapter Six: Conclusions*

In chapter two (*The road to Section 72 of the Development Planning Act, 2016*) the author focuses on how the pertinent legislation evolved since it was enacted in 1992 with regard to the manner development planning applications are determined. The author shares his views on what the legislator indicated or must have intended, whilst taking the opportunity to comment on the legal appropriateness of selected provisions. In parallel, the author makes a continuous attempt at identifying the legal gaps arising due to lack of clarity or as a result of the legislation not having tackled the issue.

In chapter three (*Determining a planning permission – the rules set by the court*), the focus is first directed towards identifying those instances when applicants will be able to claim to have a vested right against the application of new policies that might adversely affect their prospects of obtaining permission. Specifically, the discussion first centres

around whether the PA should determine planning applications in line with policies in force at the time of validation of the application or whether it should base its decision on the laws *in vigore* at the time of the said decision, even if by so doing the applicant is put at a disadvantage.

The focus then shifts towards the extent to which a developer already in possession of a planning permission is protected from subsequent, and therefore new, regulations. Particular reference will be made to the renewal process of a full development application, to when works covered by a previous permission had failed to proceed according to what was already approved and to what occurs, in such situations, if and when an approved development ceases to exist.

In the last part, this chapter examines the legal interplay between planning policies and material considerations, with particular emphasis put on the issue of '*commitment*' which has, by far, received most attention from the courts since the PA's inception in 1992. Finally, this chapter examines whether the court succeeded, after all, in providing a correct and clear legal formula to determine such matters.

In chapter four (*From the Planning Appeals Board to the Environment and Planning Review Tribunal*), an assessment of the role of the EPRT as well as its predecessor, that is to say the PAB, is carried out. Particular attention is given to what the legislator intended and, as in chapter two, the author shall provide his comments on the legal appropriateness of the enacted provisions. This paves the way for the better understanding of the next chapter in which a discussion on what '*a point of law decided by the Tribunal'* means from a judicial perspective.

In chapter five (*A point of law decided by the Tribunal*), an analysis of the most common challenges brought in front of the court under the pretext of *'a point of law'* decided by the EPRT and, before that, the PAB is made. The focus is limited to cases concerning alleged breaches of natural justice, non-observance of statutory enactments and mishandling of laws and planning policies. An assessment of various court judgments is also made with a view to establishing whether a wrongly appraised fact could give rise to a point of law.

Finally, in chapter six (*Conclusions*), the author attempts to provide his own concrete solutions on how to fill the legal gaps unravelled by the research questions.

CHAPTER TWO
The road to Section 72 of the Development Planning Act, 2016

1 GENERAL

Development planning applications are determined according to a set of rules and statutory directions which decision makers are obliged to follow. Today, these rules are found in Section 72 of the Act VII of 2016.[136] However, it is worth bearing in mind that Act VII is a relatively recent piece of legislation, which took effect on the 4th April, 2016. Prior to that, Section 72's counterparts were introduced by virtue of the following Acts:

— Act I of 1992, cited as the Development Planning Act, 1992[137];

— Act XXIII of 1997, which amended the Development Planning Act, 1992[138];

— Act XXI of 2001, which amended the Development Planning Act, 1992[139]; and

— Act X of 2010, this being the Environment and Development Planning Act[140];

This chapter explores the fundamental changes since the enactment of Act I of 1992. The following standpoints, dictated by the various legal changes that took place over the years, shall be commented upon.

— The substantive rules which decision makers are obliged to follow;

— The rights which an applicant may claim in his favour at the point of determining a planning application;

[136] House of Representatives (Sitting No. 338) (9th December 2015)
[137] House of Representatives (Sitting No. 611) (15th January 1992)
[138] House of Representatives (Sitting No. 115) (30th July 1997)
[139] House of Representatives (Sitting No. 597) (17th September 2001)
[140] House of Representatives (Sitting No. 249) (30th June 2010)

— The effect of illegalities on the outcome of planning decisions;

— The procedural rules which decision makers are bound to follow;

— The validity status of permissions;

— The interaction between a permission and those who have an interest in the land.

2 ACT I OF 1992[141]

The approach to dealing with planning applications under Act I of 1992 must be seen in the political context of the time. Act I of 1992 was aimed at overhauling the Maltese planning system, which had been left at a standstill since 1969.[142] Until then, it was the Minister who decided whether to grant or to refuse planning permissions whereas such role has since then shifted onto the PA. In deciding a development planning application, the PA has had to adhere to Section 33(1) of Act I of 1992, which was worded as follows:

> *'... the Authority shall have regard to development plans, to representations made in response to the publication of the proposal and to any other material consideration, including aesthetic, sanitary and other considerations.'*

To a certain extent, Section 33 of Act I was quite similar to Section 70(2) of the Town and Country Planning Act, 1990[143], which provided that in dealing with applications for planning permissions, the local planning Authority '*shall have regard to the provisions*

[141] Development Planning Act 1992
[142] Kevin Aquilina, *Development Planning Legislation – The Maltese Experience* (Mireva Publications 1999): 2
[143] The Town and Country Planning Act, 1990 is an act of the United Kingdom Parliament regulating the development of land in England and Wales. It is a central part of English land law in that it concerns town and country planning in the United Kingdom

of the development plan, so far as material to the application, and to any other material consideration.' Incidentally, Section 70(2) had been replaced by Section 54A which provided that '*the determination shall be made in accordance with the plan unless material considerations indicate otherwise'.*

The said amendment took place prior to the promulgation of the DPA in Malta, however, Section 33(1) of Act I of 1992 was modelled on the repealed Section 70(2) and not on the amended version found in Section 54A. A possible explanation for this is that Act I was promulgated without the legislator having had time to digest the new Section 54A. Another plausible explanation is that the legislator was indeed aware of both versions but preferred to opt for the old one.

According to Act I, '*development plans'* were to include '*the structure plan, subject plans, local plans, action plans and development briefs'*.[144] The Planning Authority was itself responsible to prepare the subsidiary plans[145] which could be subsequently reviewed '*as frequently as may be necessary'*[146], however not before the lapse of two years.[147] An important point to bear in mind is that changes in subsidiary plans could possibly take place after a planning application was validated but before it was decided and this is certainly still the case today. It was therefore possible for the changes therein to be incompatible with the development proposal as originally planned. This raised the issue as to whether the relevant development plan that was to be considered was the one which was *in vigore* at the time when the application was validated or the one that was *in vigore*

[144] Development Planning Act 1992, Definitions
[145] *Ibid* : s 23 defines subsidiary plans as Subject plans, local plans and action plan which were intended to compliment the Structure plan
[146] *Ibid* : s 23
[147] *Ibid* : s 28(1)

at the time of the decision. Unfortunately, Act I of 1992 offered no insight on this issue, and, as shall be seen, neither have subsequent acts.

'Material considerations', on the other hand, were not statutorily defined. Indeed, several planning textbooks[148] define the term *'material considerations'* by referring to the prominent case in the names Stringer v Minister of Housing and Local Government, whereby the court held that *'...any consideration which relates to the use and development of land is capable of being a planning consideration'*.[149] The given definition is, to say the least, vague, lacking clarity and precision due to the fact that anything could in some way or other qualify as a material consideration taking this pronouncement as a yardstick. One of the obvious consequences of adhering to this definition was that the term *'...any other material considerations'* remained open to a subjective interpretation in juxtaposition to the examination of plans which presented the decision maker with more of an objective test.

With regard to third party representations, the Act made it amply clear that such representations had to reach the Authority following the publication of the proposal in the press and the fixing of a notice on site.[150] That said, there was no indication whether third-parties had to show a juridical interest as required by the courts of civil jurisdiction.

The term '*…shall have regard to…'* followed by a list which presented no order of priority seemed to suggest that decision makers were obliged to give equal importance to

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

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

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

plans, representations and material considerations.[151] It would seem that, at the end of the day, it was for the PA, or the DCC[152] to determine where their priorities should lie, that is whether on development plans, material considerations or third party representations.

When it came to how proceedings are conducted, both the PA and the DCC could regulate their own procedures.[153] For example, unlike with the PAB[154], there was no obligation on the PA or the DCC, at least on paper, to hold their meetings in public although it is a well-known fact that such meetings were always, in fact, held in public.

Yet, decision-makers were obliged to clearly state the reasons for refusing an application or for imposing conditions annexed to a permit.[155] On the other hand, there was no similar requirement for decision-makers to explain the reasons which led to approving an application.[156] This technically meant that the PA and the DCC were not obliged to provide an explanation when a negative recommendation was overturned and permission issued. This is very ironic since overturning a studied recommendation should, all the more, be supported by a justification for the decision taken.

Once a development permission was issued, it could be granted for '*…a limited period or in perpetuity'*.[157] In any event, for a permission to remain operative, it was necessary

[151] *Grandsen (E.C.) & Co. Ltd. And Falksbridge v Secretary of State for the Environment and Gillingham BC* [1986] JPL 519
[152] The Planning Authority Board focused on the determination of major projects whereas the seven-member Development Control Commission, constituted by way of Section 13(1) of the Development Planning Act 1992, were assigned the remaining case load which was delegated to it by the Planning Authority Board under those same terms established by the Board
[153] Development Planning Act 1992, First Schedule para 8
[154] *Ibid* : Third Schedule para 9
[155] *Ibid* : s 33(2)
[156] *Ibid*
[157] *Ibid* : s 33(3)

for it to be '*acted upon'* within twelve months from issue.[158] Under Act I of 1992, once a permission was no longer operative, any works carried out from that point onwards were deemed to have been undertaken illegally. Interestingly, once a permission was not '*acted upon*' and therefore rendered inoperative, applicants could not renew their permission for further periods and a new application was required.

A potential problem arose with regard to the definition of the term '*acted upon'* since no satisfactory explanation was given as to the degree of input required by the developer to claim that the permission was indeed '*acted upon'*. Whether the term '*acted upon'* implied that the site had to be committed with physical works or whether it was sufficient if anything connected with the permission took place, such as asking the Land Survey Unit within the Authority to provide the setting-out on site, remained an open question.

The difficulties presented by the choice of words in this particular clause extended to the notion of due diligence since the law besides imposing a twelve-month time-frame within which a permission had to be acted upon, also stated that this had to be done with '*due diligence*'.[159] Again, the implications of this term were by no means clear. Let us take as an example a situation where a permission was acted upon within the twelve-month time frame, but the imposed conditions were not adhered to. Would that have automatically implied that works done were not pursued with due diligence and hence the given permission ceased to be operative? Interestingly, the PAB had held to the principle that the notion of due diligence was equivalent to acting as a *bonus paterfamilias* as envisaged in the Maltese Civil Code.[160]

[158] *Ibid*
[159] *Ibid*
[160] Kevin Aquilina, *Development Planning Legislation – The Maltese Experience* (Mireva Publications 1999): 547

Development permissions were deemed to '…*enure for the benefit of the land and for all persons for the time being interested therein'*[161] except as otherwise provided in the permission. This means that that permissions could exceptionally be granted to benefit a specific person or persons and not necessarily any person who had an interest in the land. A classic example of this instance is when a permit for a dwelling used to be granted to an applicant on account of his being a fulltime farmer, in which case a condition used to be normally included limiting the use to such farmer and his family. Such restrictions were obviously imposed in order to deter property speculation, particularly outside the development zone.

The *'owner'* or '*occupier*' of a land also risked facing enforcement action had any development, which required planning permission, been carried out on land without a valid permit or in breach of the conditions subject to which a permit was issued.[162] Nevertheless, planning permission could still be issued for development which had taken place without prior authorization or after a permission ceased to be valid or operative. In such cases, the applicant was obliged to desist *'forthwith'* from carrying out further unauthorized works if so required by the Authority.[163]

[161] Development Planning Act 1992, s 33(4)
[162] *Ibid* : s 52
[163] *Ibid* : s 34(1)(a)

3 ACT XXIII OF 1997

Four years following its promulgation, Act I of 1992 was amended by virtue of Act XXIII of 1997. As a result, Section 33 was slightly modified so as to add that regard had also to be given to *'...policies emanating from existing structure plan and from any subsidiary plans'*.[164] That meant that from that moment on, decision makers had to take stock of important details which, very often, were not included in the more generic subsidiary plans. Still, the Authority had to have regard to those material considerations which the Authority deemed '*relevant'*[165], though the question as to what constituted '*material considerations'* remained unaddressed.

Another novelty was the fact that '*any person'* was entitled to file representations objecting to a proposed development, provided that such objection was in writing and based on reasoned justifications.[166] What seemed to be important is that third parties had to have a reason to object, though it was not clear whether such reason had to be based on a particular premise. Also, the term '*any person'* could suggest that third party individuals were not required to prove a juridical interest, namely an interest which is personal, actual and immediate, to participate in the planning process.

Moreover, a new proviso was added to Section 33(1), stating that legislated policies and conditions could not be applied retroactively so as to adversely affect the acquired rights arising from a valid development permit. This was important since it gave added certainty to permit holders who were to be accorded legal protection against subsequent changes

[164] Development Planning Act 1992 as amended by Act XXIII of 1997, s 33(1)(a)
[165] *Ibid* : s 33(1)(d)
[166] *Ibid* : s 32(5)

in policies. More important, however, is that the permit had to be valid. The understanding was therefore that a development permission does not accrue into an acquired right once it ceases to be operative. This raised the question as to whether in fact a planning permission, once completed, translated itself into a vested right.

When it came to deciding on the application, the Authority was still obliged to clearly state the reasons for refusing a permission. Yet again, there was no similar obligation where a negative recommendation was overturned and permission issued.

A provision was introduced, stating that *'…the permit shall automatically pass on to new owners upon the notification of the transfer of ownership by simple letter to the Planning Authority'*.[167] Consequently, a landowner, not being the applicant, could on the one hand make use of a permit which was applied for by a third party though the law added a requirement that such a person must notify the Authority in writing. Still, in reality, the notion that a permit would *'ensure for the benefit of the land and for all persons that could have an interest on the land'* was not revoked. This means that that the added requirement of a written notification upon the transfer of ownership appeared pointless because subsequent owners, who would invariably have an interest on the land, were acknowledged regardless.

When compared with the previous piece of legislation, an important observation that needs to be made is that a development planning permit was no longer valid in perpetuity when *'acted upon, with due diligence'*, whatever these terms actually implied. Instead,

[167] *Ibid* : s 33(4)

the default validity period with the new Act was set at three years from the date of issue.[168] At the end of which period, the validity status would have needed to be assessed according to whether or not the site had been committed in accordance with the permission granted.

In a particular scenario[169], that is when the site was committed according to permits, the validity of the permit was extended *ipso jure* to four years. At the end of the fourth year, it was possible for applicant to have his permit extended to *'…further period or periods…'* as the Authority deemed reasonable upon a request. Having said that, it was not clear whether decision makers had to assess the degree of commitment, that is, whether commitment had reached an extent where applying the new plans and policies introduced hitherto would not have made construction sense.

When, on the other hand, the site was not committed in accordance with the permit, a new separate planning application was needed to resume works on site. The new application needed to be assessed *'…according to the policies in force at the time of the said new application'*.[170] The consequences for an applicant choosing not to follow the provisions of a permit were therefore clear – he lost all rights on the said permit. Even so, the law provided no indication insofar as to whether the decision should have been based on the policies in force when the new application was validated or on those *in vigore* at the moment it was determined.

When it came to illegal works, it was still possible to file a planning application for the regularization thereof[171], however, it is worth pointing out that a year before the

[168] *Ibid* : s 33(3)
[169] *Ibid* : s 33(3)(b)
[170] *Ibid* : s 33(3)(a)
[171] *Ibid* : s 34(1)

promulgation of the Act under review, the Authority had issued circular PA2/96 stating that requests for new developments could only be *'considered'* for determination provided the illegalities were removed from site[172] or requested to be sanctioned as part of the application.[173] For some unknown reason, the legislator stopped short of carrying forward these Circular provisions in the amending Act.

4. ACT XXI OF 2001

Act XXI of 2001 introduced further changes, the most significant of which being that decision makers were now obliged to '*apply*' planning policies and development plans and *'have regard to'* material considerations and representations.[174] Notably, the Maltese legislator did not follow the position adopted in section 54A of the Town and Planning Act 1990[175] which placed a rebuttable presumption in favour of the development plan unless material considerations indicated otherwise.[176] In the Maltese case, it seemed that plans and policies had to be '*applied'* without exception.

In addition, decision makers were also required to apply the height limitations shown in the TPS's or in local plans, unless such height could be modified by some other policy

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

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

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

[175] *'54A: Where, in making any determination under the Planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.'*

[176] *St Albans District Council v Secretary of State for the Environment* [1993] JPL 374

which *'...[dealt] with the maximum building height'*.[177] On paper, this approach should have offered a degree of certainty since citizens should have been put in a better position to envisage what type of development would be likely acceptable. Moreover, the idea that legislated policies and conditions could not be applied retroactively so as to adversely affect the acquired rights arising from a valid development permit was retained.[178]

The Authority could no longer do away with giving '*any*'[179] reason upon a refusal or imposition of particular conditions since reasons had to be specific and based on existing development plans and planning policies. This could have meant that an application could only be refused due to non-compliance with policy and not because of some material consideration or a third party objection. On the other hand, as with previous legislation, there was no obligation to provide an explanation when the Authority decided to overturn a negative recommendation and issue permission.

By virtue of Act XXI of 2001, the notion that development permissions could be granted for a limited period or in perpetuity was reinstated in Section 33(3) after having been removed by virtue of Act XXIII of 1997.[180] Nevertheless, all permissions ceased to be operative if the approved works were not completed within five years of issue[181] although the Authority could impose tighter time frames, provided it stated the reasons justifying such requirement.[182] The default period, now five years, could be extended '…*to such*

[177] Development Planning Act 1992 as amended by Act XXI of 2001, s 33(1)(a)(i)
[178] *Ibid* : proviso to s 33(1)(a)(ii)
[179] *Ibid* : proviso to s 33(2)
[180] *Ibid* : s 33(3)
[181] *Ibid*
[182] *Ibid* : s 33(3A)

further period or periods as it may consider reasonable'[183] following a renewal application.

Unlike the previous Section 33(3), there was no requirement to assess whether the site had been committed in accordance with the permit or not, prior to deciding whether the permit should be renewed at the end of the five-year period. What was certain was that the Authority could renew the permit for any other period as it held reasonable. It here appears that the legislator wanted to award more discretion to decision makers in renewing valid permissions, rather than have them bound by the principle of site commitment.

Insofar as illegalities were concerned, a new procedure was introduced whereby any person who was served with an enforcement notice after the 1st July 2000 in respect of illegal development carried out prior to the 1st January 1993 within the TPS or the development zone as indicated in a Local Plan could claim that such notice was not applicable to his case.[184] This was not, however, tantamount to saying that the illegal development was regularised.[185] The obvious consequence of this was that a compliance certificate[186] could still not be obtained and many of these buildings remained without the provision of water and electricity supply. One of the prime failings of such a situation was that a considerable amount of building stock was allowed to stay, as no enforcement action was taken, without the possibility of being inhabited.

[183] *Ibid* : s 33(3)
[184] *Ibid* : s 55B(1)
[185] *Ibid* : s 55B(4)
[186] Compliance certificates were introduced by virtue of Section 61 of the Development Planning Act, Act I of 1992, providing that all new development was to be provided with a service consisting of water or electricity only after applicant obtains a compliance certificate stating that the development was carried out in accordance with the development permission

Finally, it should be pointed out that Act XXI held on to the notion that a permit enured for the benefit of the land and for all persons that could have an interest on the land. As held earlier, this suggested that a landowner, though not being the applicant, could still make use of a permit which was applied for by a third party due to him having an obvious interest in the land. Consequently, there was hardly any point in stating that a permit automatically passed on to new owners upon the notification of the transfer of ownership by a letter to the PA. This notwithstanding, Act XXI held to the same idea, further requiring that the letter which was to be sent to the Authority had to be sent by registered post.[187]

5. ACT X OF 2010[188]

The DPA was abrogated on the 31st December 2010 by way of Legal Notice 512 of 2010 and substituted on that same day by Act X of 2010, namely the EDPA.

At this juncture, development planning applications had to be determined according to Section 69 of Chapter 504 of the Laws of Malta. In essence, Section 69 echoed Section 33 as amended in 2001 since decision makers were required to '*apply'* plans and policies[189] and '*have regard to'* material considerations and representations made following the publication of the proposal in the press.[190] Once again, decision makers were required to apply the height limitations shown in the TPS's or in Local Plans, unless

[187] Development Planning Act 1992 as amended by Act XXI of 2001, s 33(4)
[188] Environment and Development Planning Act
[189] Environment and Development Planning Act, s 69(1)(a)(i) and (ii)
[190] *Ibid* : s 69(2)

such height could be modified by some other policy '…*which [dealt] with the maximum building height'*.[191]

Another provision stating that '…*commitment from nearby buildings could not be used as a material consideration to justify heights which were over and above the height limitations set out in the plan'* was also included.[192] A possible explanation to this was that Parliament sought to place further emphasis on the importance of the Local Plans after the Maltese courts had taken the view that height limitations could be overruled where commitment was shown to exist despite it being clear that height limitations could not be modified if not by policy.

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

As with previous legislation, applicants were protected from the retroactive application of legislation which could negatively affect their acquired rights arising from valid development permissions. A notable development concerned policies which were under review. Following the introduction of Legal Notice 158 of 2013[193] the applicant (or his *perit*) could request the Authority to suspend the application for a maximum period of one year, when the Parliamentary Secretary communicated to the Authority that a

[191] *Ibid* : proviso to s 69(1)(a)(ii)
[192] *Ibid* : proviso to s 69(2)(a)
[193] The Development Planning (Procedure for Applications and their Determination) (Amendment)
Regulations 2013, s 9(2)(b)

particular policy was under review in the hope that the eventual revisions would work out in his favour. Certainly, the idea behind this Legal Notice was directed in favour of those applicants who, having a pending application, knew that they could not have a favourable decision until a particular policy was changed. This provision could be construed as a move to favour developers, providing breathing space within which one could work around the restrictions imposed by Section 33.

Under Act X of 2010, the Authority remained obliged to give specific reasons when refusing an application or when imposing particular conditions. Once again, the reasons had to be specific, however, not necessarily based solely on *'existing plans and policies'* but also on *'regulations or other material considerations'.*[194] Another novelty is that the Commission was also obliged to *'…register in the relevant file the specific environmental and planning reasons'* once it decided to overrule the Director's recommendation.[195] This implied that the Authority's duty to state reasons was no longer limited to when imposing conditions or refusing an application, addressing the author's previously mentioned concerns.

Furthermore, Act X of 2010 introduced a number of key changes in the procedures which had to be adopted by both the Authority and the Commission. For example, it was made clear that although a sitting member of the Authority could request that the deliberations be held in private, the final vote had to be taken in public and no secret vote was allowed.[196]

[194] Environment and Development Planning Act, proviso to s 69(3)
[195] *Ibid* : Schedule 1 clause 10
[196] *Ibid*

In what could be interpreted as a bold move to increase efficiency in the application process, the Commission was further obliged to determine a planning application during the first sitting unless the Commission was intent on overturning the Directorate's recommendation. In that case, the Commission could request any further information, including updating of the plans, provided that the substance of the application remained unchanged and the application would then be determined during the following sitting which was statutorily held within thirty days.[197] Considering that applications could, in the past, take years to be decided, the introduction of the thirty-day time frame between one sitting and the next was a step in the right direction. The flaw with that approach was that a decision would need to be given in the second sitting even if the requested information failed to reach the Commission due to reasons beyond applicant's control.

The provisions of Section 33(3) of the previous DPA were carried forward in their totality, namely, development permissions could be granted for a limited period or in perpetuity, but all permissions ceased to be operative if the approved works were not completed within five years of issue[198], although the Authority remained entitled to impose tighter time frames, when it could give a justification.[199] Should works not have been completed within the five year period, applicants could be granted extensions '*…to such further period or periods as it may [have] consider[ed] reasonable'* following a renewal application.[200] Once more, there was no indication of any criteria upon which the Authority was to decide whether a permission was to be extended or otherwise.

[197] The Development Planning (Procedure for Applications and their Determination) Regulations, s 5(4)
[198] Environment and Development Planning Act, s 69(4)
[199] *Ibid*
[200] *Ibid*

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

A number of other changes concerned enforcement issues. With Act X, it was no longer possible for the Authority to entertain all types of sanctioning applications. In fact, the type of development listed in Schedule 6 of the said Act, that is all irregular development located in protected areas or outside the development zones[201] which took place after May 2008[202] as well as all illegal interventions in scheduled property, regardless when undertaken[203], were excluded from the possibility of being sanctioned.

The downside to this approach was that there was no point in removing a building which in reality could eventually be permitted by policy. Even so, Section 70 made no distinction between small and large-scale interventions. Meanwhile, sanctioning applications were also to be regulated by Legal Notice 514 of 2010.[204] Reading Regulation 14(1) of the said Legal Notice, one is reminded of paragraphs 3.1[205] and 3.2[206] of the previously mentioned Circular 2/96, whereby applicants had to remove all illegalities prior to submitting a sanctioning application, unless these were not included

[201] This provision, however, did not apply registered livestock farms located outside development zones
[202] Environment and Development Planning Act, s 70
[203] *Ibid*
[204] The Development Planning (Procedure for Applications and their Determination) Regulations
[205] '*When existing development on a site is wholly or partly illegal (that is, it is not covered by a development permit), the DCC will not consider a development permit application relating to new development on that site, unless the illegal development is regularised.'*
[206] '*The illegal development may either be regularised through a specific application solely for that purpose or through an application which includes it as well as new development. However, in the latter case, it must be made clear in the application what development is covered (both in the description on the application form and in the drawings and plans), in order that the Planning Authority is sure that the unauthorised development does form part of the application.'*

for sanctioning in that same application. This means that if the illegalities were not specifically indicated in the drawings and mentioned in the application form, the Authority could not process the application, let alone approve it.

Consequently, it was by no means clear how, in the same Legal Notice[207], an application containing illegalities not *'indicated for sanctioning'* could still be approved subject to the removal of the illegal development within a six-month time frame from the issue of permission. The Daily Penalty Regulations were also enacted less than two years later, whereby all illegal development carried out after 24th November 2012 was to be subject to a daily administrative fine which could reach fifty thousand Euro unless the illegal development was sanctioned or removed.[208]

Act X of 2010 also introduced the possibility for owners of certain type of illegalities listed under Category A[209] or Category B[210] of the Eighth Schedule of the Act to obtain a concession, on the basis of which, one could subsequently obtain a compliance certificate[211] and also claim immunity from a pending enforcement notice.[212] Nevertheless, the Act made it very clear that these concessions were not tantamount to the regularisation of the illegal development in question.[213]

[207] The Development Planning (Procedure for Applications and their Determination) Regulations, s 14(5)
[208] Daily Penalty Regulations, Regulation (3)(2)
[209] Under Category A were all unauthorised interventions carried out within the Temporary Provisions Scheme or the Local Plan development boundary, other than developments consisting in a change of use or not built according to the official road or building alignments, which were carried out prior to 1st January 1993
[210] Category B developments consisted of specific interventions which typically fell short of sanitary requirements and thus could not be sanctioned
[211] Environment and Development Planning Act, s 92(2)
[212] *Ibid* : s 91(1)
[213] *Ibid* : s 92(2)

At the same time, Regulation 14(1) of Legal Notice 154 of 2010 held that Category B illegalities were not to be construed as illegal development in the processing of a planning application. The understanding was that Category B illegalities were not to be indicated in application drawings forming part of new applications for development, as a result of which plans ended up being approved with parts of the property not shown. As a consequence, this had the possibility of presenting problems during the drawing up of contracts dealing with the transfer of property since the attached plans to the contract showed incomplete information.

6. ACT VII OF 2016[214]

During the run up to the Malta general elections of 2013, the then Labour Opposition had pledged its intent on undertaking a major overhaul in the planning system.[215] The core idea was to divest the Malta Environment and Planning Authority[216] of its regulatory functions and set up two independent authorities instead – the *Awtorita` għall- Ambjent u r-Riżorsi*[217] and the *Awtorita` għall-Ippjanar u l-Izvilupp Sostenibbli*.[218]

After a Labour administration was elected in March 2013, the planning portfolio was taken over by the Parliamentary Secretariat for Planning and Simplification Processes within the Office of the Prime Minister. Notably, the remit of the Secretariat included the setting up of the new Authority for Planning and Sustainable Land Use. On the other

[214] Development Planning Act 2016
[215] Partit Laburista, 'Malta Taghna Lkoll, Manifest Elettorali' (2012) <http://3c3dbeaf6f6c49f4b9f4-a655c0f6dcd98e765a68760c407565ae.r86.cf3.rackcdn.com/082d10b0fed6c04d78ced4e7836e1dc11067452380.pdf> accessed 29th March 2020
[216] (the MEPA)
[217] Authority for the Environment and Resources
[218] Authority for Planning and Sustainable Land Use

hand, the Ministry for Sustainable Development, the Environment and Climate Change was entrusted with the establishment of the new Authority for the Environment and Resources.

In March 2014, the Parliamentary Secretariat for Planning and Simplification Processes published a consultation document entitled '*For an Efficient Planning System'*[219], paving the way forward for the setting up of a new development planning authority which would be responsible for development planning together with building and sanitary regulations.

This consultation document contained several proposals, which clearly indicated government's intent on moving away from the plan led approach. The term '*shall apply'* insofar as plans and policies were concerned was ear-marked for removal and the way applications would be determined had to be redefined in line with the '*balancing act principle*'[220] The key implication drawn from this was that decision makers were to have like regard to plans, policies, regulations, material considerations, public expression by the Minister on policy matters that is formally communicated to the Authority and published by the Authority together with public representations.

Moreover, it was suggested that existing commitments including height of buildings were to be considered as material considerations.[221] At the same time, however, no weight was to be afforded to draft policies[222], meaning that they could not be used as a material consideration to influence a decision. It was further proposed that valid police or trading

[219] Parliamentary Secretariat for Planning and Simplification Processes, *For an Efficient Planning System – A consultation Document* (Auberge de Castille Malta, 2014)
[220] *Ibid* : 26 para 27
[221] *Ibid* : 26 para 30
[222] *Ibid* : 26 para 29

licenses issued before 1992 were to be considered as vested rights[223] while the Sixth Schedule was to be deleted.[224]

The consultation document was followed by the publication of a Bill entitled Development Planning Act, 2015 (hereinafter, referred to as the '*Bill*'), which was discussed by Parliament in July 2015. Notwithstanding the introduction of a specific provision stating which policies should prevail over others in case of conflict,[225] Section 72 of the Bill made it clear that Government was intent on moving away from the plan led approach and revert to the situation prior to Act XXII of 2001. As had been highlighted in the consultation document, decision makers were now directed to have equal regard to plans, policies, regulations made under the Act, material considerations and representations. Notably, Section 72 also omitted any reference to public expressions by the Minister on policy matters, as had been previously suggested in the consultation document.

'*Surrounding commitments'* were expressly singled out as '*material considerations'* which decision makers ought to assess.[226] This, in stark contrast with the idea held in the Environment and Development Planning Act whereby *'the height limitation could only be modified by applying a policy which deals with the maximum building height which may be permitted on a site'*.[227]

[223] *Ibid* : 26 para 27
[224] *Ibid* : 26 para 32
[225] Bill entitled Development Planning Act 2015, s 52
[226] *Ibid* : s 72(2)(d)
[227] Environment and Development Planning Act, proviso to s 69(1)(a)(ii)

Following the publication of the Bill, various non-governmental organisations drew attention to Section 72. The General Retail and Traders Union (GRTU)[228] openly questioned the fact that plans and policies were '*no longer binding'*.[229] From the Union's perspective, applicant's position was seen to be weakened since planning applications could be simply rejected on account of material considerations. This view was supported by the Malta Developers Association (MDA) who asked whether material considerations could adversely affect the benefits emanating from a plan or policy.[230]

Din l-Art Helwa argued that the expression *'have regard to'* plans and policies, as opposed to *'shall apply',* had serious implications since it was *'too vague and subjective'.*[231] Furthermore, *Din l-Art Helwa* questioned the decision to remove the proviso whereby height limitations could not be modified by decision makers, describing it as *'a loophole with which developments which are higher than the height limitation will be permitted'*.[232] The *Kummissjoni Interdjoċesana Ambjent* argued against the idea that surrounding commitment could *'justify a development which would otherwise be undesirable'* by policy.[233] In a similar vein, Vella Lenicker in giving her reactions to the

[228] Since then, the General Retail and Traders Union (GRTU) has rebranded itself as the Malta Chamber of SMEs

[229] Reactions to Bill entitled Development Planning Act 2015, General Retailers Traders Union (GRTU) (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions% 20 20 15%20-%20final.pdf accessed 29th March 2020

[230] Reactions to Bill entitled Development Planning Act 2015, Malta Developers Association (MDA) (2015) http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions% 202015%20-%20final.pdf accessed 29th March 2020

[231] Reactions to Bill entitled Development Planning Act 2015, Din l-Art Helwa (DLH) (2015) http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015 %20-%20final.pdf accessed 29th March 2020

[232] *Ibid*

[233] Reactions to Bill entitled Development Planning Act 2015, Kummissjoni Interdjocesana Ambjent (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%20201 5%20-%20final.pdf> accessed 29th March 2020

Bill was concerned that illegal commitment could be used to justify a proposal which went against policy.[234]

Similar objections were also levelled towards the proposed removal of the Sixth Schedule. Vella Lenicker[235] pointed out that the removal of the Sixth Schedule implied that '*the 'no tolerance' policy previously adopted no longer applie[d]'.* In a similar vein, *Front Ħarsien ODZ* maintained that the new PA should be prohibited from approving the '*legalisation of ODZ development carried out after 2008 and of any development carried out on scheduled zones irrespective of when it was carried out'.*[236] *Din l-Art Ħelwa* described the removal of the said schedule as a '*retrograde step'*, however conceding that amendments may have been required.[237] Nevertheless, no explanation was given as to how this Schedule could have been possibly amended without removing it altogether.

While it may be true that, as held by the various eNGOs, the Sixth Schedule served as a deterrent, serious questions remained due to the fact that no distinction was made between minor and major unauthorised interventions or works which could be sanctioned in principle and those which were not. Furthermore, it bears to point out that the Sixth Schedule was introduced at a time when the Daily Penalty Regulations[238], which likewise serve as a deterrent, were not yet in force.

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[234] Reactions to Bill entitled Development Planning Act 2015; Perit Simone Vella Lenicker (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 29th March 2020

[235] *Ibid*

[236] Reactions to Bill entitled Development Planning Act 2015; Front Harsien ODZ (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 29 th March 2020

[237] Reactions to Bill entitled Development Planning Act 2015, Din l-Art Helwa (DLH) (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 29th March 2020

[238] Daily Penalty Regulations

The Development Planning Act, 2016 was eventually passed by the House of Representatives at Sitting No. 338 of the 9th December, 2015 and took effect on the 4th April 2016. In Parliament, the Honourable Michael Falzon[239] explained that Section 72 was designed to allow decision makers to also take stock of the specific site circumstances instead of adhering blindly to policy requirements.

This article found a strong reaction from Opposition spokesman, the Honourable Ryan Callus[240] who contended that a development proposal could now be accepted despite it being against planning policy or rejected owing to the absence of surrounding commitment regardless of it being in line with policy. This, according to Callus, went against the interest of certainty and good planning. However so, the Opposition still ended up voting in favour of Section 72 as proposed by Government after Falzon accepted Callus' suggestions to amend sub-paragraph (2)(d) of Section 72 to ensure that the decision makers only took legal commitments into consideration.[241]

The principle that subsidiary plans and policies could not be applied retroactively so as to adversely affect vested rights arising from valid permits was not only retained but valid police or trading licenses issued prior to 1994 were to be similarly acknowledged.[242] Today, the only difficulty that arises with this provision is that following the introduction of Legal Notice 420 of 2016[243], all major commercial activities became exempted from the need of a trading license[244] as a result of which trading licenses became obsolete. Consequently, it is by no means clear whether an applicant, who until 2016 was in

[239] House of Representatives Malta (Sitting No. 336) (2nd December 2015)
[240] *Ibid*
[241] A right on illegal commitment
[242] Development Planning Act 1992, s 72(2)
[243] Trading Licences Regulations 2016
[244] Regulation 5(2) of Legal Notice 420 of 2016

possession of a trading license, could claim to be in possession of a *'valid'* license for the purpose of Section 72(2).

Act VII of 2016 brought further novelty on board. It acknowledged the long-held principle whereby all development carried out before 1967 is to be considered legal.[245] Moreover, the reclamation of land for agriculture by the deposit of material prior to 1994, from this point onwards, did not constitute an illegality.[246] Likewise, all uses which subsisted continuously from a period when such use was not considered illegal did not require a permission from then on.[247] However, the term '*subsisted continuously'* could pose particular problems in cases where the premises were temporarily unoccupied for some reason or other.

Once more, the Authority was obliged to give specific reasons when refusing an application or imposing particular conditions, based on '*existing plans, policies and regulations or other material considerations'*.[248] As with the Environment and Development Planning Act, specific planning reasons were also to be given when the Board decided to overturn a recommendation.[249] Yet, unlike with the EDPA, there was no indication whether, in the case of overturning a recommendation, such reasons had to be based on environmental and, or planning grounds.[250]

A later provision was made to state that a recommendation could be overturned only after the majority of the members of the PB, or the PCom as the case may be, were in a position

[245] Development Planning Act 1992, s 95(2)
[246] *Ibid* : s 70(2)(b)(ii)
[247] *Ibid* : s 70(2)(e)
[248] Development Planning Act 2016, proviso to s 72(1)
[249] *Ibid* : Schedule 2 clause 10
[250] Environment and Development Planning Act, Schedule 1 clause 10

to express a provisional opinion to substantiate their intent in overturning the recommendation, which opinion had to be communicated to the *perit*, the applicant, the statutory consultees as well as the registered interested parties prior to the next sitting, which has to be held within six weeks.[251] Nevertheless, the obligation, previously found in the EDPA[252], whereby the deferred application had to be determined in the second sitting was removed. Although this move could at face value imply that the Authority was retracting on its efficiency, it should be pointed out that applicants were often not in a position to adhere to the Commission's request within six weeks. This is especially so when applicants were required to obtain information from government departments. In this way, applicants could now request further deferrals instead of having their application dismissed due to lack of information.

Furthermore, the PB was now authorised to amend the proposal during the pendency of proceedings, prior to the decision '*so as to better reflect the principle of the development'*.[253] This was possible as long as the proposal did not depart from the scope of the development or negatively affect the vested rights of the applicant.[254] The notion introduced by way of Legal Notice 158 of 2013 whereby applicant (or his *perit*) could request the Authority to suspend the application for a maximum period of one year when the Minister communicated to the Authority that a particular policy was under review in the hope that the eventual revisions would work to his favour was carried forward.[255] Furthermore, as with previous legislation, the final vote still had to be taken in public and no secret vote was allowed.[256]

[251] Development Planning (Procedure for Applications and their Determination) Regulations, s 4(a)
[252] Environment and Development Planning Act, Schedule 1 clause 10
[253] Development Planning (Procedure for Applications and their Determination) Regulations, s 13(6)
[254] *Ibid*
[255] *Ibid* : s 13(2)(b)
[256] *Ibid*

The provisions of Section 69(4) of the EDPA were essentially carried forward in Section 72(4) of the new DPA. Once again, development permissions can be granted for a limited period or in perpetuity. Whereas Section 72(4) stipulated no timeframe within which applications for permissions cease to be operative, Section 71(1) provides that outline development permissions[257] cannot be valid for a period that exceeds five years. Within this latter statutory period, the full development permit application has to be submitted, failure of which renders the outline development permit null.[258]

With the 2016 DPA, it is still possible to renew full development permissions should works not be completed within the stipulated time frames. Unlike in previous Section 69(4), the new DPA, however, provides criteria upon which the Authority should decide whether to extend a full development permission '*to such further period or periods as it may consider reasonable'*.[259] This means that the Authority has to first assess whether the application for renewal was submitted while the previous permission was still operative. Subsequently, the Authority has to decide whether there had been a change in the plans and policies, in which case account has to be given to the new policies unless it is shown that *'the site subject to the application is already committed by the original development permission in relation to these plans and policies'*.[260]

It is an open question whether this means that the original development permission can only be renewed if the site is committed to an extent that it is not feasible to apply the new policies. Moreover, it is not known whether a request for renewing a valid permission

[257] Outline development permissions are defined in Section 71(2) of the Development Planning Act, 2016 as permissions which give approval in principle to the proposed development subject to reserved matters which subsequently need to be included in a full development permit application
[258] Development Planning Act 1992, s 71(2)(a)
[259] *Ibid* : proviso to s 72(4)
[260] *Ibid*

should still be entertained if the committed parts are not strictly compliant with the drawings and/or conditions of permission. In addition, a new proviso was included in the Act, stating that if *'…the applicant fails to submit the commencement notice*[261] *relative to the permission, such development permission shall be considered as never having been utilised'*.[262] Still, it is unclear whether the submission of a commencement notice, which legally implies that the permission is being made use of, should not be construed as the site having been necessarily committed '*in relation to the plans and policies'* for the purpose of renewal of planning permissions.[263]

Meanwhile. the notion that a permission would enure for the benefit of the land and for all persons for the time being interested therein was repealed. Act VII of 2016 however held on to the principle that a planning permission automatically passes on to new owners once the land in question is transferred.[264]

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

Concession certificates[265] introduced under previous law, on the basis of which one could subsequently obtain a compliance certificate[266] and claim immunity from a pending

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

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

[263] *Ibid*

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

[265] Environment and Development Planning Act, Schedule 8

[266] *Ibid* : s 92(2)

enforcement notice[267], were also done away with. Section 101 (1) was, however, introduced to make up for the loss, whereby the Minister could make regulations '*to regularise development'*.

As a matter of fact, Legal Notice 285 of 2016[268] was eventually introduced, giving landowners the possibility to regularise their irregular development instead of having a simple obtainment of a concession with a very limited scope. These regulations were, however, only applicable with regard to a development, the footprint of which appeared in the scheme boundaries[269] as shown in the Authority's aerial photographs of the year 2016[270] as well as all irregular development already covered by a Category B concession and located in a Development Zone.[271] According to these same regulations, permission could only be granted if it was shown that the unauthorised development was not tantamount to an injury to amenity and the premises were used as a dwelling, office, retail shop or their use was in conformity with current planning policies and regulations.[272]

7. CONCLUSIONS

This chapter has critically illustrated that a number of provisions have changed in a sporadic fashion over the years with the situation, at times, reverting to what was previously in place. A classic example is that relating to Section 72(1) of the current DPA, which was reworded very similarly to Section 33 as held until 2001. Other

[267] *Ibid* : s 91(1)
[268] Regularisation of Existing Development Regulations, 2016
[269] *Ibid* : s 3(a)
[270] *Ibid* : s 4(6)
[271] *Ibid* : s 3(b)
[272] *Ibid* : s 4(5)

provisions have been struck off completely from the statute. A case in point is Schedule 6 of the EDPA, which was completely done away with in the current Act.

A few of the provisions not found in the original DPA were enacted at a later stage and are still found in the respective piece of legislation today. One such example is the notion introduced in 1997, where applicants are protected from the retroactive application of legislation which could negatively affect their acquired rights arising from valid development permissions. Still, a number of provisions found in current legislation are unprecedented. One such case is Section 72(4) of the current DPA, which links commencement notices with the utilisation of a full development permission.

Notwithstanding the various amendments which took place over the years with a view to addressing emerging anomalies, it is safe to say that a number of legal lacunae, due to lack of clarity or as a result of legislation not expressly addressing a particular issue, still exist.

For example, the law is clear in stating that legislated policies and conditions cannot be applied retroactively given that if they did, they would adversely affect the acquired rights arising from valid development permits. Nonetheless, the law fails to address, at least in an unequivocal manner, whether a valid planning application also gives rise to a legitimate expectation to which end the application should be eventually assessed in line with the policies in force at the moment of validation notwithstanding any subsequent changes that may take place in the process.

Indeed, the situation could be even more serious when policy amendments have been made at a time when the decision on a planning application had already been taken by the Authority and proceedings are pending at appeal because if the EPRT decides to apply the new policies, it would be converting itself to a Board of Instance.

What has just been said also applies to enforcement notices while a sanctioning application or an appeal is still pending. The situation here could be equally critical since the retroactive application of a law or policy which could not be reasonably foreseen at the point when the illegality was committed is contrary to the basic tenets of the rule of law.

Another issue is that while it is true that the current DPA made a clear attempt to address previous anomalies when it says that renewal applications should be assessed according to the *'new policies'* unless *'the application is already committed by the original development permission in relation to these plans and policies'*[273], the Act still fails to define whether the '*new policies'* are those in force at the moment when the renewal application was validated or when about to be eventually determined should changes take place in the process.

Moreover, the law fails to shed light on whether commitment by the original development permission in relation to these plans and policies implies that works already permitted would need to be removed if the '*new policies'* are applied. Additionally, it is also not yet

[273] Development Planning Act 2016, proviso to s 72(4)

known whether a commencement notice[274], once submitted during the operative period, is tantamount to a *'commitment'* in terms of Section 72(4).

When it comes to the legal interplay between vested rights and planning permissions, the law requires the permit to be valid. Having said this, the law is silent as to whether a *'valid'* planning permission pending a third-party appeal constitutes a vested right or otherwise, in favour of applicant, since proceedings are still '*open*'. The law is equally silent as to what happens once works covered by a permit are completed and the permit time frame expires. In other words, it is not clear whether a planning permission can be said to confer a vested right once it expires, given that no right seems to ensue when a planning permission is no longer valid irrespective of the fact that works are completed. It is even less clear whether landowners are still protected against retroactive legislation when an approved development is not carried out in strict conformity with planning permission or once a building which has been covered by the required planning permission, perishes.

Finally, the changes introduced by way of Section 72 of the current DPA to no longer *'apply'* plans and policies and instead *'have regard'* thereof seem to imply that decision makers now have a discretion to give priority to plans and policies, material considerations and representations as they deemed fit. As it has been demonstrated, this is at least the general perception held prior to the promulgation of the current DPA given

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

that decision makers ought to have previously applied plans and policies while only having regard to material considerations and representations. But is that truly the case?

The approach taken by the court to fill in all these lacunae and eliminate certain legal uncertainties will be discussed in the next chapter.

CHAPTER THREE
Determining a planning permission – the rules as interpreted by domestic courts

1. GENERAL

As illustrated in the previous chapter, the PCom or the PB (in the eventuality that an application cannot be delegated) are required to take a decision once a case officer draws up a recommendation on whether a development application should be accepted or refused.

Today, development proposals are expected to be accepted or rejected along the parameters set out in Section 72(2) of the current DPA. Section 72(2) was immediately preceded by Section 69(2) of the EDPA. Prior to that, planning applications were determined in accordance with Section 33(1) of the DPA enacted in 1992. To date, Section 72(2) of the current DPA has not experienced any changes. Similarly, Section 69(2) remained intact throughout the period it remained in force (2010-2016). On the other hand, Section 33(1) was amended several times until the original DPA was finally repealed in 2010.

This chapter will discuss various aspects of the decision-making process of an application taking into consideration the considerable attention such process has received from the courts. As previously hinted at, one crucial issue is whether planning applications should be determined in line with the policies in force at the time when they are validated or in accordance with the laws *in vigore* on the day of the decision. This is particularly important to investors seeking certainty in order to base their investments on solid ground. The shifting of goalposts in mid project creates a certain insecurity among stakeholders and stalls potential progress of business ventures. As an offshoot of this, there is the

additional problem of identifying the juncture at which an applicant could claim a vested right, that is a right which cannot be taken away through retroactive legislation. The degree of discretion available to decision makers and whether planning policies should always take priority over material considerations in decision making, are also subjects of constant academic discussion.

Against this backdrop, this chapter will attempt to seek further clarifications by looking into what the Maltese courts had to say on the above issues. An analysis shall be first made to establish whether a development planning application should be immune to policy changes should there be any pending its determination. Focus will then be shifted on the instances in which an applicant may claim a vested right that results from a planning permission. Finally, an analysis shall be conducted with a view of establishing whether Section 72(2) of the current DPA has contributed towards more legal certainty in this area.

2. POLICY CHANGES DURING THE APPLICATION PROCESS

For a comprehensive, sustainable land use planning system to succeed, it is essential that a robust framework of development plans and planning policies are not only in place, but regularly revised and updated. Planning policies may still be perceived as an *'interference with the right to property'* [275], restricting landowners their absolute right to exploit their property as they please. There is, however, considerable agreement in the European Court of Human Rights (ECtHR) judgments that the *'…control of use of property…'* is

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

compatible with the spirit of Section 1 of Protocol No. 1 to the European Convention on Human Rights so long it is *…'in accordance with the general interest…*'[276] and founded on *'…a reasonable relationship of proportionality between the means employed and the aim pursued…'.*[277] The present understanding is also that individual states are the '*sole judges*', enjoying a wide margin of appreciation with respect to which planning policies are enacted and updated.

In the Maltese scenario, the PA has since its inception been empowered to prompt changes to subsidiary plans and to introduce new ones when it considered appropriate. It is not the first time that criticism was levelled in view of planning policies being seen to favour *'greedy developers'*.[278] With effect from 2001, these powers have been extended to the Minister.[279] In fact, Section 41 of the current DPA empowers the Executive Council *'…out of its own motion or if so requested by the Minister…'* to prepare new plans or policies on *'…any matter relating to development planning…'* as well as to review existing plans or policies. This leads to the aforementioned crucial question, that is, what if a new policy is introduced while a development planning application is still in process? Should the application, in such a case, be determined according to the policies in force when the application was submitted to the Authority? Or should the decision be based on the policies in force at the moment of the decision?

As has already been pointed out, Act XXIII of 1997 established the principle that '*…legislated policies and conditions shall not be applied retroactively so as to adversely*

[276] *Galtieri v. Italy* App no 72864/01 (ECtHR, 24th January 2006)
[277] *Depalle v. France* App no 34044/02 (ECtHR, 29th March 2010)
[278] Astrid Vella, 'Planning System Breakdown' *Times of Malta* (26th January 2018) <https://www.timesofmalta.com/articles/view/20180126/opinion/Planning-system-breakdown-Astrid-Vella.668907> accessed 29th March 2020
[279] XXI. 2001.24

affect acquired rights arising from a valid development permit'.[280] The introduction of this principle was considered to be a huge significant step in the field of local planning legislation since it was made clear that a valid development permit could not be compromised by a subsequent change in policy. This reasoning is also consistent with the precepts of the law found in the Interpretation Act that a right which is '… *acquire or accrued or incurred under any law so repealed'* should remain '*unaffected*' by any changes in substantive law which occurs during at any subsequent stage.[281] That, however, is not the same as saying that legislated policies are not to be applied retroactively if these were introduced half-way through an application process while a decision whether to grant permission or otherwise was still pending.

Deciding whether to proceed with an investment, all too often, depends on the prospects of development that is likely to be permitted. For this reason, applicants could face a financial quandary if new policies that an applicant was unaware of after having submitted an application are introduced during the pendency of proceedings which policies are then applied retroactively. Of course, the situation might not be so damning if the Authority would have already signalled its intentions of changing the applicable policy when the applicant was still in the preparatory phase of planning his investment since this gives him the option of whether to proceed or otherwise with the planning application.

Government does, in fact, sometimes show its intention for change, especially on subject matters that are topical at a particular point in time. A case in point at the moment of writing is the fuel station policy, a review to which was requested by government in recent

[280] Development Planning Act 1992, as amended by Act XXIII of 1997, s 33(1)
[281] Interpretation Act, s 12(1)(c)

months so as to limit further land take up outside the development zone.[282] A further example is the controversial Rural Policy which is currently also under review.[283]

In the case of the fuel station policy, the Executive Council has published a draft policy in April 2019, according to which, the relocation of fuel stations on agricultural land will no longer be permitted whereas the maximum allowed footprint shall be reduced from the current 3000 sq.m. to 1,000 sq.m. Subsequently, an even more restrictive draft was issued in September 2019[284] for consultation and the Executive Council has now to decide the way forward.

On the other hand, a set of proposed objectives aimed at revising the 2014 Rural Policy were issued for public consultation in November 2019. According to the said objectives, the Authority intends to establish whether the scope of the current policy has had the intended effect with a view of ensuring that the new policy is consistent, effective and in line with the spirit of the Strategic Plan for the Environment and Development as well as the National Rural Development Programme rural objectives.

[282] 'Transport Minister Ian Borg expects to receive the fuel station policy review soon' *Malta Independent* (12th February 2019) <https://www.independent.com.mt/articles/2019-02-12/local-news/Transport-Minister-Ian-Borg-expects-to-receive-the-fuel-station-policy-review-soon-6736203547> accessed 29th March 2020

[283] 'Planning Authority Ordered To Review Malta's Controversial Rural Policy' *Lovin Malta* (25th October 2019) <https://lovinmalta.com/news/planning-authority-ordered-to-review-maltas-controversial-rural-policy/> accessed 29th March 2020

[284] 'Proposed fuel station policy re-issued for public consultation' *Malta Independent* (20th September 2019) <https://www.independent.com.mt/articles/2019-09-20/local-news/Proposed-fuel-station-policy-re-issued-for-public-consultation-6736213742> accessed 29th March 2020

In this instance, the Executive Council has commissioned Dr Ivan Mifsud, the current Dean of the Faculty of Laws, to prepare a draft policy for eventual public consultation[285], which draft has not been published as yet.

Regardless of whenever an existing policy is amended or replaced, there is no question that a number of pending planning applications will be caught half-way through the process. When these applications reach determination stage, decision makers have to establish whether to rely on the new, perhaps more restrictive policy or that applicable at the moment of validation, which applicants would potentially opt for if they are given the opportunity to choose.

Before delving into what the Maltese courts had to say about these matters, it is opportune to find out what the doctrine of legitimate expectation entails. This is because legitimate expectations centre around the notion that a public authority should not be permitted to go back to a policy, a statement or a past practice. The reason to this is that when a public authority promises to follow a certain procedure, it is in the interest of good administration that it should act fairly and implement its promise.[286]

In view of the above, legitimate expectations typically arise from an express promise given on behalf of a public authority and/or from the existence of a regular practice which an applicant could reasonably expect to continue.[287] Of course, one should assume that

[285] 'Dean of University Law Faculty to prepare amendment to policy regarding rural zone development' *Television Malta* (6th November 2019) <https://www.tvm.com.mt/en/news/id-dekan-tal-fakulta-tal-dean-of-university-law-faculty-to-prepare-amendment-to-policy-regarding-rural-zone-development-nkarigat-biex-ifassal-abbozz-ghal-revizjoni-tal-policy-dwar-l-izvilupp-fiz-zoni/> accessed 29th March 2020
[286] *Attorney General of Hong Kong v. Ng Yuen Shiu*, [1983] 2 AC 629, [1983] 2 All ER 346, [1983] 2 WLR 735, (99 LQR 499), United Kingdom: Privy Council (Judicial Committee), 21 February 1983
[287] See for example: *Regina v Secretary of State for the Home Department ex parte Ruddock* [1987] QBD; *O'Reilly v Mackman* [1983] UKHL 1

the expectation could, in the first place, be allowed to take place by statute.[288] By contrast, an informal and generalized advise cannot be said to give rise to a legitimate expectation.

Interestingly, it has been argued that the courts are more likely to give effect to a legitimate expectation of a certain procedure rather than one of a substantive benefit. But even so, a legitimate expectation of substantive benefit should not be denied when the promise was made to an individual or a small group of people and denying the promise would be considered irrational, unfair or both.[289] One last thing is that a legitimate expectation could be overridden by public interest.[290] In other words, there could be competing public interests that, at the end of the day, make it difficult to bring about what is expected.

Going back to the topic under discussion, we have to assess whether a policy in force at the time of submitting the planning application is tantamount to '*an express promise given on behalf of a public authority'* as a result of which '*the applicant could reasonably expect to continue'.*

In the past years, the Maltese courts had the opportunity to examine whether a planning application created a legitimate expectation and should therefore be determined in accordance with the policies in force at validation stage as opposed to those in force at the moment of the decision should new policies have beenintroduced half way through the process.

[288] *Findlay v Secretary of State for the Home Department* [1984] AC 318
[289] Lisa Webley, Harriet Samuels, *Public Law, Text, Cases and Materials* (Oxford University Press 2018) p 646
[290] *R v Secretary of State for the Home Department, Ex parte Khan*, [1980] 2 All ER 337, [1980] 1 WLR 569, United Kingdom: Court of Appeal (England and Wales), 13 February 1980

The case of **Angelo Farrugia -vs- Il-Kummisjoni għall-Kontroll ta' l-Iżvilupp**[291] is one of the early judgments on the subject of which policies should apply if new policies are introduced during pendency of proceedings. In this case, the court held, in no uncertain terms, that the PAB (today replaced by the EPRT), though being a Board of Second Instance, should apply all policies in existence at the moment when the appeals judgment is delivered and not those in existence at the time when the planning application was filed with the PA. Nevertheless, the court failed to explain the reasons which led it to decide this way.

In another case[292], the applicable policy at the time of validation was DC1/88 entitled Conditions for Development and Design Control. The decision by the Authority was given four years after its validation, that is in 1997, during which time, DC1/88 was still the applicable policy. In its decision, the DCC observed *inter alia* that the area was zoned for development with a maximum height limitation of four floors[293] and consequently proceeded to uphold the application, though it emphasised that the dwelling at the third floor level was to be receded by 4.25 metres from the building alignment whereas the overlying airspace was to remain undeveloped. Nevertheless, the applicant filed an appeal before the PAB and the Commission's decision was confirmed by the Appeals Board on the 12th December 2001, this time round, based on the 2000 Policy and Design Guidance which had replaced DC1/88 during the pendency of the appeal proceedings. The applicant went straight on to the Court of Appeal whereby he insisted that the PAB was a board '*of review'* and should have therefore decided his application according to the laws

[291] *Angelo Farrugia v il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [24th April 1996] (CMSJ) (612/1994)
[292] *Charles Demicoli v L-Awtorita' ta' l-Ippjanar* [27th January 2003] (CAInf) (41/2001)
[293] Four floors as equivalent to ground floor, first floor, second floor and third floor

applicable at the time when the application was determined by the Commission, that is DC1/88.

It follows that plaintiff's arguments were discarded by the Court on the following grounds:

> *'...ir-regolamenti u l-'policies' applikabbli għall-każ odjern huma dawk viġenti fil-mument tad-deċiżjoni tal-għoti jew rifjut mill-Awtorita' ta' l-Ippjanar jew minn wieħed mill-organi kompetenti tagħha...'.*[294]

It should be noted that the Appeals Board was impliedly described as one of the Authority's competent organs when in actual fact it was anything but. The Appeals Board was extraneous to the Authority and its role was precisely to review the Authority's decisions independently. However, what is important in the context of this discussion is that the court had once again reiterated the idea that the PAB was bound to base its decision on the policies *in vigore*' at the time of judgment, even if new policies were introduced during the pendency of appeal proceedings.

Consequently, both judgements of **Farrugia [1996]** and **Demicoli [2003]** highlighted the principle that decision makers should adhere to policies applicable on the date of the decision whatever the case.

[294] '...The rules and policies applicable in this case are those in force at the moment of the decision given by the Authority or one of its competent organs...'

More or less, the court's reasoning is in line with a number of Maltese court judgments meted over the years. For example, in the 1987 judgment in the names **David Harding vs Lawrence A. Farrugia et.**[295], the Court of Appeal made it clear that in the absence of a clear provision, *'il-Qorti hija fid-dmir li tiddeciedi l-kawza li jkollha quddiemha skond kif tiddisponi l-ligi vigenti'.*[296] This was also in line with Section 12(1)(c) of the Interpretation Act which states that once a law is replaced, *'…the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect…'*.[297]

This, however, does not mean that all was fine for the individual applicant. On analysis it soon becomes apparent that applicants could find themselves in a position in which their investment prospects that were planned from the standpoint of the legislation available at the time of application could no longer be met.

Even worse, the court made no exception when a policy was modified during the pendency of the appeal proceedings, hence after a decision was given. In this case, the injustice could thus appear to be even greater since the PAB should in principle have been restricted to examining whether the Authority made the correct technical and legal determinations in the first place and not consider the application as if it were being decided before a Board of First Instance. With this background, applicants could easily end up in a situation where a proposal is rejected by the Appeals Board on the basis of a new policy coming into force during appeal proceedings without being given the

[295] *David Harding v Lawrence A. Farrugia et* [9th February 1987] (CA); see also: *Dottor Filippo Nicolo Buttigieg et v Maggur Gerard C. Gatt R.M.A.* [3rd December 1947] (FH); *Joseph Caruana Curran noe v Anthony Camilleri noe* [29th October 1959] (FH); *Edgar Baldacchino et v Onor. Dr. Tommaso Caruana Demajo LL.D. ne et.* [26th February 1954] (CA)
[296] 'the court is obliged to decide the case in line with the law in force'
[297] Interpretation Act, s 12(1)(c)

opportunity to know whether the Board would have acted differently had there been no change in policy.

Once again. the subject of whether new legislation should take precedence over what was in force at time of validation was also regarded with unease in **Emanuel Mifsud -vs- il-Kummissjoni ghall-Kontroll ta' l-Izvilupp**.[298] What was interesting about this judgment was that the court described a planning application as a '*mere wish'*, unlike a building permit which was an *'att kompjut'*[299], hence tantamount to a *'vested right'*. Incidentally, this judgment was given a year before Act XXIII of 1997 established the principle that a '*valid'* development permission constitutes a vested right through the notion that '…*legislated policies and conditions shall not be applied retroactively so as to adversely affect acquired rights arising from a valid development permit'*.[300]

Without delving into great detail, **Mifsud [1996]** enshrined the principle that no one has a vested right in a fixed, unchanging, legislative pronouncement. In other words, no right is acquired in law unless the right has crystallized under a planning permit and vested as such in the beneficiary. The implications to this judgment are that despite the fact that an applicant can expect that his application be assessed according to law, such expectation is still subject to the general principle that legislation is not static and that one's expectation should be of it changing. What this judgment fails to explain is how individuals who had been beneficiaries of previous policies could put their mind to rest about the Authority not taking irrational or perverse factors when deciding to enact a change.

[298] *Emanuel Mifsud v il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [31st May 1996] (CA) (63/1995)
[299] 'Fait accompli'
[300] Development Planning Act 1992 as amended by Act XXIII of 1997, s 33(1)

The subject of retrospective legislation was also discussed by the courts in the context of enforcement action, specifically whether it should be possible for an individual to assess the risks associated with the carrying out of illegal development and in particular whether retrospective application of laws and policies should be prohibited when the person concerned is not in a position to assess the consequences which a given action may entail. This is different from a situation where an individual submits a planning application and new rules are introduced half way through. In the case of a planning application, it is possible to argue that the act or transaction is not completed, or at most is pending completion. On the other hand, when it comes to enforcement action, the act, in this case the alleged illegality, is said to have been completed.

Frankie Tonna -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar[301] is an example where plaintiff was served with an enforcement notice on the 16th May 1997, on which was alleged that he had constructed a swimming pool in a scheduled location without planning permission. In reaction, Tonna lodged an appeal with the PAB to revoke the said notice whilst concurrently submitting a sanctioning application to the PA with the intent of regularizing the pool. At that time, there was no provision at law suggesting that an appeal from an enforcement notice together with a planning application to sanction that same irregular development could not be lodged simultaneously. On the 26th June 2002, the Board dismissed plaintiff's appeal on the basis of Section 52(11) of Chapter 356[302] which stated that an appeal against an enforcement notice should be dismissed by the PAB once an application to regularize the illegal development is submitted to the

[301] *Frankie Tonna v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [12th January 2004] (CAInf) (22/2002)

[302] Section 52(11) stated as follows: *'If before an appeal is lodged or during the pendency of an appeal, the appellant submits to the Authority an application for development permission regarding the land mentioned in the enforcement notice, the Board shall dismiss the appeal if it is satisfied that the said application is intended to regularize the development mentioned in the enforcement notice*.'

Authority during the pendency of proceedings. This was the view taken by the Appeals Board even though the latter provision was introduced way after the unauthorized development had taken place and the respective enforcement notice served. Plaintiff appealed this very decision before the Court of Appeal (Inferior Jurisdiction), stating that the Board's decision was founded on Section 52(11) which was not yet in force when the enforcement notice was served.[303] Plaintiff insisted that his appeal should have been suspended pending the outcome of the sanctioning application, as was the practice prior to the introduction of Section 52(11). Nevertheless, the Court concluded that the prohibition against retroactive legislation is limited to the area of criminal law and the Board was thus correct to apply the legal provisions that were in force at the time of judgment.

One, however, ought to be careful how to interpret this judgment. Planning enforcement is about an act or omission having allegedly taken place at some point. If a person is alleged to have carried out illegal development when such development was at the time exempt from the need of obtaining planning permission, it is only fair to expect that the said person should not be held liable if the rules are changed *ex post facto*. Let us take a simple example: at present, emergency works in relation to public safety carried out by Government do not require planning permission. But should that no longer be the case due to a change in legislation, government cannot be expected to be served with enforcement action for emergency works carried out until then for the scope of new infringements cannot be extended to acts which previously were not considered as such.

[303] Section 52(11) was in fact introduced by way of Development Planning Act 1992 (Act XXI of 2001) on the 17th September 2001, while the appeal proceedings against the enforcement notice were still ongoing

It is felt, however, that **Tonna [2004]** could lend the impression that new legislation is to take precedence over the policies in force when the illegalities were committed. At the time when Tonna was charged with having built an illegal swimming pool, the law was clear as to the risks that such illegal activity entailed. Tonna knew that he ran a real risk of enforcement action for his unlawful actions, however it was still possible for him to prolong direct action by requesting suspension of appeal proceedings until the sanctioning application was decided. At the time when the illegality was carried out, Tonna was therefore in a position to clearly foresee the risks that the illegal activity entailed since the law was absolutely clear and precise. Still, the Appeals Board decided not to apply the principle of non-retroactivity on the premise that the law had changed by the time it had to deliver judgment.

Whether such reasoning is correct, it is doubtful as it should be possible for an individual to know from the wording of the law what acts and, or omissions will make him liable and what sanctions will be imposed for the act committed and, or omission on his part. A degree of foreseeability that not only the law must, where possible, be proclaimed in advance of implementation, but also foreseeable as to its effects when it also comes to enforcement procedures should be guaranteed in a democracy governed by the rule of law. Plaintiff Tonna was probably right to claim that he was put in a position where he could no longer regulate his conduct at the expense of the principle of foreseeability even if the approach taken by the court could, on the other hand, benefit a wrong doer if an act of illegality is no longer considered so by the time a decision is taken by the Authority or the EPRT.

Another interesting aspect to the discussion on retrospective legislation concerns development permissions subject to third-party appeal. Earlier on, it was explained that legislated policies and conditions may not be applied retroactively so as to adversely affect acquired rights arising from a valid development permit.[304] Is that also true when a third-party appeal is lodged before the EPRT and subsequent policy changes take place during the pendency of proceedings? It is therefore legitimate to ask whether the appealed permit is deemed to be valid permit until the issue is settled once and for all by the EPRT and any new policies introduced during appeal proceedings cannot, therefore, be applied retroactively.

Indeed, it is possible to argue that the appealed permit is a '*valid permit'* in the eyes of the law since applicant can, after all, still proceed with the works at his own risk while a third-party appeal is pending. It would thus seem that there are two sides to the argument:- one, a vested right is deemed to accrue only after the decision process reached finality, in which case new policies introduced at appeal stage would apply retrospectively; two, a vested right is deemed to have been obtained once permission was issued by the Authority so much so that works can take place irrespective of any eventual challenge. That would imply that new policies introduced half-way through the appeal process may not be applied retroactively.

Emmanuel Muscat et -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar[305] provides insight into the matter since it specifically deals with a third-party appeal against the issue of a full development permission and, therefore, one which is intended to obtain

[304] Development Planning Act 1992 as amended by Act XXIII of 1997, s 33(1)
[305] *Emmanuel u Rita Muscat u Pauline Borg et. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (5/2011)

a revocation of what seems to be an acquired right to carry out development. In the year 2000, the *Għaqda Socjali Muzikali Kristu Sultan* was granted permission by the DCC for the conversion of a residence to a band club subject to a condition that sound levels were not to exceed 60 decibels (dB), together with the obligation that a sound check was to be carried out by a competent person prior to the issuing of the relative compliance certificate. Nevertheless, the neighbours (plaintiffs Muscat) lodged an appeal with the then PAB, asking for the revocation of the permit.

The Muscats explained that their bedrooms were separated from the band club with a 230mm masonry skin, alleging that there was also very low sound insulation. In their appeal application, plaintiffs also contended that the 60dB sound limit imposed by the Commission was way above the acceptable domestic sound levels typically acknowledged by the local Courts.[306] Against this background, the plaintiffs held that the permitted use was tantamount to bad neighbourliness in an otherwise designated residential area. On the 26th April 2011[307], the EPRT, which had in the interim period taken over the role from the PAB, delivered judgment.

The EPRT observed that the appeal was lodged in the year 2000 and that the Local Plans together with other planning policies had come into force in the year 2006. The EPRT took note, according to the Local Plans in force at time of judgement, that bars and restaurants were prohibited in designated residential areas, such as the one in question. Embracing the principle that planning decisions should conform to current policies, the EPRT decided that the permission should be modified so as to exclude the bar/restaurant

[306] According to plaintiffs, the Maltese Courts have held that acceptable domestic sound levels should under no circumstance exceed 50dB whereas in the case of rooms next to third party bedrooms, the levels should not exceed 40dB during the day and 35dB at night

[307] Therefore, the case took 12 years to be decided

and barbecue areas. Evidently, the EPRT failed to acknowledge that the permission granted in the year 2000 gave a vested right to applicant so as not to be adversely affected by subsequent policies.

As a reaction, the *Ghaqda Socjali Muzikali Kristu Sultan* (permit holders) filed an appeal before the Court of Appeal (Inferior Jurisdiction), making no reference to vested rights. Instead, the Ghaqda highlighted that neither of the parties had in actual fact pointed out to the EPRT that the decision should have been taken according to the new policies which came in force during the pendency of EPRT proceedings. The *Ghaqda* argued that as things had turned out, the EPRT had converted itself to a Board of first instance since it *ex officio* considered matters not previously discussed by the parties. On its part, the PA made express reference to the previously mentioned **Farrugia [1996]** case and counter argued that the EPRT had to decide in accordance with current policies at the time of delivering judgment.

The Court took on board the arguments of the permit holders and referred the case back to the EPRT for reassessment, since none of the parties had referred to the policies that came *in vigore* during the course of proceedings which polices, as was noted by the Court, took effect years after the appeal was lodged in the year 2000. The Court consequently held that the EPRT had to decide according to those policies which were in force at the time when the appeal was lodged, that is to say the year 2000. The Court also held *obiter* that it was unfair for applicant to have his planning permission revoked twelve years down the line due to changes in policy which took place during the pendency of the EPRT proceedings.

In this judgment, the court relied on the yardstick of fairness, leaving it open whether the court would have acted differently had the appeal been decided within a shorter timeframe. Nevertheless, it could be well argued that the said judgment provided a gateway for legal uncertainty when an equitable solution could be found on the premise that once a development planning permission was granted, applicants acquired a vested right that could not be adversely affected by subsequent policies.

Matters took a surprising twist in the case of **Grace Borg -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[308] in which the court seemed to have decided to distance itself from the long held principle that planning applications should be determined in line with the policies in force at the time of the decision. The facts of the case under examination were the following: Initially, applicant Grace Borg had filed a planning application to construct three additional floors over an existing five storey block in Triq San Piju, Sliema. This application was refused by the DCC on the 3rd October 2006. The Commission, primarily, based its objections on the fact that the proposal was in breach of the statutory height limitation for the area.

Aggrieved by this decision, applicant lodged an appeal with the PAB, insisting that there was already a commitment with a similar development and thus should have been granted permission. Nevertheless, the Commission's decision was confirmed by the PAB on the 6th March 2009 after it held that the proposal was in conflict with the Local Plan, notwithstanding any commitment situated in the vicinity. Applicant subsequently challenged the Board decision before the Court of Appeal (Inferior Jurisdiction), claiming that the Board was obliged to have regard to the surrounding commitment. On the 29th

[308] *Grace Borg v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (28/2011)

October 2009, the Board's decision was revoked by the Court and the Board was directed to review the case having regard to the surrounding commitment in terms of Section 33 of Chapter 356 of the Laws of Malta.

While the proceedings were once again pending before the EPRT[309] (following the Court's decision) Section 33 of Chapter 356 was substituted by Section 69 of Chapter 504 of the Laws of Malta[310], as a result of which the law stipulated that *'...no such material consideration including commitment from other buildings in the surroundings may be interpreted or used to increase the height limitation set out in a plan…'.* On the 28th June 2011, the EPRT made reference to the said Section 69 and the appeal was rejected once more. Aggrieved for a second time, appellant lodged an appeal before the Court of Appeal (Inferior Jurisdiction), noting the EPRT's decision was based on the provisions of Chapter 504, which was not yet in force when the application was initially lodged in 2006. It was argued that the EPRT should have decided in accordance with Section 33 of Chapter 356, which held no restrictions insofar as commitment from other buildings in the surroundings was concerned. The Court held in favor of applicant's arguments. In its decision, the Court highlighted that in the absence of a specific transitory provision, Chapter 504 was to apply only for those planning applications which were lodged with the PA following its promulgation, namely the 1st January 2011. The Court observed that Ms. Borg's application was submitted in 2006 and should have been determined in terms of the provisions of Chapter 356 of the Laws of Malta, being the law in force at the time of validation. The case was therefore remitted before the EPRT for a second review.

[309] At that juncture, the Environment and Planning Review Tribunal took over the role of the Planning Appeals Board

[310] Section 69 of Environment and Development Planning Act took effect on the 1st January 2011

The reasoning adopted in **Borg [2012]** was echoed in another judgment in the names of **Dr. Graham Busuttil -vs- L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[311] delivered by the court on the same day. Clearly, the approach taken by the court in these two cases seem at odds with the generally held principle that *'…the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect…'*[312]. If anything, the absence of a transitory provision should have meant, that all pending matters were to be governed by the new law, unlike what was decided in Borg and Busuttil.

Nevertheless, the position held in Borg and Busuttil was reaffirmed in yet another case[313] in which a certain Emmanuel Vella submitted a planning application seeking the demolition of an existing building and the construction of residential units, during the period in which Chapter 356 was still in force. The application was refused by the then DCC in July 2009 and the refusal was also confirmed by the Authority on the 13th January 2011 upon a request for reconsideration, by which time Chapter 504 had taken effect. This refusal was once again confirmed on appeal by the EPRT on the 13th October 2011.

Subsequent to the EPRT's decision, applicant lodged an appeal before the Court of Appeal (Inferior Jurisdiction) whereby he argued that, contrary to the EPRT's conclusions, the proposed development was acceptable since it was in line with the law in force at the moment of the decision, that is to say Section 69(2)(a) of Chapter 504. But similarly to what was held in **Borg [2012]** and **Busuttil [2012]**, the Court observed that

[311] *Dr. Graham Busuttil v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (26/2011)
[312] Interpretation Act, s 12(1)(c)
[313] *Emmanuel Vella v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [26th June 2012] (CAInf) (49/2011)

plaintiff could not rely on Section 69(2)(a) since his application was validated in the year 2009 whereas Chapter 504 was brought into effect on the 31st December 2010.

At this juncture, the Court's '*new approach*' was entirely based on the premise that the introduction of new rules while a decision is still pending may seriously compromise the ideal of legal certainty, no matter whether applicant was to benefit or not because of the legal changes. Notwithstanding that, these judgments stand out in that they neither followed the *raison d'etre* of previous judgments, nor were they followed in subsequent judgments. In fact, matters took a different turn once again after Mr Justice Mark Chetcuti started presiding over the Court of Appeal (Inferior Jurisdiction) instead of the late Mr Justice Raymond C. Pace.[314]

One of the early judgments on the subject of retroactivity, delivered by Mr Justice Mark Chetcuti, was **Joseph Tanti -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**.[315] The new judge immediately appeared unwilling to subscribe to the reasoning adopted by his predecessor. The Tanti judgement marked a new wave of decisions about retroactivity when it comes to planning judgements, going back to the original position taken in judgements such as that of **Farrugia [1996]** and the string of judgements that immediately followed it.

[314] Mr Justice Mark Chetcuti took over the Court Appeal (Inferior Jurisdiction) in January 2013 after the former Mr Justice Raymond C. Pace who until then presided over cases involving decisions from the Environment and Planning Review Tribunal tendered his resignation from the bench on the 15th December 2012

[315] *Joseph Tanti v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (2/2012)

In this case plaintiff had submitted a planning application in 2006 which was refused by both the Commission[316] and the EPRT[317] on the basis of the Qawra Coast Road Development Brief[318], even though this Brief was published in the year 2007, that is, months after the application was lodged with the Authority. Aggrieved by the EPRT's decision, applicant filed an appeal before the Court of Appeal (Inferior Jurisdiction) whereby he maintained that the EPRT's decision was null and void since the Qawra Brief was not in force when the Authority had validated his application. However, the Court rejected the appeal without going into further detail by simply stating that:

> *'Il-gurisprudenza kostanti f'dan ir-rigward hi illi l-ligijiet u policies li ghandhom jigu applikati huma dawk vigenti fil-mument meta tittiehed id-decizjoni tal-Bord'*.[319]

The court chose its words wisely when it qualified the word '*gurisprudenza*' stating that it was '*gurisprudenza kostanti'* since although its reasoning was not in line with judgements delivered in the previous year (2012), it saw fit to remind that the courts had consistently held the very same reasoning over a span of years previous to that.

The said reasoning was echoed in another case[320] delivered shortly after. At issue was a 2005 development proposal to construct penthouses in the air space overlying an existing two storey block situated within the Urban Conservation Area (UCA) of Zebbug (Gozo).

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[316] 19th December 2011
[317] 3rd January 2012
[318] According to the Qawra Coast Development Brief, the site in question was identified as Zone 2, where a comprehensive development scheme was required for the provision of further recreational facilities, provided free public access along the shoreline is not hindered by any development
[319] 'In this regard, jurisprudence has been consistent in holding that the applicable laws and policies are those in force at the moment when the decision is taken by the Board'
[320] *Charles Schembri f'isem u in rapprezentanza tas-socjeta' C & F Enterprises Limited v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th June 2013] (CAInf) (131/2012)

The proposal was refused by the then DCC on the 5th July 2006 after it noted that the existing building consisted of two floors whereas Policy 10.6 of the Development Control Policy & Design Guidance 2005 only permitted penthouses within UCA's on buildings of four floors or more. Aggrieved by the said decision, applicant filed an appeal before the PAB, insisting that the site was surrounded by similar development to that proposed. In his note of submissions, appellant made extensive reference to other planning applications which had already been upheld by either the Authority or the EPRT on the premise of similar commitments, despite the limitations imposed in Policy 10.6 and the relative Local Plan. Chapter 356 was repealed by the time the judgment was delivered by the EPRT on the 31st July 2012. Section 69(2) of Chapter 504 and the Central Malta Local Plan were then in place.

Against that background, the EPRT held that although appellant had submitted his planning application in 2005, the proposal still could not be justified because Section 69(2) prohibited the granting of additional floors over and above the statutory height limitations as provided in the Local Plan notwithstanding any surrounding commitment that could have existed. The EPRT's decision was subsequently appealed before the Court of Appeal (Inferior Jurisdiction), previous to which it had delivered a string of judgments concluding that Section 69(2)(a) of Chapter 504 was not to apply for sthose planning applications validated before the 31st December 2010.[321] In delivering judgment, the Court, however, rejected plaintiff's arguments holding that the EPRT was correct in its

[321] This is the date the Development Planning Act, 1992 was repealed and the Environment and Development Planning Act became law. In his application, applicant echoed the principles highlighted in Borg [2012] and Busuttil [2012] alleging that the Tribunal had made a wrong application of the law in applying Section 69 of the Environment and Development Planning Act which took effect during the pendency of the proceedings before the Tribunal

decision since Chapter 356 was abrogated on the 31st December 2010 by way of Legal Notice 512 of 2010 and substituted with Section 69 of Chapter 504 on the same day.

At this point, the general impression given by the court was that **Borg [2012]**, **Busuttil [2012]** and **Vella [2012]** never even existed. However untoward it may seem, the author opines that the approach taken by the Court at this stage was legally correct because in the absence of specific transitory provisions, all procedural regulations in newly promulgated legislation should be applied immediately.

In the judgment of **Oliver Ruggier -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[322], the Court of Appeal revisited the principles highlighted in the case of **Mifsud [1996]** whereby a planning application does not constitute a vested right but merely reflects applicant's intentions to undertake development. The court thus stated the following:

> '*…applikazzjoni ma tikkreja ebda dritt iżda biss rieda ta' żvilupp soġġetta għal dak permissibbli u sostenibbli fl-interess pubbliku fejn jidħlu kwistjonijiet ta' ppjanar fil-mument li tittieħed deċiżjoni għax hu f'dak il-ħin li jista' jinsorġi dritt jekk il-liġijiet, pjanijiet u policies jippermettu tali żvilupp'*.[323]

[322] *Oliver Ruggier v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (110/2012)

[323] '…an application does not create any right but it merely shows intentions to carry out development subject to what is permissible and sustainable in the public interest where planning issues during the time of decision are concerned since it is at that time that a right to carry out a development may ensue if laws, plans and policies permit the said development.'

It was therefore clear that the court was going to continue to hold to the principle that new policies introduced half-way through the application process should apply despite the fact that the applicant may find himself in a disadvantageous position being unable to plan for the practical and legal consequences of his investment at the moment of submitting his application. A planning application is clearly considered to be a '*mere wish'* whereas a building permit, being an *'att kompjut'*[324], is tantamount to a *'vested right'* that devolves at the moment when the planning application is favourably determined.

In **Mariella Spiteri -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[325] the court recalled that it was in the proper exercise of the Authority's duty to act for the public good, hence the prerogative to change its policies.[326] For this reason, all planning applications are thus qualified *a priori* by an important reservation, namely that of the Authority's right to change its policies in the future. Indirectly, the Court implied that applicants are well aware in advance that their planning applications are exposed to the potential risk of being assessed in terms of policies which are as yet unknown and hence may not claim a breach of what they hold to be their '*legitimate expectations'* should the legislation be amended during the course of the application process in the name of the common good.

Spiteri [2013], therefore, lends the impression that once a policy is published, applicants are left with no option but to agree to its contents. Indeed, there is no simple way of challenging a Local Plan or a policy before the EPRT on the lack of public interest like,

[324] 'Fait accompli'
[325] *Mariella Spiteri v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (81/2012)
[326] We have already seen that Section 41 of the Development Planning Act, 2016 empowers the Executive Council *'out of its own motion or if so requested by the Minister'* to prepare new plans or policies on *'any matter relating to development planning'* or '*review'* existing plans or policies

say, in expropriation proceedings where persons interested in the land can go to the Land Arbitration Board and contest the public purpose for which the land was expropriated.[327] At best, a Local Plan could be challenged on the traditional grounds of judicial review, possibly under the tenets of *'abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations'*.[328]

Possibly, a planning policy shown to be inconsistent with human rights could likewise be challenged before the First Hall, Civil Court, using Section 116 of the Constitution, which right of action is held not to be time barred and available to all persons without the need to show any personal interest.[329] However so, the court needs to be convinced that an act which lacks the required public interest is tantamount to a breach of human rights, a concept which is not necessarily simple to reconcile. To date, there were no reported instances in which a planning policy was annulled on being inconsistent with human rights or due to the Authority having abused its power. On the other hand, there was one case[330] in which a Local Plan was declared null following a challenge in terms of Section 469A, however due to the Authority being found to have acted in breach of the principles of natural justice when deciding not to consult a second time and not because public interest was lacking.

[327] Government Lands Act, s 41(1)
[328] Code of Civil Procedure, s 469A (1)(b)(iii)
[329] Section 116 of the Constitution states as follows: '*A right of action for a declaration that any law is invalid on any grounds other than inconsistency with the provisions of articles 33 to 45 of this Constitution shall appertain to all persons without distinction and a person bringing such an action shall not be required to show any personal interest in support of his action.'*; See also: *Falcon Investments Limited v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u Avukat Generali* [17th June 2013] (FH) (1198/2011)
[330] *Joseph Sciriha et. v L-Awtorita' ta' Malta ghall- Ambjent u l- Ippjanar et.* [28th January 2016] (FH) (127/2007)

Richard Tua -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar[331] makes good reference since it brings the notions of legitimate expectations, vested rights, legal certainty and common good together in a single judgment. The following principles are all found in the said judgement:

— A planning application does not amount to a vested right but merely reflects applicant's intentions to obtain a planning permission;

— A vested right ensues only when the planning permission is issued;

— In order to guarantee legal certainty and consistency in decision making, all planning applications should be determined according to the applicable policies at the moment of decision by the Authority. On the other hand, appealed decisions are to be determined according to the existing policies at the date when the EPRT delivers judgment;

— Making sure that planning decisions are taken in line with the policies in force at the moment of the decision should result in decisions reflecting the priorities of the legislator at a particular time insofar as sustainable land use is concerned;

— Relying on the policies in force at the moment of the decision may, indeed, be disadvantageous to some, but it could benefit others; and

— Changes in laws and planning policies are matters of public order and when such changes occur during the pendency of appeal proceedings, the EPRT has no option but to draw the attention of the parties of its own motion and provide them with an adequate opportunity to make submissions before a final decision is delivered.

[331] *Richard Tua v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [27th November 2014] (CAInf) (35/2014)

These same principles were iterated by the Court in subsequent judgments, *inter alia* **Carmelo Calleja -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**[332], **Angolina Buttigieg -vs- l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**[333] and **Mario Muscat -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**.[334]

An interesting analogy between planning applications and civil transactions was drawn in **James Zammit -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar.**[335] This is not remotely surprising since Maltese law belongs to a mixed legal family where concepts from the two major legal families, namely the Roman/Civil Law system which regulates a good part of private law and the British system which inspired domestic administrative and planning legislation, sit side by side.

In this case, applicant James Zammit had his 2007 planning application to construct an additional floor refused by the then DCC on the 3rd August 2009 after it found that the proposal would detract from the traditional urban skyline. Applicant proceeded to lodge an appeal with the PAB, insisting that permission should have been issued due to similar commitment situated nearby. In his detailed submissions, applicant quoted an extensive number of cases to show that, in determining a planning application, regard had to be given to material considerations, notably any surrounding commitment which, according to established jurisprudence, could justify the granting of additional stories over and above the stipulated height limitations set out in the Local Plan. The refusal was however

[332] *Carmelo Calleja v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [8th October 2014] (CAInf) (9/2014)
[333] *Angolina Buttigieg v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [11th December 2014] (CAInf) (15/2014)
[334] *Mario Muscat v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [22nd April 2015] (CAInf) (44/2014)
[335] *James Zammit v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (117/2012)

confirmed on appeal by the EPRT on the 9th July 2012 after it held that Section 69 of Chapter 504 had taken effect during the pendency of the proceedings before it, following which *'...no such material consideration including commitment from other buildings in the surroundings'* could '*be interpreted or used to increase the height limitation set out in a plan…'*.[336]

An appeal to the EPRT's decision was filed before the Court of Appeal (Inferior Jurisdiction) on the 9th July 2012, few weeks after the court had established the principle that Section 69 was to apply for all pending applications.[337] The arguments advanced by plaintiff were typical of the reasoning adopted by the Court in **Borg [2012]**, **Busuttil [2012]** and **Vella [2012]**, in the sense that Section 69 was not yet in force when the Authority validated the planning application in 2007 and the EPRT was therefore expected to decide according to previous legislation which contained far less restrictions. The court, which had changed course by the time the judgement was given, did not accept appellant's arguments and *obiter* made reference to the following key principles emanating from continental jurisprudence:

— Acts and transfers are regulated according to the laws in force at the time when they are given effect;

— When an act or transfer commences under a particular law but sees termination under a subsequent law, such act or transfer is regulated in terms of the latter law;

— Only when a right is obtained under a previous law, it shall remain so protected under the subsequent law.

[336] Environment and Development Planning Act, s. 69 (2)(a)
[337] See *Grace Borg v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (28/2011); *Dr. Graham Busuttil v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (26/2011)

Finally, it is interesting to point out is that the court made no distinction between a planning application in process and a positive recommendation prior to a decision, as these were both considered not to constitute a vested right.

The difference between a recommendation and a decision was also pronounced in **Michael Axisa -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar.**[338] This was a case in which the application process was prolonged, through no fault of the applicant. In fact, plaintiff Axisa had submitted a planning application '*to sanction garages as built'* to the PAPB[339] in 1984 and this was decided upon twenty-six years later by MEPA. The application was in fact refused on the pretext that the garages were located outside the development zone. This decision was later confirmed by the EPRT on appeal on the basis that planning decisions should be determined according to the policies in force at the time of the decision, in this case the Structure Plan.

An appeal was filed from the EPRT's decision before the Court of Appeal (Inferior Jurisdiction) wherein appellant claimed that although the Minister had failed to endorse his application as required by the law at the time, the permit was endorsed by the PAPB and the relative payments associated with the issuance of the permit were also affected. Plaintiff argued that once the Authority took over the previous role held by the PAPB, it was obliged to issue his permit since he claimed to have a vested right which prevailed over current policies. Plaintiff's arguments were however outrightly rejected. As one would expect, the Court reasoned that the PAPB's '*approval*' was only tantamount to a

[338] *Michael Axisa ghas-socjeta Lay Lay Co. Ltd v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14thJanauary 2015] (CAInf) (44/2013)
[339] Planning Area Permits Board (PAPB) was the predecessor to the Planning Authority

favourable recommendation which ultimately had to be endorsed by the Minister according to the laws in force at the time. The Court held that:

> *'Lanqas jista' jingħad li kien hemm aspettativa legittima li jinħareġ permess għaliex ir-rakkomandazzjoni ma kinitx approvazzjoni tant li kien jeħtieg l-approvazzjoni finali tal-Ministru.* '[340]

3. VESTED RIGHTS

So far, the discussion centred around the idea that '*a valid development permit'* constitutes a vested right in such a way that new planning policies cannot be used to adversely affect those rights should applicant submit a fresh application on the same site. This notion was made law by virtue of Act XXIII of 1997[341], only to be carried forward in all subsequent legislations. Consequently, vesting is clearly dependent on whether permission is still valid. However, the term *'valid development permit'* could be a misnomer since permissions remain valid for a specified period. The questions to be asked, therefore, are: What happens once works are completed and the permission no longer valid? Is it possible to claim that the completed works are immune to new policies should applicant decide to submit a second application on the same site? If that is the case, what if the works were not strictly carried out according to permission? Would it make a difference if the deviations were occasioned by site restrictions and the permit holder is found to have acted in good faith? What if works are not completed by the time

[340] 'It cannot be said that there was a legitimate expectation that a permission would be granted since the recommendation was not tantamount to an approval, so much so that that permit approval required the Minsiter's final endorsement.'

[341] Development Planning Act 1992 as amended by Act XXIII of 1997, s 33(1)

the permit is no longer valid? What is the situation if the permitted works cease to exist? Would it make a difference if a building perishes through no owner's fault?

What these questions are essentially asking is whether a perpetual right to hold on to a permit could be claimed once works are taken in hand and the said permit's time-frames expire. This becomes all the more important when the land owner subsequently decides to undertake further interventions on a site where development has already taken place following a permit and that permit is no longer valid.

This brings us back to the 'vested rights doctrine' which was already tackled briefly in the literature review. A vested right was held to be *"a right which the law recognizes as having accrued to an individual by virtue of certain circumstances and that cannot be arbitrarily taken away from that individual*".[342] Unfortunately, there is not one common line of thought among scholars with regard to when a vested right arises. In fact, when commenting on the subject, Cunningham & Kremer observed that the vested rights doctrine is often a confusing morass of inconsistent decisions and arbitrary results.[343]

Some commentators, however, hold on to the idea that *"the only time a developer has a true 'vested right' to develop is after he has literally established that right in concrete, the concrete of the building's foundation"*.[344] This line of thought seems to imply that a vested right accrues once the foundations are physically in place. The downside to this is

[342] John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment and Due Process and Taking Claims* (19 Wash. U. J. Urb. & Contemp. L. 27, 32, 1996) p 31

[343] Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process* (29 Hastings L.J. 1978) p 625

[344] William A. Fischel, *The Economics Of Zoning Laws: A Property Rights Approach To American Land Use Controls* (67 John Hopkins University Press 1985) p 23

that a developer may be encouraged to prematurely engage in activities to establish the substantial reliance required to vest his right to develop without continuing the works and, as a result, the site remains in an unsightly state.

Having said so, the "physical test" is not the only method to claim that a permit has been rendered perpetually valid. One other approach is to also look at substantial investment or a balancing of interests in order to determine if rights have vested. This is the so called "proportionate/ratio test" or the "balancing test" which measures substantial reliance by comparing the amount spent on the project to the estimated total cost of the project.[345] Expenses, in this case, could also include pre-construction expenses because of the necessary investment of time and money in the conceptual, pre-construction stage of development.[346] The balancing test, therefore, is more fact sensitive. Of course, both the "physical" and the "balancing" test assume that the works carried out are in line with the permit conditions because there can never be a magical rule which converts a violation into a vested right.[347]

The following Maltese judgments were analysed in an attempt to establish at which point vesting could be said to occur once a development permit is in hand, keeping in mind the theoretical principles discussed above.

In **Philip Cortis -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[348] the court qualified that '*…permess maħrug jikkostitwixxi dritt kweżit u l-iżvilupp konformi mal-*

[345] Daniel R. Mandelker, *Land Use Law 234* (3rd edn. 1993) p 240
[346] David G. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes* (Urb. L. Ann. 63, 1971) p 91
[347] *Town of Derry v Simonsen* [1977] 117 NH 1010
[348] *Philip Cortis v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [22nd January 2014] (CAInf) (170/2012)

permess ma jistax jintmiss'[349], removing any doubt that notwithstanding works being completed, rights are lost once the validity period of the permission expires. In this case, plaintiff filed an application to sanction a chicken farm, which use had been approved in a previous permit in 1997. Permission to carry out further extensions was granted through a second application lodged in 2005. Applicant carried out the works, however failed to adhere to the latest approved drawings when he increased the built footprint by 300 square metres. Consequently, in 2007, applicant submitted a sanctioning application with a view to regularizing the unauthorized interventions but permission was denied once the Commission held that the scale, planimetry and proposed uses were unjustified for the needs of a poultry farm.

The Commission also observed that applicant had failed to follow the conditions imposed in previous permits. In view of the Commission's decision, applicant lodged an appeal before the EPRT, claiming that the site was legally committed as a chicken farm by way of previous permits. In addition, plaintiff maintained that the unauthorized extensions were built to cater for the high activity demand. For its part, the EPRT took umbrage at the then MEPA for having granted permission to construct a farm on such an environmentally sensitive site, resulting in irreversible damage. The EPRT however issued a temporary sanctioning permission on the suspensive condition that in twenty-five years' time, permission would have to be sought again for the purpose of ascertaining whether the policies during that period would still allow the building to be used as a '*farm*'. Plaintiff appealed the decision before the Court of Appeal (Inferior Jurisdiction), insisting that the twenty-five-year condition was in breach of his vested rights since the

[349] '...An issued permission constitutes a vested right and the development which is in conformity with the permission cannot be touched'

'*use*' was clearly permitted for an indefinite period through previous applications. The Court, in fact, held in applicant's favour after highlighting that the permits preceding the sanctioning application gave assurance that the approved use could intrinsically continue without being effected by retroactive application of new laws:

> *'Dan l-appell hu wieħed ġustifikat fis-sens illi t-Tribunal injora principju bażilari cioe li permess maħrug jikkostitwixxi dritt kweżit u l-iżvilupp konformi mal-permess ma jistax jintmiss. Kwindi meta t-Tribunal illimita l-permess għall-użu tas-sit sħiħ għal 25 sena kien qiegħed ibiddel kundizzjoni ta' permess maħruġ u li ma jistax jitpoġġa in kontestazzjoni. ……It-Tribunal ma setax juża l-argument li l-permessi oriġinali ma messhomx inħarġu u kwindi juża din l-applikazzjoni biex ibiddel dak ġia akkwizit'.*[350]

Still, it is worth noting that in the court's own words, an existing development should be '*konformi mal-permess*'[351] for applicant to be in a position to claim immunity from future policies should he eventually decide to lodge a new planning application. In this case, it is perhaps ironic that the court ignored this same principle since the building *per se* was clearly not built according to permits unless, of course, one were to accept the principle that '*uses*' should be considered independently of '*works*', though pertaining to the same permit.

[350] 'This appeal is justified in the sense that the Tribunal ignored a basic principle, namely that once a permit is granted, this constitutes a vested right, and that any development carried out in conformity with such permit cannot be tampered with. Therefore, when the Tribunal limited the use of the entire site for a period of 25 years, it was altering an already approved permit which cannot be contested. ... ...The Tribunal could not make use of the argument that the original permits should not have been granted and thus make use of this application for the purposes to altering that which has already been acquired.'

[351] 'in conformity with the permit'

The idea that vested rights cannot be tainted by illegalities featured prominently in a number of judgments. One example is **Alfred Manduca -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**.[352] Mr Manduca filed a planning application to sanction the construction of a farmhouse as built, but his request was denied after the Authority found that the built footprint exceeded the floor space permitted in outside development zones. The Authority considered that the proposal, if accepted, would have led to further urbanization and unnecessary urban sprawl. Subsequently, applicant filed an appeal before the PAB. To substantiate his arguments, applicant (now appellant) submitted a geological report to justify why the building was built differently from what was approved. The report presented suggested that had the building not been finalised as was in fact constructed, the neighbouring properties risked collapsing. It identified that in the particular circumstances, a walled basement had to be created, until a sound bearing stratum was reached so as to stabilize the weak foundations for the purpose of mitigating the danger. This, of course, resulted in an inevitable increase in massing which was not contemplated in the permit.

In reply, the Authority counter argued that the basement was built prior to applicant obtaining the necessary clearances and reiterated that permission should not be granted since the massing went contrary to the current policies at the time. The EPRT rejected the appeal and held that as a matter of principle, it is precluded from delving into engineering issues, adding that *'...kull argument strettament ta' natura teknika ma jistax jintuża biex jiggustifika l-fatt li dan l-iżvilupp f'sit sensittiv u ODZ spicca t-tripplu ta' dak li kien permess'*.[353] Appellant, however, decided to appeal the EPRT's decision before the Court

[352] *Alfred Manduca v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (42/2013)

[353] '…any argument of a strictly technical nature cannot be used to justify the fact that this development, which in a sensitive site and ODZ location, ended up three times bigger than the permitted size.'

of Appeal (Inferior Jurisdiction), quoting Section 51(d)(i) of Chapter 504. This stated that the Authority had to ensure that:

> *'…plans, policies and programmes are holistic and comprehensive so that all factors in relation to land and sea resources and related environment conservation are addressed and included and to balance demands for development with socio-economic considerations and the need to protect the environment'.*

Appellant went on to claim that just as what happened in his case, the Authority had to distinguish between self-induced danger and unsolicited danger. In its assessment, the Court however rejected applicant's arguments and embraced the EPRT's decision, adding the following:

> *'Darba li hemm permess, u t-titolari tal-permess jirriskontra problemi tekniċi li skond hu huma insormontabbli, waqt l-iżvilupp, li jibni skond il-permess, għandu jitlob tibdil u modifiki. F'dan l-istadju l-Awtorita` tikkonsidra x'inhu fattibbli tenut kont tal-policies u liġijiet applikabbli. Pero` mhux aċċettabbli li permess jiġi njorat u jsir bini mhux konformi mal-permess u li jivvjola l-policies eżistenti u jippretendi sanzjoni għalih'.*[354]

[354] 'Once a permit is issued and applicant comes across technical problems, during construction stage, which in his view are insurmountable and which make it difficult for him to develop according to the permit, he has to ask for changes and modifications. At this stage, the Authority considers what is doable keeping in mind the applicable laws and policies. However, it is not acceptable that a permit is ignored and that development not in conformity with the permit and in breach of the existing policies takes place and that applicant expects its sanctioning.'

In a sense, the same principles were reiterated in **Joseph Borg -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[355] concerning a planning application for the sanctioning of a perimeter wall and the proposed shifting of a garage which, according to applicant, was covered by an earlier building permit. The application was rejected after the PA noted that the site was zoned as a scheduled buffer zone of archaeological importance and the proposal was thus in breach of the policies at the time, namely Policy NWCO04 of the North West Local Plan.[356]

Aggrieved by the Authority's decision, applicant insisted with the EPRT that he was in possession of a previous permit showing a boundary wall and a garage occupying a floorspace of thirty square metres. Though admitting that the garage was not built in the exact location shown in the approved plans, applicant still contended that he was immune from current policies. The EPRT, however, rejected the said arguments on the pretext that Section 70 of Chapter 504 prohibited the sanctioning of unauthorized interventions in scheduled areas, regardless of when the illegalities took place.

Appellant appealed the decision before the Court of Appeal (Inferior Jurisdiction), reiterating that he had a building permit issued in 1991 to construct a garage on that same site, which permit gave him assurance that the garage would remain intact. The Court nevertheless observed that the garage was built on a different location from that approved, so much so that appellant was attempting to sanction his own illegalities through the

[355] *Joseph Borg v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [11th December 2014] (CAInf) (6/2014)

[356] Policy NWCO4 of the North West Malta Local Plan specifies that in the case of Class A archaeological sites, no development will be permitted which would adversely affect the monument or site or it natural setting and that a buffer zone of at least 100 m around the periphery of the site will be established in which no such development will be allowed

application under review. Concluding, the Court held that the 1991 permit had lost its relevance once it was not '*attwat'* as approved.[357]

Jean Paul Busuttil -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar[358] echoed the reasoning adopted in **Borg [2014]** delivered by the Court of Appeal (Inferior Jurisdiction) on the same day. The facts at issue were as follows: In 2010, plaintiff submitted a planning application to sanction a farmhouse '*as built'* outside the development zone, which application was turned down by the Authority after it found *inter alia* that the proposal ran counter to Policy CG04.[359] The Authority also highlighted that there were no reasons from a planning point of view as to why such development could not be located in an urban area.

The Authority's decision was appealed before the EPRT, wherein applicant contended that he had obtained permission to construct a farmhouse on that same site way back in 1983. In reply, the Authority acknowledged the existence of a building permit to construct a farmhouse on that same site as had been pointed out by applicant. Nevertheless, the permit plans showed a different plan configuration from what actually existed on site. Indeed, the case officer representing the Authority noted that applicant's farmhouse occupied a footprint of circa 500 square metres whereas the approved footprint only totaled 160 square metres. The EPRT rejected the appeal and confirmed that the landowner was not protected since works on site did not tally with the permit plans.

[357] 'actualized'
[358] *Jean Paul Busuttil v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [11th December 2014] (CAInf) (180/2012)
[359] Policy CG04 of the Central Malta Local Plan does permit dwellings (including farmhouses/farmer's dwellings) in Category 2 Settlements but these are limited to a maximum footprint of 150sq.m and floorspace of 200sq.m

The decision was subsequently appealed before the Court of Appeal (Inferior Jurisdiction). Once again, appellant reiterated that he had a building permit to construct a farmhouse on that same site and therefore had a vested right. The Court however observed that plaintiff acknowledged that his building was illegal, so much so that he had sought to sanction that same building, which application had been rejected and now formed part of this same appeal. As with **Borg [2014]**, the Court's conclusions were based on the principle that vested rights are deemed incompatible with illegalities.

From the above judgments it transpires that all works covered by permission are required to comply with the conditions stipulated in the permit for the Court to admit the existence of a vested right. Although that seems to be a very proper and logical *iter* for such permits, on a deeper analysis, there are a few issues that stick out like sore thumbs. The first one is notably that the degree or seriousness of the illegality involved seems to be irrelevant. Likewise, the nature and/or type of the illegality at issue also seem to be irrelevant.

A natural consequence to this is that a building, though permitted, which was constructed slightly out of alignment and one that was constructed entirely without permission are put on a par since both fail to reflect what is shown in the approved plans. Although, in practice, this position would seem effective to prevent abuse, there is no doubt that it is not necessarily the most practical approach that one could adopt.

The issue of vested rights could also arise when a valid permission is sought to be renewed and held to be no longer valid by the time it is decided. Under the first Planning Act, a development permission could be granted for '*a limited period or in perpetuity'*.[360] For a

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

permission to have remained operative, it was necessary for it to be simply '*acted upon'* within twelve months of issue.[361] On the other hand, once a permission was not '*acted upon*', it was rendered inoperative, meaning that a new application was required. A potential problem, however, was with the definition of the term '*acted upon'* since no satisfactory explanation was given as to the degree of input required by the developer to claim that the permission was indeed '*acted upon'*. Whether the term '*acted upon'* implied that the site had to be merely committed with physical works or that works had to be almost completed remained an open question. The difficulties presented by the choice of words in this particular clause extended to the notion of due diligence since the law, besides imposing a twelve-month time-frame within which a permission had to be acted upon, also stated that this had to be done with '*due diligence*'.[362]

In one case[363] the Authority had issued full development permission for the sanctioning of various structural alterations in a licensed ground floor restaurant forming part of a block of apartments. The license to operate the premises as a restaurant was issued by the Police prior to the setting up of the PA in 1992. Subsequently, the permission was appealed before the PAB by a third party residing within the same block, who drew the attention of the Board that the premises had operated as a supermarket for some time during the mid-1990's after the Authority had granted permission for such use in 1994. To reinforce his arguments, appellant brought forward a number of affidavits containing sworn declarations from various individuals who confirmed that they were regular clients of the former supermarket. In its arguments before the EPRT, the respondent Authority

[361] *Ibid*
[362] *Ibid*
[363] *Alex Grech f'isem u in rapprezentanza tar-residenti ta' Les Roches, Qui-si-Sana, Sliema v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Noel Agius* [5th November 2016] (CAInf) (19/2015)

stood by its decision on the premise that applicant had failed to abide with the 1994 permit conditions, in that he had failed to obtain a trading license prior to operating his premises as a supermarket and consequently, the 1994 permit was rendered without effect.

On the other hand, the EPRT was reminded that applicant had a valid trading license to operate his premises as a catering establishment, which kept on being renewed since a time prior to the setting up of the PA. The EPRT agreed with the Authority and held against the objector, who in turn filed an appeal before the Court of Appeal (Inferior Jurisdiction), claiming that despite the applicant not abiding by the permit conditions, the 1994 permit for the operation of a supermarket was still *in vigore*. On its part, the Court referred to Section 33(3) of Chapter 356[364] and held that a development permit would cease to be operative only if it is not *'acted upon'* within twelve months of its issue. To this end, the Court did not rule out that the premises were covered by a permit to operate as a supermarket.

This judgment seems to imply that once the premises were '*used'* as allowed, the permission was duly '*acted upon'* in terms of law, regardless of the duration, and adherence to permit conditions, in this instance a requirement to obtain a trading license prior to commencement. With this in mind, it is unclear how the '*due diligence*' requirement[365] came into play when the court showed little concern with regard to whether the permit conditions had been complied with.

[364] Section 33(3) of the Development Planning Act, 2016, applicable at the time when the 1994 permission was issued, stated that '*A development permission may be granted for a limited period or in perpetuity, but shall in all cases cease to be operative if it is not acted upon within twelve months of its issue or if, having been so acted upon, works are not pursued with due diligence*.'
[365] *Ibid*

After the introduction of Act XXI of 2001, it was no longer enough for a planning permission to be '*acted upon'* for it to remain operative but the approved works had to be completed within five years of issue[366] unless tighter time frames were imposed, for good reason.[367] Yet, the default period, now five years, could be extended '*to such further period or periods as it* (the Authority) *may consider reasonable'*[368] following a renewal application. It was therefore up to the Authority to decide whether to renew the permit for any other period. What was deemed to be '*reasonable*' was not defined in the law and it was up to decision makers to set the criteria.

Having said this, the accepted position was that valid planning applications could be renewed without prejudice to new policies if works were found to have reached an advanced stage. This was the position, for example, in **Gerald Cassar -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[369] where the facts were as follows: A full development permission was obtained to construct a complex on three floors but no works were carried out. Subsequently, plaintiff sought to renew his permission. At the time, the law was silent with regard to the criteria which the Authority or the EPRT were to use in deciding whether a permission were to be extended or not. The Authority denied applicant's request due to the fact that the area had been re-zoned for two floors and no works had been undertaken on site.

As a reaction, plaintiff lodged an appeal before the EPRT, insisting that the original permission vested a right in his favour which could not be taken away. He also held that

[366] *Ibid*
[367] Development Planning Act 1992 as amended by Act XXI of 2001, s 33(3A)
[368] *Ibid* : s 33(3)
[369] *Gerald Cassar v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (145/2012)

the neighbouring area was committed with a three-storey development. This notwithstanding, the EPRT, held against applicant and confirmed the appealed decision. Plaintiff lodged an appeal against the EPRT's decision before the Court of Appeal (Inferior Jurisdiction) holding that his application for renewal, was filed with the Authority when the original permission was still valid and consequently the previous policies, which would have allowed him to build three floors, were still to apply. The learned Judge Chetcuti however emphasized that the success of a renewal application depends very much on the *'progress ta' żvilupp li jkun sar fuq is-sit'*[370] even though the law prescribed no criteria which the Authority or the EPRT could use when deciding whether the permission were to be extended or not. Also, the Court made it clear that *'commitment'* in the ambit of renewal applications refers to the extent of physical development witnessed on site and has nothing to do with the degree of committed development located within the site's vicinity.

A similar situation arose in **Roseanne Gafa` -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**.[371] At issue was a renewal application for two back to back bungalows which were permitted in 2003, namely, prior to the introduction of Policy 3.2 of the Development Control Policy & Design Guidance 2007 which required a minimum side curtilage of six metres to be retained around detached dwellings. At the time when applicant filed the renewal application in 2005, only one of the two approved bungalows had been constructed. The said renewal application was subsequently rejected by the Authority, which decision was also confirmed by the EPRT on appeal. Both the Authority and the EPRT based the decision not to renew permission since there was no '*firm*

[370] 'The extent of development undertaken on site.'
[371] *Roseann Gafa' v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (14/2013)

physical commitment on site for the lower bungalow' and consequently, a side curtilage of six metres, as required by the new policies, was to be provided. This signified that the applicant could not proceed with her development. It is instructive to note that at the time, there was no indication of any criteria upon which the Authority or the EPRT could decide whether the permission was to be extended or not. Subsequently, applicant appealed the EPRT's decision before the Court of Appeal (Inferior Jurisdiction) insisting that in assessing whether there was '*firm commitment'*, the site in question had to be viewed as a '*whole*', even though no works pursuant to the second bungalow had begun.

Although there were no set legal criteria, as previously stated, the case was remitted to the EPRT for it to assess the degree of '*prejudice*' that applicant would suffer should the application for renewal be rejected because of the new policies. This was one way of protecting the permit holder against subsequent legislation if it were found that *'he has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change'.*[372]

Yet, the Court made no attempt to qualify the term '*prejudice*', leaving it up to the EPRT whether the prejudice was to be based on whether the investment incurred was substantial to justify continuation or on whether the issue was one of aesthetic integrity, or lack thereof, should the site remain '*as is'* or on other similar matters. The matter was left wide open to interpretation.

[372] Grayson P. Hanes, Randall J. Minchew, *On Vested Rights to Land Use and Development* (46 Washington & Lee Law Review)

Matters took a different route following the introduction of the current DPA. Notwithstanding the fact that it remained possible to renew full development permissions should works not be completed within the stipulated time frames, the Authority was no longer bound by what it thought to be reasonable. Instead, the Authority is now required to ascertain two things prior to deciding whether to renew a permission:- firstly it needs to ensure that the application for renewal was submitted while the previous permission was still operative and secondly, it has to assess whether the site subject to the application was '*committed in relation to the new plans and policies'*.[373]

Still, it is unclear whether commitment *'in relation to the new plans and policies'* is said to subsist solely when compliance with the new policies necessarily entails the removal of already permitted works or if it is enough to submit a commencement notice[374], utilizing the permit in the process. One case involving a renewal application in terms of Section 72(4) of the current DPA is **Michael Zammit et nomine -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[375] in which the facts at issue were as follows:- In 2012, plaintiff had obtained a full development permission to replace an underground fuel tank to service a petrol station situated in a UCA, which permission was to remain valid until 2017. In the interim period (2015), the PA introduced a policy regulating fuel service stations which *inter alia* encouraged the relocation of existing fuel stations from UCA's due to their incompatibility with general safety and residential amenity. In 2016, plaintiff filed a planning application to renew his 2012 permission, well knowing that no steps

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

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

[375] *Michael Zammit in rapprezentanza ta' Go Fuels Limited v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)* [30th April 2018] (CAInf) (7/2018)

were taken to carry out any works. The request was however denied by both the Authority and the EPRT since the proposal was found to be incompatible with the new fuel policy.[376] The EPRT's decision was appealed before the Court of Appeal [Inferior Jurisdiction], whereby plaintiff claimed that he had a vested right arising from a valid permission. On its part, the Court considered that no works had been carried out in relation to the tank, hence the new policies were to apply.

What mattered to the court was that no works covered by the previous permission were detected on site. For this reason, the court held that the EPRT was correct not to renew the permit, regardless of the financial prejudice that applicant was about to face. It is safe to believe that the court would have acted differently had works on the tank area been initiated. Still, one cannot pinpoint the level of progress that would have been required in order to confidently hold that the criterion regarding *'commitment in relation to the new plans and policies'* be considered satisfied, given that works on site had never been initiated. One is equally in no position to evaluate the interplay, should there be any, between a commencement notice and the '*commitment'* in the context of Section 72(4) since that issue was not tackled by the court.

The subject of vested rights in the context of property which ceases to exist is also worth discussing. The DPA, as was the case with previous legislation, is completely silent on this matter but if one were to draw an analogy with other real property rights, such as active or passive easements, one finds that these are maintained when a new wall or a

[376] The new Fuel Policy was applicable since the site was found not to be 'committed' in terms of Section 72(4) of the Development Planning Act, 2016 given that the approved works, that is the construction of the tank approved in the year 2012, were never undertaken

house is demolished and reconstructed.[377] Nevertheless, development planning rights appear to become extinguished once a property no longer exists.

In the case of **Albert Satariano et -vs- l-Awtorita' tal-Ambjent u l-Ippjanar**[378], the landowner decided to demolish an old building and replace it with another, even though he had no building permit in hand. Eventually, the PA issued an enforcement order which was not contested by the landowner within the statutory sixteen-day timeframe. A few years later, the Authority proceeded with direct action and cleared the site of all existing buildings, following which the landowner instituted a case for judicial review of administrative action[379] before the First Hall (Civil Court) against the Authority, claiming that the Authority was obliged to reinstate the site with the original building, the legality of which was never contested. Nevertheless, plaintiff's arguments were rejected after the Court opined that any right which plaintiffs could claim with regard to the old building ceased to exist once the Satarianos decided to proceed with the demolition works and construct another building without planning permission. In fact, the conclusion reached by the First Hall, later confirmed on appeal, were the following:

> *'kull dritt li seta` kellhom l-atturi fil-binja l-antika intemm meta huma stess għazlu li jwaqqgħuha u jibnu mill-ġdid mhux skont il-permessi li kellhom'.*[380]

[377] Civil Code, s 424
[378] *Albert u Maria Dolores sive Doris Satariano v L-Awtorita` tal-Ippjanar* [28th March 2004] (CA) (1721/2001/1)
[379] Code of Organization and Civil Procedure, s 469A
[380] 'any right which plaintiffs could claim with regard to the old building ceased to exist when plaintiffs decided to demolish it and proceed with the construction of a new development without a permit.'

The conclusions held in **Satariano [2004]** were reflected in the case **Austin Agostino sive Xuereb -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[381] following a planning application seeking '*to rehabilitate existing agricultural rooms*' in a field situated outside the development zone of Rabat. The said application was initially turned down by the PA after it held that the proposed development was in breach of various Structure Plan policies. Subsequently, applicant appealed the decision before the EPRT, thereby insisting that the said application amounted to the rehabilitation of previously existing rooms, on which he believed to have a vested right. Nevertheless, the EPRT concluded that there was no scope for rehabilitation since the rooms had fallen into ruins. The EPRT's decision was appealed before the Court of Appeal (Inferior Jurisdiction). In his appeal, applicant (now, appellant) submitted that the EPRT made a wrong application of the law, reiterating that he had a vested right to rebuild the rooms. The Court however disagreed with plaintiff and held that the EPRT was obliged to assess whether the proposed interventions were in line with current plans and policies even though in this case, unlike in **Satariano [2004]**, applicant had no direct contribution to the events preceding the collapse.

Also relevant to this theme is the case of **John Mary Vella -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[382] involving an enforcement notice issued against the owner of a restaurant following allegations that a chimney stack had been installed without permission, which notice was confirmed by the EPRT following an appeal. The EPRT's decision was appealed before the Court of Appeal (Inferior Jurisdiction) where plaintiff argued that the chimney in question was installed more than thirty years earlier

[381] *Austin sive Agostino Xuereb v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (147/2012)
[382] *John Mary Vella v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [5th November 2015] (CAInf) (21/2015)

despite the fact that his architect had failed to indicate it in the drawings forming part of a more recent application which led to the demolition of the previous building where the chimney had allegedly already been installed. In its *ratio*, the court explained that the rules of acquisitive prescription[383] are alien to Maltese development planning law, further noting that, in any event, applicant had demolished the property in the process and lost any vested right that he could have possibly had, which rights were certainly not acquired through the institute of acquisitive prescription.

As is evident, the common thread between these last three judgments is that landowners may not claim any rights on a development which is no longer in place.

4. THE 'SHALL APPLY'/'SHALL HAVE REGARD TO' DICHOTOMY

The criteria on which decision makers should rely upon in the course of determining planning applications were also examined in the previous chapter. When the PA was initially established by virtue of Act I of 1992, decision makers had to adhere with Section 33(1) which was worded as follows:

> *'... the Authority shall have regard to development plans, to representations made in response to the publication of the proposal and to any other material consideration, including aesthetic, sanitary and other considerations.'*

[383] Section 2143 of the Civil Code states that '*All actions, whether real, personal or mixed, are barred by the lapse of 30 years, and no opposition to the benefit of limitation may be made on the grounds of the absence of title or good faith.*' For the purposes of 30-year acquisitive prescription it is enough to show that the person had occupied the land with the intention of becoming owner (*animus domini*) provided that possession had to be continuous, not interrupted, peaceful, public and not equivocal

As already discussed, this provision was clearly modelled on Section 70(2) of the Town and Country Planning Act, 1990, which was incidentally repealed a few months before Section 33 took effect.[384] The term '*shall have regard to'* was followed by a list which presented no order of priority. Four years on, *'policies emanating from existing structure plan and from any subsidiary plans'*[385] were identified in the list, meaning that decision makers had to also take stock of important details which are very often not included in the more generic subsidiary plans.

Section 33(1) was modified significantly in 2001[386] and reworded in a manner in which decision makers were now required '*to apply*' plans and policies and not simply have regard thereof. Still, there was a requirement *'to have regard to'* material considerations and representations. Section 33 was replaced with Section 69 of the EDPA , though nothing changed much except that '*commitment from nearby buildings could not be used as a material consideration to justify heights which were over and above the height limitations set out in the plan'*.[387] Clearly, that was a reminder to decision makers not to deviate from the height limitations set out in plans.

Section 69 was eventually replaced with Section 72(2) of the current DPA so that decision makers were no longer required to *'apply'* plans and policies but instead *'have regard'* to plans, policies, material considerations and representations with no apparent order of priority. In essence, the situation reverted back to that prior to 2001.

[384] Section 70(2) similarly stated that in dealing with application for planning permissions, the local planning Authority '*shall have regard to the provisions of the development plan, so far as material to the application, and to any other material consideration.'*
[385] Development Planning Act 1992, s 33(1)(a)
[386] Development Planning Act 1992 as amended by Act XXI of 2001, s 33(1)(b)
[387] Environment and Development Planning Act, proviso to s 69(2)(a)

The court's response to the above developments will now be examined:

Prior to the promulgation of Act XXI of 2001, namely when Section 33 of the DPA stipulated that, in determining planning permissions, the PA had to *'have regard to'* '*development plans'* together with '*material considerations'* and '*representations made in response to the publication of the proposal'*, it was accepted that the schemed height limitations could be overruled if it was shown that the immediate area was sufficiently committed with similar development.

During this period, the settled position by the PAB was that statutory height limitations could be overruled when it could be demonstrated that commitment had been achieved without adverse effect on the particular character and amenity of the area as provided in policy PLP 10 (Interim Review of Building Heights Pending Local Plan Completion).[388] This means that, notwithstanding the *'shall apply plans and policies'* requirement was not promulgated as yet, decision makers were still not given a *carte blanche* to overrule policy requirements as they pleased.

Alexander Agius -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar[389] was delivered in 2003, by which time Act XXI of 2001 was enacted, binding decision makers to apply development plans and planning policies whilst having regard to material

[388] See for example: *Alex Montanaro ghan-nom u in rapprezentanza ta' The Park Lane Co v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [9th February 2001] (CA) (215/1998/1); *John Borg u Baskal Camilleri v Il- Kummissjoni ghall-Kontroll ta' l-Izvilupp* [19th October 1998] (PAB) (425/1996); *Tony Borg f'isem Alpha Tours Ltd. v Il- Kummissjoni ghall-Kontroll ta' l-Izvilupp* [16th June 1999] (PAB) (295/1998); *Paul Borg v Il- Kummissjoni ghall-Kontroll ta' l-Izvilupp* [23rd February 2000] (PAB) (59/1995); *Joseph Debono v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [31st May 2000] (PAB) (111/1998); *Charles Bugeja v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [19th July 2000] (PAB) (627/1998)

[389] *Alexander Agius v L-Awtorita' ta' Malta dwar I- Ambjent u l-lppjanar* [13th October 2003] (CAInf) (2/2003)

considerations. Initially, the Authority turned down an application for a change of use of a garage to an engineering workshop after having found that the proposal was in breach of the TPS's together with various Structure Plan Policies. Nevertheless, the decision was subsequently overturned by the PAB, and this despite the fact that the proposed use was clearly objectionable in terms of the applicable planning policies.

The Authority appealed the decision before the Court of Appeal (Inferior Jurisdiction) insisting that the Board had acted *ultra vires* since it had failed to '*apply*' the development plans[390] as required by Section 33. For its part, the court considered that the site was located outside the development zone where no industrial use was permitted according to policy. At the same time, however, the court felt that it should point out that the PAB was obliged to *'apply'* the policies in this case '*…stante li ma kien hemm l-ebda committement la fiz-zona imsemmija u lanqas fis-sit in kwistjoni…'*.[391] It would seem that in the court's view, the Board would have been justified in not applying the development plans had it been shown that the site itself was committed or a commitment was found in the surrounding area. In a way, this judgment was pretty odd since notwithstanding the introduction of the term *'...shall apply plans and policies'* found in Section 33, the court took the approach that had there been commitment, the decision maker would not have been obliged to apply the relative plans and policies.

A different approach was, however, taken some months later in **Louis Van Den Bossche -vs- il-Kummisjoni għall-Iżvilupp**.[392] In the instant case, the PAB ordered the Authority to issue a permission for the redevelopment of a hotel in an area which, according to the

[390] Namely, the structure plan, subject plans, local plans, action plans and development briefs
[391] '...Since there was no commitment neither on site nor in the vicinity...'
[392] *Louis Van Den Bossche v L-Awtorita' ta' Malta dwar I- Ambjent u l-lppjanar et* [26th February 2004] (CAInf) (44/2002)

TPS's, was designated for the building of bungalows. To justify its departure from applying the established policies, the Board held that the site was committed with commercial development and thus the building of the hotel was in line with the existing commitment. In furtherance to the Board's decision, the owner of a nearby bungalow, who had registered his interest as an objector earlier in the application process, filed an appeal before the Court of Appeal (Inferior Jurisdiction) alleging that the Board had acted *ultra vires* because it was not empowered to grant permission for a hotel in an area where the development plans only provided for the construction of bungalows and detached residential units. Unlike with **Agius [2003]**, the Court reasoned out that decision makers had no option but to comply with policy requirements, and this irrespective of any subsisting commitment. In other words, the court made it clear that the expression *'…shall apply planning policies and development plans…'* implied a mandatory obligation on the part of decision makers to ensure that the proposed development conformed with development plans and planning policies - no more, no less.

Matthew Vella -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar[393] was another case where the Authority filed an appeal before the Court of Appeal (Inferior Jurisdiction) claiming that the Board had acted *ultra vires* when it ignored the strict applicability requirement imposed by the words '*shall apply'* in the relative section of the law. This, after the PAB upheld plaintiff's appeal to build a farmhouse in Bidnija, despite the Authority's objections that the proposal was in breach of the Development Outside Built-Up Areas (1995) policy.[394] As with **Van Den Bossche [2004],** the Court agreed with the Authority in that:

[393] *Matthew Vella v L-Awtorita' ta' Malta dwar I- Ambjent u l-lppjanar* [30th March 2006] (CAInf) (1/2005)

[394] This policy regulated farmhouse development outside the development zone

> '*…l-imsemmi artikolu 33 tal-Kap 356 jagħmilha mandatorja għall-istess Bord li josserva tali skemi, u ċertament ma hemm ebda eċċezzjoni għal żviluppi bħal dak hawn propost'*.[395]

In a later case[396], namely that of **Anthony Ciappara -vs- l-Awtorita' ta' Malta dwar I-Ambjent u l-lppjanar,** the court however gave the impression that the term '*shall apply'* could be toned down should the Board be faced with '*particular circumstances'*. In this case, the PAB overturned a refusal given by the Authority for the sanctioning of an extension to a dwelling outside the development zone of Għargħur although the interventions were clearly in breach of various planning policies. Although the court justified the Authority's appeal since the Board chose not to comment whether, as alleged by the Authority, the proposal was in breach of Structure Plan Policies AHF5, BEN5, RCO2, RCO4, SET11 and SET12 as well as the Policy and Design Guidance entitled Farmhouses and Agricultural Buildings, the Court reminded the parties that the Board was not empowered to issue permission in breach of planning policies unless, however, it was shown that:

> *'...hemm xi commitment fl-area in kwistjoni li kien jikkonsentixxi li wieħed jiddipartixxi mill-Iskema Temporanja ta' Zvilupp'*.[397]

[395] '...Section 33 of Chapter 356, which makes it mandatory on the Board to observe the said Schemes, and certainly allows for no exceptions in developments such as the one proposed.'
[396] *Anthony Ciappara v L-Awtorita' ta' Malta dwar I- Ambjent u l-lppjanar* [28th June 2006] (CAInf) (11/2004)
[397] '...There is a commitment in the area in question which would justify the Board to depart from abiding by the Temporary Provision Scheme'

Ciappara [2006] was followed by a string of other judgments, in which the court saw nothing wrong in decision makers having excercised their discretion at the expense of policy requirements. In the case of **J.Formosa Gauci f'isem Trident Development Limited -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[398], the Authority felt aggrieved that the EPRT had failed to '*apply'* the development plans and policies as required by law. In its assessment, the Court however took occasion to point out that it was the Authority through its case officer who had pointed out that the area was heavily committed with dispersed development, permission of which development was granted in the preceding years. Against this background, the Court rejected the appeal after it found that the EPRT had acted correctly when it took note of the effect of the surrounding commitment and moved on to order the issuance of the relative permission.

In yet another case[399], the Court of Appeal reiterated that decision makers could not simply dismiss a development proposal on the pretext that it was incompatible with the Local Plan. Possibly taking note of the more recent court's decisions on the subject, applicant highlighted that *'...il-prinċipju tal-commitment hu ntiż fost l-oħrajn biex jekk zona hi stabbilita bħala waħda residenzjali, iżda fiha hemm preponderanza ta' użu kummerċjali, allura fiha jiġi aċċettat użu kummerċjali'*.[400]

The Court of Appeal (Inferior Jurisdiction) agreed with plaintiff's reasoning, concluding that the principle of '*commitment'* was not discarded from the law as a result of the Local

[398] *J. Formosa Gauci f' isem Trident Development Limited v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [26th March 2009] (CAInf) (4/2008)
[399] *John Saliba v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (9/2011); See also: *Domenic Sultana v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (7/2011)
[400] '…the principle of commitment is aimed among other things so that if the zone is established as residential but with a preponderance of commercial developmental use, commercial use should be accepted.'

Plans. The EPRT was reminded that it could not opt to disregard the commitment and rely solely on the provisions of the Local Plan but instead had to gauge:

> *'...x'effett għandu l-istess commitment fid-dawl ta' l-iżvilupp propost u fid-dawl tal-policies applikabbli, inkluż il-Pjan Lokali'.*[401]

Although the Court did not say that permission should have been automatically granted were it to result that the site was surrounded with similar development, in another case[402] it went on to highlight that were '*commitment'* to be shown to subsist,

> *'...applikazzjonijiet ta' natura simili ghandhom ikollhom trattament identiku'.*[403]

At this juncture, the Court's message was that decision makers were to apply a sentencing policy if it transpired that the significant facts of a case under examination were similar to those already decided upon in a case which went *res judicata*. In the opinion of the author, such reasoning not only defied the spirt of the law at the time, which required decision makers *'to apply development plans and policies'* and not simply rest on past decisions so as not to disturb an already existing sentencing policy, but also ran counter to the basic principles of sustainable planning.

[401] '…The effect of the commitment in the light of the proposed development and the applicable policies, including the Local plan'
[402] *Joseph Gauci v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [26th June 2012] (CAInf) (9/2012); See also: *Jason Barbara v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [26th June 2012] (CAInf) (48/2011)
[403] '...Applications of a similar nature should be treated in an identical manner'

Roger Vella -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar[404] was yet another example where the court had once again rebuked the EPRT for adhering blindly to plans and policies without taking into consideration material considerations. This case is particularly interesting because judgment was delivered at a point after the law was changed so that '*commitment from nearby buildings'* could no longer be used to justify a departure from planning policy and construct additional storeys over and above the statutory height limitation.[405] However, the court considered that, if nothing else, polices could not be overruled on the basis of commitment only when the development concerned additional development over and above the height limitation. Otherwise, according to the court,

'*…commitment għandu japplika għal każijiet oħra'.*[406]

Clearly, the introduction of Section 69(2) did not alter the court's view in holding that the expression *'shall apply planning policies and development plans'* does not imply a mandatory obligation on the part of decision makers to abide by planning policies. In another judgment[407], the court went far as saying that the Local Plans ought not to be followed blindly for it would have been pointless to oblige decision makers to have concurrent regard to material considerations. Clearly, the court thought that decision makers should be the final arbiters when policies and material considerations pulled in opposite directions, notwithstanding there being an express provision obliging decision makers to *'apply planning policies and development plans'* and *'have regard to material*

[404] *Roger Vella v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [29th November 2012] (CAInf) (7/2012)
[405] Environment and Development Planning Act, proviso to s 69(2)(a)
[406] '…Commitment still applies for other cases.'
[407] *Ray Aquilina ghan-nom ta' Le Terrain Limited (C 27922) v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [29th November 2012] (CAInf) (63/2011)

considerations.' Evidently, the court felt no need to draw a distinction between the term *'apply'* and *'have regard to'.*

Matters, however, took a completely different turn after Mr Justice Mark Chetcuti was handed over the pending case load from the late Judge Pace who withdrew from the bench in December 2012. From the very outset, it was very evident that the court now presided over by Mr Justice Mark Chetcuti would take a different approach.

Roderick Cutajar -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar[408] was one of the early cases to be decided by the new judge. In this case, plaintiff appealed a decision of the EPRT whereby permission to carry out various interventions in his villa was denied due to the proposal being in breach of Policy 3.2 of the Development Control Policy & Design Guidance 2007.[409] This decision was subsequently appealed before the Court of Appeal (Inferior Jurisdiction), whereby plaintiff argued that his premises, though located within a designated villa area, was surrounded by terraced houses and multi-storey apartment blocks. Plaintiff stressed that the EPRT's assessment was based solely on what was provided in the policies whereas no regard had been given to the surrounding commitment. In its assessment, the court concluded that albeit regard to material considerations would need to be given during assessment of a planning application, decision makers had no option but to '*apply'* the development plans and policies. In fact, this is what the court had to say:

[408] *Roderick Cutajar v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (44/2012)

[409] This policy laid out the design requirements for villa sites in terms of minimum site area, maximum site coverage, minimum site curtilage, and maximum number of habitable floors

> *'F'dan il-każ it-Tribunal mexa preċiż ma' dak li trid il-liġi u kwindi l-aggravju tal-appellant mhux fondat la fil-fatt billi t-Tribunal ikkonsidra l-aggravji tiegħu pero` aktar fid-dritt billi a prescendere minn kwistjonijiet oħra inkluz ta' allegat 'commitment' it-Tribunal hu marbut bil-liġi li japplika l-policies u pjanijiet.'*[410]

This was a stark departure from what was previously decided by Mr Justice Pace in **Agius [2003]**, **Muscat [2004]**, **Ciappara [2006]**, **Formosa Gauci [2009]**, **Gauci [2012]**, **Barbara [2012]**, **Vella [2012]**, **Aquilina [2012]** and **Cutajar [2012]**. Suddenly, it seemed that all the importance was shifted to policy requirements. The reasoning held in **Cutajar [2013]** persisted in practically all the subsequent judgments delivered by Mr Justice Mark Chetcuti. In fact, in **Anthony Attard -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[411] delivered sometime later, the court held that Policy CG07 of the Central Malta Local Plan[412] could not be vetoed despite the site being evidently surrounded by similar development to the one proposed by plaintiff. Plaintiff's pleas to receive similar treatment were rejected by the Court of Appeal (Inferior Jurisdiction) after it held that the notions of '*equality'* and '*commitment'*, though potentially relevant in the assessment of a planning application, should never take precedence over development plans and policies.

[410] 'In this case, the Tribunal adhered precisely to the letter of the law and for this reason plaintiff's claims are unfounded both on fact, since the Tribunal took note of same, but more so, at law, since notwithstanding apart from any other material considerations, including that of alleged commitment, the Tribunal is legally bound to 'apply' the plans and policies.'

[411] *Anthony Attard v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (143/2012)

[412] Policy CG07 stipulates what use is permissible in residential areas

In the case of **Lorraine Micallef -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[413] the court reached similar conclusion when it said that that no precedent could be used to overrule the plans and policies, which in this case prevented further urban sprawl in an area which was neither a Category 1 nor a Category 2 Settlement. In another case[414], the Court of Appeal (Inferior Jurisdiction) held that even though '*commitment'* had to be taken into consideration as required by Section 69(2) of Chapter 504, it remains '*…subordinat biss ghal dak li jrid l-artikolu 69(1)'.*[415] Permission could therefore not be granted solely on the basis of there being similar development in the vicinity.

In **Dr Simon Mercieca -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[416] the Court reiterated the notion that '*…l-artikolu 69 ..jagħmilha tassativa …għat-Tribunal li għandu japplika l-pjanijiet u l-policies l-ewwel u qabel kollox'.*[417] The idea that the EPRT had a residual power to depart from the maximum height limitations when the site was surrounded with commitment was held to be untrue since the law did not provide for such an eventuality.[418] On the same lines, the court held that the EPRT was correct in denying permission for a dwelling outside the development zone despite the site being surrounded by numerous developments which included a supermarket, since new development outside the schemed boundaries was strictly prohibited by policy.[419]

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[413] *Lorraine Micallef v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (153/2012)
[414] *Andrew Camilleri v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (161/2012)
[415] Subordinate to Section 69(1)
[416] *Dr Simon Mercieca v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (123/2012)
[417] '...Section 69 …makes it a matter of strict application …that the Tribunal, first and foremost, has to apply the plans and policies'
[418] *Patrick Filletti v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th June 2013] (CAInf) (113/2012)
[419] *Rita Carachi v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th June 2013] (CAInf) (118/2012)

In **Charles Schembri pro et nomine -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[420] the court underlined that decision makers would be expected to rely on precedents as long as it can be proven that the facts at hand are sufficiently similar, yet never at the expense of policy requirements. In another case[421] plaintiff argued that the EPRT had failed to have regard to the surrounding commitment as required by Section 69(2) of Chapter 504 but the Court reiterated the notion that no material consideration, including any surrounding commitment, could take precedence over plans and policies which the EPRT had in this case correctly applied.

Marie Agius -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar[422] was another case in which plaintiff alleged that he was being discriminated against for the Authority had allegedly granted third parties with permission on the premise of surrounding commitment. Once again, the Court of Appeal (Inferior Jurisdiction) held that *'precedent'* was not reason enough to overrule the applicable planning policies. In another case[423], the court stood firm by the notion that *'...il-kwistjoni ta' permessi oħra ...mhix daqshekk importanti'*.[424] As the court would later say in **Alfred Magro -vs- l-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[425], the presence of commitment, however relevant, cannot

[420] *Charles Schembri f'isem u in rapprezentanza tas-socjeta' C & F Enterprises Limited v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th June 2013] (CAInf) (131/2012)
[421] *Grezzju Grech v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (82/2012); See also: *Joe Debono v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (140/2012); *Jerry Ghigo v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (187/2012)
[422] *Anne Marie Agius v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [12th June 2014] (CAInf) (71/2013); See also: *Emmanuel Vella u Jeremy Gambin v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th January 2015] (CAInf) (57/2014); *Justin Zammit Tabona v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th May 2015] (CAInf) (43/2014)
[423] *Carmelo Calleja v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [8th October 2014] (CC) (9/2014)
[424] '…The existence of other permits ...is not that important.'
[425] *Charles Fenech v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th May 2015] (CAInf) (1/2015/1)

be used to defuse the Authority's primary obligation to decide planning applications against policy requirements. In fact, the court's conclusions were as follows:

> '*ebda aggravju ta' commitment ma jista' jew għandu jintuza jekk dan ser ixxejjen pjan, liġi jew policy in vigore u jinħareġ permess li jmur kontra tali liġi, pjan jew policy'*.[426]

It is interesting to note that the court's emphasis on decision makers to '*apply*' policies irrespective of nearby commitment has, on a couple of occasions, worked to the benefit of developers. For example, in the case of **Chris Dixon et -vs- l-Awtorita` ta' Malta tal-Ambjent u l-Ippjanar**[427], the EPRT had revoked an approval for the construction of a building block following a third-party appeal after it considered that the area close by was characterized by low storey development. For this reason, the EPRT thought it was perfectly acceptable to ignore the height limitations set out in the Local Plan. The Court of Appeal (Inferior Jurisdiction), however revoked the EPRT's decision after it held that the Local Plans clearly stipulated that the area in question was zoned for three floors and three courses as was reflected in applicant's proposal. The Court thus concluded that the EPRT had to *'apply'* the heights as stipulated in the relative Local Plan, irrespective of the fact that the surroundings were not likewise committed. Of course, the court's decision in such a case was surely to applicant's benefit.

[426] 'No aggravation based on the precept of commitment can or is to be used if such will render ineffectual a plan, law or policy *in vigore* and a permit is issued policy against such plan law or policy'
[427] *Chris Dixson et v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u limsejha Candice Galea* [7th November 2013] (CA) (1/2012); See also: *Dr. Mark Fenech v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [18th May 2016] (CAInf) (4/2016)

Surrounding commitment was not the sole material consideration which Mr Justice Chetcuti held to be less important than planning policy. Environment Impact Assessments (EIA's) were likewise regarded as being secondary to plans and policies. In one case[428], the EPRT ordered the Authority to issue permission for the relocation of a hardstone quarry from Ħagar Qim to Wied Moqbol even though the latter had previously objected to the proposal once the Local Plan designated the site as an '*agricultural area'*, hence subject to Policy SMAG01 of the South Local Plan.[429]

To support its decision to overrule the same Policy SMAG01, the EPRT relied on the conclusions of the EIA commissioned by plaintiff himself, which held *inter alia* that the existing land was barely cultivable as most of the site consisted of exposed rock, bird hides, and low-lying soil deposits whereas the dominant trees were mainly associated with trapping and hunting activities. Meanwhile, a third party lodged an appeal with the Court of Appeal (Inferior Jurisdiction) alleging that the EPRT erred in its judgment. In his arguments, the objector said that the EPRT had to apply the relative policies which clearly prohibited the removal of soil from the site in question. In fact, the Court accepted objector's arguments after it said that the EPRT could not count on the findings of an EIA to overrule a policy.

In two other cases[430], all efforts to justify edge construction outside the development zone failed notwithstanding the visual setting was likely to improve. Each time, the EPRT

[428] *Charles Fenech v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th May 2015] (CAInf) (1/2015/1)
[429] Policy SMAG01 seeks to protect Agricultural Land by limiting building structures and uses which are essential to the needs of agriculture
[430] *Stephen Seychell v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [27th June 2013] (CAInf) (78/2011); See also: *Joseph Ciantar v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (94/2012)

declared the proposal as being against rural policy while stressing that no material consideration could take priority over policy requirements. In both instances, the EPRT's decision was confirmed by the courts.

With this said, it remains unclear under what circumstances material considerations might ever enter the decision equation, if at all. The only instance identified by the court would seem when two or more policies relating to the same subject matter conflict with each other. If that were to be the case, material circumstances should dictate which policies ought to be applicable.[431]

Interesting, however, is the case of **Paul Polidano -vs- l-Awtorita` ta' L-Ippjanar.**[432] This was a retrial case wherein the Court of Appeal (Inferior Jurisdiction) presided by another judge, namely Mr Justice Anthony Ellul, was requested to annul a previous judgment in the same names by the same Court, then presided by the late Judge Pace. The merits of the case related to the sanctioning of a villa outside the Development Zone, permission of which was denied by both the Authority and the EPRT. On the other hand, the Court of Appeal (Inferior Jurisdiction) presided by Judge Pace had upheld Polidano's claim after it found that the EPRT had failed to have regard to the surrounding commitment as required by law.

Aggrieved by the court's decision, the Authority filed an application before the same court with a view to have the said judgment retried on the premise that the court had made

[431] *Redento Bonnici v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (107/2012); See also: *Anne Marie Agius v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [12th June 2014] (CAInf) (71/2013)

[432] *Paul Polidano v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [7th October 2015] (CAInf) (13/2011)

a wrong application of the law.[433] This in view of the fact that commitment could not be relied upon when development was in principle excluded *a priori* given it was proposed to be constructed outside the development boundaries. In essence, the Authority was simply reiterating what Mr Justice Chetcuti had been insisting upon in the previous two years. Nevertheless, the court presided over by Mr Justice Anthony Ellul dismissed the Authority's request, holding to the old notion that decision makers are still required to have regard to '*commitment from other buildings in the surroundings'* as per Section 69(2)(a) in Chapter 504 so long that such commitment may not be interpreted or used to increase the statutory height limitations. Still, the court was careful not to express itself whether commitment could, after all, overrule the provisions of development plans and policies. At any rate, **Paul Polidano** was an isolated case which contrasted with the general trend established over the previous two years.

What is sure to be of great interest is the court's handling of Section 72(2) of the current DPA[434] which took effect from the 4th April 2016. As previously explained, decision makers are no longer required to *'apply'* plans and policies but instead *'have regard'* to plans, policies, material considerations and representations with no apparent order of

[433] Code of Organization and Civil Procedure, s 811(e) and s 811(f)

[434] Development Planning Act 1992, s 72(2) states the following: *'In its determination upon an application for development permission, the Planning Board shall have regard to:*
(a) plans;
(b) policies:
Provided that subsidiary plans and policies shall not be applied retroactively so as to adversely affect vested rights arising from a valid development permission, or a valid police or trading licence issued prior to 1994;
(c) regulations made under this Act:
Provided that the Planning Board shall only refer to plans, policies or regulations that have been finalised and approved by the Minister or the House of Representatives, as the case may be, and published;
(d) any other material consideration, including surrounding legal commitments, environmental, aesthetic and sanitary considerations, which the Planning Board may deem relevant;
(e) representations made in response to the publication of the development proposal; and
(f) representations and recommendations made by boards, committees and consultees in response to notifications of applications.'

priority. The general perception of the new direction was that plans and policies were '*no longer binding'*[435] and that '*a development which would otherwise be undesirable by policy'* could be justified. The Honourable Michael Falzon was perhaps more cautious in Parliament when he said that the proposed legal amendments were designed to allow decision makers to take better note of the site context[436] without excluding that policies and material considerations now enjoyed equal status. Nevertheless, the few court judgments handed down so far reveal another interpretation of Section 72(1).

The court's reasoning when there is more than one policy applicable to the case remained unchanged. The idea that in the case of conflict, it is for the decision makers to determine which policies ought to apply was confirmed by the court even following the introduction of Section 72(2).[437] This came as no surprise as there was nothing in the new law to suggest a different interpretation.

What is more intriguing at this point is the court's approach to the fact that decision makers are no longer required to *'apply'* plans and policies while '*having regard*' to material considerations and representations but instead are now obliged to *'have regard'* to plans and policies together with material considerations and representations. **Michael Debrincat -vs- L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)**[438] was one of the cases that directly touched upon the issue. This was a

[435] Reactions to Bill entitled Development Planning Act 2015, General Retailers Traders Union (GRTU) (2015) <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> accessed 29th March 2020

[436] House of Representatives Malta (Sitting No. 336) (2nd December 2015)

[437] *Kenneth Grima v L-Awtorita' ta' l-lppjanar (gja L-Awtorita' ta Malta dwar l-Ambjent u l-Ippjanar)* [30th April 2018] (CAInf) (18/2018)

[438] *Michael Debrincat v L-Awtorita' ta' l-lppjanar (gja L-Awtorita' ta Malta dwar l-Ambjent u l-Ippjanar)* [24th October 2018] (CAInf) (55/2018); See also: *Winston J. Zahra v L-Awtorita' ta' l-lppjanar (gja L-Awtorita' ta Malta dwar l-Ambjent u l-Ippjanar)* [16th May 2019] (CAInf) (1/2019)

proposal for an extension of a dwelling beyond the schemed boundary. Applicant insisted to be granted permission since a similar extension was approved next door. The EPRT, however, held the proposal not to be in line with policy and went on to refuse the permit without making reference to the adjacent development. Before the court, applicant insisted that the EPRT had failed to have regard to the commitment next door as required by Section 72(2). Indeed, the court accepted plaintiff's argument, citing lack of fair hearing on the part of the EPRT. Nevertheless, the court saw it fit to highlight that the EPRT was still obliged to decide according to policy, notwithstanding the presence of any nearby commitment:

> *'Il-Qorti hawn tippreciza illi ebda commitment ma jista' qatt jeghleb il-fatt li permess ma ghandux jinhareg jekk isir kontra l-ligi, pjan jew policy. Tant hu hekk illi l-artikolu 72(2) tal-Kap. 552 jipprovdi li l-Bord ghandu jqis l-ewwel u qabel kollox pjanijiet u policies imressqa quddiemu u ghandu jqis ukoll kull haga ohra ta' sustanza inkluz commitments. Il-kliem tal-artikolu hu car fil fehma tal-Qorti u ma biddel xejn mill-gurisprudenza l-aktar ricenti fil-materja. L-enfasi tal-legislatur hi fuq aderenza ghal ligijiet, pjanijiet u policies u fatturi ohra jittiehdu in konsiderazzjoni basta ma jxejnux il-ligijiet, pjanijiet u policies applikabbli ghal kaz'.*[439]

[439] 'The court clarifies that no commitment could override the fact that permission cannot be issued against law, plan or policy. So much so, that Section 72(2) of the Development Planning Act states that the Board should primarily have regard to plans and policies submitted to it and have regard to all other material considerations, including commitments. The words of the section are clear in the eyes of the court, having not altered anything in the recently held jurisprudence on the subject matter. The emphasis of the legislator is located on adherence of laws, plans and policies and other factors to be taken into consideration as long as these do not defuse the laws, plans and policies that apply to the case.'

Clearly, the court acted as though nothing had changed from the previous law. There is no doubt that, as the court stated in this judgement, an unlawful consideration ought to be disregarded, irrespective of it being material to the case. When looking at Section 72(2), it is however difficult to conclude that emphasis was laid on adherence of laws, plans and policies as the court chose to infer in the above judgment. Decision makers are now required to *'have regard'* to plans and policies together with material considerations and representations whereas before, they were obliged to *'apply'* plans and policies and '*have regard*' to material considerations and representations.

This means that decision makers can neither choose to ignore the applicable plans and policies, nor discard material considerations and representations. It follows that the decision maker should, on the one hand, ensure that the implications of the policy are clearly understood. However so, the decision maker should equally ensure that the material considerations that are truly relevant to the case are taken into account. In a situation where a policy and a material consideration pull in different directions, the decision maker is still required to see to both. However, that does not necessarily mean that priority should be directed towards policies at the expense of material considerations as **Debrincat [2018]** seems to imply. If anything, that was the situation under previous legislation, when decision makers were obliged to *'apply'* plans and policies and '*have regard*' to material considerations and representations.

The current situation with Maltese courts is, therefore, different from that held by the English courts when it comes to giving an interpretation of the term *'have regard to'* in a development planning context. As illustrated earlier on, the view taken by Lord Guest in

Simpson v Edinburgh Corpn[440] is that the duty '*to have regard to*' the development plan does not mean to '*slavishly adhere'* to it and that planning permission which departs from policies in the plan could thus be granted. In **Enfield L.B.C. v Sec State for Environment, the Court**[441] it was similarly held that the requirement *'to have regard to'* the development plan does not make adherence to the plan mandatory. As a matter of fact, a grant of permission by the Secretary of State was, in this case, upheld on appeal despite the proposed development being in clear breach of the development plan. **Grandsen (E.C.) & Co. v Sec. of State**[442] is another straightforward case wherein it was held that as long as a policy is properly considered, the decision does not have to adhere rigidly to it so long as clear-cut reasons were given for not doing so.

The author of this study is convinced that, contrary to what was stated in **Debrincat [2018]**, the meaning of the phrase '*having regard to'* was not intended to have the same definition as '*the decision shall be consistent with'* or *'the decision shall conform with'*[443] but lay somewhere on the scale that stretches from *'recite them then ignore them'* to *'adhere to them slavishly and rigidly'*.[444] In other words, what should be ultimately important is that, decision makers give all the necessary attention to the relevant policies, material considerations and representations whilst keeping in mind that giving the required attention does not imply adherence

[440] *Simpson v Edinburgh Corpn.* [1961] SLT 17
[441] *Enfield LBC v Secretary of State for Environment* [197] JPL 15
[442] *Grandsen (E.C.) & Co. Ltd. And Falksbridge v Secretary of State for the Environment and Gillingham BC* [1986] JPL 519
[443] Dennis H. Wood Assisted by: David Berney, 'Have Regard To, Shall Be Consistent With and Shall Conform With: When Do They Apply and How Do You Apply Them?' (February 2007) < http://www.woodbull.ca/docs/default-source/publications/have-regard-to-shall-be-consistent---paper> accessed 29th March 2020
[444] *Concerned Citizens of King Township Inc. v King (Township,)* [2000] 42 O.M.B.R.3 (Div. Ct.)

The reasoning held in **Debrincat [2018]**, however, resurfaced in **Michael Stivala -vs- L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)**.[445] Once again, the court reiterated that under the new Act:

> *'…il-policies qeghdin hemm biex jigu osservati u applikati'.*[446]

The court went on to clarify that when a policy was clear and specific, decision makers were left with no discretion but to apply same. Yet again, the court acted as though nothing had changed when the EPDA was replaced by the current DPA. There is no question that, as suggested by the court, planning policies ought to be observed. However so, the author thinks that, contrary to what the court is saying, the degree to which policies should apply is not a predetermined function but could vary upon assessment of material considerations and representations.

Interestingly, however, is the approach taken by the court in **Silvan Agius et. -vs- L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) et.**[447] In this case, the court's conclusions in relation to what degree was the EPRT bound to abide by the recommendations of the Superintendent of Cultural Heritage were the following:

> '*Hu minnu illi wiehed mill-elementi li t-Tribunal kellu jikkonsidra hu l-parir tal-istess pero tali parir ma jorbotx lit-Tribunal basta li t-Tribunal*

[445] *Michael Stivala v L-Awtorita' ta' l-lppjanar (gja L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)* [4th March 2019] (CAInf) (69/2018)
[446] '…The policies are there to be observed and applied'
[447] *Silvan Agius, Allan Callus, Marcelle Callus Fsadni u Jenny Mifsud v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Albino Sacco* [30th January 2019] (CAInf) (66/2018)

> *ikun ta r-ragunijiet tieghu ibbazati primarjament fuq ligijiet, pjanijiet u poteri tenut kont ta' dak li jipprovdi l-artikolu 72, ghaliex iddipartixxa mill-parir'.*[448]

What the court is saying is that all statutory recommendations are to be taken on board except when the plans and policies provide to the contrary. This is yet another restriction imposed by the court which goes beyond the '*plain meaning*'[449] of Section 72(2).

John Cilia -vs- L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)[450] complicates matters a bit further. In this case, the court held that the EPRT was not bound by what statutory consultees had to say on the matter, provided however that it explains why *'il-pjan lokali f'dan il-kaz tenut kont l-izvilupp partikolari kellu jipprevali'*.[451] At this point, the court is not exactly saying that statutory recommendations should be taken on board save in those instances the plans and policies provide to the contrary. Rather, the court is suggesting that an explanation is owed when priority is given to local plans over consultees. For the first time since Section 72(2) was incepted, the court is acknowledging, though indirectly, that the Local Plan could take less priority when statutory consultees had had a more solid argument.

The approach taken by the court in discerning Section 72 goes to show that there is still a long way to go. Although Section 72 is written using simple customary language, the

[448] 'It is correct to say that one of the elements that the Tribunal had to consider was the recommendation of same, however such recommendation is not binding on the Tribunal provided the Tribunal gave reasons that were primarily based on laws, plans and powers in keeping with what is stated in Section 72, justifying its departure from such recommendation'

[449] 'Statutory Interpretation: General Principles and Recent Trends' (March 30, 2006 – September 24, 2014) <https://www.everycrsreport.com/reports/97-589.html#fn12> accessed 29th March 2020

[450] *John Cilia v L-Awtorita' ta' l-lppjanar (gja L-Awtorita' ta Malta dwar l-Ambjent u l-Ippjanar)* [20th March 2019] (CAInf) (71/2018)

[451] 'The local plan in this case, given the particular development, was to prevail'

court has given it an unexpected interpretation. The court remains held to the view that material considerations are of secondary importance whereas statutory consultees possibly enjoy a higher status. Clearly, this stands nowhere near the political will to enable decision outcomes which were not possible in terms of the EDPA.

5. CONCLUSIVE REMARKS

This chapter discussed a number of key aspects touching the decision process following development planning applications. The question whether planning applications should be determined in line with the laws in force when they were validated or those *in vigore* at decision stage has been aptly answered by the court. Although a handful of judgments delivered in 2012[452] held that in the absence of a specific transitory provision, the policies in force at the time of validating the application are to apply, the settled position is that a decision on a planning application should be taken according to the laws and policies in force at the moment of the decision.[453]

The latter notion was found to be more in order since the Authority is, after all, empowered by law to change planning plans and policies at any given time.[454] In other words, a change in policy while a planning application is pending decision is a perfectly legal act and applicants are therefore aware that such a change could happen any time. The courts also defended the idea that determining planning applications according to the

[452] See *Grace Borg v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (28/2011); *Dr. Graham Busuttil v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (26/2011)
[453] The most recent judgment being *Michael Axisa ghas-socjeta Lay Lay Co. Ltd v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14thJanauary 2015] (CAInf) (44/2013)
[454] See *Mariella Spiteri v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (81/2012)

applicable legal regime at decision stage gives a sense of consistency and legal certainty.[455] That is also true from a purely planning perspective, as it is desirable to have all decisions on planning applications at any one time determined according to a common set of priorities founded on one policy regime. However, the strongest justification seems to be that a planning application merely reflects applicants' intentions as opposed to an acquired planning permission which is tantamount to a vested right.[456] That would also seem consistent with the principle that subsidiary plans and policies may not apply retroactively *'...so as to adversely affect vested rights arising from a valid development permission*'[457], which provision found its way in current planning legislation way back in 1997.

Having said all this, there are still a couple of grey areas which have been singled out and possibly merit further discussion. It was shown that the above ratio equally applies to the EPRT presiding over appeals from refused planning applications.[458] This, notwithstanding the principle that the role of an appeals Board as a Board of Second Instance should be that of merely reviewing the decision taken at First Instance and of deciding whether that decision was the correct one or not at the time it was taken. Even worse, the subject matter could be a planning permission pending a third-party appeal. The question at that point is whether the planning permission constitutes a vested right in

[455] *Ibid*
[456] See *Richard Tua v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [27th November 2014] (CAInf) (35/2014); *Angolina Buttigieg v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [11th December 2014] (CAInf) (15/2014); *Mario Muscat v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [22nd April 2015] (CAInf) (44/2014)
[457] Development Planning Act 2016, proviso to s 72(2)(b)
[458] See *Charles Demicoli v L-Awtorita' ta' l-Ippjanar* [27th January 2003] (CAInf) (41/2001); *Richard Tua v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [27th November 2014] (CAInf) (35/2014); *Angolina Buttigieg v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [11th December 2014] (CAInf) (15/2014)

favour of applicant, even though proceedings are still '*open*'. In the one case discussed[459] the court found that new legislation did not apply when the subject of the appeal was a permission. However so, the court based its judgment on the premise that none of the parties had referred to the policies that came *in vigore* during the course of proceedings and not because the permission under appeal was tantamount to a right which could not be taken away by new policies.

Of equal concern is when it comes to analyzing whether the Authority can impose sanctions for reasons which could not be reasonably foreseen at the time when an illegality was committed. The general view held by the courts was also that a decision on a sanctioning application should also be taken according to the laws and policies in force at the moment of the decision.[460] The difficulty with this position is that wrongdoers cannot assess the risks and consequences associated with the carrying out of illegal development when a degree of foreseeability that not only the law must, where possible, be proclaimed in advance of implementation, but also foreseeable as to its effects when it also comes to enforcement procedures should be guaranteed in a democracy governed by the rule of law.

Finally, there is also the reality that applicants, or interested third parties for all that matter, are left with no option but to accept that any change in policy was undertaken in the name of public interest and for no other extraneous reason. Although it is possible to challenge the legality of a Local Plan or a policy before a court, it is by no way an easy

[459] *Emmanuel u Rita Muscat u Pauline Borg et. v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (5/2011)
[460] *Richard Tua v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [27th November 2014] (CAInf) (35/2014)

task. In practice, the planning application would have long been decided according to the latest policies by the time the latter could be declared null.

Either way, the accepted position is that new plans and policies introduced while a decision is still pending are to apply, no matter what. The only exception is found to be when applicant can show to be in possession of a vested right, with which the new policies are incompatible. Indeed, the current DPA, as well as its counterparts, acknowledge vested rights that arise '*from a valid development permission'*.[461] The understanding, therefore, is that the permission is required to be '*valid',* hence the question: what happens once the term of validity expires? The answer to this was given by the courts when looking at different scenarios. The court had occasion to assess whether an expired planning permission carries validity after works were completed and if so, when not carried out in strict conformity with planning permission or not completed in their entirety. The court also expressed its view as to when a building covered by permission perishes.

The position held by the courts is quite clear: once a permit is granted, this constitutes a vested right and any development carried out in conformity with such permit cannot be tampered with.[462] This is a very crucial step since the law could give the impression that a vested right does not subsist beyond the timeframe set in the permit. Were the court's reasoning to be anything different, the consequences to applicants would be that any permitted intervention no longer allowed by policy has to be removed in the eventuality of a new development application concerning that same site.

[461] Development Planning Act 2016, proviso to s 72(2)(b)
[462] *Philip Cortis v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [22nd January 2014] (CAInf) (170/2012)

Still, this chapter has demonstrated that things could get complicated where a building constructed after planning permission was obtained does not reflect what is exactly on plan. In a number of cases[463] , the court took the view that a permission loses its relevance when the works are not undertaken as approved even though in one case[464], the conclusions reached by the court could give the impression that a development permission would not necessarily lose its effect if the attached conditions were not adhered to. Having said all this, there could be an issue with the fact that the degree or seriousness of the illegality involved as well as its nature and, or type are irrelevant in the assessment. Although in practice, it is only right to prevent abuse, one ought to distinguish between flagrant abuse and a genuine mistake.

This chapter also tackled the subject of planning applications that are up for renewal. The existence of some intervention was found not to be a sufficient argument to justify the renewal of a planning permission. The position held by the courts has always been that renewing a planning permission would depend on the degree of interventions carried out on site, namely the '*progress ta' żvilupp li jkun sar fuq is-sit* '[465] which has nothing to do with the extent of commitment in the site vicinity.[466] Ultimately, this was a subjective assessment ought to be decided by the PA or the EPRT, as the case may be.

Following the introduction of the current DPA, the legislator wanted to provide better direction in saying that applications for renewal should be assessed according to the '*new*

[463] See *Joseph Borg v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [11th December 2014] (CAInf) (6/2014); *Jean Paul Busuttil v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [11th December 2014] (CAInf) (180/2012)

[464] *Alex Grech f'isem u in rapprezentanza tar-residenti ta' Les Roches, Qui-si-Sana, Sliema v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Noel Agius* [5th November 2016] (CAInf) (19/2015)

[465] 'The extent of development undertaken on site'

[466] *Roseann Gafa' v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (14/2013)

policies' if *'the application is already committed by the original development permission in relation to these plans and policies'*.[467] Nevertheless, it is still unclear whether this means that if the new policies were to be applied, works already permitted had to be removed. Moreover, the law offers no explanation whether a commencement notice[468] submitted during the operative period is now tantamount to a '*commitment*' in terms of Section 72(4).

Finally, as to the question *'whether 'planning rights' are lost once a building perishes'*, this chapter has demonstrated that the court was consistent in holding that rights from planning permissions are lost once a building no longer exists.[469]

The final part of this chapter shifted focus on the legal interpretation of Section 72 of the current DPA as well as its previous counterparts. At a time when decision makers became obliged to '*apply*' plans and policies while '*having regard'* to material considerations, it is ironic that the Court of Appeal (Inferior Jurisdiction), presided by the late Judge Pace, held fast to the idea that decision makers should adhere to established policies only if material considerations dictated otherwise.[470]

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[467] Development Planning Act 2016, proviso to s 72(4)

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

[469] See *Albert u Maria Dolores sive Doris Satariano v L-Awtorita` tal-Ippjanar* [28th March 2004] (CA) (1721/2001/1); *Austin sive Agostino Xuereb v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (147/2012); *John Mary Vella v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [5th November 2015] (CAInf) (21/2015)

[470] See *Joseph Muscat v L-Awtorita' ta' Malta dwar I- Ambjent u l-lppjanar* [18th May 2005] (CAInf) (9/2004); *Anthony Ciappara v L-Awtorita' ta' Malta dwar I- Ambjent u l-lppjanar* [28th June 2006] (CAInf) (11/2004); *J. Formosa Gauci f'isem Trident Development Limited v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [26th March 2009] (CAInf) (4/2008); See *John Saliba v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (9/2011); *Domenic Sultana v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (7/2011); *Joseph Gauci v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [26th June 2012] (CAInf) (9/2012); *Jason Barbara v L-Awtorita' ta'*

This train of thought, however, was not followed by Mr Justice Mark Chetcuti who took over the pending case load from the late Judge Pace. By contrast, Mr Justice Mark Chetcuti, possibly quite rightly, was adamant about the idea that material considerations should not overrule planning policies[471] since the law clearly required decision makers to '*apply*' plans and policies whereas only '*have regard to'* material considerations.

On the other hand, the change introduced by Section 72 of the current DPA to no longer *'apply'* plans and policies and instead *'have regard'* thereof had limited, if any, practical effect. Now that decision makers are required to *'have regard'* to plans and policies together with material considerations and representations, the court is saying that plans and policies should take priority.

Evidently, the court is, at least in the present day, not comfortable with the idea that decision makers are now given discretion to give priority to plans and policies, material

Malta dwar l-Ambjent u l-Ippjanar [26th June 2012] (CAInf) (48/2011); *Roger Vella v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [29th November 2012] (CAInf) (7/2012)

[471] See *Roderick Cutajar v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (44/2012); *Anthony Attard v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (143/2012); *Andrew Camilleri v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (161/2012); *Dr Simon Mercieca v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (123/2012); *Rita Carachi v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th June 2013] (CAInf) (118/2012); *Patrick Filletti v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th June 2013] (CAInf) (113/2012); *Charles Schembri f'isem u in rapprezentanza tas-socjeta' C & F Enterprises Limited v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th June 2013] (CAInf) (131/2012); *Stephen Seychell v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [27th June 2013] (CAInf) (78/2011); *Redento Bonnici v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (107/2012); *Joseph Ciantar v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (94/2012); *Joe Debono v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (140/2012); *George Mifsud v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (12/2013); *Anne Marie Agius v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [12th June 2014] (CAInf) (71/2013); *Joe Bartolo v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [8th October 2014] (CAInf) (159/2012); *Carmelo Calleja v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [8th October 2014] (CAInf) (9/2014); *Emmanuel Vella u Jeremy Gambin v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th January 2015] (CAInf) (57/2014); *Charles Fenech v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th May 2015] (CAInf) (1/2015/1); *Alfred Magro v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th May 2015] (CAInf) (3/2015); *Justin Zammit Tabona v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th May 2015] (CAInf) (43/2014)

considerations and representations as they deemed fit. By contrast, the court keeps on insisting that Section 72 has not altered anything in the recently held jurisprudence on the subject matter[472] but then somehow acknowledges that an explanation is owed when priority is given to local plans over what the Superintendent of Cultural Heritage has to say.[473]

Consequently, it is fair to say that apart from overlooking the political will to enable decision outcomes which were not possible in terms of previous legislation, the court is now simply ignoring the implications of '*shall have regard'* which, according to English jurisprudence, is held to carry a softer meaning than the term *'shall apply'*.

[472] *Michael Debrincat v L-Awtorita' ta' l-lppjanar (gja L-Awtorita' ta Malta dwar l-Ambjent u l-Ippjanar)* [24th October 2018] (CAInf) (55/2018); See also: *Winston J. Zahra v L-Awtorita' ta' l-lppjanar (gja L-Awtorita' ta Malta dwar l-Ambjent u l-Ippjanar)* [16th May 2019] (CAInf) (1/2019)
[473] *John Cilia v L-Awtorita' ta' l-lppjanar (gja L-Awtorita' ta Malta dwar l-Ambjent u l-Ippjanar)* [20th March 2019] (CAInf) (71/2018)

CHAPTER FOUR
From the Planning Appeals Board to the Environment and Planning Review Tribunal

1. GENERAL

Development planning decisions can be appealed, within the parameters of the Environment and Planning Review Tribunal Act, in front of the EPRT. The said Tribunal took over the role of the now-defunct PAB in 2010, however, in 2016, when the EPRT and the PA became regulated under two distinct pieces of legislation, it took on an added legal dimension.

This chapter will examine the legal evolution that has changed the role and nature of the PAB into the EPRT as we know it today. The legal quandaries that arose from time to time and the courts' response in respect thereof will be discussed in the sections that follow.

2. ACT I OF 1992

Under this Act, a decision of the PA on any matter of development and enforcement control could be appealed to by an aggrieved person before the PAB[474] which board had the power to confirm, revoke or alter the decision appealed by giving directions as it deemed appropriate.[475] Indeed, the role of the PAB was aptly described by the Court of Appeal in **Richard Zammit -vs- Chairman ta' l-Awtorita' ta' l-Ippjanar**[476] as follows:

[474] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 15(1)(a)
[475] *Ibid* : Third Schedule, para 6
[476] *Zammit Richard v Chairman ta' l-Awtorita' ta' l-Ippjanar* [31st May 2002] (CA) (99/1998)

> *'il-Bord tal-Appell dwar l-Ippjanar mhux biss ghandu s-setgha li jirrevoka d-decizjoni ta' l-Awtorita' ta' l-Ippjanar li biha gie rifjutat il-permess ghall-izvilupp mitlub mill-appellat izda wkoll l-istess Bord ghandu s-setgha li huwa stess johrog il-permess mitlub, naturalment jekk huwa jkun sodisfatt li dan jista' jaghmlu skond il-ligi'.*[477]

In the light of this definition, the PAB had the power to slip into the shoes of the PA and take a new decision[478] as opposed to simply assessing whether a challenged decision was invalid, and if any of the matters at issue had to be decided afresh, refer the case back to the Authority. Consequently, the PAB was empowered not only to quash an unlawful decision, but also to substitute it with its very own and exercise its discretion differently from that of the Authority. In other words, the PAB had *'kompetenza kemm dwar iI-fatti u kemm dwar il-ligi ghall-kaz sottomess quddiemha'.*[479]

When it came to giving its interpretation on planning policies, the PAB was held to have a *'diskrezzjoni wiesgha hafna'.*[480] The *raison d'etre* leading to the outcome reached by the Authority could also be varied even when that the said outcome remained practically unchanged. In one case[481], for instance, the court saw nothing wrong with the PAB

[477] The PAB not only has the power to revoke a PA decision through which the development permission requested by the appellant was refused but the same PAB itself had the power to issue permission, naturally on being satisfied that it could do so according to law

[478] See for example: *Alexander Mizzi v L-Awtorita` ta' l-Ippjanar* [12th May 1997] (CA) (379A/1996); *Trapani Galea noe. v L-Awtorità tal-Ippjanar* [29th October 1999] (FH) (228/1996)

[479] *Barbara Cassar Torregiani bhala prokuratrici specjali ta' missierha Joseph J. Edwards v L-Awtorita` ta' l-Ippjanar* [27th October 2003] (CAInf) (5/2001/1): 'competence on facts as well as law with regard to the case brought before it'

[480] *Vincent George Delicata f'isem Ataciled Enterprises v Awtorita' tal-Ippjanar* [31st May 2002] (CA) (165/1997): ' very wide discretion'

[481] *Barbara Cassar Torregiani bhala prokuratrici specjali ta' missierha Joseph J. Edwards v L-Awtorita` ta' l-Ippjanar* [27th October 2003] (CAInf) (5/2001/1)

confirming the scheduling status of a building, yet held that this was to be done on the basis of different technical considerations from those noted by the PA.

Having said this, an applicant could not decide to amend the drawings subject to appeal during the pendency of proceedings before the PAB. This was due to the fact that, unlike the PA, the PAB was not a Board of First Instance.[482] While not excluding the possibility that an applicant could have second thoughts during appeal proceedings, the PAB could, at best, direct applicant to first request the PA to take a fresh decision on the amended drawings.[483]

Pertinently, the PAB was singled out to be a *'mode of contestation or of obtaining redress'*[484] when a person felt aggrieved about the outcome of a decision of the PA concerning matters of development and enforcement control. In practice, this meant that a challenge against an administrative act of the PA relating to such matters could not be brought before the First Hall, Civil Court under Section 469A of the COCP since a remedy was available before the PA.[485]

At this point, the PAB had to be constituted by three members, one of whom had to be a lawyer acting as chairman. One of the other two members had to be well versed in

[482] *Joe Cortis v L-Awtorita` ta' l-Ippjanar et.* [27th February 1996] (CA) See also: *Barbara Cassar Torregiani bhala prokuratrici specjali ta' missierha Joseph J. Edwards. v L-Awtorita` ta' l-Ippjanar* [27th October 2003] (CAInf) (5/2001/1)

[483] *Joe Cortis v L-Awtorita` ta' l-Ippjanar et.* [27th February 1996] (CA)

[484] Code of Organization and Civil Procedure, s 469A(4) states: '*the provisions of this article shall not apply where the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal is provided for in any other law.'*

[485] See for example: *George Catania u martu Marie Louise Catania ghal kull interess li jista' jkollha, u Tarcam Company Limited v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [27th November 2009] (CA) (451/2004); *Kunsill Lokali Birzebbugia v Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [7th July 2004] (FH) (160/2003)*; Fish & Fish Ltd. et. v Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [26th June 2009] (CA) (439/2006/1)*;Carmelo Farrugia et v Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [27th November 2009] (CA) (1203/2008/1)

planning[486], whereas there was no specifically mentioned requirement with regard to the third member. According to the court, the members could not be sued for damages unless it was shown that they had acted in bad faith.[487]

The Board was to be supported by a so called *'independent'* administrative secretariat chosen by the Board itself. The law also provided for a possibility of having a multitude of panels so that the caseload could be distributed across different panels.[488]

The advantage of having a lawyer as chairman was to ensure that the person at the helm was aware of the legal norms which needed to be adhered to in a quasi-judicial context in order for a decision to be legally valid. It should be remembered that if the law did not provide access to justice before the PAB, those aggrieved would have had to seek a remedy before the courts. This meant that, in practice, the PAB was substituting the role of the court. No doubt, therefore, the idea of having a person at the helm of the PAB who was capable of seeing to legal aspects made sense. This in spite of the fact that lawyers are likely to view things differently from urban planners who would probably be more concerned about ensuring the efficient use of land to promote more desirable social and environmental outcomes, even if that meant compromising property rights.

Moreover, anyone without a legal background would probably not grasp the importance of certain concepts, like legitimate expectations or acquired rights, thus leading to decisions falling foul of the necessary elements making up sound judgements and, in turn,

[486] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 14(1)
[487] *Victor Bonavia v L-Awtorita` tal-Ippjanar u b'digriet tad-19 ta' Novembru, 1996 gew kjamati in kawza l-Avukat Dr. Kevin Aquilina, il-Perit Konrad Buhagiar u l-Perit Joseph M. Spiteri bhala formanti l-Bord ta' l-Appell dwar l-Ippjanar* [9th February 2000] (FHCJ) (538/1996)
[488] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 14(2)

leading to the said decisions being found to be invalid under the scrutiny of judicial review. An example would be not considering an outline permission as constituting an approval in principle and failing to uphold it if the applicant files for a full development application within the validity period[489], a pit-fall more likely to be made by a person without legal background than with it. Another instance would be that of Board members expressing themselves during the proceedings being unaware of the principles of natural justice in play in the ambit of quasi-judicial decision making. Having a legal person chairing the proceedings thus helps avoid unnecessary voiding of administrative decisions.

One aspect that members could, however, not claim to be unaware of was that they had to abstain when a conflict arose because of personal bias. In fact, members were, by operation of the law, *'disqualified from hearing an appeal'*[490] for the same reasons judges would need to abstain when presiding over civil suits. At the time, Section 734 of the Code of Organization and Civil Procedure[491] regulated the conduct of judicial officers, listing cases where either party in a case could challenge judges with having a conflict of interest.

That said, members seem to have had no choice but recuse themselves whereas, in the case of judges, they had the final word on whether to recuse themselves, so much that his decision was not appealed.[492] In the case of judges, the thinking is that *'the judge knows fully his or her own thoughts or feelings'*[493] and *'the trial court, in the exercise of its*

[489] *Eucharist Bajada ghan-nom tas-socjeta` Baystone Ltd v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (37/2011)
[490] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 14(3)
[491] Code of Organization and Civil Procedure
[492] *Ibid* : s 738
[493] *Spremo v Babchik,* 155 Misc. 2d 796, 589 N.Y.S.2d 1019 (N.Y. Sup. Ct. 1992)

personal conscience is the sole arbiter of a claim that recusal is warranted'.[494] A criticism of this explanation is that the judge is deciding his cause in breach of the maxim *nemo iudex in causa propria*. Still, the First Hall sitting as a constitutional jurisdiction court went on record as saying that in deciding whether he had a conflict of interest, the judge did not violate the Maltese Constitution.[495] Back to the PAB, it would, however, seem that the PAB members were *'disqualified from hearing'* a priori should there have been a conflict of interest and it was not in the members' discretion to decide whether they should recuse themselves.

Even so, it must be said that, at the time, Section 734 covered only a limited number of scenarios that might give rise to partisanship regarding a case, and these were mostly related to when the judge had family connections with any one of the parties.[496]

On the other hand, the law was silent about many other relationships that could possibly lead to a reasonable apprehension of bias. For example, Section 734 did not indicate what should happen in the event of a personal prejudice that could result from personal friendships between adjudicators and the parties to a case. Similarly, there was nothing in the law to suggest that members of the EPRT could not retain their private professional practice while sitting on the tribunal, and those appearing before them were professional rivals.

[494] *Burdick v Shearson American Express Inc*, 160 A.D.2d 642, 559 N.Y.S.2d 506 (N.Y App. Div. 1990)
[495] *Sharon Rose Roche v Avukat Generali u b' digriet tat-30 ta' Novembru 2017 gie awtorizzat jintervjeni fil-kawza in statu et terminis Dottor Jean Paul Grech fil-kwalita` tieghu ta' mandatarju specjali ta' Dean Michael Roche* [31st May 2018] (FHCJ) (77/2017)
[496] Since then, Section 734 was amended so that the judge may be even asked to abstain if he has family ties with the advocate or legal procurator pleading before him

Another interesting point was that Act I of 1992 did not indicate whether PAB members could be authorized by the parties to remain involved in a particular case despite a conflict of interest, as is the case with civil suits.[497] To date, no reported court cases have dealt with such an issue, and it is doubtful that there would be any such cases since a party who gives his no objection is not expected to challenge his own position later.

One significant area of concern was the way that the PAB was funded to keep up with its obligations. The funds required for the Board's performance, including the payment of the members themselves, were to be forked out by the PA, namely, the defendant in the proceedings.[498] Arguably, that was the same as saying that Magistrates are remunerated by the Commissioner of Police to preside over criminal cases in which the police are party to the proceedings.

As we saw, the PAB was empowered *'to hear and determine all appeals made by a person aggrieved by any decision of the Planning Authority on any matter of development control, including the enforcement of such control'.*[499] The expression '*matters of development*' appeared to be a broad enough term to include anything from a decision on a planning application to the setting out of building alignments[500], the scheduling of property[501], a letter under the signature of the secretary of the DCC requesting an

[497] Code of Organization and Civil Procedure, s 735(2)
[498] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 15(8)
[499] *Ibid* : s 15(1)(a)
[500] *Lawrence Fino in the name of Tamarac Ltd v Development Control Commission* [9th September 1997] (PAB) (550/1995 KA, 6/1996KA)
[501] See for example *Alex Mercieca and Joseph Borg v L-Awtorita' ta' l-Ippjanar* [31st October 1997] (PAB) (183/1994E, 190/1994, 260/1994, 300/1994)

applicant to submit fresh plans[502] as well as the alleged non-compliance with a decision of the PAB.[503]

Nonetheless, there were instances when the PAB held that the matter at issue was unrelated to development control for no apparent reason. For instance, it is difficult to comprehend how the PAB concluded that a letter signaling the Authority's intention to proceed with enforcement action was not a decision on a matter of development control.[504]

It is good to note that a significant difference exists between matters of '*development control'* and those of '*planning control'*.[505] Matters of '*planning control'* are primarily associated with the formulation of subsidiary plans used to supplement the Structure Plan[506], namely subject plans, local plans, and action plans), which fall outside the jurisdiction of the PAB. As an example, a challenge against a Local plan escaped the jurisdiction of the PAB and had to be addressed by the First Hall, Civil Court, sitting as a court of judicial review under Section 469A. This was the case, for example, in **Joseph Sciriha et. -vs- L-Awtorita' ta' Malta ghall- Ambjent u l- Ippjanar *et.***[507] Plaintiff's complaints concerned the prospects of his redeveloping the property being made impossible following the publication of the Local Plan after his property was scheduled within the Urban Conservation Area without prior warning. This matter was clearly one

[502] *Ray Bugeja v Development Control Commission* [5th December 1994] (PAB) (131/1994RR)
[503] See for example *Charles Mifsud v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [18th April 1997] (PAB) (332/1995)
[504] *Mario Griscti v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [22nd April 2015] (CAInf) (2/2010/1)
[505] *Joseph Pavia v Kummissjoni ghall-Kontroll ta' l-Izvilupp* [23rd April 2001] (CA) (220A/1999)
[506] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 23
[507] *Joseph Sciriha et. v L-Awtorita' ta' Malta ghall- Ambjent u l- Ippjanar et.* [28th January 2016] (FH) (127/2007)

of *'planning control'* and not of '*development control'*. As a result, the issue could not be brought before the PAB but had to be resolved before the First Hall.

The words '*decision of the Planning Authority'* also had a bearing on the reach of the PAB's jurisdiction. Primarily, the appealed decision had to be taken by none other than the PA. For instance, the PAB at the time could not decide for the SEO who took an active part in the planning application process but was legally answerable to the GSB and not the PA.[508] The PAB was not authorized to determine an appeal on sanitary matters which arose from decisions of the SEO during the planning application process.[509] Instead, the decisions of the SEO could be appealed before the GSB[510], and the GSB's ruling was subject to yet another appeal before the Court of Appeal.[511]

The practical implications to this state of affairs were that each time a sanitary issue arose, even on a simple matter such as a yard falling short of the required clear distance, the applicant's only option was to request suspension of the proceedings before the PAB until the GSB, or the Court of Appeal, decided the matter. In effect, the process sometimes took years until proceedings resumed before the PAB.

It took almost two years, for instance, to reactivate the application process involving a straightforward request to park a small car in a covered driveway, which also provided access to applicants' residence.[512] The SEO, in this case, had insisted that the design was

[508] Code of Police Laws (as on 15th January 1992), s 102
[509] *Pater Holding Co. Ltd. v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp u David Caruana kjamat fl-appell fl-4 ta' Novembru 1997 b'ordni tal-Bord* [5th October 2001] (CA) (232/1998)
[510] Code of Police Laws (as on 15th January 1992), s 102(4)
[511] *Ibid* : s 102(6)
[512] *Philip Bonanno u martu Marisa Bonanno v Suprintendent tas-Sahha Pubblika* [31st May 2013] (CA) (4/2013/1)

in breach of ventilation requirements, after which the applicant had no option but to ask the PA to suspend proceedings until the issue was decided by the GSB, only for the SEO's decision to be confirmed. Following the decision of the GSB, the applicant took the matter to the Court of Appeal only to have the decision of the GSB overruled. It was only then that the application process was reactivated.

A pragmatic solution was eventually found in response to such a situation after the recent adoption of Legal Notice 227 of 2016.[513] As shall be seen later in this study, sanitary issues are now determined by the PA with a possible appeal together with the other merits of the planning application before the current EPRT.

It is pertinent to observe that appeals that fell within the competence of the PAB were available to '*any aggrieved person'*.[514] At face value, it would, therefore, seem that '*any aggrieved person'* included applicants as well as third parties who felt wrongfully deprived in one way or another.

This line of thought was reflected in the ground breaking judgment of **Perit Austin Attard Montaldo -vs- Chairman ta' l-Awtorita`**.[515] The question was an appeal to the PAB by a certain Rudolf Ragonesi acting on behalf of a group of Sliema residents who opposed a development that was taking place near their residence. The appeal was based on the allegation that permission was granted in breach of the law since no environmental impact assessment had been carried out. In their appeal, the objectors had contended that

[513] The Development Planning (Health and Sanitary) Regulations, 2016 which came into force on the 10th June 2016
[514] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 15(1)(a)
[515] *Perit Austin Attard Montaldo v Chairman ta' l-Awtorita` tal-Ippjanar* [20th August 1996] (CA) (433/1994)

the wording of section 15(1) was so broad that it included any aggrieved person and not only the owner or the applicant for a planning permission. Nevertheless, the PAB held that the objectors had no *locus standi* since the expression '*aggrieved person'* applied only to applicants and persons served with an enforcement notice.

Perit Austin Attard Montaldo, who subsequently took over from Ragonesi, decided to take the matter to court and appeal the PAB judgment, insisting that the residents that he was representing lived very close to the location where the development was to take place and were thus to be considered as '*aggrieved persons'* in terms of Section 15(4). In its ruling, the court agreed with the plaintiff objectors and held that Section 15(4) of the DPA conferred the right on any interested party to challenge the undertakings of the Authority before the PAB. The court concluded that the '*aggrieved person*' could be anyone who had an *'interess guridiku, legittimu, re[j]ali u konkret u anke personali.*'[516]

This judgment marked a very important step in the sense that the expression '*aggrieved person'* did not only apply to applicants and persons served with an enforcement notice but also third parties so long they had '*id-debitu interess'*.[517] However, the court left it open as to when a third party could claim to have acquired a juridical interest. It seemed however that a juridical interest arose when, because of the new development, a burden was placed on the person aggrieved or when the commercial value of one's property was at stake. Nevertheless, it was up to the court to decide, on a case by case basis, whether the person who felt aggrieved had the required juridical interest.

[516] 'juridical interest, legitimate, real and concrete and also personal'
[517] 'due interest'

One interesting thing to note is that the law was silent as to whether the right to appeal to remove a condition in a permission was taken away when an applicant decided to adhere to such condition prior to lodging the appeal before the PAB. In a number of cases[518], applicants who had obtained planning permissions subject to a bank guarantee did not lose their right to appeal the removal of that same condition, even though they had decided to effect the guarantee as requested by the PA. In a number of other cases[519], however, the court's reasoning was that an applicant could not adhere to a condition without prejudice to his right to appeal before the PAB. In other words, once applicant decided to abide by a condition, there was no point in lodging an appeal requesting its removal.

The Act also provided the timeframes within which an appeal application had to reach the PAB. Appeals from decisions on planning applications had to be lodged within twenty eight days of the receipt of the decision.[520] In the case of enforcement notices, the period to appeal was limited to fifteen days from the serving of such notices.[521] As shall be seen later in this study, both the PAB and the Maltese courts have shown to be quite adamant about the importance of adhering to such time frames.

As with an ordinary appeal before the courts, the appeal application had to contain the grounds of appeal and had to be communicated to the defendant, that is to say the PA, before the first sitting.[522] From that point onwards, the PAB could regulate its own

[518] *Kevin Muscat et v Il-Kummissjoni ghall-Kontroll tal-Izvilupp u l-Awtorita' ta' l-Ippjanar* [15th July 2002] (CA); See also: *Anne Marie Carabottv L-Awtorita` ta' Malta Dwar l-Ambjent l-Ippjanar* [1st June 2009] (CAInf) (9/2007)
[519] *Wayne Chetcuti noe v Kummissjoni ghal-Kontroll tal-Izvilupp* [6th October 2000] (CA); See also: *Emanuel Psaila v Kummissjoni ghal-Kontrol tal-Izvilupp* [30th March 2006] (CA)
[520] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 37(2)
[521] *Ibid* : s 52(6)
[522] *Ibid :* Third Schedule para 2

procedure.[523] In **Paul Vella -vs- l-Awtorita` ta' l-ippjanar**[524], the Court interpreted the expression '*regulate its own procedure'* in the sense that the PAB was not obliged to follow the Code of Organisation and Civil Procedure (COCP) as was the case for the civil courts. Therefore, in this particular case, there was nothing to prevent the PAB from receiving unauthorized submissions notwithstanding the oral pleadings had been concluded, unlike what happens in a civil court.

That is not to say that the PAB could do away with the various requirements set out in the DPA. For instance, the PAB was bound to observe specific timeframes, such as to give advance notice of its meetings of not less than fourteen days[525] and to hold sittings in public.[526] The PAB was also obliged to give full opportunity to the parties to the appeal proceedings to bring evidence, make submissions[527], and produce witnesses to testify under oath.[528]

Indeed, applicants could not produce and examine witnesses up until the application was determined by the Authority, let alone request them to produce evidence that might be important to sustain his case. Interestingly, this is contrary to what happens in ordinary civil proceedings, where the opportunity to bring evidence and produce witnesses happens at first instance and not at the appeal stage. Ordinarily, it is for the First Court to witness the behavior of witnesses and assess their credibility *in facia*[529] whereas the Court

[523] *Ibid* : s 15(9) and Third Schedule para 10
[524] *Paul Vella v L-Awtorita` ta' l-Ippjanar* [11th January 1999] (CA)
[525] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 15(4)
[526] *Ibid* : Third Schedule para 9
[527] *Ibid* : Third Schedule para 4
[528] *Ibid* : Third Schedule para 5
[529] *Joseph Grech Sant nomine v Dottor Riccardo Farrugia nomine* [28th February 1997] (CA)

of Appeal subsequently relies on the factual findings held by the First court unless there are exceptional grave circumstances.[530]

In the planning realm, things take place the other way round. A piece of evidence, such as an official document that the applicant required to prove his case could remain unavailable until those holding it were made to summon before the PAB. An applicant who failed to convince the PA that his premises had already been in operation after the police refused him a copy of an old trading license[531] found himself in such a situation. The first opportunity when applicant could possibly obtain such a document was during appeal proceedings because the PAB had the power to obtain information from government entities.[532]

To take another example, an enforcement officer who drew up a series of allegations could not be summoned in person before the PA so that an assessment of his oral testimony could be made. That meant that applicant has to wait until proceedings reached appeal stage and the officer summoned to testify under oath.[533]

Appeal proceedings, therefore, served as a means to rectify a breach of the right to a fair hearing experienced by applicants until the Authority decided their planning application. Notwithstanding so, it has to be said that requests to summon case officers involved in the writing of the application report or members of the DCC were rarely entertained by the PAB. Obviously, that was meant to discourage an attitude where officials could end

[530] *Phyliss Ebejer v Joseph Aquilina* [10th January 1995] (CA)
[531] Up until 2006, commercial licenses were held by the police
[532] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 15(6)
[533] *Jack Farrugia v L-Awtorita' ta' Malta dwar l-Ambjent u l- Ippjanar* [15th May 2014] (EPRT) (199/2013E)

up being called upon to justify their actions each and every time an application was refused permission.

Besides having the power to obtain information from government entities, the PAB could also seek advice directly from them.[534] It would seem likely that the legislator sought to make it easier for the PAB to ask for expert guidance if need be. To some extent, however, this could be considered a threat to the impartiality of the PAB, since the latter was required to be seen as having no ties with the government. As shall be seen, this issue appears to have been addressed in the current Environment and Planning Review Tribunal Act since any reference to seeking advice from government entities has been omitted.

Once the PAB pronounced judgment, a further appeal could be lodged to the Court of Appeal by the appellant or the Authority[535] *'on a question of law decided by the Board'*.[536] Anyone else who could have an interest in the outcome of the PAB decision was, therefore, not entitled to challenge it before a court.[537] What was also significant is that the law lacked a definition of a '*question of law'*, and it was, therefore, for the courts to decide when to seize jurisdiction.

3. AMENDMENTS TO ACT I OF 1992

Up until it was officially repealed in the year 2010, the DPA had undergone several amendments, all that had a bearing on the workings of the PAB.

[534] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 15(6)
[535] *Ibid* : Third Schedule para 8
[536] *Ibid* : Third Schedule para 7
[537] *Teresina Portanier v L-Awtorita` ta' l-Ippjanar* [19th November 2001] (CA) (77/2000)

One of the notable primary changes came about by way of Act No. XXIII of 1997. '*Any person'* could now file written objections against a proposed development within fifteen days from *'the publication of the notice'*[538] which notice included a description of the proposal and the name of the applicant.

The court continuously held that the term '*publication'* was to be associated with the printing of a document for eventual distribution. Namely, the fifteen-day period had to run from the date on which the notice appeared in the newspaper.[539] That was not to say that the absence of a site notice had no legal implications, so much so that failing to affix a notice on-site at the outset of the application process was reason enough to revoke the eventual permission.[540]

Indeed, Act XXI of 2001 eventually required that the application and site plan were to be also served to the local council in whose locality the development was to take place so that councils could likewise register their objections and participate in the application process.

Another significant development was that Act XXI of 2001 made an apparent attempt to specify the circumstances under which an appeal was available and to who, moving away from the thinking held in **Attard Montaldo [1996]**, where an appeal was open to any person showing a juridical interest at any stage during proceedings.[541] Section 15(1)(d) now specified that '*interested third parties'* were entitled to appeal '*a decision of the*

[538] Development Planning Act, Act I of 1992 amended by Act XXIII of 1997, s 32(5)
[539] *Reverendu Carmelo Busuttil v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp u Margaret Ellul* [5th October 2001] (CA) (310/2000)
[540] *Emmanuel Busuttil Dougall v L-Awtorita` ta' Malta dwar l-Ambjent u l- Ippjanar* [24th February 2011] (CAInf) (3/2010)
[541] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 15(1)(a)

Authority on any matter of development control'. However, they could only do so as long as they had lodged written comments within fifteen days from when the application was published in the newspapers at the outset of the application process[542] and the approved development was not specifically authorized in a development plan.[543]

Consequently, the most important thing to note was that it was no longer possible for a third party to appeal a decision on the basis of having a juridical interest without first lodging a formal objection, as occurred in **Attard Montaldo [1996]**. At this point, a prospective third party objector had to show further that he had made written representations within the statutory time frames during the initial stages of the planning application. But even so, the law failed to specify whether an '*interested party'* had also to show that he had a juridical interest as is the case in civil law proceedings.

For example, in **Saviour Cremona -vs- Kummissjoni Kontroll ta' l-Izvilupp u l-kjamat in kawza Joseph Farrugia**[544] the Court found that appellant had not submitted any written representations within the statutory fifteen-day period from publication of the notice and declared appellant not to be an '*interested third party*' in terms of Section 15(1)(d). Still, the court refrained from stating whether plaintiff's written concerns at the onset of the application would have been enough to show that he had a juridical interest or whether he was also expected to demonstrate a direct and actual interest in the subject matter as the court had held in **Attard Montaldo [1996].**

[542] Development Planning Act, Act I of 1992 amended by Act XXI of 2001, s 15(d)(i)
[543] *Ibid* : s 15(d)(ii)
[544] *Saviour Cremona v Kummissjoni Kontroll ta' l-Izvilupp u l-kjamat in kawza Joseph Farrugia* [27th April 2006] (CAInf) (4/2004)

This quandary was eventually settled when the EPDA was enacted in 2010[545], following which a provision was made stating that prospective third parties who had expressed their objections to a planning application within the statutory time frames were entitled to appeal without the need to show that they had an interest in terms of the doctrine of juridical interest.

Moreover, Act XXI of 2001 introduced the idea that local councils in whose locality one found the boundaries of the development to be carried out, were deemed to be interested third parties by law and therefore entitled to appeal decisions on planning applications subject to also having already expressed an objection within the statutory time frame at the onset of the said planning applications.[546] Incidentally, this provision followed a judgment in the names **Kunsill Lokali tax-Xewkija -vs- L-Awtorita` ta' l-Ippjanar et**[547] where the Court had highlighted that local councils had a distinct legal personality, and had a right, if anything, more than anyone else, to lodge a third party appeal against an approved development taking place within the locality.

Act XXI of 2001 specified a number of instances, not being decisions on planning applications, which could also be subject to appeal before the PAB. Notably, appeals to scheduling property and conservation orders were, through the said law, made available to '*any person who felt aggrieved by the decision*'.[548] Unlike with planning applications, an appeal to scheduling property and conservation orders was made available to third

[545] As shall be seen in the next section, Environment and Development Planning Act introduced a provision, namely paragraph 12 of the Second Schedule which states the following: *'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 planning considerations to justify his appeal.'*

[546] Development Planning Act, Act I of 1992 amended by Act XXI of 2001), s 15(1)(d)(iii)

[547] *Kunsill Lokali tax-Xewkija v L-Awtorita` ta' l-Ippjanar et* [6th October 2000] (CAInf)

[548] Development Planning Act, Act I of 1992 amended by Act XXI of 2001), s 46(9)

parties without a specific need to have made any comments before the scheduling or the order took place.

On the other hand, appeals to the enforcement of notices, previously open to '*a person aggrieved by the decision'*, could now be made by *'aggrieved persons'*, specifically excluding '*interested third parties'*.[549] However, at the same time, Section 52(9) of the Act provided that the appeal from an enforcement notice was explicitly open to *'any person who feels aggrieved by any enforcement notice served on him,'* who could either be the owner and, or the occupier.[550] The anomaly, here, was that the owner of the land subjected to an enforcement notice could end up in a situation where he could not contest a notice served to a third party occupant before the Board if not served on him.

On the other hand, Act XXI of 2001 made it also possible to lodge an appeal against the Authority for issuing an order indicating steps to rectify an offence[551] or for issuing an order prohibiting the transfer *inter vivos* accompanying an enforcement notice.[552] Once again, it was very likely for an order indicating steps to rectify an offence or one prohibiting the transfer *inter vivos* not to be served to each and every person who could possibly have an interest in contesting such order. It should be noted that, in the latter two instances, the legislator failed to specify whether the remedy was only available to the person served with the order/notice or any person who felt aggrieved with the decision.

Act XXI of 2001 also empowered the Board to hear and determine appeals from revocations or modification of permissions. Nevertheless, the remedy in this case was

[549] Development Planning Act, Act I of 1992 amended by Act XXI of 2001, s 15(1)(d)(i)
[550] *Ibid* : s 45(1)
[551] *Ibid* : s 58(1)
[552] *Ibid* : s 61(7)

only given to the applicant on whose name the permit was issued.[553] Consequently, there could be a situation where the owner of the land, not being the permit holder, was not entitled to appeal against a decision to revoke a planning permission. This state of affairs hardly made sense considering that a planning permission not only endured for the benefit of the applicant but also for the benefit of the land and of all the persons for the time being interested in it, which persons included, of course, the land owner. More so, the complainant who could have possibly instigated the revocation process upon a request was likewise not eligible to appeal.

Act XXI of 2001 also specified that an appeal could be sought from the imposition of planning obligations. In this case, the law made it clear that the remedy was available to '*the applicant and any person interested in land'*.[554] Apart from applicant who had an obvious interest, any other person who had some connection with the land was, therefore, also entitled to appeal against the imposition of a planning obligation. *Prima facie*, having any person interested in the land entitled to appeal a planning obligation appeared to make sense, particularly so when applicant would have accepted to carry out a planning obligation on land which is not his.

Another novelty in Act XXI of 2001 was that a sanctioning application or an appeal against a refusal from that application did not prevent the police from concurrently prosecuting the offenders before the Court of Magistrates.[555] Although duplication of proceedings could go a long way towards discouraging abuse, there could be some doubt as to whether this was in line with Section 4 of Protocol 7 of the European Convention of

[553] *Ibid* : s 39A(3)
[554] *Ibid* : s 40(4)
[555] *Ibid* : s 56(5)

Human Rights as well as with Section 50 of the EU Charter of Fundamental Rights for criminal proceedings cannot be instituted against a person on whom there had been the imposition of a final administrative penalty having a criminal character. Indeed, this is a position which also appears to have been recently embraced by the Maltese courts, based on the premise that a person should not be penalized twice for the same contravention arising from identical facts or facts which are substantially the same.[556]

Another interesting provision that found its way through Act XXI of 2001 allowed the PAB to enter into both private and public premises in order to carry out site inspections[557], though in the case of dwellings, inspections could only be carried out between nine o'clock in the morning and eight o'clock in the evening with a forty-eight-hour notice. Although this provision could seem as giving excessive power to the PAB, it should be said that the Maltese Constitution expressly acknowledges that private property could be inspected if *'reasonably required in the interest of town and country planning'*.[558] Still, the '*reasonable*' safeguards, such as the need for the property owner to be physically present during inspections or the duty to provide a satisfactory justification for the necessity of such inspections, were lacking in this new provision.

Throughout the period 1992-2010, the composition of the PAB remained practically unchanged. The Board continued to be presided upon by a lawyer flanked by a member who had to be well versed in planning matters and a third member. The manner in the way members were appointed was, however, changed by way of Act XXIII 1997 since

[556] *Robert Ciantar v L-Onorevoli Prim Ministru, L-Avukat Generali, Il-Kummissarju tat-Taxxa fuq il-Valur Mizjud, u b`digriet tat-23 ta` Mejju 2013 "il-Kummissarju tat-Taxxa fuq il-Valur Mizjud" inbidel ghal Direttur Generali (Taxxa fuq il-Valur Mizjud)" , Il-Kummissarju tal-Pulizija* [29th October 2005] (FHCJ) (14/2011)
[557] Development Planning Act, Act I of 1992 amended by Act XXI of 2001, s 16A
[558] Constitution of Malta, s 39(2a)

the President could no longer appoint or substitute any of the members without first seeking the advice of the Minister.[559] Moreover, the members of the Board were to hold office for a definite period of three years, though the said period could be extended.[560] Thus, it could be argued that the future of one's career was dependent on the whim of the executive who ultimately had the final say insofar as deciding whether to extend a member's appointment for another three years.

Arguably, this went against the principle that judicial officers should be guarded against the risk of them having to appease the executive during their tenure in order to stand eligible for reappointment.[561] For this reason, conventional thinking today is that the appointment and removal of judicial officers should be '*depoliticized as much as possible'*.[562] As shall be seen later, this state of affairs was, to a certain extent, addressed in the current EPRT Act by having members of the EPRT not eligible for reappointment.

Additionally, Act XXIII 1997 introduced a provision by way of which members could be removed on grounds of gross negligence, conflict of interest, incompetence or acts or omissions unbecoming. The final word as to whether to have a member removed rested with the President who, yet again, had to act on the advice of the Minister.[563] In itself, this was a positive development because members could now foresee their duties with precision and had no excuse of claiming not to know what standard of behavior was expected of them.

[559] Development Planning Act, Act I of 1992 amended by Act XXIII of 1997, s 14(1), 14(2), 14(3)
[560] *Ibid* : s 14(4)
[561] Paras 46 and 47 of the Recommendation CM/Rec(2010)12 of the Committee of Ministers to EU Member States on judges
[562] *Oleksandr Volkov v Ukraine* App no 21722/2011 (ECtHR, 9th January 2013)
[563] Development Planning Act, Act I of 1992 amended by Act XXIII of 1997, s 14(5)

The law, however, failed to provide a counter-framework to ensure that a member facing removal was fully informed of the charges and, less so, sufficient time to prepare a defense. Members risked being removed without the possibility of being represented at a hearing and judged by an independent and impartial tribunal, in turn being obliged to provide reasons with the possibility of judicial review in order to ensure that all the legal requirements of the removal process were adhered to. In this way, the removal process could be used to penalize or intimidate members since the Minister could single-handedly decide to bring disciplinary charges based on the results of his inquiries. The situation was, therefore, different than that in the ordinary courts where judges of the Superior Courts in Malta could only be removed from office with the support of not less than two-thirds of all the members of the House of Representatives.[564]

The presence of the Minister was made even stronger after the promulgation of Act XXI of 2001 because an appeal against a decision on some developments deemed to be of particular importance, namely those listed in Section 15A(2)[565], could not be decided by the PAB unless the Minister signaled his no objection within fifteen days of being notified of the appeal.[566] In the event of an objection, the appeal was to be decided by Cabinet. Also, a decision of the Board to deschedule a scheduled property or to downgrade the protection afforded to a scheduled property, which became possible with

[564] Constitution of Malta, s 97(2)

[565] '*(a) applications in respect of development which appears to the Minister to be of a strategic significance;*
(b) applications in respect of development which appears to the Minister to affect matters of national security or national interests;
(c) applications in respect of development which appears to the Minister likely to affect the interests of other governments;
(d) applications in respect of development which is subject to an environmental impact assessment and which in his opinion is of national interest;
(e) applications in respect of which the applicant is a department of Government or a body corporate established by law'

[566] Development Planning Act, Act I of 1992 amended by Act XXI of 2001, s 15A

the enactment of Act XXI of 2001, could only take effect once the Minister gave his endorsement.[567]

Act XXI of 2001 introduced a new provision, namely Section 15(12), reminding the PAB that in determining whether to grant or refuse permission, there had to be compliance with Section 33(1) and (2).[568] In other words, the PAB and the PA had to comply with the same provision of the law regulating the determination of planning applications. Although this principle had been highlighted in earlier jurisprudence[569], the legislator thought it fit to remind the Board what should already have been obvious. Namely, the PAB could not exercise its discretion according to what it deemed fit, but decide planning applications within the parameters set out by development plans and planning policies while having regard to material considerations.[570] Notably, the court has subsequently relied on the said Section 15(12) to revoke a number of PAB judgments for not being in line with Sections 33(1) and (2).

One such court judgment was **Louis Van Den Bossche -vs- l-Kummissjoni ghall-Kontroll ta' l-Izvilupp et**[571] in which the Board's decision was revoked due to the latter having granted permission for a detached building not according to planning policies as required by Section 33(1). Likewise, the court annulled the Board's decision in the names **Matthew Vella -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**[572] after it found that Vella was given permission to build a new farmhouse outside the development

[567] *Ibid* : s 46(11)
[568] *Ibid* : s 15(12)
[569] *Michelangelo Theuma v Chairman, Awtorità ta' l-Ippjanar* [12th May 1997] (CC)
[570] Development Planning Act, Act I of 1992 amended by Act XXI of 2001, s 33(1), 33(2)
[571] *Louis Van Den Bossche v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp et* [26th February 2004] (CAInf) (44/2002)
[572] *Matthew Vella v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [30th March 2006] (CAInf) (4/2008)

zone despite being expressly prohibited by the Design Guidance entitled '*Farmhouses and Agricultural Buildings'*. On the other hand, the Board's decision in **Anthony Ciappara -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**[573] was declared null by the court due to the Board having taken a short cut and failing to take cognizance of the relevant plans and policies as it was obliged under Section 33(1). In **Anna D'Amato -vs- Kummissjoni ghall-Kontroll tal-Izvilupp**[574] the Board's decision was nullified not due to the latter having ignored or made a wrong application of the relevant policy but for failing to have proper regard to material considerations, in this case the surrounding commitment, as required by Section 33(2).

Section 33(2), therefore, reinstated what should have been evident from the very outset, namely that the Board's discretion was not unrestricted, and in exercising its powers, it could not undermine the purpose for which the discretion and power had been given.[575] However so, Section 15(12) was a step in the right direction as it is always desirable to have written rules reminding the Board what it stood for.

Several changes intended to improve the Board's efficiency were introduced over the years. A move in this direction was found in Act XXIII of 1997, namely to have Board hearings appointed within three months from the date of filing of the appeal.[576] Furthermore, Act XXIII of 1997 obliged the Authority to file its reply to the appeal within thirty days of being served with the appeal application and further obliged it to serve a

[573] *Anthony Ciappara v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [28th June 2006] (CAInf) (11/2004)
[574] *Anna D'Amato v Kummissjoni ghall-Kontroll tal-Izvilupp* [28th June 2006] (CAInf) (11/2005)
[575] Lisa Webley, Harriet Samuels, *Public Law, Text, Cases and Materials* (Oxford University Press 2018) p 549
[576] Development Planning Act, Act I of 1992 amended by Act XXIII of 1997, s 37(3)

copy of the reply on the appellant.[577] The idea here was that the appellant would have already been notified of the Authority's position well ahead of the first hearing.

What is perhaps more relevant is that there are no reported cases to show whether, in such default, the Board would have made an error of law due to it having failed to observe the statutory procedure. In practice, written replies were rarely submitted on the day of the first sitting, even if in defiance of the thirty-day timeframe. Consequently, it is by no means the case that the changes introduced by way of Act XXIII of 1997 to have a speedier judicial process had the desired effect.

A string of other changes aimed at improving the Board's efficiency were also introduced in Act XXI of 2001. The minimum fourteen- day period within which notice of the sitting was to be given to the parties could also be abridged by order of the Board upon valid reason.[578] In order to discourage the piecemeal production of documents, an appeal from an enforcement notice had to be supported by all relevant development permissions as well as permit and other relevant information relative to the site, which was subject of the appeal proceedings.[579]

Meanwhile, the PAB was also obliged to dismiss an appeal once it resulted that a sanctioning application on the development mentioned in the enforcement notice was lodged in parallel with the proceedings.[580] This was one logical step to take since an

[577] *Ibid* : Third Schedule para 2
[578] Development Planning Act, Act I of 1992 amended by Act XXI of 2001, s 15(4)
[579] *Ibid* : s 52(6)(10)
[580] *Ibid* : s 52(11)

appeal against an enforcement notice was tantamount to saying that the works could be carried out without the need for permission.[581]

The Board was also given the power to correct any defect or error in an enforcement notice without having to annul the proceedings, provided, however, that the appellant was given sufficient time to make submissions.[582] A similar provision was present in the Criminal Code, allowing the court to correct an error which becomes evident during a trial and which error is in respect of the circumstances of time, place and person, when, where, and against whom the offence was committed, or as to the indication or description of the things on which the offence was committed.[583]

Act XXI of 2001 provided that a partial Board decision could only be appealed together with an appeal on the final decision.[584] It is important to note that the Board was not prevented from delivering a preliminary decision that could bring finality proceedings. Of course, it was only in that eventuality, that the preliminary decision could be appealed.

Finally, once a decision was taken by the PAB, the PA had to follow that order and issue development permission within one month from the date of the decision or compliance with the conditions set out in that decision.[585] However so, nothing held the Authority into account when it failed to adhere to the said timeframes.

[581] *David Buhagiar v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [28th October 2010] (CA) (8/2007)
[582] Development Planning Act, Act I of 1992 amended by Act XXI of 2001, s 52(6)(13)
[583] Criminal Code, s 599(1)
[584] Development Planning Act, Act I of 1992 amended by Act XXI of 2001, s 15(2)
[585] *Ibid* : s 15(13)

Meanwhile, during the period 1992 – 2010, the right to appeal PAB decisions on a question of law before the courts remained in place. The only difference was that as from 2001, the Court of Appeal (Inferior Jurisdiction) presided over by one judge took over the Court of Appeal (Superior Jurisdiction) presided over by three judges.[586] Also, the secretary of the Board became officially recognized to represent the Board during all court proceedings brought against it.[587]

3. ACT X OF 2010 AND THE ESTABLISHMENT OF THE EPRT

On the 1st January 2010, Act I of 1992 was replaced by Act X of 2010.[588] As discussed earlier, the new Act was the result of a widely publicized campaign promoting a reformed Authority founded on four key pillars – consistency, transparency, efficiency, and better enforcement.[589] Amongst the many changes introduced by the new legislation, the role of the PAB was taken over by the EPRT. The rationale at the time was that environmental considerations should be integrated into the development planning decisions.

At first glance, the words '*review tribunal'* could give the impression that the jurisdiction previously held by the PAB was to be somewhat curtailed. The term '*review'*, as opposed to '*appeal'*, is usually related to seeing whether the decision under challenge was reached in a legitimate way without the ability to substitute that decision. Nevertheless, the role of the newly established EPRT was to '*hear and determine appeals'*[590] as with previous legislation.

[586] Development Planning Act, Act I of 1992 amended by Act VI of 2001, s 15(2), 15(10)
[587] Development Planning Act, Act I of 1992 amended by Act XXI of 2001, s 14(11)
[588] Environment and Development Planning Act
[589] Office of the Prime Minister, 'A Blueprint for MEPA's Reform' (2009) <https://opm.gov.mt/mep> accessed 29th March 2020
[590] Environment and Development Planning Act, s 41

Section 41 of the new Act made it clear that the EPRT was to hear and determine '*appeals on any matter of development control, which included of course decisions on planning applications'* lodged by the applicant[591] as well as interested third parties who had submitted their written comments '*on the basis of issues relevant to environment and planning*'[592] within the statutory timeframes at the outset of the planning application.[593] The EPRT has been reminded that in determining a planning application, its discretion was not unfettered, hence its obligation to abide by Section 69 of the Act (previously Section 33 of the previous Act).[594]

As in the previous Act, Local Councils in whose locality the development was intended to be carried out[595] were deemed to be an interested third party under the law. On the other hand, a novel provision was made allowing any department, agency, authority, or other bodies corporate wholly owned by the Government and Government itself to appeal decisions on development planning applications without the need to have lodged written representations during the statutory consultation period.[596] The first time that the government turned to this remedy was in April 2014 after the Authority was found to have issued permission to the Malta Freeport Corporation to carry out repair and maintenance works despite there being strong objections from residents.[597]

Furthermore, it is worth observing that under the new legislation, once an interested party submitted an appeal, he was not required to prove that he had an interest in that appeal in

[591] *Ibid* : s 41(1)(a)
[592] *Ibid* : s 68(4)
[593] *Ibid* : s 41(1)(c)(i)
[594] *Ibid* : s 41(13)
[595] *Ibid* : s 41(1)(c)(iii)
[596] *Ibid* : s 41(c)(iv)
[597] 'Government to appeal MEPA's Freeport decision' *Maltatoday*, (5th April 2014) < https://www.maltatoday.com.mt/news/national/37679/metsola_in_agreement_with_local_councils_objection_to_birzebbuga_shipyard#.XbXwMuhKiUk> accessed 29th March 2020

terms of the doctrine of juridical interest[598], putting to rest any previous doubts on the matter. The only thing necessary was that the third party appeal was founded on justified environmental and/or planning grounds.[599]

Furthermore, an interested third party who was not the appellant became entitled to be informed by the EPRT if an appeal was lodged by an applicant and, moreover, the said third party was invited to participate and enjoyed the right to address the EPRT during proceedings.[600] Not only so, but the third party could now challenge the eventual EPRT decision before the Court of Appeal (Inferior Jurisdiction) on a point of law[601], something that was clearly prohibited under previous legislation.[602] This meant that the new Act gave third parties a similar status to that enjoyed hitherto by applicants except that a third party had no automatic right to attend site inspections where the EPRT entered upon the property of the appellant without the latter's consent.[603]

At first glance, the consequence of all this was that a mere busybody could challenge the validity of a planning permission. Still, this was not to be understood that third parties were now entitled to appeal to all kinds of planning decisions. As with earlier legislation, an appeal to the imposition of an obligation could only be made by '*the applicant and any person interested in land*'[604], meaning that a third party had to show that the decision had placed some burden upon him. Once again, the right to appeal revoked permissions was limited to the applicant.[605] Appeals from decisions for notices not to be executed

[598] Environment and Development Planning Act, Second Schedule para 12
[599] *Ibid*
[600] *Ibid* : Second Schedule para 11
[601] *Ibid*
[602] *Teresina Portanier v L-Awtorita` ta' l-Ippjanar* [19th November 2001] (CA) (77/2000)
[603] Environment and Development Planning Act, Second Schedule para 11
[604] *Ibid* : s 76(4)
[605] *Ibid* : s 70(3)

were open to the person served with the notice.[606] Meanwhile, an appeal against an enforcement notice[607] or the imposition of administrative penalties for committing an offence[608] could, as with the previous act, be made by the '*person aggrieved'*.

On the other hand, an appeal to scheduling and, or conservation order could, as with previous legislation, be lodged by '*any person'*.[609] Interestingly, this was not the only instance where an appeal to the new EPRT was available to '*any person*. A specific provision was also introduced to allow any decision of the Authority relating to environment protection, including environmental assessments, access to environmental information and the prevention and remedying of environmental damage open to an appeal could also be submitted by '*any person'*.[610]

It, therefore, made little sense for a specific challenge on the substantive or procedural legality of any decision, act or omission relating to a development or an installation which was subject to an EIA or an Integrated Pollution Prevention and Control ('*IPPC*') permit to be then restricted to those members of the public having '*sufficient interest'*[611] such as non-governmental organizations promoting environmental protection registered under the Voluntary Organizations Act.[612] What happened is that this latter provision, namely Section 41A, found its way in the Act under Legal Notice 223 of 2014 at a point when those responsible for drafting it simply transposed Section 9(2) of the Aarhus

[606] *Ibid* : s 91
[607] *Ibid* : s 41(1)(a)
[608] *Ibid* : s 93
[609] *Ibid* : s 81(11)
[610] *Ibid* : s 41(1)(a)
[611] *Ibid* : s 41A(1)
[612] *Ibid* : s 41A(3)

Convention[613] which had been ratified by Malta almost twelve years before, namely on the 23rd April 2002. This Convention is aimed at improving the public's involvement in decision-making and access to justice in environmental matters, by promoting the right of individuals to environmental information and enhancing access to justice.

Interestingly enough, what the Maltese drafters appeared to have failed to acknowledge is that access to review of environmental decisions before the EPRT was, by way of principle, already available to '*any person*'[614] and not only persons having '*sufficient interest'*.

The Act contained other provisions that were clearly designed to bring Maltese legislation in line with the Aarhus Convention. One such provision was the right of every person to have access to information, public participation in decision-making, and access to justice in environmental matters enshrined in the Aarhus Convention.[615] This principle was now reflected in the Act[616] while the Authority was obliged to inform the public of his right to appeal its decisions on the Authority's website, which information had to contain the legal time limits within which an appeal could be made as well as the registry fees.[617]

Moreover, the principle that proceedings were not to be prohibitively expensive, also found in the Aarhus Convention[618], was enshrined in the Act.[619] As to this last point, it is

[613] 'Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters' (Aarhus, Denmark, 25th June 1998) <https://www.unece.org /fileadmin/DAM/env/pp/documents/cep43e.pdf>
[614] Environment and Development Planning Act, s 41(1)(a)
[615] 'Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters' (Aarhus, Denmark, 25th June 1998), s 1
[616] Environment and Development Planning Act, Second Schedule para 16
[617] *Ibid* : Second Schedule para 12
[618] UNECE, *The Aarhus Convention: An Implementation Guide* (2nd edn, UN Doc. ECE/CEP/72/Rev.1 2014): 19
[619] Environment and Development Planning Act, s 40(15)

worth noting that it was, however, up to individual contracting states to determine what was deemed prohibitively expensive or not.[620] To provide some perspective, planning appeal fees at the time were equivalent to five percent of the development permit fee[621] unless the third party was not a local council or a registered non-governmental organization having environmental protection as one of its purposes, in which case the fee was capped at €4,658.75.

That meant that an interested third party individual, not being a local council or environmental organization, could still find himself unable to pay the equivalent of five percent of the development permit fee over and above the professional fees. This was particularly true when it came to proposals for large projects because the development permit fees in such instances ran into thousands of euros. That meant that registry fees were, after all, not necessarily affordable to all and sundry.

Furthermore, the call in procedure introduced under previous legislation was modified.[622] While Cabinet could still seize jurisdiction from the EPRT in the same circumstances envisaged in the previous law, its decision was no longer immune from judicial review when the subject matter was a development or an installation subject to an environmental impact assessment and/or an IPPC permit. An '*interested party'* was now entitled to lodge an appeal to the Court of Appeal from such decisions within ten days from the communication thereof on both matters of substantive and procedural legality. The court, on the other hand, had to pronounce judgment within four months, during which period the works had to be suspended.[623] Even in this case, there appeared to be, yet another

[620] Opinion of A.G. Kokott, EU:C:2012: 645
[621] Planning Appeals (Fees) Regulations (Legal Notice 7 of 1993 as amended), Regulation 5
[622] Environment and Development Planning Act, s 75
[623] *Ibid* : s 75(5), 75(6)

contradiction because the appeal was limited to an '*interested party'* when access to review of environmental decisions before the EPRT was, by way of principle, available to '*any person'*.

According to the new legislation, the EPRT was empowered to not only confirm, revoke or alter the decision appealed against and give such directions as it may deem appropriate[624] but also to ask the appellant to submit fresh documents and plans subject to giving reasons for such request and as long as the '*substance of the matter'* as presented earlier to the Authority remain unchanged.[625] This meant that the new Tribunal was rendered even more powerful than its predecessor since the court had hitherto insisted that the PAB was a '*Bord Revizorju'*[626] that could not entertain and/or process new drawings for that would be tantamount to acting as a Board of First Instance.[627] The substance of the proposal not being altered meant that should the EPRT request appellant to submit new drawings, these had to reflect how the plaintiff desired that the judgment be varied.[628]

There is no question that the possibility of submitting new drawings at appeals stage without having to lodge a new planning application was of great benefit to prospective applicants even though, strictly speaking, review proceedings are meant to provide the opportunity of opposing an appealed decision and not that of finding alternative solutions. An issue could, however, have arisen once a decision was delivered, since the defendant

[624] *Ibid* : Second Schedule para 5
[625] *Ibid*
[626] Board of revision
[627] *Joe Cortis v Kummissjoni tal-Izvilupp* [27th February 1996] (CA)
[628] *Anthony Delia v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u b'digriet tal-15 ta' Marzu 2018 David Zammit u Mary Zammit intervenew fil-kawza in statu et terminis* [30th April 2018] (CAInf) (3/2018)

Authority was in no position of commenting on the fresh drawings ordered by the EPRT thus being left with the only option of lodging an appeal on a point of law before the Court of Appeal (Inferior Jurisdiction).

Incidentally, this issue arose in **Martin Baron -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Mario Farrugia f'isem il-Fondazzjoni Wirt Artna**.[629] Plaintiff objector complained that the EPRT had requested the applicant to submit a revised restoration method statement in its decision without him having the opportunity of commenting on the changes. Nevertheless, the court found nothing wrong with the court's approach after it found that it had ensured that the substance of the proposal, namely the restoration of a saluting battery, remained unchanged. After all, this was in line with what was provided in paragraph 5 of the Second Schedule of the EPRT Act.

Another interesting issue is whether a plaintiff could decide, of his own motion, to trim a proposal down in order to stand a better chance of convincing the EPRT of granting him a planning permission. Although the law has always been silent on this matter, earlier case law made it clear that a proposal could not be modified during appeal proceedings even if it meant that the changes would render a proposal more acceptable.[630] Of recent, the court, however, thought that the EPRT was entitled to accept amended drawings during the pendency of proceedings upon applicant's request, in which event it could

[629] *Martin Baron v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Mario Farrugia f'isem il-Fondazzjoni Wirt Artna* [22nd January 2014] (CAInf) (54/2013)
[630] *John Pace v L-Awtorita' ta' l-Ippjanar* [31st May 1996] (CA) (594A/1995)

either proceed with assessment and judgment or refer the matter to the Authority for reassessment.[631]

Ahead of the promulgation of the Environment and Development Planning Act, it has been suggested that all members of the EPRT should be scrutinized and endorsed by a Parliamentary Committee[632], a proposition that however, never materialized. Still, the composition of the new EPRT was to be different from that of the PAB. The main change was that the EPRT was no longer to be presided over by a lawyer but by a person versed in environment or development planning who, in turn, was flanked by a lawyer and an architect.[633]

This move could be perceived as a reaction to the criticism that a number of planning permissions would not have seen the light of day were it not due to legal loopholes being identified by the legal professionals on the EPRT.[634] In order to eliminate this from happening, the solution seemed to be the avoidance of the legal profession from taking centre stage. While it may well be true that some controversial permissions could only be justified on legal subtleties, it was equally clear that the EPRT could not lose sight of the general legal principles. EPRT decisions were still open to judicial review, meaning that the members, regardless of their profession, were still obliged to act in a manner that would not put applicants at an unfair disadvantage for the sake of coming across as *'environmentally friendly'*.

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[631] *Grezzju Camilleri v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th January 2015] (CAInf) (38/2014)
[632] Opinion on the consultation document on 'MEPA's Reform' (2009) <http://thechurchinmalta.org/files/2009/09/85-Kumm-ID-Ambjent-on-MEPA-REFORM.pdf> accessed 29th March 2020
[633] Environment and Development Planning Act, s 40(1)
[634] 'Mepa reform requires transparency (1)' *Times of Malta* (26th June 2009) < https://timesofmalta.com/Articles/view/mepa-reform-requires-transparency-1.262518 > accessed 29th March 2020

Another interesting provision introduced in the new Act concerned the payment of the honorarium to the EPRT's chairman and members as well as the salary of the secretary and staff. With the new Act, the funds required by the EPRT for the performance of its functions were no longer paid out by the Authority but forked out of the Consolidated Fund without the necessity of any further appropriation.[635] In this way, the EPRT would no longer depend on the whims of the defendant party in proceedings brought before it, to function smoothly.

Under the new Act, it also became possible for the EPRT to order suspension in whole or in part of the execution of works when a concurrent request for suspension was made by a third party appellant.[636] Clearly, the thinking was to introduce a remedy that was similar to an application for a prohibitory injunction in a civil court whereby the defendant is ordered to maintain the status quo until there is a hearing to determine the matter in dispute.

When a request to suspend the execution of works was made, the first hearing had to be held within six days of receipt of the appeal application, following which the EPRT had to immediately decide whether a prejudice that was disproportionate when compared with the actual doing of the thing so permitted subsisted. Depending on the degree of prejudice, the EPRT had to decide whether to stop the works and when the suspension was granted, a final decision on the appeal had to be given within three months. If, on the other hand, the final decision was not delivered within three months, the suspension was deemed to have elapsed *ipso iure* and the works covered by the permission could proceed.

[635] Environment and Development Planning Act, s 40(7)
[636] *Ibid* : s 41(3)

Although a three-month period does not look like a reasonable timeframe for the EPRT to pronounce judgment when a case is not straightforward and complicated studies are involved, it can be said that the EPRT has consistently managed to comply with this timeframe.

Having said this, a request for suspension could not be entertained when, in the opinion of the Minister, the appealed permission was deemed of strategic significance or of national interest or which was related to any obligation ensuing from a European Union act and/or affected national security or interests of other governments. However so, the Minister had no say when the application was related to developments or installations which relate to an *'environmental impact assessment and, or integrated pollution prevention and control ('IPPC') matters'*.[637] In practice, therefore, this would have meant that the majority, if not all, of major projects commissioned by the government, would still be susceptible to suspension proceedings since projects of strategic significance or national interest are very often planned on a large scale, likely to qualify for an EIA.[638]

The new Act also sought to provide added certainty as to when the period of lodging an appeal would start running. Under the previous act, an appeal against a decision on a planning application had to be lodged within thirty days from the date the decision was communicated to the person on whose application the decision was taken.[639] In practice, the thirty-day period commenced on the day the applicant signed the registered letter accompanying the decision, a process which could have taken months if the applicant could not be traced. With the new Act, the thirty-day period started running from *'the*

[637] *Ibid*
[638] Environment Impact Assessment Regulations (Legal Notice 412 of 2017)
[639] Development Planning Act, Third Schedule para 1

date of notification of the decision or order by the Authority'[640], namely the date of publication of the notice of the decision in a local newspaper[641], even though both the applicant and the interested third parties still received a copy of the decision.

With the new system, one could no longer justify his lodging a late appeal due to not being served with a copy of the decision. Also, an objector would no longer have to wait until the applicant was served with notice of the decision for him to be able to lodge a third party appeal.

Still, the weakness in this approach was that an applicant or an interested third party could be caught unawares of the publication of the notice of the decision in the newspaper, thus being left unable to lodge an appeal within the thirty-day stipulated time frame. It is, therefore, possible to argue that the new procedure disclosed a hindrance to access to the EPRT in this respect. That being so, it is generally accepted that it is always incumbent on the interested parties to display special diligence in the defense of their interest.[642] The rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed, after all, at ensuring the proper administration of justice in a context of legal certainty.[643]

With regard to enforcement notices, it should be noted that the fifteen day period to lodge an appeal would still run from the day the notice was served on the owner of the land or on the occupier of the land, or on both, as was the case with Section 52(9) of the

[640] Environment and Development Planning Act, s 41(2)
[641] Development Planning Procedure for Applications and their Determination Regulations (Legal Notice 514 of 2010 as amended), Regulation 9(7)
[642] See *Teuschler v Germany* App no 47636/1999 (ECtHR, 4th October 2001); See *Sukhorubchenko v Russia* App no 69315/2001 (ECtHR, 10th February 2005) paras 41-43
[643] *Miragall Escolono and Others v Spain* App no 38366/1997 (ECtHR, 25th January 2000)

Development Planning Act.[644] Consequently, the landowner or the occupier did not risk being caught unawares of the date when the fifteen-day period within which notice could be challenged started to run.

Timely delivery of justice was also a key feature in the new legislation, to the extent that the principle of seeking to have proceedings before the EPRT conducted '*in a timely manner'* was specifically stipulated in the Act.[645] The three-month time frame within which the EPRT had to appoint the first hearing was reintroduced after having been previously abolished.[646] Moreover, a copy of the appeal application had to be immediately notified to the Authority for the latter to respond within thirty days from the date of service.[647]

An appeal was to be deemed abandoned if the appellant showed no interest.[648] Summoned witnesses could also find themselves liable to a fine of not less than five hundred euros and not more than five thousand euros if they failed to appear before the EPRT.[649] Frivolous or vexatious appeals could be subject to a fine of two thousand five hundred euros without any redress before the Court of Appeal (Inferior Jurisdiction).[650]

Nevertheless, it is worth bearing in mind that except for granted suspensions following third party requests whereby final judgments had to be pronounced within three months,

[644] Development Planning Act, Third Schedule s 52(9)
[645] Environment and Development Planning Act, s 40(15)
[646] *Ibid* : s 41(5)
[647] *Ibid* : Second Schedule para 1(c)
[648] *Ibid* : Second Schedule para 13
[649] *Ibid* : Second Schedule para 4
[650] *Ibid*

the new Act failed to provide any timeframes within which the EPRT had to pass final judgment.

As with previous legislation, the decisions of the EPRT were deemed to be final and an appeal to the Court of Appeal (Inferior Jurisdiction) was only possible on points of law decided by the EPRT. Once again, the new Act failed to provide a definition of '*a point of law'*. The only notable change in this ambit was that the fifteen-day time frame within which the plaintiff had to register his appeal with the Court Registry had been extended to twenty days from the day the EPRT pronounced decision in public.[651] Conceivably, this amendment was designed to bring the time frames in line with those applicable to an ordinary appeal from a decision of the First Hall Civil Court.[652]

4. FOLLOWING MEPA'S DEMERGER

As discussed earlier, a consultation document entitled '*For an Efficient Planning System'*[653] was launched in March 2014, paving the way forward for the setting up of a new Authority for Planning and Sustainable Land Use[654] which would take over the responsibility for development planning from MEPA together with additional building and sanitary regulations.

[651] Environment and Development Planning Act, s 41(6)
[652] Code of Organization and Civil Procedure, s 226(1)
[653] Parliamentary Secretariat for Planning and Simplification Processes, *For an Efficient Planning System – A consultation Document* (Auberge de Castille, Malta, 2014)
[654] 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)

The consultation document was followed by the publication of two bills - the Development Planning Act, 2015, which envisaged the demerger of MEPA into two distinct entities – a Planning Authority responsible for '*sustainable planning and management of development'* and another authority to serve as an environmental regulator, namely the Environment and Resources Authority.[655] Moreover, an appeals Tribunal, still to be known as the EPRT, was envisaged under a separate Bill.

The decision to have the EPRT established under a separate piece of legislation was highly criticized by Aquilina who argued in favor of having all institutions established under a single code in order to ensure better interaction between them.[656] Nonetheless, Aquilina's recommendation was not taken forward by the Honorable Minister Owen Bonnici[657] who is recorded as having said that the EPRT was *'tant importanti ... li qegħdin nagħmlu liġi speċifika li tistabbilixxih u tirregolah'*.[658] This, according to Bonnici[659], would have also brought about a *'sistema iżjed ordnata u ċerta fis-smigħ tal-appelli'*[660] since the EPRT was a better alternative to an ordinary court due to it being more technically equipped and there were fewer expenses involved in its running.

The new EPRT Act enshrined the long-held principle that the EPRT was to act in an independent and impartial manner[661], not subject to the control or direction of any other person or authority.[662] This was, of course, in line with the principle of the separation of

[655] *Ibid*
[656] 'Twenty reasons against MEPA's demerger' *Maltatoday* (29th July 2015) < https://www.maltatoday.com.mt/comment/blogs/55519/twenty_reasons_against_mepas_demerger#.W_uzg-hKiUk> accessed 29th March 2020
[657] House of Representatives (Sitting No. 292) (17th July 2015)
[658] 'So much important that we are making a specific law to establish and regulate it'
[659] House of Representatives (Sitting No. 292) (17th July 2015)
[660] 'A system which was more ordered and legally certain in appeal procedures'
[661] Environment and Planning Review Tribunal Act, 2016, s 3
[662] *Ibid* : s 4(8)

powers founded on the notion that citizens were allowed to challenge the decisions of the administration, something which Bonnici[663] described as a '*strength'* of the government he represented.

Once more, the EPRT was to be funded directly from the consolidated fund.[664] The thinking, here, was to ensure the independence of the EPRT from the Authority whose decisions are challenged before it.[665]

As with earlier legislation, sittings had to be conducted in public[666], albeit the fact that the EPRT could regulate its own procedures in the absence of any rules on any matter.[667]

The newly set up EPRT consists of three members, two of whom have to be well versed in development planning and environmental matters, whereas another member has to be an advocate with at least four years of practical experience.[668] The four-year experience requirement was included upon the insistence of the Honorable Marthese Portelli, who stressed the importance of having a person already familiar with the rules of procedural fairness sitting on such tribunal.[669] More so, the members have to be appointed by the President acting on the advice of the Prime Minister.[670]

Incidentally, the direct involvement of the Prime Minister in public appointments has attracted wide criticism in the years that followed the enactment of the EPRT Act after

[663] House of Representatives (Sitting No. 292) (17th July 2015)
[664] Environment and Planning Review Tribunal Act, 2016, s 5(3)
[665] House of Representatives (Sitting No. 292) (17th July 2015)
[666] Environment and Planning Review Tribunal Act, 2016, s 6(3)
[667] *Ibid* : s 32
[668] *Ibid* : s 4(2)
[669] House of Representatives (Sitting No. 292) (17th July 2015)
[670] *Ibid* : s 4(3)

the Venice Commission voiced concern with the general state of the rule of law in Malta. The Commission commented that the Maltese Prime Minister was seen to be the centre of political power in Malta as s/he has very wide powers when it comes to institutional appointments and constitutional commissions. The Commission noted that *'the Prime Minister is predominant, while other actors are not sufficiently strong to contribute significantly to the system of checks and balances'* and the solution proposed was that it should be the Cabinet of Ministers, and not the Prime Minister alone, which should act as the appointing authority.[671]

Interestingly, the new Act did not provide who was to occupy the role of chairperson of the EPRT but left such a decision to be taken by the Prime Minister.[672] Unlike what was stated in the previous Act, there was nothing to prevent the legal member to take up the role of chairperson. This notwithstanding, the first appointed chairman under the new Act held a Masters' Degree in Planning.[673]

Similar to the members of the judiciary, new EPRT members were to take an oath before the Attorney General[674], a step which, according to Bonnici[675] would give more credibility to the new setting. As with previous law[676], members were again disqualified from hearing an appeal in those instances that would likewise disqualify a judge in a civil

[671] 'Malta Opinion On Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement', (2018) <https://www.venice.coe.int/webforms/documents/default.aspx ?pdffile=CDL-AD(2018)028-e> accessed 29th March 2020
[672] Environment and Planning Review Tribunal Act, 2016, s 4(1)
[673] The first chairperson appointed by virtue of the Environment and Planning Review Tribunal Act, 2016 was Mr Martin Saliba B.A. (Hons,), M.A. (Town & Country Planning U.K.)
[674] Environment and Planning Review Tribunal Act, 2016, s 8(1)
[675] House of Representatives (Sitting No. 292) (17th July 2015)
[676] Environment and Development Planning Act, s 40(3)

suit.[677] The only innovation was that the instances were now qualified by referring to Section 734 of the Code of Organization and Civil Procedure.

From this point onwards, members held office for a defined period of five years without being eligible for reappointment.[678] According to Bonnici, this meant that EPRT members enjoyed the security of tenure so they could not be removed '*at the whim of the Minister*'.[679] The Minister's understanding was that members need not feel they needed or were somehow obliged to please the government of the day with the hope of securing reappointment as their full term of office was approaching. At first sight, that could happen under previous legislation since members were eligible to reappointment after four years.[680] Nevertheless, Bonnici's reasoning would stand ground only if a member showed no interest in taking his experience elsewhere within public administration once his appointment expires.

The new Act further underlined that EPRT members could be removed from office by the President acting on the advice of the Prime for reasons of proved inability to perform functions of their office (whether arising from infirmity of body or mind or any other cause), proved misbehaviour, gross negligence or for a just cause.[681] In a sense, EPRT members could still be removed at the discretion of the Minister without being accountable to anyone else. Thus, a more transparent approach would have been to appoint members for an indefinite period and remove them with at least two-thirds majority in Parliament as was the case with the judiciary.

[677] Environment and Planning Review Tribunal Act, 2016, s 4(6)
[678] *Ibid* : s 4(7)
[679] House of Representatives (Sitting No. 292) (17th July 2015)
[680] Environment and Planning Review Tribunal Act, 2016, s 5(3)
[681] *Ibid* : s 4(8)

The EPRT's discretion was further enhanced under the new Act. It should be recalled that prior to 2010, the PAB was, by right, not allowed to entertain alternative solutions during pendency of proceedings before it.[682] Following the introduction of the EPDA, the EPRT was given the power not only to '*confirm, revoke or alter the decision appealed against and give such directions as it may deem appropriate'* but also to request appellant to submit fresh drawings on condition that the substance of the matter as presented before the Authority did not change.[683]

The EPRT Act went even a step further since it has been allowed to request the applicant to produce fresh documents and/ or plans prior to delivering judgment. Such a request could be done *'according to the circumstances'* on condition that the EPRT gave reasons for making such a request.[684] But what was even more intriguing is that such new drawings could also be accepted when the substance of the matter had changed, in which case the EPRT was obliged to redirect the case to the Authority to be determined afresh.[685] It is good to note that, in practice, such requests are usually prompted by an initial request submitted by the applicant to be allowed to lodge amended drawings during the pendency of proceedings instead of having to present a new planning application.

It was therefore highly evident that the legislator wanted to provide even more flexibility in the application process. Up to the date of writing, the trend is that the EPRT accepts any amended drawing without referring it to the Authority to be determined afresh, so

[682] *Joe Cortis v Kummissjoni tal-Izvilupp* [27th February 1996] (CA)
[683] Environment and Development Planning Act, Second Schedule para 4
[684] *Ibid* : s 31
[685] *Ibid* : Second proviso to s 31

long as there are no material changes[686] in terms of Legal Notice 162 of 2016.[687] So, for example, a downscaled proposal to contain less dwelling units than initially intended might not give rise to a material change in terms of Legal Notice 163 of 2016 but would alter the substance of the proposal. The likelihood in such cases is for the EPRT to proceed with a decision without remitting to the Authority. It is by no means clear, however, whether that trend could be challenged given that such a change, although it is not material, hits on '*the substance of the matter'*.

Under the new Act, the Authority remained obliged to notify the public of a person's right to appeal planning decisions alongside the legal time limits and registry fees *'including through publication on the electronic website of the Authority'*.[688] In practice, the parties to a planning application as well as any interested third parties, are also informed of their rights to appeal via unregistered mail.

Under the new Act, the powers of the EPRT became better defined, and the Prime Minister could further increase these powers without the need of going to Parliament.[689]

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[686] Decelopment Planning Procedure for Applications (and their determination) Regulations, s 2 states: '*(a) a change in site configuration which increases the site area by more than five percent and which change in the site area does not result in a change in the categorization of the proposal in terms of the schedules of these regulations;*
(b) an addition in the number of floors;
(c) an increase in height of the building which would exceed the maximum height limitation in metres;
(d) an increase in volume, area or units by more than ten percent that does not result in a change in the categorization of the proposal in terms of the schedules of these regulations;
(e) a change in the proposed use which does not fall within Section 3(1) of the Development Planning (Use Classes) Order, 2014;
(f) a change in the official alignment of the building;
(g) a change in the positioning of development/s within the site but which would fall within an area subject to additional constraints; or
(h) a change in the positioning of the development/s vehicular access which will result in such vehicular access being located in a different road'

[687] *Godwin Gatt v L-Awtorita' tal-Ippjanar* [3rd October 2019] (EPRT) (63/2016MS); *Adrian Mallia v L-Awtorita' tal-Ippjanar* [28th June 2018] (EPRT) (75/2017MS); *Kevin Camilleri v L-Awtorita' tal-Ippjanar* [1st March 2018] (EPRT) (52/2017MS)

[688] Development Planning Act, 2016, s 33(3)

[689] Environment and Planning Review Tribunal Act, s 11(2)

Rather than being entitled to appeal on *'any matter of development control'*[690], as was previously the case, applicants, under the new legislation, could lodge an appeal from *'a decision taken following an application'* for any development permission[691] as well as appeals from decisions on development notification orders and projects of common interest.

A point that can be made is that a *'decision taken following an application for a development permission'* is sufficiently broad to include all measures taken by the Authority that halt the application process. It would thus seem that an appeal following an application for a permission should not be restricted to a decision taken by the PB or PCom. This would include, as an example, a decision of the vetting officer not to validate a planning application owing to alleged missing information. It would also include a decision of the Executive Chairman not to issue an application report within the prescribed timeframes, of course, if one were to accept that inaction following a planning application is tantamount to a decision not to act.

The above being said, the possibility of appealing decisions taken following a request for screening of a proposed development is limited to additional submissions, studies, assessments and documentation being requested and fees and/or contributions required prior to submission.[692] Notably, the said restrictions apply to the screening process which takes place prior to the commencement of the application process. This lends weight to the previous argument that once an application for development permission is lodged without a request for screening, an appeal can be filed even if the application it is not yet

[690] Environment and Development Planning Act, s 41(1)(a)
[691] Section 71(2) of the Development Planning Act, 2016 recognizes outline, full and non-executable full development permissions as development permissions
[692] Environment and Planning Review Tribunal Act, 2016, s 11(1)(b)

validated, given it can be taken to be an appeal against any decision not to take the process further.

Another novelty found in the new Act is that a decision on a certain type of planning control applications, specifically those in relation to changes of alignments, can be now challenged before the EPRT.[693] On the other hand, a remedy against a decision on the other types of planning control applications, like those involving changes in land designation, was still to be found through an application for judicial review before the First Hall Civil Court.[694]

Under the new law, the rights of '*third parties'* to appeal planning decisions also take the forefront. Predictably, the lack of necessity for an '*interested third party'* to demonstrate that he has a juridical interest was carried forward under the new Act.[695] All that is needed is that the appeal is based on reasoned environment and planning grounds.[696] As with previous legislation, an '*interested third party'* is one who has already made written submissions at the very beginning of the planning application.[697] Furthermore, when an appeal is lodged by the interested third party, the applicant is to be informed so that he can participate in the relevant proceedings.[698] Inversely, when an appeal application is lodged by the applicant, registered third parties are to be duly informed by the EPRT and have five working days to state whether they want to be registered for the appeal and be

[693] Environment and Development Planning Act, s 54(1)
[694] See for example *Avallone Raymond Pen v Onorevoli Prim Ministru et* [pending] (FH) (1031/2015)
[695] Environment and Planning Review Tribunal Act, 2016, s 22(1)
[696] Environment and Development Planning Act, Second Schedule para 12
[697] *Ibid* : Second Schedule para 11
[698] Environment and Planning Review Tribunal Act, 2016, s 22(2)

present during all sittings of the EPRT.[699] This notwithstanding, third parties do not have the power to enter the appellant's property while on a site inspection.[700]

A major novelty found in the new EPRT Act is that the newly set up Environment and Resources Authority (ERA) which took over environmental regulation, which was previously overseen by MEPA, is now considered to be an external consultee from the standpoint of development permissions, planning control applications with respect to alignments as well as permission for projects of common interest.[701] Like all other external consultees listed in Schedule 3 of Legal Notice 162 of 2016, ERA is required to be consulted by the Executive Chairperson during the processing of any development application and, in turn, eligible to eventually appeal the decision subject to having voiced concern during the same consultation process. This is seen to be an important development given that all the way up to April 2016, ERA's predecessor, that is MEPA, for obvious reasons, was specifically prohibited from appealing any of its own decisions.[702]

Furthermore, the Attorney General is given special status under the new Act owing to his being there to safeguard the common interest of Maltese citizens.[703] When an appeal concerns a decision on an application for development permission, a planning control application or a scheduling and/or conservation order, the Attorney General is to be considered as an interested third party *ex lege* independent of him having submitted any comments or otherwise during the public consultation process.[704]

[699] *Ibid* : s 22(2)
[700] *Ibid* : s 21
[701] *Ibid* : s 11(1)(f)
[702] Development Planning Act, 2016, proviso to s 41(1)(iv)
[703] House of Representatives (Sitting No. 292) (17th July 2015)
[704] Environment and Planning Review Tribunal Act, 2016, proviso to s 11(1)(e)

As a matter of fact, after the EPRT Act came into force, there was only one instance when the Attorney General appealed a decision on a development application though not having registered his interest right at the beginning of the process. That decision concerned a winery extension, to which decision the Attorney General had appealed on the basis that the Planning Board allegedly failed to observe a mandatory legal procedure.[705] On his part, the applicant vehemently contended that the Attorney General had no *locus standi* since his objections were strictly based upon procedural grounds instead of planning and/or environmental grounds as required by law. Without going into detail, the EPRT ruled that the Attorney General was a recognized interested party by virtue of Section 11(1)(e)(ii).

As with previous legislation, an appeal from scheduling and/or conservation orders remained open to '*any person*.' This is reflected in Section 11(c)(ii) of the new EPRT Act as well as Section 57(11) of the current DPA. The said two Sections mainly provide that a decision of the Executive Council concerning scheduling and conservation orders can be revoked or modified in an appeal made by any person aggrieved through such a decision.

Curiously enough, Section 11(1)(e)(iii) offers another remedy of appealing decisions on scheduling, and/or conservation orders to *'an interested third party who had submitted written representations as established by the Planning Authority in terms of Section 71(6) of the Development Planning Act, 2016'*.[706] Nevertheless, there is no satisfactory account

[705] *Avukat Generali ghan-nom tal-Gvern v L-Awtorita' tal-Ippjanar u l-kjamat in kawza, Juanito Camilleri* [6th December 2018] (EPRT) (209/2016)

[706] Section 71 (6) of the Development Planning Act, 2016 states the following*: 'Any person may declare an interest in a development and, on the basis of issues relevant to environment and planning, make representations on the development. Such declaration of interest and representations shall be in writing and is to be received by the Planning Board within such period as established by regulations prescribed*

or explanation as to why this latter provision was included in the law. This, because Section 71(6) is concerned with declarations made by interested third parties to the PB or PCom whereas the Executive Council handles scheduling and conservation orders.[707] The second point is that there is no mechanism designed to allow *'interested parties'* to send in written representations before a decision on a scheduling or conservation order is eventually taken behind closed doors. In practice, notice of the conservation or scheduling order is published in the Government Gazette after a decision is taken by the Executive Council. It is only then that the landowner, if known, is informed of the order by way of a registered letter[708] for him to be able to request reconsideration to the Executive Council within thirty days of the notification on the gazette.[709]

Meanwhile, an appeal against the order is also available to other '*aggrieved person'* by not later than thirty days from the date of publication of the order on the Department of Information website.[710] It is, therefore, possible to have an order that could be subject to reconsideration and an appeal. It would seem that in such a case the likely solution would be for the EPRT to suspend proceedings until the reconsideration request is decided by the Authority before proceeding with the same.

Another seeming innovation in the new EPRT Act is that an appeal on a decision following a request for modification or revocation of a permission is also open to '*any person'*[711], therefore not just the applicant.[712] However so, the DPA appears to have

by the Minister. A declaration that is not submitted within this stipulated period shall be considered null and may not be considered by the Planning Board.'

[707] Development Planning Act, 2016, s 57

[708] *Ibid* : s 57(2)

[709] *Ibid* : s 57(10)

[710] Environment and Planning Review Tribunal Act, 2016, s 13(1)

[711] *Ibid* : s 11(1)(c)

[712] Environment and Development Planning Act, s 77(3)

reserved such right to the applicant and/or the interested person making the request for revocation.[713]

When the said two provisions in question are thus taken into account together, it becomes questionable whether an appeal pursuant to a decision on a revocation request is actually open for all and sundry. That being stated, in **Travis Boyd, John Agius, Philip Borg u Margerita Farrugia -vs- L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u kjamat in kawza Ghaqda Muzikali San Guzepp**[714], both the EPRT and the Court of Appeal (Inferior Jurisdiction) decided a request for revocation of a development planning permission made by a number of individuals, in this case a number of neighbouring residents who had engaged a lawyer to file the request on their behalf, even though these residents had not previously objected to the planning application.

Even though the new DPA came into force on the 4th April 2016 and proceedings were still pending, the request had to be purportedly decided in terms of the said Section 77 since proceedings were already in force prior to the 3rd April 2016.[715] Yet, the EPRT's decision was given on the basis of Section 80 of the new DPA and the request was rejected since appellants had not properly identified themselves as '*interested parties'* when the Authority initially received the complaint.

[713] Development Planning Act, 2016, s 80(3)
[714] *Travis Boyd, John Agius, Philip Borg u Margerita Farrugia v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u kjamat in kawza Ghaqda Muzikali San Guzepp* [28th February 2018] (CAInf) (5/2018)
[715] Regulation 9 of Environment and Development Planning Act (Repeal and Applicability) Regulations, 2016 stated the following: '*The provisions of Article 77 shall remain in force and be applicable in so far as it relates to procedures for revocation and modification of permissions, licenses or authorizations, including any clearance issued by the Malta Environment and Planning Authority under an order, which have already commenced by the 3rd of April 2016*.'

Plaintiffs appealed the decision to the Court of Appeal (Inferior Jurisdiction), claiming that it was them, through their lawyer, who had sent the letter in February 2016[716] to the Authority with a view to causing revocation proceedings. In turn, the court likewise based its reasoning on Section 80, once again against the text of Legal Notice 107 of 2016. What was however interesting in the context of this discussion was that the court concluded that the plaintiffs had *locus standi* after drawing a connection between them and the letter sent in February 2016 since the lawyer had stated that he was acting on behalf of residents living in the same street of the club.

In asserting so, the message of the court was that a third party appeal against a decision on a revocation application could only be admitted with regards to the person or persons making the original request and therefore not with regards to '*any person'* set forth in Section 11(c)(iii) of the EPRT Act. It is understood that were it not to be so, the court would have agreed that plaintiffs had a *locus standi* as a matter of fact and without further debate.

By the same token, it is equally uncertain whether an appeal from an enforcement notice is in reality open to '*any person'* who might feel aggrieved as purported in Section 11(c)(i)[717] of the EPRT Act or limited to the persons who are served by the notice as stated in Section 13(3) of the same EPRT Act.[718]

Under the previous Act, the owner or the occupier of the land had fifteen days to lodge an appeal against an enforcement notice, which period commenced from the day they

[716] Thus, prior to 3rd of April 2016
[717] Environment and Planning Review Tribunal Act, 2016, s 11(1)(c)(i)
[718] *Ibid* : s 13(3)

were served with such notice.[719] With the new Act, the fifteen days within which an appeal could be lodged commence to run from the day the owner of the land or the occupier are either served with the notice or from the date of the publication of the said notice on the Department of Information website, should the PA deem fit to make such a publication.[720] Evidently, a problem could thus arise for the land owner or the occupier if the notice remains unclaimed for some reason and the Authority decides to publish the notice on the Department of Information website without them knowing.

While on the subject of third parties, it is essential not to ignore the fact that an appeal on any decision of the ERA concerning environmental assessments, access to environmental information and the prevention and remedying of environmental damage is yet again open to *'any person'*.[721] Once again, it, therefore, makes no sense for the right to challenge the substantive or procedural legality of any decision, act or omission relating to a development or an installation which is subject to an EIA or an IPPC permit, already found in the previous Act be limited to persons having '*sufficient interest*.'[722] Even so, it is not all that clear why the Act omits all previous references to non-governmental organizations promoting environmental protection being considered as having sufficient interest in terms of this same Section.

The EPRT Act also envisages a right of appeal to any person and institution or any department or agency of Government *'having a direct interest and aggrieved by any decision, ruling or direction in relation to Building Regulations and Building Control*

[719] Development Planning Act, Third Schedule s 52(9)
[720] Environment and Planning Review Tribunal Act, 2016, s 11(1)(c)(i)
[721] *Ibid* : s 47(1)
[722] *Ibid* : proviso to s 11(1)(e)

Regulations'.[723] It is important to note, however, that building control regulations have not yet been assigned to the PA and there is no reason to believe that this will happen any time soon. This is because the Maltese government already announced that a new entity to be known as the Malta Construction and Building Authority should be set up precisely for that purpose.[724] Interestingly, there was a particular instance[725] in which a third party, having failed to secure a timely objection against a planning application, relied on this new Section 11(d) to claim that he was still entitled to appeal since this provision was open to '*any person'*. Nevertheless, the court made it very clear that a person who failed to register his objections at the outset of a planning application could not rely on this Section to get his way through.

With the new legislation, it remained possible for the EPRT to stay the execution of permissions, including summary permissions.[726] It bears to note that when a suspension concerns a summary decision or an application of strategic significance or national interest, related to any obligation ensuing from a European Union Act, affecting national security or affecting the interests of the Government and/or of other governments, the EPRT is required to deliver final judgment within one month.[727] As to all other planning permissions, the period for delivering a final judgment is three months, after which period the suspension loses its legal effect as occurred under previous law.[728] The problem with having decisions pronounced within such short periods is that difficulties might arise for the EPRT to hear and process all the necessary evidence in a timely fashion, particularly

[723] *Ibid* : proviso to s 11(d)
[724] Public Administration Act, Building and Construction Agency (Establishment) Order, 2019 (Legal Notice 192 of 2019)
[725] *Joseph u Maria Concetta Borg v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Staphen Tabone* [15th January 2020] (CAInf) (32/2019)
[726] Environment and Development Planning Act, s 34
[727] *Ibid* : s 34(b)
[728] *Ibid* : s 34(a)

so when it comes to complicated cases. Even so, there were no reported instances of the EPRT having failed to deliver judgment within the stipulated three-month timeframes.

One other significant new feature in the EPRT Act is the establishment of a set of principles, known as the principles of good administrative behavior.[729] In the author's view, this was a major step forward since a clear responsibility was placed on the EPRT to follow such rules. Though anyone entrusted with being part of a quasi-judicial body should be familiar with these principles, no matter whether or not they are written in the law.

Topping the list, one finds the principles of natural justice, that is to say, the principle known as *nemo judex in causa sua*, and the principle of *audi et alteram partem*.[730] Indeed, the subject of natural justice has in fact been the subject of several court judgments as shall be seen later in this study, and therefore one understands why it was felt that the said principles should be judiciously listed.

The second principle of good administrative behavior mentioned is concerned with the delivery of prompt decisions. It prescribes that decisions shall be taken within a reasonable time, although acknowledging that this also depends '*on the circumstances of each case.'* This same principle goes a step further to say that the EPRT is to now deliver one single final decision about all matters involved in the appeal, whether they are of a preliminary, substantive or procedural nature with the notable exception being when an appeal is made concurrently with a request for suspension.[731] In all probability, the

[729] Environment and Planning Review Tribunal Act, 2016, proviso to s 9
[730] *Ibid* : proviso to s 9(2)(a)
[731] *Ibid* : s 33

legislator wanted to make sure that when the defendant enters a preliminary plea, the proceedings are not suspended halfway.

That said, the EPRT did not immediately adopt this disposition after the new law came into force, as demonstrated in **Din l-Art Helwa -vs- L-Awtorita' tal-Ippjanar.**[732] In this case, Din L-Art Helwa challenged a decision of the Executive Council to deschedule a property, after which the defendant Authority entered a plea to maintain that Din L-Art Helwa did not enjoy any *locus standi* under the law. The EPRT, by way of a detailed preliminary decree, ruled that contrary to what the Authority argued, **Din l-Art Helwa [2019]** qualified as '*any aggrieved person'* and decided that proceedings could resume on the merits of the case. In doing so, the EPRT, however, ignored the principle of pronouncing one single final decision about all matters involved in the appeal, whether they are of a preliminary, substantive or procedural nature.

The Authority appealed the partial decision insisting that the EPRT was prevented from delivering a partial decision. For its part, the court referred to the second principle of administrative behaviour and agreed with the Authority, in that the EPRT had to deliver one decision on both the preliminary plea and the merits.

A similar situation was met in **Susan Xerri -vs- L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamata in kawza Helen Sidebotham.**[733] This was a third-party appeal against the decision of the Authority to grant a regularisation permit, for which the Authority responded that plantiff had no *locus*

[732] *Din l-Art Helwa v L-Awtorita tal-Ippjanar* [16th May 2019] (CAInf) (4/2019)
[733] *Susan Xerri v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamata in kawza Helen Sidebotham* [19th June 2019] (CAInf) (14/2019)

standi because he had not filed any written representations within the specified time period. In a preliminary decree, the EPRT ruled that the appellant still qualified as an '*aggrieved person'*. Yet again, the question was whether the EPRT could pronounce itself through a partial decision. As was the case with Din L-Art Helwa, the Court found that the EPRT was prevented from delivering a partial decree and went on to annul its judgment.

In another case[734], the EPRT similarly decreed, through a partial decision, that the third-party plaintiffs enjoyed a *locus standi* notwithstanding they never lodged any comments. However, the Court subsequently declared that the EPRT could not move to express itself on the preliminary plea before delving into the merits of the case.

At face value, these three judgments go to show that proceedings would have been more efficient had the EPRT complied with the second principle of administrative behaviour and pronounced a single decree on both the preliminary plea and the merits at the very end. Nonetheless, the said assertion would hold water so long as, in its final decision, the EPRT rules against the preliminary plea and moves on to probe into the merits of the appeal. On the other hand, the situation is all different when the EPRT proceeds with hearing the parties discuss the merits, well knowing that it would eventually entertain the preliminary plea not to pronounce itself on the merits. In that eventuality, the EPRT would have had devoted unnecessary time and effort to hear the parties debate the merits when this could be avoided if a peremptory ruling was given half way through the process. It

[734] *Charles sive Charlie Theuma u Salvina Theuma, Lorenza Bajada u Christopher Theuma, Joseph Zammit u Diana Zammit, Antonella Xerri u Victoria Xerri v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Rodney Metters* [19th June 2019] (CAInf) (13/2019)

is, therefore, likely that in seeking to encourage timely decisions, the drafters of the new Act hardly thought that such a move would, in some circumstances, be counterproductive.

The new act is strewn with a multitude of other provisions aimed at encouraging timely decisions. For instance, an appeal now has to be appointed within two months after submission[735] whereas no time frame was present in the previous legislation. Furthermore, once the Secretary allocates the case to be heard by a specific panel, a copy of that appeal together with the ancillary documentation is to be communicated to the PA within five working days and the Authority must reply within twenty days of service upon it.[736] Previously, a copy of the appeal had to also be communicated to the Authority at any point in time before the appeal was heard and the period to file a reply was thirty days.[737]

In so far as witnesses are concerned, the new law makes attempts to avoid having proceedings unnecessarily delayed. Both the appeal application and the reply must contain a list of the required witnesses the respective parties intend to produce in evidence together with the facts sought to be established through their evidence.[738] As with Section 560 of the COCP, which leaves it up to the court to disallow any evidence that it considers to be irrelevant or superfluous, or which it does not consider to be the best evidence which the party can produce, the EPRT shall on the first hearing decide which of the listed witnesses are indeed relevant.[739] Having said that, the possibility that other witnesses are produced at a late stage cannot be excluded as the same legislation permits the production

[735] Environment and Planning Review Tribunal Act, 2016, s 23
[736] *Ibid* : s 20
[737] Environment and Development Planning Act, Second Schedule para 1(c)
[738] *Ibid* : Second Schedule, s 17(1)
[739] *Ibid* : Second Schedule, s 23(1)

of other witnesses to give evidence that *'might be required in view of evidence given or produced by other witnesses'*.[740] In another effort to expedite proceedings, the EPRT is now permitted to inflict sanctions of not less than two hundred euro (€200) and not more than five thousand euro (€5,000) if witnesses fail to make an appearance.[741]

What is even more interesting is that the new legislation has also given a timeframe within which EPRT proceedings need to be decided. Indeed, an appeal from a stop or enforcement notice is required to be decided within six months.[742] When it comes to appeals from special summary proceedings' applications, the time period is reduced to three months[743] whereas all other appeals are required to be determined within a maximum one year.[744] As with the earlier law, the decisions of the EPRT have also to be complied with by the Authority within one month.[745]

This said, the EPRT could decide, '*in exceptional cases in the interests of justice'* to extend the said time frames by another six months provided that no evidence or submissions may be lodged during the said extension period. The legislator took further precautions by prescribing a solution for the eventuality that these timeframes are not respected. In such cases, the secretary has an obligation to assign the case to another panel.[746] Nevertheless, it is fair to say that this was a half-baked solution because the new panel is not bound by any set time frames to deliver judgment.

[740] *Ibid* : Second Schedule, s 26
[741] Environment and Planning Review Tribunal Act, 2016, s 29
[742] *Ibid* : s 36(5)
[743] *Ibid* : s 35(c)
[744] *Ibid* : s 35(a)
[745] *Ibid* : proviso to s 45(2)
[746] *Ibid* : proviso to s 35

Other provisions clearly aimed at avoiding unnecessary delays include the one which no longer allows the EPRT to give an adjournment of a hearing in cases where the hearing can proceed without causing prejudice to the rights of the party who failed from showing up.[747] Moreover, the EPRT may consider an appeal as abandoned if the appellant fails to appear before it on two consecutive sittings without good cause[748] whereas before, the EPRT could take much longer to declare an appeal abandoned as it was up to it to decide when appellant showed no interest in the appeal.[749]

In trying to cut out on meaningless formalities, the previous act had already given the EPRT the power to correct any defect or error in the enforcement notice which might otherwise render it invalid. This was subject to the condition that the appellant was given sufficient time to prepare and put forward his case.[750] Under the new law, the additional provisions of Section 175 of the COCP applicable to the Civil Courts were literally incorporated into the EPRT Act, with the EPRT now being given the power to *'correct any mistake*'[751] and defect at any stage until decision is pronounced and not only when the appeal subject was an enforcement notice.

What is even more interesting is that the EPRT may now also order corrections once a decision is delivered. More specifically, the EPRT may amend at any time, by a decree, any error of calculation incurred in the decision[752] as well as correct text in the decision which may be construed differently from that evidently intended by the EPRT.[753] In the

[747] *Ibid* : proviso to s 28
[748] *Ibid* : s 42
[749] Environment and Development Planning Act, Second Schedule para 13
[750] Environment and Planning Review Tribunal Act, 2016, proviso to s 36(2), s 36(4)
[751] *Ibid* : proviso to s 46(1)
[752] *Ibid* : proviso to s 46(3)
[753] *Ibid* : proviso to s 46(4)

latter case, however, an application is required to be made to that effect not later than twenty days from when the decision is delivered to give legal certainty. This is very much on the same lines as Section 825 of the COCP.[754]

Also, the substitution of any act and written pleadings as well as *'other submission of fact or of law to be added even by separate note'* is, now, allowed and this may be carried out either of the EPRT's own motion[755] or upon the request of the parties.[756] It should, however, be noted all this is subject to the substance either of the action or of the defence on the merits of the case not being changed. It means the EPRT is unable to, for instance, accept an additional ground of objection from a third-party appellant halfway through the proceedings as that would affect the substance of the defence on the merits of the case. On the other hand, there does not appear to be an issue when, for instance, the heads of the decision complained of are not listed under different headings as required in the act[757] since such a defect, were it to be so named, may now be remedied in any stage of the proceedings until a decision is delivered.

In a way, the third, fourth, fifth, sixth, seventh and eighth principles of good administrative behavior are equally concerned with the principles of natural justice. The third principle is about ensuring procedural equality between the parties to the

[754] '*825.(1) Nothing in this Title contained shall operate so as to bar the court, upon the application of any of the parties to be served on the other party, from amending at any time, by a decree, any error of calculation incurred in the judgment.*
(2) Nor shall the court be debarred from correcting any error in the wording of the judgment, or from altering any expression which is equivocal, or which ma y bear a construction different from that evidently intended by the court, provided that an application is made to that effect within thirty days from the date of the judgment,and in such case, the time allowed by this Code for entering an appeal from any judgment so amended, shall commence to run from the date of the decree given on the demand for the amendment.'
[755] Environment and Planning Review Tribunal Act, 2016, proviso to s 46(2)
[756] *Ibid* : proviso to s 46(1)
[757] Environment and Development Planning Act, Second Schedule, s 15

proceedings. Particular mention is made of allowing the opportunity to each party to present its case, whether in writing, or orally, or both, without being placed at a disadvantage.[758] This idea is further reaffirmed in Section 27 of the same act, which requires the EPRT to give the appellant, including third-party appellants, and the PA an opportunity to make final submissions once the production of evidence is concluded. It is essential not to ignore that even though nothing was written to this effect in earlier legislation, the courts were very adamant about the importance of upholding these principles, as shall be seen in the next chapter.

The fourth principle is also associated with procedural fairness in the sense that the EPRT must ensure that the PA makes available to the parties to the proceedings, the documents, and information relevant to the appeal.[759] To be precise, plenty of information which is typically relevant to appeal proceedings, such as case officer reports, the relative plans and documents together with impact and planning statements is publicly available regardless of the proceedings.[760]

The fifth principle is essentially a reflection of the fourth, and an affirmation that all evidence admitted to the EPRT is to be made available to the parties with a view to the adversarial argument.[761] A complimentary provision has also been inserted allowing parties to an appeal to submit a request to the EPRT in order to view the PA files.[762]

[758] Environment and Planning Review Tribunal Act, 2016, s 9(2)(c)
[759] *Ibid* : s 9(2)(d)
[760] Development Planning Act, 2016, s 33(2)
[761] Environment and Planning Review Tribunal Act, 2016, s 9(2)(e)
[762] *Ibid* : s 19

The sixth principle states that the EPRT shall be in a position to examine all of the factual and legal issues relevant to the appeal presented by the parties in terms of the applicable law.[763] Albeit it would appear that this is nothing more other than stating the obvious, the relevance of this section comes from the fact that the EPRT may not ignore other laws, rules, regulations and equitable principles.

The seventh principle brings nothing new as it provides that EPRT proceedings shall be open to the public[764], a practice that has been adopted since the inception of the PAB in 1992.

Finally, the eighth principle underscores the notion of the duty to give reasons.[765] In what appears to be a drafting mistake, unless the legislator meant to emphasize the importance of the same principle, the same text is echoed in Sections 40 and 41 of the Act. Furthermore, this principle obliges the EPRT to indicate, with sufficient clarity, the grounds on which it bases its decisions, although the EPRT doesn't need to give specific expression to each and every consideration except in cases where such a plea is decisive for the outcome of the appeal. Even though no similar provisions were found in previous planning legislation, the '*duty to give reasons'* has always been regarded as a fundamental principle in quasi-judicial proceedings, as will be seen in the next chapter.

Once again, the decisions of the EPRT bind all stakeholders, namely the PA, external consultees, registered interested third parties as well as any other person and, or entity affected by the decision.[766] The consequence of this was that once a decision is made, an

[763] *Ibid* : s 9(2)(f)
[764] *Ibid* : s 9(2)(g)
[765] *Ibid* : s 9(2)(h)
[766] *Ibid* : s 38(1)

external consultee having objected to the proposal, later approved by the EPRT, may not refrain from abiding by that same decision.

Take, for example, a development planning application endorsed by the EPRT despite the Commissioner for the Rights of Persons with Disability, who is a statutory external consultee, had previously warned that the proposal was not compatible with access for all requirements. It would seem that the decision is binding also on the Commissioner even though Section 37 of the Equal Opportunities (Persons with Disability) Act[767] clearly states that *'when another law is inconsistent with this Act, this Act shall prevail when such inconsistency regards the rights of a person with disability.'* The reason for this is that Section 37 is concerned with inconsistencies with other laws and not decisions taken by quasi-judicial bodies.

The legal situation could, however, be different with the Superintendent of Cultural Heritage because of a last-minute provision introduced in the EPRT Act[768] which says that the provisions of the Cultural Heritage Act and the powers of the Superintendent of Cultural Heritage, as well as the Special Powers of the State emanating from the Heritage Act, should take precedence over anything stated in the EPRT Act. In practical terms, this means that the decisions of the EPRT are binding on all the external consultees except for the Superintendent of Cultural Heritage who, according to the Culture Heritage Act, could veto any intervention on cultural or scheduled property.[769]

[767] Equal Opportunities (Persons with Disability) Act
[768] Environment and Planning Review Tribunal Act, 2016, s 2(2)
[769] Culture Heritage Act, s 59(1)

Under the new law, the legal remedies available following the pronouncement of a EPRT decision remain virtually unchanged. The notion that the decisions of the EPRT shall be final and no appeal shall lie therefrom except on a point of law decided by the EPRT was reaffirmed.[770] The difference from previous legislation is that an appeal to the court might also be lodged *'on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal'.* Even though this might give the impression that Section 39 led to new legal avenues, the requirements of procedural fairness were always regarded to represent a point of law as shall be seen in the next chapter.

[770] Environment and Planning Review Tribunal Act, 2016, s 39

5. CONCLUSIONS

This chapter critically assessed the role of the now-defunct PAB and its replacement, the EPRT, which entered the scene in 2010. The EPRT and its predecessor were basically entrusted with the same task, namely to review decisions of the PA and confirm or substitute those decisions with their own.

The composition of the Appeals Board and the EPRT was analyzed. Over the years, there were no significant changes except that the Executive can no longer reappoint members once their term of office expires. The thinking here was to underline the EPRT's independence since members need not appease the government of the day to stand a better chance of being reappointed. Nevertheless, the method of appointing members is still in the hands of the Prime Minister. This could soon be regarded as a problem after the Venice Commission reported that the Executive enjoys too much power when it comes to judicial appointments, at the expense of the rule of law in Malta.[771]

It was shown that several amendments emerged in 2014 to allow for increased participation in the appeal process as a result of Malta's obligation to comply with the Aarhus Convention. However, the most significant development came when, years earlier, the Environment and the Development Planning Act acknowledged that anyone could appeal a decision on a planning application without having to demonstrate a juridical interest whereas appeals to environmental matters were likewise open to '*any person'*.

[771] 'Malta Opinion On Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement', (2018) <https://www.venice.coe.int/webforms/documents/default.aspx ?pdffile=CDL-AD(2018)028-e> accessed 29th March 2020

Initially, the competence of the EPRT was to hear appeals on '*any decision of the Planning Authority on any matter of development control, including the enforcement of such control'*[772] Eventually, Section 11 of the EPRT Act specified the instances when an appeal from a ruling of the Planning Authority is available.

Section 11 appears to be generally working well for practitioners, even though the use of some terms to qualify third parties entitled to appeal could be regarded as a source of confusion. For example, it is difficult to understand how a challenge on the substantive or procedural legality of a decision subject to an environmental impact assessment ('*EIA*') or an integrated pollution prevention and control ('*IPPC*') permit is restricted to those members of the public having *'sufficient interest'*[773] and appeals concerning environmental matters are, at the same time, open to '*any person'*.

It is equally unclear whether *'a person aggrieved'* in the context of an appeal form an enforcement notice is necessarily that person who was served with the notice or any other person who feels that the notice should have not been issued.

A similar issue exists with appeals from decisions on a modification or revocation of development permission because Section 80(3) of the DPA appears to have reserved such right to the applicant and, or the interested person making the request for revocation[774] whereas Section 11(1)(c) of the EPRT Act says that the appeal is open to *'any person'*.[775] Whether an *'interested person making the request for revocation'* is taken to mean *'any person'* or a person who had acquired an interest due to him having previously registered

[772] Development Planning Act, Act I of 1992 (as on 15th January 1992), s 15(1)(a)
[773] Environment and Development Planning Act, s 41A(1)
[774] Development Planning Act, 2016, s 80(3)
[775] Environment and Planning Review Tribunal Act, 2016, s 11(1)(c)

an objection at the onset of the planning application process is open to question. What is certain is that when the court had occasion to deal with this issue, it concluded that a number of residents who had not registered their interest during the application process pursuant to the decision were still allowed to trigger the revocation process and appeal the decision on the revocation request both before the EPRT and the Court of Appeal (Inferior Jurisdiction).[776]

Also, the mechanism regulating appeals against scheduling and/or conservation orders as held in Section 11(1)(e)(iii) was singled out as problematic. It has been pointed out that this provision offers a remedy of appealing decisions on scheduling, and/or conservation orders to *'an interested third party who had submitted written representations as established by the Planning Authority in terms of Section 71(6) of the Development Planning Act, 2016'*[777] when Section 71(6) is, in actual fact, unrelated to the scheduling process.

The introduction of the principles of good administrative behaviour was considered to be a step in the right direction because members have guidelines on which to rely. It was, however, noted that Section 9(h) directs the EPRT not to comment on those pleas that are not decisive for the outcome of the appeal, and that could be a source of concern. Rather than stay silent, it would have been wiser if the EPRT were to deal with all the heads of the decision complained as well as the counter-arguments in the reply and then give a

[776] *Travis Boyd, John Agius, Philip Borg u Margerita Farrugia v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u kjamat in kawza Ghaqda Muzikali San Guzepp* [28th February 2018] (CAInf) (5/2018)

[777] Section 71 (6) of the Development Planning Act, 2016 states the following: *'Any person may declare an interest in a development and, on the basis of issues relevant to environment and planning, make representations on the development. Such declaration of interest and representations shall be in writing and is to be received by the Planning Board within such period as established by regulations prescribed by the Minister. A declaration that is not submitted within this stipulated period shall be considered null and may not be considered by the Planning Board.'*

satisfactory explanation of why a matter is not considered decisive to the decision. That would instill a greater sense of accountability since what the decision-maker had in mind becomes known.

Over the years, efforts were directed to increase the efficiency of appeal proceedings, though some shortfalls still exist. A case in point being preliminary pleas, which must be now decided in the final judgment together with the merits. Things augur well when a plea not to delve into the merits is rejected, and judgment on the merits is pronounced. However, the same cannot be said when a plea not to delve into the merits is accepted after these would have had been debated at length.

Another issue that seems not to have been adequately addressed concerns the timeframes within which the EPRT should pronounce judgment. Although the case will be now assigned to another panel in the eventuality that the statutory timelines are not complied with[778], the new panel is not bound by any timeframe to deliver judgment.

Efforts to cut down on meaningless formalities can also be regarded as a step in the right direction. However so, some issues are not treated by the EPRT as they should. One such example involves requests to file new drawings, which, on paper, should be prompted by the EPRT. In truth, such requests are frequently triggered by the parties and accepted by the EPRT so long as the changes are not *'material'* in terms of Legal Notice 163 of 2016. A further issue here is that changes that are not '*material*' are very often seen not to affect the *'substance of the matter'* as required in Section 31 of the EPRT Act, but that is not necessarily true in all given situations.

[778] Environment and Planning Review Tribunal Act, 2016, proviso to s 35

This chapter underlined that the EPRT can regulate its own proceedings. Nevertheless, that does not mean that the EPRT can ignore the rules set out in the law. The EPRT Act makes no provision for a distinction between those rules that go to the root of the matter so that they cannot be broken, and those which are directory and a breach of them can be overlooked provided there is substantial compliance.

It was further shown that the decisions of the EPRT are binding on all stakeholders[779], however, without prejudice to the powers of the Superintendent of Cultural Heritage emanating from the Culture Heritage Act.[780] We have, therefore, a situation where a potential stakeholder in the appeal process can eventually choose to veto a decision to which he is a party.

Finally, this chapter referred to access to justice after the EPRT delivers judgment. It was underlined that, even after the EPRT took over the role of the PAB in the year 2010, the Court's role was restricted to hear and decide appeals '*on a point of law decided by the Tribunal'*. Following the promulgation of the EPRT Act in the year 2016, this role was extended to specifically include '*any matter relating to an alleged breach of the right of a fair hearing before the Tribunal'*.[781]

It is appropriate to note that the legislator never attempted a definition of *'a point of law decided by the Tribunal'. Prima facie,* the court's jurisdiction appears to be limited to deciding on matters having a legal character and highlighted explicitly in the appealed decision. However, it is also legitimate to say that a point of law should cover anything

[779] *Ibid* : s 38(1)
[780] Culture Heritage Act, s 59(1)
[781] Environment and Planning Review Tribunal Act, 2016, s 39

from purporting to exercise powers that the EPRT does not possess to have used power for an improper purpose or take into account irrelevant considerations and disregard the relevant ones. It is also possible to argue that a point of law is triggered if the EPRT exercises discretion beyond the reasonable threshold or metes out a judgment that would not otherwise legally stand had the facts upon which it is based were correctly appraised. With this scenario in mind, the next chapter will search for a workable definition of *'a point of law decided by the Tribunal'.*

CHAPTER FIVE
'A point of law decided by the Tribunal'

1. GENERAL

As per Section 39 of the EPRT Act, the decisions of the EPRT are deemed to be final and binding on all stakeholders, that includes the PA and the statutory consultees which are thus bound by the outcome of the EPRT's decision. A further appeal is still, however, possible on '…*a point of law decided by the Tribunal or on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal'*[782] before the Court of Appeal as an Inferior Court of Civil Jurisdiction.

One significant problem with the wording of this framework establishing the jurisdiction of the appellate court is the fact that that the term '*point of law decided by the Tribunal'* was never actually defined, despite the law having been amended several times. The idea that the point of law is required to have been decided '*by the Tribunal'* as opposed to not having the said limitation is not unique to Maltese legislation. For example, in the case of the Tourism Appeals Board that was established way back in 1992 to hear appeals from decisions taken by Malta Tourism Authority, an appeal from a point of law was likewise available before the Court of Appeal so long as it was also '*decided by the Board'*.[783]

In any event, what is certain is that the Court has the *vires* to overrule a decision of the EPRT. Yet, at the same time, its competence is restricted to points of law and does not extend to anything else considered during proceedings leading up to the appealed

[782] Environment and Planning Review Tribunal Act, s 39
[783] Malta Travel and Tourism Services Act, s 14(2)

decision. This reality has generated a nebulous legal environment, characterized by a strong sense of unpredictability.

This chapter will analyze a number of judgments through which, by deciding whether to seize jurisdiction or otherwise, the court implied whether or not a point of law was decided by the PAB and/or the EPRT. The analysis will be divided in four parts:

The first part deals with the three recognized principles of natural justice, that is to say (i) *Nemo judex in causa propria* (nobody shall be a judge in his own case), (ii) *audi alteram partem* (listen to the other party), and (iii) the duty to give reasons. An analysis of judgments will be conducted in order to see how these principles were interpreted by the courts and to analyze whether the non-observance of them amounts to a point of law decided by the PAB or the EPRT;

The second part will seek to assess whether failure to observe statutory requirements amounts to a point of law decided by the EPRT. An analysis will be carried out in order to assess whether a distinction is made between provisions of substance and ones that are simply directory;

The third part will analyse whether a point of law could be said to subsist when the EPRT relies on a wrong law or policy, when the law or policy applied to the facts appraised is misunderstood or when the EPRT does not get its facts right;

The fourth and final part deals with constitutional grievances and whether these qualify within the parameters of '*points of law decided by the EPRT'* that could be challenged before the Court of Appeal (Inferior Jurisdiction).

The above-mentioned analysis will be used as the groundwork that paves the way for a workable definition of the criterion stated as being that of '…*a point of law decided by the Tribunal'.*

2. EARLY INTERPRETATION

As previously stated, the role of the Court of Appeal (Inferior Jurisdiction) in planning legislation is very particular. It is restricted to hearing and deciding appeals on *'a point of law decided by the Tribunal or on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal'*.[784] A positive interpretation of this provision makes one believe that it is not enough for the complaint to be one having a legal import, but that it also needs to be one on which a position was taken by the EPRT in the appealed decision.

Indeed, this is what the Court of Appeal used to repeatedly insist on in earlier judgments, namely, that the question brought before it not only had to be one of law but that it also had to be *'decided'* by the Planning Appeals Board as held in the Third Schedule of the DPA at the time.[785] A clear example of this can be found in **Francis Mugliett –vs- L-Awtorita' ta' l-Ippjanar**[786], in which judgement the court made it very clear that for it

[784] Environment and Planning Review Tribunal Act 2016, s 39
[785] Development Planning Act, Act I of 1992 (as on 15th January 1992), Third Schedule para 7
[786] *Francis Mugliett v L-Awtorita' ta' l-Ippjanar* [31st May 1996] (CA)

to seize jurisdiction it was not sufficient for the complainant to show that the matter had legal traits but it had to be '…*dibattuta, trattata u definita fis-sentenza appellata.'*[787] The same reasoning was held in **Emanuel Mifsud -vs- Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp**[788] wherein the court reiterated that '*m'hemmx dritt ta' appell lanqas fuq punti ta' ligi sakemm dawn ma jkunux espressament decizi fid-decizjoni appellata'*[789] This reasoning was also reflected in **Ludwig Camilleri nomine -vs- Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp**[790] and in **Tony Zahra -vs- Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp.**[791]

A significant departure from the above stance taken by the court was however noted in later judgments[792] in which the court held to have jurisdiction not only if the matter of law was expressly highlighted in the text of the decision but essentially on any challenge alleging the performance of an *ultra vires* act on the part of the PAB.

Having said that, the legislator never felt the need to change the wording '*a point of law decided by the Board'* to one inclusive of an additional criterion to reflect the court's interpretation, that is, inclusive of '…*an ultra vires act conducted by the Tribunal'*. Indeed, the only amendment carried out to the legal text ever since the enactment of the DPA in 1992 was the addition of '*an alleged breach of the right of a fair hearing before the Tribunal'* to *'a point of law decided by the Tribunal'* as found in the current

[787] '…The question should have been disputed before the Board, considered and pronounced in the appealed decision'
[788] *Emmanuel Mifsud v il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [31st May 1996] (CA) (63/1995); See also: *Jack Galea v Awtorita' ta' I-Ippjanar* [19th November 2001] (CA) (213/1999)
[789] 'There is no right of appeal not even on points of law if these are not expressly decided in the appealed decision'
[790] *Ludwig Camilleri nomine v Awtorita' ta' I-Ippjanar* [28th February 1997] (CA)
[791] *Tony Zahra v Awtorita' ta' I-Ippjanar* [6th May 1998] (CA) (54A/1997)
[792] See for example: *Anthony Cuschieri v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [30th March 2001] (CA) (89/2000); *Joseph Cassar v L-Awtorita' ta' l-Ippjanar* [31st May 2002] (CAInf) (257/1997)

Environment and Planning Review EPRT Act. In a pre-emptive move by the courts, as will be seen shortly, breaches of the principles of natural justice have likewise been held to qualify as points of law for the purpose of planning legislation way before the said amendment saw the light of day.

3. THE PRINCIPLES OF NATURAL JUSTICE

The principles of natural justice are traditionally expressed in the form of two Latin maxims, that is to say: (i) *Nemo judex in causa propria* (nobody shall be a judge in his own case), (ii) *audi alterem partem* (to hear the other side), as well as (iii) the duty to give reasons. The underlying aim behind these principles is to guarantee a minimum level of protection of rights with a view to prevent miscarriage of justice. Historically, the principles of natural justice were only applicable to *'judicial'* decisions but after the *Ridge v Baldwin* case, their relevance has also been extended to include purely administrative decisions where a person's existing rights were at stake.[793]

This means that when a statute has conferred on a body the power to make decisions affecting individuals, irrespective whether the body is an administrative authority (such as the PA) or has a quasi judicial character (such as the EPRT), natural justice may require additional procedural safeguards to be taken so as to ensure the attainment of fairness.[794] Still, it is held that the standard of duty varies according to the rights at stake.[795]

[793] *Ridge v Baldwin* [1964] AC 40
[794] *Lloyd v McMahon* HL [1987] AC 625, [1987] UKHL 5, [1987] 1 All ER 1118, [1987] 2 WLR 821
[795] *McInnes v Onslow-Fane* [1978] ChD 3 All ER 211, [1978] 1 WLR 1520

Section 39 of the Maltese Constitution, in fact, guarantees a fair trial with respect to proceedings concerning the determination of the existence or the extent of civil rights or obligations which are instituted before *'a court or other adjudicating authority'* without distinguishing between adminsitrative entities and judicial bodies.

Indeed, the principles of natural justice feature as one of the critical characteristics of good administrative behaviour listed in the First Schedule of the Administrative Justice Act, which administrative tribunals are bound to '*respect and apply'* in their relations with the public.[796] Meanwhile, failure to observe the principles of natural justice is also one of the elements which could give rise to a challenge against an administrative entity in terms of Maltese law through judicial review under Section 469A of the COCP. In 2016 all three principles of natural justice have been also codified in the EPRT Act.[797]

3.1 NEMO JUDEX IN CAUSA PROPRIA

The principle that no one should be a judge in his own case – *Nemo judex in causa propria* – is mostly concerned about the prevention and management of conflict of interest to increase accountability, transparency, and proper management.[798] This concept does not simply have one element as there are different ways in which those sitting in judgment could be seen as not acting impartially and without bias.

[796] Administrative Justice Act, s 3(1)
[797] Environment and Planning Review Tribunal Act 2016, proviso to s 9
[798] This is a principle which is also gaining momentum at EU level – see for example: The Common Approach on EU decentralised Agencies (European Parliament, the Council of the EU and the European Commission, July 2012) and the roadmap thereof adopted in December 2012

Bias can, therefore, take different forms, starting from personal bias all the way to pecuniary bias. The former has to do with personal relationships of the decision maker with one of the parties, such as the two being family members, colleagues or friends. The said personal relationship could be also born out of hostility towards one of the parties or by one of the parties towards the adjudicator. On the other hand, pecuniary bias is born out of a direct or indirect financial interest in the outcome of the case.

There is another type of bias which might be less obvious, sometimes known as official or inherent bias, and it arises out of the adjudicator's general interest in the subject matter, for instance, due to being both entrusted with formulating policy and carrying it out. Typically, this type of bias arises when the same department initiates a matter and also decides it.

Another type of bias arises out of preconceived notions. This type of bias could be relevant in the local planning context since the Planning Board includes members who represent entities, such as the ERA and the Local Council in whose locality the development is to take place, that would have been already consulted earlier during the application process. Although no individual is expected to sit as a blank sheet of paper, it is very difficult to accept that these members are open to persuasion when the entity they represent would have had expressed itself against the development prior to the decision.

As shown in the previous chapter, a legal provision that would disqualify members of the PAB from hearing an appeal in instances that would likewise disqualify a judge in a civil suit was put in place as soon as the first DPA entered in force. Still, one of the most significant concerns of environmental NGOs in the past has been that members of the

DCC and the PAB could still work in private practice while holding on to their appointment.

Just as it is improper for one person to act as a judge and as an advocate[799], a layperson could be left wondering whether architects appointed on decision-making bodies who had not refrained from their private practice could be impartial and free from bias. Notwithstanding so, in **L-Avukat Dottor Alfred Grech et. -vs- Awtorita' Maltija ghall-Ambjent u Ippjanar**, the court found no objection with an architect who sat on the DCC and retained his private practice so long as he refrained from taking part in any hearings during which his clients' planning applications would be discussed.[800] Indeed, the court saw no ground for a reasonable apprehension of bias that could arise because of the professional relationship between this architect and fellow architects with whom he was a professional rival. Neither did the court see a possibility that the said architect could be motivated by a desire to favour one route and disfavour another knowing that in the future he, himself, could benefit if the application went one way rather than another thus creating some sort of precedent on the issue at hand.

Incidentally, the case of **L-Avukat Dottor Alfred Grech**[801] was instituted in the year 2006, namely four years before the practice of appointing part-time architects on decision making bodies was abolished. With a change of government in 2013, however, members

[799] Though conceptions of judicial propriety were still fluid in the nineteenth century: Robert Megarry, *Miscellany-at-Law* (UK edn, Wildy, Simmonds & Hill Publishing, 2006): 7-8; *Thellusson v Rendlesham* [1859] 7 H.L.C. 429
[800] *L-Avukat Dottor Alfred Grech et. v Awtorita' Maltija ghall-Ambjent u Ippjanar* [7th December 2011] (CMSJ) (105/2006)
[801] *Ibid*

sitting on the EPRT, except for the chairman, were appointed once again on a part-time basis and allowed to continue their private practice.[802]

A much more recent judgment, the subject of which was the possibility of bias because of financial interest, is that of **Kunsill Lokali Pembroke et. -vs- L-Awtorita' tal-Ippjanar et.**[803] At issue was a controversial permission to build a hotel and a multi-story tower on public land. The Authority's decision was appealed in front of the EPRT because, *inter alia*, it was alleged that a member of the PB had a conflict of interest due to him being a franchisee of an estate agency who had marketed the project prior to the decision being taken.

The arguments of the plaintiff objectors were in the sense that this member had an active interest in having the project seen through since he could eventually derive a commission on the sales of the apartments through his agency. The EPRT, however, held plaintiff's arguments to be '*absurd'* since the law itself required that one of the PB members had an interest in '*commerce, economy, and industry'*.[804] This decision was subsequently appealed before the Court of Appeal (Inferior Jurisdiction) which, indeed, was of a different opinion. The EPRT's arguments were dismissed after the court held that a member of the PB could not have a financial or other interest in any enterprise or activity

[802] 'Labour councillor appointed on MEPA tribunal' *Maltatoday* (28 August 2015) <https://www.maltatoday.com.mt/news/national/56495/labour_councillor_appointed_on_mepa_tribunal#.XgdZy0dKiUk> accessed 29th March 2020

[803] *Kunsill Lokali Pembroke, Kunsill Lokali San Giljan, Kunsill Lokali Swieqi, Moviment Graffitti, Friends of the Earth Malta, Zminijietna – Voice of the Left, Din l-Art Helwa, Flimkien Ghal Ambjent Ahjar, Alison Pullicino, Sonya Tanti, Rita Zammit, Norman Zammit, Mario Sultana, Adrian Grima, Josef Buttigieg, Stephanie Buttigieg, u Arnold Cassola v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Silvio Debono ghan-nom u in rapprezentanza ta' db San Gorg Property Limited* [19th June 2019] (CAInf) (11/2019)

[804] Development and Planning Act 2016, s 63(2)(b)(i)

which is likely to affect the discharge of his functions.[805] The court's conclusions were as follows:

> *'Il-membru koncernat ma setghax jiddeciedi fuq progett li fih kellu interess patrimonjali potenzjali bl-approvazzjoni tal-progett'.*[806]

It is, however, pertinent to note that, at the same time, the Court saw nothing wrong with members representing statutory entities sitting on the Planning Board so long as the entities they represented had not previously *'esprimew ruhhom pubblikament kif ser jivvotaw'*.[807] It should be noted, at this point, that there are at least two members of the PB representing entities who would have been formally consulted and possibly expressed their views on a project proposal earlier in the process. One member represents the interests of the Local Council (where the development under consideration is to take place) and another is that of ERA. Consequently, we have a situation in which the Local Council and ERA who are legally obliged to be consulted at the onset of the application process, also have a say in the decision.

Using the standard set out by the Court in **Kunsill Lokali Pembroke et. [2019],** it would thus seem that there is no problem with statutory consultees expressing concern to the proposed development at the consultation stage without revealing their eventual voting intentions. Despite not being the ideal way to remove a reasonable suspicion from the circumstances of a case that bias might have infected the decision, this is not the first time that a similar reasoning was adopted in common law. For example, in **R v Reading**

[805] *Ibid* : s 63(3)(e)
[806] 'The member concerned could not decide on a project in which he had a patrimonial interest with the potential approval of the project'
[807] 'Expressed themselves publicly as to the way they are going to vote'

Borough Council ex parte Quietlynn[808], a councilor had previously written to a newspaper saying that sex shops should be banned. Some time later, he was not disqualified from sitting in a panel to license sex establishments after the court suggested that this was a field where local representatives could be expected to have views, perhaps even strong views. However still, the justifying factor, in this case, was that the views were not expressed in such a certain way that they implied an unwillingness to listen fairly to new arguments or to give the matter genuine further consideration at the formal hearing. The court's justification in this case was, therefore, premised on the notion that the objections were provisional about the general issues and the councilor remained open to persuasion about the particular decision.

Going back to the Maltese scenario, the truth is that it is difficult to expect a PB member representing an entity that had expressed itself against the proposed development prior to the decision to move away from such a position and, therefore, not having a conflict of interest.

Incidentally, this issue will have to be decided in a case bearing the names of **Joseph Cassar ghan-nom ta' Gozo Prestige Holdings Ltd -vs- L-Awtorita' tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar)**[809] which at time of writing is pending judgment before the EPRT after the Court decided on its remission to the said Tribunal. In this case, the applicant had his permission for a destination port comprising a hotel, a yacht marina, and a tourist village initially refused by the PB. An appeal was then filed to the EPRT in which, amongst other things, the applicant raised concern about

[808] *R v Reading Borough Council ex parte Quietlynn* [1986] 85 LGR 387
[809] *Joseph Cassar ghan-nom ta' Gozo Prestige Holdings Ltd v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar)* [24th October 2018] (CAInf) (24/2018)

the appointment of the Council Mayor on the PB despite him having opposed the project earlier on. Applicant specifically asked the EPRT to declare the Authority's decision as legally vitiated due to the Mayor having also participated in the appealed decision. Nevertheless, the EPRT skirted around the issue by saying that this was a constitutional matter which went beyond its remit. The Court of Appeal (Inferior Jurisdiction), on the other hand, concluded that this was a question of law, which the EPRT was obliged to dispose of. The acts were, therefore, remitted to EPRT for a decision to be given afresh and the proceedings of this case are still pending at time of writing.

It is safe to say that the EPRT is likely to pursue any one of the following routes: either declare the decision to be legally vitiated since the Mayor had expressed himself before the decision or refuse to hold the Mayor disqualified since applicant tacitly accepted his presence due to him having failed to take the objection at the earliest practicable opportunity.[810] Whatever the decision might be, no one can suppose that the current composition of the planning board is untainted with suspicion of bias.

Another interesting case that is worth mentioning is that of **Emanuel sive Noel Ciantar -vs- L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamati in kawza Ian u Rachelle konjugi Borg.**[811] In this case, the permit holder happened to be the Minister responsible for the PA. A third party appealed against the permission granted to the said Minister insisting that the members of the PCom, appointed by the Minister himself, had a conflict of interest in terms of Section 734 of the

[810] A review of English, Australian and New Zealand authorities on waiver of objections for bias was undertaken by the New Zealand court of appeal in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142

[811] *Emanuel sive Noel Ciantar v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamati in kawza Ian u Rachelle konjugi Borg* [19th June 2019] (CAInf) (11/2019)

COCP. The plaintiff made a compelling argument, saying that the decision should have been taken by the members of the PB who were not appointed by the Minister. On this point, the Court, however, observed that there was nothing to suggest that any of the Board members had expressed their views on the application prior to decision. All participating members, including those appointed by the applicant himself, were therefore held to be impartial and independent.

In spite of this ruling, there is still reason to rethink the manner members of the PB are appointed, also in view of the conclusions reached by the Venice Commission on the rule of law in Malta[812] where the Executive was singled out as enjoying too much a power when it comes to judicial appointments.

3.2 AUDI ALTERAM PARTEM

The second principle of natural justice is a firmly established rule that a judge or anyone exercising a judicial function must hear both parties in every case for no one should be judged upon unheard. This rule, known as the *'audi alteram partem'* principle, is founded on the idea that a party should never be taken by surprise[813] and deprived of a reasonable opportunity to prepare his case.[814] This should not necessarily imply that an oral hearing is required to take place in all circumstances. It is widely accepted that there could be reliance on written submissions[815] even when there is a conflict of evidence in the statements taken, since a conflict can be resolved by the inherent unlikelihood of one

[812] 'Malta Opinion On Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement' (2018) <https://www.venice.coe.int/webforms/documents/defaul t.aspx ?pdffile=CDL-AD(2018)028-e> accessed 29th March 2020
[813] Stanley Alexander De Smith, *Constitutional and Administrative Law* (4th edn, Penguin 1983): 571
[814] *Ibid*
[815] *Regina v Army Board of Defence Council, ex parte Anderson* [1991] QBD

version or the other.[816] This is not to say that there aren't times when cross examination of witnesses is necessary for the decision maker to decide between competing versions of the facts. Still, if the hearing is a fact gathering exercise involving the gathering of technical evidence, then cross examination of witnesses may not be required.[817] It is only when the charge is serious that a breach of natural justice could arise if cross examination is not permitted.[818]

The right to legal representation has also been linked to the *'audi alteram partem'* principle. As with oral cross examinations, the general principle is that there is no absolute right to legal representation except when the charge is serious, carrying a potential penalty, and points of law are likely to arise in the process.[819]

Locally, the principle of fair hearing has an impressive history in the field of development planning law dating back to even before it was codified by means of the EPRT Act.[820] Of course, this is not surprising because of the already established approach of the Maltese courts when dealing with breaches of fair hearing in other areas of administrative law.[821]

Today, the EPRT has no choice but to give the opportunity to each party to present its case, whether in writing, orally, or both, so as not to be placed at a disadvantage.[822] Plaintiffs, interested third parties, as well as the PA must be given the opportunity to make final submissions once the production of evidence is concluded. Parties also have a

[816] *Ibid*
[817] *Bushell v Secretary of State for the Environment* [1981] AC 75
[818] *Regina v Board of Visitors of Hull Prison, ex parte St Germain (No 2)* [1979] CA
[819] *Regina v Home Secretary, ex parte Tarrant and Others* [1985] 1 QB 251
[820] Environment and Planning Review Tribunal Act 2016, proviso to s 9
[821] See for example: *Commissioner of Lands v Maria Concetta Cassar et* [24th February 1986] (CA) (Kollezz. Vol. XX.II.141); *Architect Rene Buttigieg v Carmelo Abela* [24th June 1985] (CAInf) (Kollezz. Vol. LXIX.II.259)
[822] Environment and Planning Review Tribunal Act 2016, s 9(2)(c)

right to be represented by an agent during sittings meaning that all the parties to an appeal have a right to legal representation.[823] The Act also contains other necessary corollaries of the right to be heard, such as the need to give prior notice to parties[824] together with the possibility of having access to all documents and the right to produce witnesses.

The current DPA and the relative subsidiary legislations deriving therefrom also contain several features aimed at ensuring that both applicants and interested third parties are duly heard prior to the Authority taking a decision. These include giving third parties the opportunity of having access to the documentation of the relative file as well as third parties being informed of any changes to the drawings carried out during the application process and given prior notice to the parties of all public hearings to be held before the PB or PCom. The Courts are on record as having stated that the right to be heard extends to proceedings before the PA.[825] This is, after all, in line with the reasoning that the principles of natural justice are applicable to '*the whole range of administrative powers*'[826] and every body of persons vested with authority to adjudicate upon matters involving civil consequences to individuals should subscribe to these principles.[827]

It is, however, noted that certain statutory rules that appear to be applicable to the EPRT are not necessarily so applicable to the Authority. For example, there is no possibility of disclosure and cross-examination of witnesses and consultees during public hearings before the PCom or the PB. What is perhaps even worse, is the fact that the chairperson of the PB or the PCom has '*absolute discretion'* to limit the participation of the applicant

[823] *Ibid* : s 18
[824] *Ibid* : s 21, s 22
[825] *Edwige Testa v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [29th November 2012] (CAInf) (72/2011)
[826] *Ridge v Baldwin* [1963] 1 Q.B. 539
[827] Kelly CB in the case of *Wood v Wood* [1874] LR 9 Exch 190: 196

and his representative or of the interested third party during a public hearing if he considers necessary for the '*maintenance of order'*.[828]

Still, the idea that parties should be allowed to defend themselves is one key facet of the *'audi alteram partem'* principle reflected in a number of court judgments, many of which, as already pointed out, precede the EPRT Act. In **Dr Cory Greenland et. -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et.**[829], for example, the Court concluded that plaintiff, who was an interested third party, had suffered a breach of his right to a fair hearing after it was found that he had waited for his turn to appear before the PCom outside the Board room and, yet, was not alerted when his application was about to be decided.

In another instance[830], the court stressed that one party could not expect to take advantage of the fact that the other party was not present in the acts of proceedings. A breach of fair hearing was also detected when the Authority was allowed to submit further documentation during the last sitting without giving the plaintiff, who was conspicuously absent during the said sitting, the opportunity to inspect the said documentation, and make counter-arguments.[831]

In **George Attard -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar,** the court observed that the presence of plaintiff's representatives during a EPRT sitting should not

[828] Development and Planning Act 2016, Second Schedule para 9
[829] *Dr Cory Greenland, Ms. Ursula Greenland u Saver Baldacchino v L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u kjamat in kawza Marthese Micallef* [23rd November 2016] (CAInf) (15/2016)
[830] *Dominic Azzopardi v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)* [27th June 2018] (CAInf) (28/2018)
[831] *Joseph Xuereb v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [12th November 2014] (CAInf) (18/2014); *George Said ghan-nom ta' La Grotta Co. Ltd.v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (18/2011)

have been taken to mean that plaintiff was considered notified and nullified the appealed judgment on that basis.[832] Yet, it must be said that in the case of a judicial person having a business address, the serving of a notification on a person whose employment is registered on that same address was held to be sufficient according to law.[833]

Also, the Courts repeatedly held that failing to give due attention to the submissions made by the parties amounts to a question of law[834] and regard of what the parties had to say had to be reflected in the decision.[835] The timely completion of EPRT proceedings cannot be achieved at the expense of natural justice, even when the arguments put forward by one of the parties would appear to make sufficient justification for a case to be decided one way or another.[836] This was highlighted in **Michael Axisa pro. et. nom. -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**,[837] through which the EPRT was reminded that timely completion of proceedings is undoubtedly an important element that carries with it multiple benefits, however not at the expense of seeing to what the parties had to say.

The plaintiff's grievances should, therefore, be thoroughly examined, weighed, and decided upon.[838] For example, in **Clyde Gauci -vs- L-Awtorita' ta' Malta dwar l-**

[832] *George Attard v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [26th June 2012] (CAInf) (51/2001)
[833] *Miller Distributors Limited (C344) v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [21st February 2012] (CAInf) (20/2011)
[834] *Marie Louise Farrugia v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [24th Feburary 2003] (CAInf) (36/2001); *Michael Gatt v L-Awtorita` ta' l-Ippjanar* [19th November 2001] (CA) (220/2000); *Alex Montanaro nomine v Il-Kummissjoni ghall-Kontroll tal-Izvilupp* [9th February 2001] (CA) (215/1998)
[835] *Alfred Polidano v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (15/2011)
[836] *Emmanuel Vella v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [26th June 2012] (CAInf) (49/2011)
[837] *Michael Axisa ghan-nom ta' Lay Lay Company Limited v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (22/2012)
[838] *Andrew Mifsud ghas-socjeta` Solidsan Limited v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [29th November 2012] (CAInf) (83/2012)

Ambjent u l-Ippjanar[839], the EPRT' s decision was annulled after it was found that it had failed to take a position on applicant's intentions to scale down the development and take measures to control the noise and smells. The EPRT cannot, therefore, choose to rely solely on the findings of the PA without explaining why it chose to discard plaintiff's arguments.[840] In another case[841], the EPRT's decision was annulled because it had concluded that the applicant's dwelling occupied a footprint over what was allowed by policy without seeing to plaintiff's counter-arguments based on a different method of calculating floor areas.

The PAB was found to have erred at law when it failed to assess whether the plaintiff was correct to state that that the washroom had a permit because the PA was in disagreement.[842] In a case[843] concerning an appeal against an enforcement notice alleging unauthorized dumping in a quarry, the Court of Appeal nullified the EPRT's decision after it found that the latter failed to verify whether plaintiff's rebuttal arguments were true or otherwise.

In a spate of other judgments[844], the PAB was found to have been in breach of the *audi alteram partem* rule due to it not having expressed itself on whether the permissions quoted by the applicant in justifying his case had a bearing on the proposed development.

[839] *Clyde Gauci v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [10th July 2013] (CAInf) (120/2012)
[840] *Thomas Zahra v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (105/2012)
[841] *Godwin Scicluna v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [27th February 2014] (CAInf) (28/2014)
[842] *Raymond Mercieca v L-Awtorita` ta' l-Ippjanar* [10th October 2003] (CA) (235/1999/1)
[843] *Vella Brothers and Sons v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [19th February 2014] (CAInf) (191/2012)
[844] *Max Zerafa v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [12th January 2004] (CAInf) (3/2005); See also: *James Oliva v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [30th November 2006] (CAInf) (3/2005)

In these cases, the breach of the fair hearing rule was pegged to the principle of *cerimus paribus*, which seeks to ensure that in similar situations, the cause and effect relationship between two specific variables are assumed to be constant.[845]

With the same token, the EPRT cannot choose to justify a decision on matters that are extraneous to the proceedings.[846] Incidentally, the latter principle is also implicitly enshrined in our domestic legal system in the Latin maxims of *'quod non est in actis non est in mundo'* (what is not kept in records of the case does not exist) and *'secundum acta et probata non secundum privatam scientiam'* (according to the evidence and not according to private knowledge of the deciding authority) and '*non refert quid notum sit judici si notum non sit in forma judicii'* (it matters not what is known to the judge, if it be not known in a judicial form or manner).[847]

In one case[848], the EPRT was found to have made an error of law after it was found that its decision relied on the evidence present in a file that was never mentioned during the course of the proceedings, thus without giving the plaintiff reasonable opportunity to bring forward any counter-evidence that he might have had. In another case[849], the Court reminded the parties that despite having an obligation to raise matters of public order *ex*

[845] *Consiglio D'Amato v Kummissjoni ghall-Kontroll ta' l-Izvilupp* [24th May 2004] (CA) (170/1999); *Carol Galea v Kummissjoni ghall-Kontroll ta' l-Izvilupp* [1st October 2004] (CA) (161/1997); *Siliano Sammut v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [3rd December 2004] (CA) (309/2000); *Grace Borg v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [29th October 2009] (CAInf) (6/2009)
[846] *Charles Fenech v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [28th October 2010] (CAInf) (16/2009)
[847] *Carmelo Zammit v Kummissjoni ghall-Kontroll ta' l-Izvilupp* [10th April 1995] (CA) (1/1994); *F. Advertising Limited v Simon Attard et* [21st May 2010] (CA) (866/2007); *Michael Debono et v Joseph Zammit et* [30th June 2010] (FH) (1289/2007)
[848] *Emanuel Formosa v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [29th November 2012] (CAInf) (60/2011)
[849] *Natalino Debono v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [25th February 2010] (CAInf) (12/2009)

officio, the EPRT could not choose to do so without first giving the parties adequate opportunity to make submissions on the matter.

The above-mentioned judgements revealed that there are various ways in which the EPRT can incur a breach of fair hearing. Consequently, the EPRT has to be careful not to get carried away simply because the law allows it to regulate its own proceedings.[850] The EPRT has to keep in mind that it must act in a way as to be '*super partes'* to ensure that it is not accused of bias due to its way of regulating matters during the pendency of the proceedings.[851]

This, however, is not to say that the *audi alteram partem* rule is cast in a rigid mould. What would be an appropriate time frame within which a party is to submit his written representations[852] or documented evidence to support his case[853] or whether the EPRT should accede to a request to carry out a site inspection[854] or whether a witness is admissible[855] are all matters that were found to fall within the discretion of the EPRT.

More so, there is obviously no rule of law obliging the EPRT to accept all the evidence that is brought in front of it as being true. It is generally accepted that a Tribunal could either accept all the evidence put forward by the parties, accept some of it, or none at

[850] *George Said ghan-nom ta' La Grotta Co. Ltd. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (18/2011)
[851] *Emanuel Formosa v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [29th November 2012] (CAInf) (60/2011)
[852] *Emanuel G. Cefai v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th February 2013] (CAInf) (48/2012)
[853] *Martin Baron v L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Mario Farrugia f'isem il-Fondazzjoni Wirt Artna* [22nd January 2014] (CAInf) (54/2013)
[854] *BD Investments Limited v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [19th February 2014] (CAInf) (2/2013)
[855] *Salvu Schembri f'isem Polidano & Schembri Co. Ltd. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [21st January 2004] (CAInf) (31/2002)

all.[856] Indeed, as court decisions show, in one particular case the EPRT was not obliged to hear all the witnesses indicated in an appeal application[857] whereas in another case, the court found no legal breach when the EPRT gave credibility to the arguments of one party and not the other.[858] It was, therefore, within the court's discretion to choose whom to believe[859] and decide to which facts and arguments brought before it deserved to be given the most weight.[860]

3.3 DUTY TO GIVE REASONS

The giving of satisfactory reasons for a decision is seen to be the third principle of natural justice[861] and one of the hallmarks of proper administration that instils accountability and transparency.[862] The principle, here, is that the individual in question has the right to know what are the areas of concern and why the deciding authority is minded to decide against him.[863] Reasons are therefore required to detect whether the decision process has gone astray.[864] Such a requirement is even more important when the decision is unusual in some way or appears to be contrary to the evidence or where the subject matter is so highly regarded by the law such as personal liberty.[865] Moreover, reasons need not only be provided but they should be intelligible and adequate.[866]

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[856] *McPhee v S Bennett Ltd* [1934] 52 WN (NSW) 8
[857] *George Gatt v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (146/2012)
[858] *Amalia Cefai ghan-nom u in rapprezentanza ta' Gozo Caterers Limited u Emanuel George Cefai v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (68/2011)
[859] *Carmelo Tabone v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [7th May 2014] (CAInf) (65/2013)
[860] *Karmenu Farrugia v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (14/2012)
[861] 'Reasoned Decision: A Principle Of Natural Justice v.s. Chauhan' (Journal of the Indian Law Institute Vol. 37, No. 1, January-March, 1995): 92-104
[862] Harry Woolf, *Protection of the Public* (Sweet & Maxwell 1990): 92
[863] *R v Home Secretary, ex p. Al Fayed* [1997]
[864] *R v Home Secretary, ex parte Doody* [1994] 1 AC 531
[865] *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 WLR 242
[866] *South Buckinghamshire District Council and Another v Porter (No 2*) [2004] HL

When it comes to local jurisprudence surrounding development planning law, the duty to give reasons is a well-established principle. When a planning application is refused, the parties should be in a position to know what conclusions the decision-maker had reached on the matter under dispute to be able to reasonably assess the prospects of succeeding if an appeal were to be lodged before the Court of Appeal.[867] The Court should also not be put in a position where it has to guess what the EPRT had in mind.[868] A motivated decision, therefore, gives the required assurance that the EPRT had acted lawfully, putting parties in a position to decide whether they should feel aggrieved with the outcome and proceed to enter an appeal before the Court. Moreover, in the case of a refused application, reasons also help the applicant assess what is acceptable in the eventuality that he decides to submit a new proposal.

On the other hand, it is equally crucial for reasons to be given when a planning application is granted permission, not only to instill a sense of accountability but also to avoid the risk of having planning considerations impact wrongly on future applications because of not knowing what the decision-maker had in mind. A simple example could illustrate this:- take a proposal for the conversion of a small garage to a shop that was granted after the EPRT thought that traffic in the site's vicinity was of no concern. The consequences of a failure to explain the reasoning behind this decision could prompt other decision-makers to think that the proposal was accepted on other grounds, say because of the small area or the nature of the activity. As a result, similar development proposals could, therefore, end up being granted permission on a wrong premise. The EPRT is therefore obliged to *'jikkonsidra sewwa s-sottomissjonijiet kollha li jsirulu mill-partijiet u li*

[867] *Michael Gatt v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [19th November 2001] (CA) (220/2000)
[868] *Josef Abdilla v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th April 2016] (CAInf) (1/2016)

jimmotiva sewwa d-decizjonijiet li jaghti anke fuq l-aspetti fattwali tal-kaz'[869], failure which, the decision could be considered null and void.[870]

Reasons are, therefore, required to demonstrate a rational nexus between the facts considered and the conclusions reached in the EPRT's decision. For example, in **George Borg -vs- Awtorita' ta' l-Ippjanar**[871] the court found that the PAB made an error of law in concluding that the plaintiff had his PAPB permit revoked but then failed to say how it had reached its conclusions. In **Anne Marie Carabott -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**[872] the court annulled a decision of the PAB to remove a bank guarantee to ensure that the landscaping and maintenance works were carried out within a five-year time frame since no justification was given. While it is true that the PAB could possibly have sufficient reason to conclude that the prescribed amount was deemed excessive especially when compared to the value of works being carried out, one could still, however, sense an air of arbitrariness due to the fact that reasons were not given.

In another recent case[873], the Authority had initially held that the historical and architectural characteristics of the public open space would be compromised if permission to replace a timber enclosure with one of glass was given. For its part, the EPRT disagreed and held that the design of the enclosure was in keeping with the surrounding context. The Court, however, annulled the EPRT's decision after it observed that the latter had

[869] 'To rightfully consider all submissions made by the parties and motivate correctly its decisions, including on the factual aspects of the case'
[870] *Tony Zahra v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [6th May 1998] (CA) (54A/97)
[871] *George Borg v Awtorita' ta' l-Ippjanar* [23rd April 2001] (CA) (82A/1998)
[872] *Anne Marie Carabott v L-Awtorita` ta' Malta Dwar l-Ambjent u l-Ippjanar* [1st June 2009] (CAInf) (10/2007)
[873] *Godwin Pullicino ghan-nom ta' Revolution Limited v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)* [25th January 2018] (CAInf) (25/2017)

failed to explain how the laminated glass enclosure, which would replace one of timber, was in keeping with the characteristics of the area. It is therefore essential for the EPRT to ensure that the appraised facts together with the legal reasoning which led to the decision are identified clearly.[874]

It is also acknowledged that reasons are particularly important when the parties are in disagreement as to which policy ought to apply. In such situations, the EPRT is required to explain why it chose to apply one policy rather than another[875], explaining why a policy is not relevant to the case in front of it[876] and why a policy is deemed applicable to the case.[877] Even so, when one policy allows for various options that could be sought by the decision-maker, the reasons for choosing one alternative over another has to be disclosed.[878]

The court has repeatedly stressed that the EPRT cannot hold itself to agree with one party without justifying.[879] The EPRT has, therefore, a duty to give its own version of events

[874] *Salvino u Stella Borg v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Emanuel Theuma* [2nd May 2013] (CAInf) (103/2012)
[875] *John u Geraldine Portelli u Marco Borg u Maghtab Residents' Association v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza John Muscat ghall-Wistin Muscat and Sons* [9th October 2013] (CAInf) (164/2012)
[876] *Michael Farrugia v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Charles Camilleri* [1st August 2013] (CAInf) (68/2012)
[877] *Michael Gatt v l-Awtorita' ta' l-Ippjanar* [19th November 2001] (CA) (220/2000); *Jimmy Vella v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [24th March 2003] (CAInf) (5/2002); *Max Zerafa v Il-Kummissjoni ghall-Kontroll tal-Izvilupp* [12th January 2004] (CAInf) (20/2002); *Anthony Ciappara v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [28th June 2006] (CAInf) (11/2004)
[878] *Michael Ellul Vincenti v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (33/2013)
[879] *Victor Bezzina v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (1/2012); *June Laferla v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [26th March 2014] (CAInf) (36/2013)

supported by its own material findings.[880] This is all the more important to show that the EPRT's decision is not based on extraneous considerations.[881]

The court also underlined that when some issue is dismissed as one of a civil nature, hence falling outside the EPRT's remit, parties are owed an explanation.[882] An explanation seems to be also required when the EPRT decides not to accept a demand from a party to produce a witness[883], notwithstanding there is no such written legal obligation to do so.

The duty to give reasons is also determinative in the context of a gathering of evidence during EPRT proceedings. An appellant could not be found to have committed any wrongdoing without an exposition of the findings.[884] With the same token, the contents of an affidavit could not be disregarded without the EPRT providing a sufficient explanation.[885]

It would also seem that reasons should be given in support of procedural decisions made in the course of EPRT proceedings. For example, in one case[886] the EPRT decreed to suspend proceedings regarding a third party appeal to a planning permission in which the approved plans made reference to CTB847/15, the latter being also the subject of an appeal under separate proceedings which were, as yet, not decided. The said decree was,

[880] *Anthony Cauchi v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (157/2012)
[881] *Natalino Debono v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [25th February 2010] (CAInf) (12/2009)
[882] *Plaza Centres p.l.c. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (45/2012)
[883] *Martin Baron v L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Mario Farrugia f'isem il-Fondazzjoni Wirt Artna* [22nd January 2014] (CAInf) (54/2013)
[884] *Josef Abdilla v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th April 2016] (CAInf) (1/2016)
[885] *Martin Baron v L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Mario Farrugia f'isem il-Fondazzjoni Wirt Artna* [22nd January 2014] (CAInf) (54/2013)
[886] *Sandra Farrugia et v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u kjamat in kawza Saviour Casha* [20th November 2017] (CAInf) (12/2017)

therefore, found to contain an error of law since the EPRT had failed to explain why suspension was necessary.

Having seen all this, there is still no magic formula which states precisely the standard of reasoning the court demands from the decision-maker to ensure that he does not fail this duty. Surely, it is unrealistic to think that a conclusion should be drawn on each and every single argument raised during proceedings.[887] There is, of course, no need for the EPRT to comment on matters that are not in dispute.[888] On the other hand, the courts have long accepted that a response should be given to those matters that are of '*substance'* albeit defining '*substance'* in a loose fashion. In one particular case[889], '*substance'* was attributed to those matters which the parties themselves underscored as being essential to support their case. In another case[890], '*substance'* was attributed to those matters that were critical to the dispute.

At another time[891], the court underlined that a matter would have needed to be focused upon, only if it was conclusive to the outcome of the appeal. In this case, the PAB was held not to have breached the law for failing to comment on an opinion from the Heritage Advisory Committee (HAC) since that was not conclusive to the result of the appeal.[892] Ironically, however, the court failed to explain why the opinion of the HAC could have

[887] *Max Zerafa v Il-Kummissjoni ghall-Kontroll tal-Izvilupp* [12th January 2004] (CAInf) (20/2002); *Vincent George Delicata f'isem Ataciled Enterprises v Awtorita' tal-Ippjanar* [31st May 2002] (CA) (165/1997); See also: *Alfred Fenech u Angelo Fenech v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Malcolm Cutajar* [30th October 2019] (CAInf) (18/2019); *France Tonna v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [11th December 2014] (CAInf) (176/2012)

[888] *Joseph Cassar v Awtorita' ta' l-Ippjanar* [31st May 2002] (CAInf) (257/1997)

[890] *Joseph Said ghan-nom ta' La Grotta Co. Ltd. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (16/2011)

[891] *Paul Buttigieg v Awtorita` ta' l-Ippjanar* [16th December 2003] (CA) (154/1988)

[892] *Josef Abdilla v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th April 2016] (CAInf) (1/2016)

no bearing on the decision of the Board. What the court might at least have done is to clarify in legal terms why an expert opinion, in this case, that of the HAC, could be discarded.

Still, when all things are taken into perspective, the above judgments provide us with a clear picture of the scrutiny and caution that would have to be adopted by the EPRT as regards its duty to give reasons. The only problem seems to be that of not having a formula for a yardstick to check the standard of reasoning the court will demand from the decision-maker in ensuring that he does not fail this administrative duties.

4. FAILURE TO OBSERVE RULES OF PROCEDURE

The application process is currently regulated by a myriad of provisions found in Legal Notice 162 of 2016. When a development is listed in Schedule 1 of Legal Notice 211 of 2016, it has to, first, undergo a screening process before a planning application can be submitted.[893] The idea is to identify all significant issues surrounding the proposal before applicant decides whether to proceed with submitting the planning application. In any other case, one can bypass the screening process and directly submit a planning application.

Upon reaching the PA, the planning application is vetted to determine what requirements there are to validate the application, including the amount of the development permit fee to be paid.

[893] Development Planning Act 2016, s 3(1)

Once these requirements are met by the applicant, a notice containing the details of the application is affixed on site. These same details, together with the date the public consultation begins, are published on the website of the Department of Information. The consultation time-frames vary depending on the nature of the planning application. During this period, any person, including twelve statutory consultees, can have their say on the application with written objections. A second round of consultations is even possible in the case of non-summary applications.

Once consultations are terminated, the case officer takes stock of the proposal in the context of the relevant policies and what third parties had to say. Furthermore, the officer prepares an application report with a recommendation to the PB or the PCom to either grant or refuse the application. The PB or the PCom is then required to either confirm or overturn the case officer's recommendation. Still, in the case of overturning the officer's recommendation, a number of procedural requirements set out in Legal Notice 162 of 2016 are required to be met.

Following a decision on a planning application, an appeal to the EPRT, requesting its revocation, is possible under the EPRT Act. *'In the absence of any other rules'*, the EPRT is authorized to regulate its own procedure.[894]

This is the application process in a nutshell, however, the procedure is in truth subject to a myriad of rules and regulations contained in the various pieces of legislation. The vast majority of provisions feature the word '*shall*' (as opposed to '*may*'), which gives a strong indication of the legislator's intentions of making the rules mandatory.

[894] Environment and Planning Review Tribunal Act 2016, s 32

The following part of this study will highlight numerous instances during which it emerged that statutory rules were not respected, and the court had to subsequently decide whether or not to tolerate such conduct. The selected judgments will be categorized under specific scenarios. The first part concentrates on proceedings before the Planning Directorate, and that is the phase between receipt of a development proposal until the drawing up of the application report. The second part deals with proceedings before the PB or the PCom, at which stage the planning application is determined. The third part will focus on the proceedings before the EPRT.

4.1 PROCEEDINGS BEFORE THE PLANNING DIRECTORATE

The courts have on occasion upheld the principle that all basic requirements have to be in place in order to process a planning application. When, in one case[895], the PAB had ordered the PA to handle a planning application even if the development permit fee was not paid in full as required under Legal Notice 133 of 1992 and Circular 8/12, the decision was subsequently revoked by the court as it went against the relevant provisions of the said Legal Notice.

The importance of providing the right information with a planning application was also the subject of another judgment.[896] In this case, the court revoked permission after it found that the proposal description in the application form referred to a permission that was later found not to exist.

[895] *Ignatius Attard v L-Awtorita` ta' Malta Dwar l-Ambjent u Ippjanar* [1st June 2009] (CAInf) (5/2008)
[896] *Saviour Schembri ghan-nom u in rapprezentanza ta' Schembri Barbros Ltd v L-Awtorita' tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar)* [25th January 2017] (CAInf) (26/2017)

Failure to mount a site notice as required by law was found to be enough to revoke a permission.[897] In the instant case, planning permission was cancelled even though it was the Authority representative which was to blame for fixing the notice in the wrong location. The court was not convinced the criteria that had to be met by law were in fact met by the fact that the relevant information was published in a daily newspaper.

However so, the court was not as stringent when it found that an address displayed on a site notice was imprecise.[898] In this case, the court saw that the location of the development was correctly plotted on the relative site plan and it was decided not to revoke the permit.

The non-observance of statutory timeframes, within which stakeholders are required to take necessary action, are also taken very seriously by the courts. A written objection that reached the Authority before the commencement of the public consultation period was considered to have no legal effect, notwithstanding the fact that no prejudice could have been caused to the applicant.[899] If nothing else, the applicant could claim to have been prejudiced if the objection was lodged after termination and not before the beginning of the consultation period.

In one interesting case[900], however, the court held that the EPRT was wrong to dismiss plaintiff objectors as being nonsuited on the grounds that they had not registered their

[897] *Emmanuel Busuttil Dougall v L-Awtorita` ta' Malta dwar l-Ambjent u l- Ippjanar* [24th February 2011] (CAInf) (3/2010)
[898] *Martin Manduca v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Camille Scerri* [7th December 2016] (CAInf) (19/2016)
[899] *Din l-Art Helwa u The Gaia Foundation v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [25th June 2009] (CAInf) (2/2008); See also *Reverendu Carmelo Busuttil v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp u Margaret Ellul* [5th October 2001] (CA) (310/2000)
[900] *George Felice et v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Keith Attard Portughes* [20th April 2016] (CAInf) (2/2016)

interest within the stipulated time frames without first ascertaining whether they were correct to allege that the drawings had materially changed after the end of the consultation period. The point here was that had the changes been known to objectors from the onset of the application, they could have decided to register their interest within the period set out by law. Although this judgment provides an interesting contrast with the norm, the court wanted to convey the message that public consultation cannot be circumvented should the proposal be changed.

Indeed, this reasoning was later reflected in Regulation 5(3) of the current Legal Notice 162 of 2016. This provision allows the executive chairperson to request an applicant to carry out a material change after the expiration of the period within which objectors may lodge complaints only if a notice is affixed on site and details of the amended proposal are republished in order to trigger a fresh consultation.[901]

Objectors, however, need to identify themselves in their communication with the Authority. For example, a problem was found when a group of anonymous objectors submitted written concerns to a planning application and subsequently wanted to be recognized during appeal proceedings.[902] On the other hand, a number of individuals who had asked a lawyer to write an objection letter on their behalf were recognized as registered objectors because they could be identified by their home address in the original letter.[903]

[901] Development Planning Procedure for Applications and their Determination Regulations (Legal Notice 162 of 2016), Regulation 5(4)
[902] *Peter Bugeja v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (196/2012)
[903] *Travis Boyd, John Agius, Philip Borg u Margerita Farrugia v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u kjamat in kawza Ghaqda Muzikali San Guzepp* [28th February 2018] (CAInf) (5/2018)

The period stipulated in outline permissions, within which the applicant is required to submit the relative full development application, was also considered critical by the courts. In one case[904], an outline permission was found to have lost its legal effect since the applicant failed to submit a full development application within the prescribed period since a screening letter was still pending by the end of the said period. The applicant was therefore punished due to the Authority not having issued him a screening letter through no fault of his own. It is noted that the situation today could be different since '*a validated request for screening'* is now regarded as an '*application*'.[905]

4.2 PROCEEDINGS BEFORE THE PLANNING BOARD AND THE PLANNING COMMISSION

The non-observance of the rules that decision-makers ought to follow once they get hold of an application report appears to be taken very seriously by the courts, a case in point being the fact that once a vote is taken, the Authority is not allowed to have second thoughts on the matter. The importance of this matter is such that the same applies even when the applicant would have still not have obtained the permit.[906]

Decision-makers must, therefore, make sure to comply with all rules and procedures. For example, from cases heard before domestic courts, one can see that registered objectors were not only required to be informed of any changes in plans prior to a sitting but, in the eventuality that the Board or Commission decided to adjourn the case, an updated case

[904] *Hector Borg, Mark Azzopardi u l-perit Patrick Calleja v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza l-applikant Joseph Bezzina* [2nd January 2014] (CAInf) (54/2013)
[905] Development Planning Procedure for Applications and their Determination Regulations (Legal Notice 162 of 2016), Regulation 2
[906] *Franco Agius ghas-socjeta` A & F Developers Ltd v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [29th November 2012] (CAInf) (66/2011)

officer report had to be placed on the website of the PA as required by Regulation 13(4) of Legal Notice 162 of 2016.[907] Conversely, a registered third party objector not only needed to be notified when the applicant submitted fresh plans but also had to be briefed on date of the following sitting.[908]

The EPC was found to have erred at law when it decided not to refer a planning application to the Planning Directorate to update a report on the application and to include a list of conditions as required by Section 9(4) of Legal Notice 514 of 2010 before deciding against a favorable recommendation.[909] The law was held to have been likewise breached when the PB decided to overturn a negative recommendation without, first, stating a provisional opinion supporting its intentions to go against the Directorate's recommendation.[910] In this instance, the court observed that the Board's conduct was incompatible with Regulation 13(4)(a) of Legal Notice 122 of 2016.

The absence of a justification to overturn a Directorate's recommendation was considered enough reason to have a permit revoked in terms of Section 39A (the predecessor of Section 80).[911] Still, justification alone was found to be insufficient due to the fact that the reasons had to be specific. In one case[912], the court ruled that it was not enough for

[907] *Jonathan u Domenica konjugi Buttigieg v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Paul Abela* [19th June 2019] (CAInf) (17/2019)
[908] *Dr Jevon Vella v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar, u l-kjamat in kawza Edmond Agius* [17th February 2016] (CAInf) (53/2015)
[909] *Adrian Coppini v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (22/2013)
[910] *Avukat Generali ghan-nom tal-Gvern ta' Malta v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u kjamat in kawza Juanito Camilleri* [21st May 2018] (CAInf) (17/2018); See also: *Dr Reuben Farrugia v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar)* [20th November 2019] (CAInf) (24/2019) in which judgment the court seems to imply that a provisional opinion constitutes a legitimate expectation provided that applicant adheres to the request expressed by the Commission
[911] *Marthese Said u l-Avukat Dottor Victor Scerri, zewgha v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (46/2012)
[912] *Paul Abela v L-Awtorita' tal-Ippjanar* [20th November 2017] (CAInf) (23/2017)

the Authority to dismiss a planning application on the grounds that the proposed development was not in line with a few general planning objectives. The court held that the reasons to warrant the overturning were meant to be specific, as stipulated in Section 69(3) of chapter 504 (the equivalent of proviso to the current Section 72(1) of Chapter 552).

4.3 PROCEEDINGS BEFORE THE TRIBUNAL

Once appeal proceedings are initiated, the EPRT *'in the absence of any other rules'*[913] is at liberty to regulate its own procedure. The court, for instance, found nothing wrong with the EPRT not delivering a decree on a request from plaintiff to amend a proposal three days before judgment was delivered.[914] The court gave no indication as to why it had so decided but a likely explanation to this is that no *'other rule'* compelled the EPRT to act differently.

It would be also appropriate to say that *'other rules'* are not limited to the provisions laid in statute but also include the general principles of law. For example, the EPRT is often reminded by the courts that it may not decide on more issues than it is requested to decide upon.[915] That is in line with the general legal principle that the deciding body is there to dispose of nothing other than the claims advanced by the parties.

[913] Environment and Planning Review Tribunal Act 2016, s 32
[914] *Anthony sive Tony Cassar v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [7th May 2014] (CAInf) (160/2012)
[915] *Perit Chris Briffa v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Dott. Alexiei Dingli ghall-Kunsill Lokali Valletta* [22nd January 2014] (CAInf) (29/2013); *Saviour Vella f'isem u in rapprezentanza tal-Ghaqda tar-Residenti Santa Maria Estate v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamata in kawza Veronique Debono* [4th December 2013] (CAInf) (173/2012); *Bahar ic-Caghaq and Madliena Residents v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u kjamat in kawza Patrick Vella ghan-nom u in rapprezentanza ta' Leisure and Theme Park* [3rd December 2013] (CAInf) (151/2012); *Frans Mamo v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (193/2012)

Another general principle of law is that the EPRT cannot act outside a power conferred by statute. To take an example, the EPRT cannot decide to approve a permission based on how a planning policy ought to have been worded.[916] This is because policy control lies within the sole remit of the PA, and the EPRT cannot assume such a role itself.

Another important factor is legal certainty in such a way that those concerned can, with relative accuracy, calculate the legal consequences of their actions as well as the outcome of legal proceedings. This was why, for example, the court said that the EPRT made an error when it ignored a decree it gave at an earlier stage without first revoking it *contrario imperio*.[917] Taking parties by surprise, similar to what the EPRT did in the said case, is the very definition of legal uncertainty.

It is also within the context of legal certainty that the court decided to nullify a decision holding the wrong date.[918] A good number of decisions in which the name of a party to the appeal was inadvertently omitted from the record of the decision were annulled precisely for the same reason.[919] In one instance[920], the court ruled that the EPRT's decision was null since some of the parties were simply referred to as '*et'* (meaning *'others'*).

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[916] *Silvio Debono et v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Ray Fenech* [19th February 2014] (CAInf) (26/2013)
[917] *Raymond Muscat v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th January 2015] (CAInf) (158/2012)
[918] *Emmanuel Vella v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [26th June 2012] (CAInf) (49/2011); See also: *George Attard v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [6th June 2012] (CAInf) (51/2011)
[919] *Maurice Formosa ghan nom u in rapprezentanza ta' JMA Ltd, Ian Zammit ghan-nom ta' Mortar Investments Ltd, u Joseph Grech v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [22nd April 2015] (CAInf) (58/2014); *Perit Wilfred De Battista v L-Awtorita` ta' l-Ambjent u l-Ippjanar ta' Malta u b'digriet tat-18 ta' Jannar 2007 gie kjamat fil-proceduri Paul Farrugia* [6th May 2008] (CAInf) (8/2006); See also: *Captain Louis Van Den Bossche v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [30th October 2008] (CAInf) (3/2008); *Mikiel Farrugia v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [11th March 2015] (CAInf) (84/2014)
[920] *Alexander u Alma Tania konjugi Vella et. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Richard Colombo* [2nd March 2013] (CAInf) (30/2011)

When a band club was party to an appeal, the EPRT's decision was, however, still considered valid despite the fact that the individuals which appeared on its behalf in the lawsuit had not been mentioned in the names of the decision.[921] Furthermore, it was not necessary to mention an interested third party, who was not a plaintiff in the case, in the names of the decision, notwithstanding that he had taken an active part.[922]

Interestingly enough, the wording of the decision, which may be construed differently from that evidently intended by the EPRT, could now be rectified without having to go to court since correction may, on request, be carried out by the EPRT within twenty days from the date when the decision is published.[923]

When it comes down to written rules, there is no excuse that they cannot be identified. The court is also adamant that these are equally observed by the EPRT. The EPRT has to, first and foremost, make sure that the statutory timeframes within which parties are allowed to file an appeal are respected.[924] A late appeal application was not be justified even when the tariff was found to have been duly paid during the prescribed timeframes.[925] Timeframes start to run from the date when notice of permission is published in the government website, no matter if a copy of the decision had not passed

[921] *Emmanuel u Rita Muscat u Pauline Borg et. v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (5/2011)
[922] *Joseph Galea ghan-nom ta' Wied Ghomor Quarry Limited v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)* [21st May 2018] (CAInf) (13/2018)
[923] Environment and Planning Review Tribunal Act 2016, s 46(4)
[924] See for example: *Kunsill Lokali Santa Venera v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza John Rizzo ghan-nom tad-Dipartiment tal-Protezzjoni Civili* [20th November 2017] (CAInf) (16/2017) and also *Kunsill Lokali Marsaskala v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Shaban Abdel Ghany* [20th November 2017] (CAInf) (21/2017); *Noel Attard v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [25th March 2010] (CAInf) (13/2009); See also: *Joseph Oliver Ruggier v Awtorita` ta' l-Ippjanar* [9th October 2013] (CAInf) (110,2012); *Harry Calleja et v L-Awtorita' ta' l-Ippjanar* [27th October 2013] (CAInf) (17/2002)
[925] *Harry Calleja u Mowafak Toutoungi v L-Awtorita` ta' l-Ippjanar* [27th October 2003] (CAInf) (17/2002)

to the objector as was established practice.[926] A legitimate expectation that emerged from established practice could not, therefore, counteract the letter of the law.

The EPRT is also barred from approving a continuation of proceedings in the case where the plaintiff fails to support his appeal with any grounds. In one case[927], the EPRT was ordered not to give plaintiff an opportunity to present the grounds of his appeal during a sitting because these were expected to be part of the appeal application as required under Section 15 of the EPRT Act.

An error of law was also found to have occurred when the EPRT delivered a series of interlocutory decrees that were not part of the final decision.[928] The reason for this was that the principles of good administrative behaviour required that the EPRT deliver one, single, final decision about all matters involved in the appeal, whether they are of a preliminary, substantive or procedural nature.

5. MISHANDLING LAWS AND POLICIES

Laws and policies can be mishandled in several different ways, from reliance on wrong provisions of the law which are not applicable to the facts in issue to making use of laws or policies which are removed from the statute books by the time judgment is given. Other

[926] *Martin Cordina u Lilian Cordina v L-Awtorita' tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza James Busuttil* [5th February 2018] (CAInf) (29/2017)
[927] *Charles Fenech v L-Awtorita' tal-Ippjanar* [27th June 2007] (CAInf) (8/2017)
[928] *Din l-Art Helwa v L-Awtorita tal-Ippjanar* [16th May 2019] (CAInf) (4/2019); *Charles sive Charlie Theuma u Salvina Theuma, Lorenza Bajada u Christopher Theuma, Joseph Zammit u Diana Zammit, Antonella Xerri u Victoria Xerri v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Rodney Metters* [19th June 2019] (CAInf) (13/2019)

instances of mishandling policies are when they are either misunderstood or wrongly applied to the established facts or when they are applied to wrong or inexistent facts.

At this point, the fundamental question to ask is whether it can be said that '*a point of law decided by the Tribunal'* occurs when the laws and policies are mishandled in some way as outlined above. The best option in attempting to respond to this question is to, first, evaluate if and how the courts have dealt with the above scenarios.

5.1 APPLICATION OF THE WRONG LAW OR POLICY (CHOOSING THE WRONG LEGAL TEST)

The first scenario is about whether a question on whether the correct law or policy was applied by the EPRT amounts to a matter of law. In a sense, this reminds us of Section 811(e) of the COCP[929], which section addresses the possibility of setting a judgment aside for retrial when a previous court relied on a legal disposition other than that which was meant to be applied.[930]

In the previous chapter, a lot has been said about the court's contribution to the discussion on whether planning applications ought to be assessed according to the policies in force

[929] Section 811 states: '*A new trial of a cause decided by a judgment given insecond instance or by the Civil Court, First Hall, in its Constitutional Jurisdiction, may be demanded by any of the parties concerned, such judgment being first set aside, in any of the following cases:*
[…]
(e) where the judgment contains a wrong application of the law. For the purposes of this paragraph there shall be deemed to be a wrong application of the law only where the decision, assuming the fact to be as established in the judgment which it is sought to seta side, is not in accordance with the law, provided the issue was not in reference to an interpretation of the law expressly dealt with in the judgment'

[930] *Reginald Micallef et noe. v Godwin Abela et noe* [3rd June 1994] (CA); *AIC Joseph Barbara v Direttur tax-Xogholijiet Pubblici* [17th February 2003] (CA) (558/1973/2); *Guido J. Vella A&CE v Dottor Emanuel Cefai LL.D* [27th March 2003] (CA) (147/1988/5); *Commonwealth Educational Society Limited v Adriana Camilleri* [2nd June 2003] (CAInf) (372/1999); *Charles Michael Gauci v Alfred Vella pro et noe et* [10th October 2003] (CA) (248/1999)

at the onset of the application or those in force at the decision stage. In that context, the position of the court was made very clear, namely that the applicable policies are those in force at the moment of final judgment.

Even so, the court also held itself entitled to intervene when the question concerned a policy that was still in draft form when the application was about to be decided. For instance, the court held that the PAB was wrong to refuse a planning application for the construction of a dwelling on the basis that such development would no longer be acceptable in terms of the proposed Local Plan, which designated the area for industrial use.[931]

In a series of other judgments, a point of law was triggered when the appealed decisions relied on policies that did not apply to the circumstances of the case. In one particular case[932], the court revoked the PAB's decision to refuse permission for a facility for olive oil production after it found that the decision was based on a policy that had to do with the construction of storage rooms and not of oil production.

In another case[933], the court annulled the EPRT's decision after it held that the latter had concluded that an additional floor was not permitted in view of the ridge edge policy when it had earlier said that the proposed works did not qualify as a ridge edge development.

[931] *Francis Gauci v Il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [24th February 2005] (CAInf) (31/2003)
[932] *Stella Buttigieg u Joseph Cordina v L-Awtorita` ta' Malta dwar l-Ippjanar* [29th January 2009] (CAInf) (24/2006)
[933] *Anna Marie Agius v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [30th October 2012] (CAInf) (35/2011)

Particular issues, such as whether the PAB should have distanced itself from Policy IND 12 of the Structure Plan, due to it being unrelated to the case as alleged by plaintiff, and instead relied on Policy SMHO 02 was also held to be a matter of law into which the Court decided to look further.[934]

In yet another such case[935], the court took it upon itself to ascertain whether, in the light of the circumstances at issue, the applicable policy was that for comparison type shops as held by the EPRT or that for convenience type shops as plaintiff had otherwise contended in his appeal application.

In one instance involving an appeal against an enforcement notice[936], the court stated that it had a duty to assess whether Section 52(11) of the DPA was to apply given that the EPRT had to decide an appeal against an enforcement notice when plaintiff himself concurrently sought to regularize that same illegal activity through a sanctioning application.

In a case relating to a proposed swimming pool in a Category 3 settlement[937], the EPRT ruled that this was permitted under the Rural Policy guidelines. Nevertheless, the court found that the guidelines did not apply in the case of Category 3 settlements, and the EPRT had therefore incurred an error of law due to having based its judgment on a wrong policy.

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[934] *Gaetano Borg v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [10th December 2008] (CAInf) (5/2007)
[935] *George Ciappara v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [29th November 2012] (CAInf) (11/2011)
[936] *Mario Azzopardi v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [30th March 2004] (CA) (41/2002)
[937] *Emanuel sive Noel Ciantar v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamati in kawza Ian u Rachelle konjugi Borg* [19th June 2019] (CAInf) (11/2019)

Notwithstanding what is being said, the court took a completely different approach in a number of other judgments[938], including one delivered in 2018.[939] In these latter cases, the court refrained from analyzing whether the decision was based on the right planning policy and went about the issue by simply stating that that choosing between conflicting policies was a matter of planning judgment falling outside its remit.

From an analysis of these judgments, there seems to be no question that the application of a policy that is no longer, or not yet in force at the time of the decision, amounts to a point of law. On the other hand, the same could not be said insofar as to whether one policy should be applied instead of another. This is because the court has, at times, decided not to intervene when it was alleged that the EPRT should have applied one policy instead of another since such matter was held to be one of planning judgment. Such reasoning is to, say the least, questionable since in giving the ultimate say to the EPRT, there is no way to know whether in the process of selecting one policy instead of another, the EPRT had regard to irrelevant considerations or failed to have regard to all relevant considerations or whether the selection was motivated by an improper purpose.

[938] *Mark Knight Adams et. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Carmelo Portelli* [9th October 2013] (CAInf) (128/2012); *John u Geraldine Portelli u Marco Borg u Maghtab Residents' Association v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza John Muscat ghall-Wistin Muscat and Sons* [9th October 2013] (CAInf) (164/2012); *Nature Trust (Malta) v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Joe Micallef* [14th November 2013] (CAInf) (116/2012)

[939] *Kenneth Grima v L-Awtorita' tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar)* [30th April 2018] (CAInf) (18/2018)

5.2 A WRONG INTERPRETATION OF THE CORRECT LAW OR POLICY

The second scenario, which we will be now discussing, is about whether the way policies are interpreted by the EPRT could give rise to a point of law. Considering how language works, a wrong interpretation ensues when the consequences attached to a statutory provision are not those envisaged by the legislator.

For some time, the thinking of the courts was that it had no say over the way laws and, or policies, were interpreted by the PAB, for example, in the oft quoted case of **Dr. Alfred Grech -vs- Awtorita' tal-Ippjanar**[940], the Board reached the following conclusion stating that:

> '… *il-Bord ta' l-Appell ghandu diskrezzjoni sabiex jinterpreta tali legislazzjoni, u din l-interpretazzjoni ma tistax tigi riveduta minn organu gudizzjarju iehor'*.[941]

In this judgment, the court made it very clear that it was not up to it to engage in the process of arriving at the proper meaning of a particular law, even if the material before it reasonably admitted a different conclusion. At the time, the reasoning behind such a legal stance was that planning policies were technical matters falling under the remit of the '*special Tribunal'*.[942] What the court was implying was that a wrong ascertainment of the meaning of the law, which, in turn, triggered the wrong effect of the legal content was not a matter of law.

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[940] *Dr. Alfred Grech v Awtorita' tal-Ippjanar* [31st May 1996] (CA) (93/1994)
[941] '...The board of appeal had discretion to interpret the said law and such interpretation could not be reviewed by another judicial organ'
[942] *Alfred Mifsud v Chairman ta' l-Awtorita` ta' l-Ippjanar* [24th April 1996] (CA) (31A/1996)

However, in **Joseph Mifsud -vs- Awtorita' ta' I-Ippjanar**[943], things took a different turn after the Court said the following:

> *'Tali nterpretazzjoni u applikazzjoni jispettaw, skond il-ligi, lill-Bord ta' l-Appell u din il-Qorti, m'ghandhiex il-gurisdizzjoni li tissindikahom jew tiddisturbahom, sakemm ma jkunx jidher car illi d-decizjoni hija manifestament ingusta minhabba applikazzjoni hazina tal-ligi, kif enuncjata fl-istess decizjoni'*.[944]

Evidently, this judgment was slightly different from that of **Grech [1996]**. What the court was now saying is that the Board could go wrong in giving effect to the meaning and construction of words so long as no manifest injustice was committed. Having said that, one was left to guess what 'manifest injustice due to a wrong application of the law' entailed.

Nevertheless, the manifest injustice standard appeared to have not been picked up in a series of subsequent judgments. All attempts to have the court review the way a policy was understood by the Planning Appeals Board were, in fact, dismissed without reference to the '*manifestly unjust'* principle. For instance, the Court rejected plaintiff's request to review whether the Board's decision was in line with the provisions of the Marsaxlokk Local Plan and this without saying whether it would act differently had the decision been manifestly unjust.[945]

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[943] *Joseph Mifsud v Awtorita' ta' I-Ippjanar* [30th May 1997] (CA) (31A/1996)
[944] 'The said interpretation and application is expected, by law, to be made by the Appeals Board this court does not have jurisdiction to investigate or disturb same, unless it is clear that the decision is manifestly unjust due to a wrong application of the law as highlighted in the same decision'
[945] *Albert Mizzi et. v Chairman ta' l-Awtorita' ta' l-Ippjanar* [26th May 1997] (FH)

In another case[946], plaintiff's appeal to ascertain whether the PAB had correctly interpreted Policy AHF6 to the circumstances of the case was held not to be a matter of law and neither did the court accept to see whether the Board had misunderstood the height limitations set out in the law in yet another case.[947] In both cases, the court made no reference to the '*manifestly unjust'* principle before deciding to dismiss the appeal as being one of fact.

In another instance[948], the court highlighted that it was prevented from looking into plaintiff's allegations that the Board had incorrectly interpreted Policy PLP 20 since his proposal would not lead to fresh land take up and in another judgment[949], the court made it clear that it would not engage in seeing how Structure Plan Policy BEN1 was interpreted and applied to the facts appraised by the Board. Once again, these appeals were dismissed by the Court without any attempt to investigate whether the facts as held by the Board were '*manifestly unjust'*. Nor did the Court say that it would have intervened if it resulted so as previously held in **Joseph Mifsud [1997].**

In so deciding, the court conveyed the message that, no matter what, it was not for it to substitute its own opinion for that of the Planning Appeals Board to whom Parliament had entrusted the decision.

In **Charles Camilleri u Frank Meli -vs- L-Awtorita ta' l-Ippjanar**[950], however, the court introduced another avenue where it thought that it could safely intervene. While

[946] *Louis Gauci v Kummissjoni ghall-Kontroll tal-Izvillupp* [7th October 1997] (CA) (72/1997)
[947] *Paul Buttigieg v Awtorita` ta' l-Ippjanar* [16th December 2003] (CA) (154/1988)
[948] *Rita Lemesre v Awtorita` ta' l-Ippjanar u Kummissjoni ghall-Kontroll ta' l-Izvilupp* [30th January 2004] (CA) (342/2000)
[949] *Daniel Spiteri v L-Awtorita' ta' l-Ippjanar* [30th May 2001] (CA) (12A/2000)
[950] *Charles Camilleri u Frank Meli v L-Awtorita ta' l-Ippjanar* [23rd April 2001] (CA) (21A/00)

holding to the principle that it had no say in the way the Board interpreted and applied a law or a policy to the facts at issue, the court concluded that an '*enuncjazzjoni zbaljata tal-ligi applikabbli*'[951] was open to the court's scrutiny. Although the court did not elaborate as to what it had in mind, it was actually saying that it was prepared to intervene in situations where, in the appealed decision, a law was pronounced different from what Parliament had intended.

The court went even a step further in **George Micallef -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**[952] when it held the following conclusion, that is to say:

> '*…l-interpretazzjoni u t-tifsira legali ta' kull policy huwa punt ta' dritt, a differenza ta' l-applikazzjoni tal-policy, interpretata korrettament legalment ghall-fatti tal-kaz'*.[953]

In what seemed a complete departure from the past, the court now seemed willing to interfere when a law or policy was wrongly interpreted by the PAB. That is not to say that the Authority was satisfied with the court's new reasoning.[954] The court, however, held firm to this new interpretation in a spate of subsequent judgments where very often, a wrong interpretation of a policy was found to subsist due to the PAB or the EPRT having ascribed a meaning to a policy that could not be found from a reading of the relevant text or because the policy was applied without being read in its entirety.

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[951] 'Wrong enunciation of the applicable law'
[952] *George Micallef v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [29th April 2004] (CAInf).
[953] '...The interpretation and legal meaning of each policy is a pony of law, in contrast to an application of a policy, interpreted in a legally correct manner to the facts at issue'
[954] *George Sultana v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [26th June 2012] (CAInf) (50/2011)

For example, in **Stella Buttigieg u Joseph Cordina -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**[955], the PAB concluded that Policy GZURCO–1 was to take precedence over the established height limitations, as a result of which development was to be limited to two floors instead of three as provided in the Local Plan. The court, however, ruled that this was a wrong interpretation of a policy because Policy GZURCO–1 gave no such indication.

In another case[956], the PAB was found to have given a wrong legal interpretation when it issued permission for a penthouse without the required recess, having overlooked the part in Policy 10.6 of the Policy & Design Guidance 2007 which states that penthouses should be setback 1.5 metres from the back alignment.

Michael Ellul Vincenti -vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar[957] is yet another case in which the EPRT's decision was revoked after the court found that the EPRT had misinterpreted a planning policy, in this case NHSJ 06 of the Local Plan. This policy provided for two possible options that could be considered as to the way additional floors could be accommodated, but the EPRT was found to have refused permission due to being incompatible with one option without looking into the second option at all.

In another case[958] the EPRT was found to have made an error of law due to having concluded that the use of aluminum material was prohibited by Policy 5.5 of the then

[955] *Stella Buttigieg u Joseph Cordina v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [29th January 2009] (CAInf) (24/2006)
[956] *Antoinette Zerafa u Joseph Cordina v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [6th November 2012] (CAInf) (4/2012)
[957] *Michael Ellul Vincenti v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (33/2013)
[958] *Marcon Abela v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (34/2013)

applicable rural guidelines when, in truth, that same policy only spoke of how aluminum could be used in an appropriate manner.

In a subsequent case[959] the EPRT refused an application for an extension to a rural farmhouse after it ruled that the proposal was incompatible with Policy PLP 20 since the building was not continuously inhabited. The court, however, held that the EPRT had erred at law since the said Policy PLP20 provided for no such requirement. In another case[960] the EPRT's decision was similarly revoked by the court after it was found that that Policy PLP 20 was wrongly interpreted by the EPRT, having said once again that the building had to have been continuously habited prior to the application for it to be granted permission.

In a particular case[961], the EPRT said that the proposed pool was objectionable in terms of Policy 5.1 of the then rural policy since it should have been close to the residence. In its ruling, the court, however, noted that the EPRT gave a wrong interpretation of Policy 5.1 since the said policy required the pool to be located within the house curtilage and not necessarily close to the residence as purported by the EPRT.

In yet another judgment involving a wrong interpretation of the law[962], the EPRT refused permission after concluding that the proposed development was earmarked in a valley and accordingly held that no interventions could take place, even more so since the

[959] *Carmel Gauci v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (28/2013)
[960] *George u Noella Vella v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [19th February 2014] (CAInf) (189/2012)
[961] *Wayne Pisani v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th April 2014] (CAInf) (51/2013)
[962] *Paul Camilleri f'isem u in rappresentanza tas-socjeta Trimeg Ltd. v L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar* [12th November 2014] (CAInf) (60/2013)

proposal was driven by private commercial interests. The court, on the other hand, revoked that decision after pointing out that there was nothing in the policy to suggest that all type of interventions in valleys were excluded.

In another instance[963], the EPRT granted permission for food take away after it was satisfied that the plaintiff had provided a horizontal ventilation duct that met the aims of Policy 15.5 of DC 2007. The decision was nevertheless revoked by the court since Policy 15.5 only spoke of vertical ventilation ducts, which had to extend beyond the roofline. The court made it clear that policies were not to be interpreted as the EPRT pleased, even if the result met the policy aims.

In another case[964], the EPRT was quick to conclude that a proposed billboard was objectionable since, had the permission been granted, it would not have been placed on a designated site identified by policy. However, the EPRT was found to have ignored another section of the relevant policy which provided the possibility of having billboards in other locations considered congruent to the ones which were designated.

In a case involving the demolition of a dwelling situated in an urban conservation area[965], the EPRT was found to have given a wrong interpretation of Policy P15 of the Development Control Design Policy, Guidance and Standards 2015 after it held that the works were in line with paragraph (g) of the said policy without ascertaining whether the

[963] *Joseph u Raquel Pisani v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Oscar Grech* [14th January 2015] (CAInf) (30/2014)
[964] *Lawrence Fino f'isem u in rapprezentanza tas-socjeta C. Fino & Sons Ltd. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (126/2012); See also *Paolo Muscat v L-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar* [17th June 2015] (CAInf) (10/2015)
[965] *Tony Falzon v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar)* [5th November 2018] (CAInf) (59/2018)

proposal met the objectives of the remaining paragraphs. The EPRT was also found to have misinterpreted policy after it equated a residence to '*any other use'* in terms of paragraph 5(d) of Policy 6.2(c) of the Rural Policy & Design Guidance, 2014 guidelines when the preceding paragraph 5(c) spoke of dwellings.[966]

In a case involving the loss of onsite parking[967], the EPRT gave the option for the applicant to make a monetary contribution instead of providing on-site parking, citing Policy P18 of the Development Control Design Policy, Guidance and Standards 2015 as a justification. Nevertheless, the court held that the EPRT made a mistake of law since Policy P18 provided for such an option only in those instances where, unlike in the instant case, it was physically challenging to provide parking onsite.

An EPRT decision confirming an enforcement notice that was not accompanied by a site plan showing the location where the illegality allegedly took place was likewise nullified by the court.[968] This is because the notice was not drawn according to the statute. In a similar situation, the EPRT was found to have erred at law for confirming the validity of an enforcement notice in spite of it not being site-specific and lacking sufficient detail as held by law.[969]

[966] *Winston J. Zahra v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar)* [16th May 2019] (CAInf) (1/2019)
[967] *Andrea Bianchi, Pippo Pandolfino, Noel Grech, Alex Grech, Vanessa Grech u Rowena Cutajar v L-Awtorita' tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Bernard Sammut* [19th June 2019] (CAInf) (15/2019)
[968] *Carmel Pullicino v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [31st May 2012] (CAInf) (6/2011)
[969] *Joseph Said ghan-nom ta' La Grotta Co. Ltd. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (16/2011)

In yet another enforcement-related case[970], the EPRT's decision was revoked after holding valid an enforcement notice that was not served on the owner or the occupier as required by statute, but on a person who had appeared on behalf of the landowner on the contract of the transfer.

The EPRT was also taken to task for holding that a simple written declaration was sufficient to declare an illegal development when the law requires an enforcement notice explicitly to be issued.[971]

When a sanctioning application was lodged during the pendency of appeal proceedings against enforcement action, the EPRT was found to have made a mistake of law when it disposed of that appeal by suspending direct action on illegalities that were not mentioned in the sanctioning application notwithstanding there is no such allowance in the law.[972]

The above cases are only a few among several[973] chosen to show that since the days of **Grech [1996]**, the court's position has changed diametrically. The court's current position seems to be one where it would not tolerate an interpretation of a law or a policy that goes against the letter of the law.

[970] *Joe Apap v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (89/2012)
[971] *Joseph Gauci v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (171/2012)
[972] *Bajja Investments Limited v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [14th November 2013] (CAInf) (43/2012)
[973] *See for example Carmelo Tabone v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [7th May 2014] (CAInf) (65/2013); *Joseph u Raquel Pisani v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Oscar Grech* [14th January 2015] (CAInf) (30/2014); *Jason Axiak v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th May 2015] (CAInf) (6/2015); *Il-Kunsill Lokali ta' Pembroke v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Ian Wirt ghan-nom ta' Pembroke Rackets Tennis Club* [9th July 2015] (CAInf) (5/2015); *Anthony Sammut v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)* [26th April 2017] (CAInf) (1/2017); *Mario u Maryanne konjugi Sammut v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Paul Falzon ghan-nom ta' Tlata Limited* [22nd June 2016] (CAInf) (9/2016)

It is, however, essential to keep in mind that not all policies are written in the same manner and style. Several policies are written in a way that the decision-maker is not obliged to act in a certain sense. In particular, when the policy uses the word '*may*', the choice will often involve an element of judgment whether to act or otherwise, to approve or not to. In these cases, decision-makers hold some discretion and can take different standpoints with respect to the matter at hand, while staying within the confines of the law. As long as discretion is exercised within the parameters set out in the policy, one thus cannot claim that the policy has been misinterpreted.[974] Obviously, discretionary powers must be used in good faith and for a proper, intended, and authorized purpose. In other words, decision-makers are not expected to apply their personal values, but those that the DPA promotes.

Still, there is one big question that has not been answered as yet: '*what if decision-makers do not get their facts right and the outcome would not legally stand had the facts upon which it was based been correctly appraised?'* This is essentially what will be discussed in the next section.

5.3 APPLICATION OF THE WRONG FACTS TO THE CORRECT LAW OR POLICY

The third scenario, now to be dealt with, is whether a point of law arises due to the taking into account factors that ought not to have been taken into account or the failing to take factors that ought to be taken into account. The question which needs to be asked is, therefore, whether the Court of Appeal (Inferior Jurisdiction), the role of which is limited

[974] *Mark Vella v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [20th May 2015] (CAInf) (62/2014); *Dr. Mark Fenech v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [18th May 2016] (CAInf) (4/2016); *Tanya Formosa et. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Tarcisio Galea* [10th December 2015] (CAInf) (43/2015)

to investigate '*points of law decided by the Tribunal'*, has jurisdiction to annul a judgment of the EPRT which is founded on wrong factual observations.

Earlier, it was shown that a court of judicial review is very often reluctant to investigate questions of fact, regardless of the sometimes undesired consequences. For example, the Federal Court of Australia is on record as having stated that it is not an error of law to make an error of fact.[975] With the application of this reasoning, however, it would seem that an EPRT decision based on wrong facts, irrespective of their gravity, is not capable of being challenged in terms of the EPRT Act[976] before the Court of Appeal (Inferior Jurisdiction).

It is, however, very possible that the EPRT would have come to a different conclusion had the decision not been premised on facts which were manifestly mistaken, absurd, or even impossible in turn leading to conjectures from wrong inferences. The EPRT's findings could, therefore, be mistaken for a number of reasons amongst which being contrary to facts admitted to by the parties; facts based on evidence that does not exist or which are contradicted on the record; or simply based on facts which are totally misunderstood.

Consequently, the central issue is whether a Court, the remit of which is limited to deciding appeals on a point of law, has a right to interfere with alleged errors of fact. One of the earlier cases that dealt with the issue of whether an error of fact can, in certain

[975] See for example: *Minister for Immigration & Multicultural Affairs v Al-Miahi* [25th June 2001] FCA 744

[976] Environment and Planning Review Tribunal Act 2016, s 39 states the following:
'The decisions of the Tribunal shall be final and no appeal shall lie therefrom, except on a point of law decided by the Tribunal or on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal.'

circumstances, be considered an error of law is **Emmanuel Mifsud –vs- Awtorita' ta' l-Ippjanar.**[977] In this case, decided upon way back in 1996, the Court categorically held as follows:

> *'m'hemmx appell fuq kwistjonijiet ta' fatt, u fuq kwistjonijiet ta' apprezzament ta' provi'.*[978]

This meant that the decision of the PAB was final to the extent that the Court could live with a judgment based on incorrect findings, no matter the practical implications that could ensue.

A similar reasoning was shown in a subsequent case[979] in which the court made it clear that it was not up to it to establish whether, as contended by the plaintiff, the neighbourhood was free from traffic congestion so that onsite parking was not required. In another case involving an appeal from an enforcement notice alleging that works were not built according to the official alignment[980] the Court was hesitant to ascertain whether plaintiff had acted according to the instructions given to him by a PA official during a site visit and that he was never officially informed about any changes.

In another case[981], the court made it clear that it was not up to it to consider whether the PAB had taken into account factors that ought not to have been taken into account or failed to take into account factors that ought to have been taken into account.

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[977] *Emmanuel Mifsud v il-Kummissjoni ghall-Kontroll ta' l-Izvilupp* [31st May 1996] (CA) (63/1995)
[978] 'there is no appeal on questions of fact and assessment of evidence'.
[979] *Charles Camilleri u Frank Meli v L-Awtorita ta' l-Ippjanar* [23rd April 2001] (CA) (21A/2000)
[980] *Salvu Pulis v L-Awtorita' ta' l-Ippjanar* [15th June 2001] (CA) (223/1998)
[981] *Barbara Cassar Torregiani bhala prokuratrici specjali ta' missierha Joseph J. Edwards v L-Awtorita` ta' l-Ippjanar* [27th October 2003] (CAInf) (5/2001/1)

The Court's wish to leave unreviewed a question of discretion was demonstrated yet again in **J. Formosa Gauci f' isem Trident Development Limited -vs- L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar.**[982] In this case, the court felt that it should not interfere in seeing whether the Appeals Board had erred in judgment when it said that the area was a '*committed built-up area'.* In another case in which the EPRT had to decide whether the site was sufficiently committed to grant renewal of permit[983], the Court stressed that it would not confirm whether, as alleged by plaintiff, there was '*firm commitment on site'* since that was clearly a point of fact over which it had no jurisdiction.

In one case[984], the court made it clear that it was up to the EPRT to see whether plaintiff had convincing arguments to show that he had a vested right. What was important, according to the Court, was that the information at hand was assessed by the EPRT in reaching the decision, regardless of the outcome.

In another case involving an appeal against the issue of a permission to carry out alterations in an old dwelling[985] the court held that it was not up to it to decide whether the proposed interventions would disrupt the overall geometry, uniqueness, and homogeneity of a four-hundred-year-old Mannerist facade as alleged by plaintiff objector.

[982] *J. Formosa Gauci f' isem Trident Development Limited v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [26th March 2009] (CAInf) (4/2008)
[983] *Roseann Gafa' v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [4th December 2013] (CAInf) (14/2013)
[984] *Paul Demicoli v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [18th February 2010] (CAInf) (1/2009)
[985] *Perit Chris Briffa v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar, u l-kjamat in kawza Avv. Damien Degiorgio* [22nd January 2014] (CAInf) (154/2012)

In yet another case[986], the Court held that it could not interfere with whether the proposal was tantamount to a good design solution. The Court held that such matter was an application of personal judgment to supervisory facts and issues and thus rejected the appeal as being one of fact. In a similar case[987] wherein plaintiff complained with the Court that the EPRT was wrong in concluding that the building proposed to be sanctioned would cause negative visual impact on the surrounding area, the Court reiterated that it was prevented from substituting the EPRT's findings with its subjective views since the issues raised by plaintiff were regarded as matters of fact.[988]

One other case[989] involved a group of objectors who alleged that the permit holder had made material changes during the application process without having the application republished as required by law in order to enable potential objectors to file their representations. For its part, the EPRT held that the objectors' claims were unfounded to which objectors appealed before the court, which held itself to be incompetent to inspect technical plans and photomontages.

Looking at the above judgements, there is room for an analogy with a football match where a call made by an official could be blatantly wrong, but there is no way of correcting it, no matter how costly that would be to the wronged team. In other words, an established fact in front of the EPRT settles the matter in the same manner that a point of law is settled in front of the Court of Appeals, regardless of whether the established fact

[986] *Romina Grech Fenech v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [19th February 2014] (CAInf) (194/2012)
[987] *Paul Vella v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [27th November 2014] (CA) (77/2012)
[988] 'Il-Qorti hi prekluza tissindaka mill-gdid il-fatti u taghti l-apprezzament soggettiv taghha kif qed jippretendi l-appellant'
[989] *George Felice et v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Keith Attard Portughes* [20th April 2016] (CAInf) (2/2016)

is right or wrong. In a way, this was in line with the long held principle that issues of fact are a matter of the decision maker and not a Court of judicial review.[990] The court seemed equally reluctant to assess whether in ascertaining the facts on which it based its decision, the EPRT acted rationally although '*irrationality*' has long stood upon its own feet as an accepted ground on which a decision may be challenged on a point law.[991] But could this position held by the Maltese Courts be regarded as conclusive?

Since 2013, the court's approach started to take a new dimension. In **Anthony Attard - vs- L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**[992], the court held *obiter* that it would have revoked the judgment had it found that the decision contained a '*zball grossolan ta' fatt li kien il-fattur determinanti ghad-decizjoni tieghu f'liema kaz id-decizjoni kienet tkun 'unsound' u kwindi revokabbli'*.[993]

All of a sudden, it seems that the court began to shift away from the '*not an error of law to make an error of fact'* idea to one that a '*misdirection in fact'* or '*acting upon the incorrect basis of fact'* could give rise to a question of law.[994] This was particularly so when the mistake of fact was so bad that it was blatantly obvious and also central to the decision.

[990] *Coleen Properties Ltd v Minister of Housing and Local Government* [1971] 1 All ER 1049, 1 WLR 433, CA
[991] *Council of Civil Service Unions v Minister for the Civil Service (The GCHQ case)* [1985] AC 374, ICR 14
[992] *Anthony Attard v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (143/2012); See also: *Emanuel Bonnici v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [27th June 2013] (CAInf) (73/2011)
[993] 'Gross error of fact that was the determining factor for its decision in which case the decision would be 'unsound and revocable'
[994] Stanley De Smith, Rt. Hon Lord Woolf, Sir Jeffrey Jowell, *Principles of Judicial Review* (Sweet & Maxwell 1999): 140-144

Indeed, the court held to the reasoning that it was not precluded from ascertaining whether the EPRT had appraised its facts right in a number of subsequent judgments. In one case[995], the EPRT had wrongly declared that the Local Plan interpretation document was published in 2006 when in actual fact it was issued in the year 2010. Plaintiff argued with the Court that the said error could have influenced the EPRT's assessment of the case since it was based on a wrong chronology of events. The Court went on to annul the decision on the premise that it contained a *'zball sostanzjali specjalment meta jitqies li din il-konstatazzjoni seta' kellha effett fuq il-valur u portata tal-interpretation document'*.[996]

In another case[997] the court implied without hesitation that it was not entirely immune to the facts as established by the EPRT. The court said that it would have been disposed to annul the EPRT's judgment were it to be convinced that the location of the development formed part of a different area within the Local Plans.

The Court, at one point, revoked the EPRT's decision after it found that it was based on a series of facts that were unsupported by any relevant and probative material. This judgment[998] was followed by yet another case[999] in which the court rejected the plaintiff's appeal on account of there being no evidence to show that the EPRT's decision was not based on material capable of supporting it. Nevertheless, the Court made it a point to

[995] *Joseph Attard v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [9th October 2013] (CAInf) (125/2012)
[996] 'A substantial mistake when considering that this finding could have effect on the value and extent of the interpretation document'
[997] *Daniel Zammit v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [26th June 2014] (CAInf) (10/2013)
[998] *Joseph Spiteri v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [8th October 2014] (CAInf) (11/2012)
[999] *Nicholas Cassar v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)* [14th January 2015] (CAInf) (48/2013)

highlight that it would have acted differently had it found that the decision was based on *'fatti li ma jezistux jew li huma zbaljati'*.[1000]

The case of **Saviour Schembri ghan-nom u in rapprezentanza ta' Schembri Barbros Ltd -vs- l-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)**[1001] is also interesting. Plaintiff objectors alleged that the EPRT had approved a permit for a parking area next to a supermarket after the EPRT had inadvertently assumed that a parking area was approved by way of previous permits when this was not the case. Instead of dismissing the complaint as one of fact, the Court decided to take cognizance of plaintiff's arguments and went on to analyse the drawings found in previous permits. The Court agreed with plaintiff, concluding that the EPRT's decision was based on the premise that the words '*vehicle parking area'* appeared on one of the old plans but that in actual fact, the precincts could not be identified in those plans. On this basis, the EPRT's decision was revoked.

In an even more recent judgment[1002], the court took it upon itself to confirm whether the building ruins coincided with the footprint of the trees by looking at the old maps and in so doing reached the same conclusions held by the EPRT.

From an analysis of the above judgments, it could be said that the court's attitude on the issue of whether a mistake of fact can be turned to one of law has significantly changed. Initially, an established fact in front of the EPRT settled the matter, regardless of whether

[1000] 'Mistaken facts or that do not exist'
[1001] *Saviour Schembri ghan-nom u in rapprezentanza ta' Schembri Barbros Ltd v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)* [25th January 2018] (CAInf) (26/2017)
[1002] *Paul Gafa' v L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)* [19th June 2019] (CAInf) (8/2019)

the fact was right or wrong. However, the situation today appears to be one where the courts are evidently willing to intervene when the outcome of the EPRT decision would not legally stand had there been no mistake of fact.

5 CONSTITUTIONAL ISSUES

Situations, whereby planning decisions could potentially be at odds with the right to the peaceful enjoyment of one's property or other fundamental human rights directly linked to one's home or possessions, do not take anyone by surprise.

An individual who is forced to move out of his residence which is located outside the development zone since he has no documentation to prove that the building was inhabited in the past could potentially claim to have suffered a disproportionate interference on the right to respect for his home in breach of Section 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[1003] A landowner whose planning permission is revoked on the basis of Section 80 of the DPA through no fault of his own could likewise claim that he has suffered a disproportionate measure and violation of Section 1 of Protocol No. 1 since the DPA provides for no compensation.

The issuance of a discontinuance order as a consequence of which an approved development cannot take place could potentially amount to a violation of Section 6(1) of the Convention.[1004] The imposition of a condition to provide an open space could amount

[1003] 'Convention for the Protection of Human Rights and Fundamental Freedoms' as amended by Protocols No. 11 and No. 14 (Rome, 4.XI.1950)
[1004] *Zazanis and others v Greece* App no 68138/2001 (ECtHR, 18th November 2004)

to a disproportionate burden on the landowner that cannot be justified under the second paragraph of Section 1 of Protocol No. 1.[1005]

Issues of discrimination could also crop up in the context of unfair treatment involving different outcomes in respect of similar planning applications, even if discrimination cannot be premised on previous legal violations.[1006]

Notwithstanding the margin of appreciation on what policies of local planning and conservation of the environment should be adopted rests with the individual States[1007], the connection between the right to an environmental quality of life to other human rights, such as the enjoyment of one's property and the right to private and family life has also gained momentum in recent years.[1008] The reason for this is that non-compliance with a positive obligation to adopt measures of protection is seen to weigh heavily on human rights.[1009]

It could be well argued that such matters are, in one way or another, all connected to the mother of all laws, namely the Constitution. Consequently, the issue here is whether such questions can be disposed of by the Court of Appeal (Inferior Jurisdiction) should they be contested within the context of a '*point of law decided by the Tribunal'*.

[1005] *Zvolský and Zvolská v the Czech Republic* App no 46129/1999 (ECtHR, 12th November 2002)
[1006] *Grace Gatt v Kummissjoni dwar is-Servizz Pubbliku u l-Kummissarju tal-Pulizija u l-Prim Ministru* [12th February 2016] (CC) (6/2009)
[1007] Dean Spielman, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review? CELS Working Paper Series' (University of Cambridge, 2012)
[1008] *Papastavrou and others v Greece* App no 46372/1999 (ECtHR, 10th April 2003)
[1009] OSCE Office for Democratic Institutions and Human Rights (ODIHR), 'Guidelines on the Protection of Human Rights Defenders' (2014) <https://www.osce.org/odihr/guidelines-on-the-protection-of-human-rights-defenders?download=true> accessed 29th March 2020: 28

When it comes to the role of the Court of Appeal (Inferior Jurisdiction) in relation to EPRT decisions, there is no provision to limit the extent of the investigation so long as the question is a '*point of law'*. Still, in a case[1010] concerning an appeal from a condition in a permission for a dwelling limiting occupation thereof to a *bona fide,* full-time, registered farmer working, or last working before retirement, in the locality in agriculture, or a relative in the direct line, the Court of Appeal said that it was not competent to decide on human rights issues. Even so, the Court went a step further by noting that it was taken by surprise since such argument was not raised at an earlier stage before the Board of Appeal.

This judgment goes on to confirm the long-held principle that a court of appeal was not entrusted to delve into constitutional matters. This is because Section 46(2) makes it very clear that it is the Civil Court, First Hall which has original jurisdiction to hear and determine an application made by a person alleging that his human rights were violated. Nevertheless, this judgment raised doubts as to whether such an issue could be pinpointed at appeals stage once it has not been brought up before. Indeed, this latter declaration should be interpreted with caution since it could give the wrong impression that constitutional disputes are statute-barred when that is clearly not the case.[1011]

In another case[1012] where plaintiff alleged that he was discriminated against due to having been given an unfair treatment since he was denied permission while others in the same position were not, the Court held that this was a question touching human rights which

[1010] *Josette Farrugia v L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar* [24th February 2011] (CAInf) (1/2010)
[1011] *Anthony Mifsud v Supretendent Carmelo Bonello et.* [18th September 2009] (CC) (176/1987/2)
[1012] *Lawrence Fino f'isem u in rapprezentanza tas-socjeta C. Fino & Sons Ltd. v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [2nd May 2013] (CAInf) (126/2012)

went beyond its competence and had therefore to be directed to the First Hall, Civil Court through an *ad hoc* application.

In **Aurelio Schembri -vs- L-Awtorita` ta' Malta dwar l-Ambjent u l-Ippjanar**[1013], plaintiff was claiming that the requirement obliging a usufructuary to obtain consent from the bare owner prior to submitting a planning application was tantamount to severe deprivation of his property, therefore in breach of his fundamental human rights. Once again, the Court of Appeal held that it was precluded to delve into constitutional issues.

Also interesting to note is how the court went about deciding whether to allow a constitutional reference made in terms of Section 46(3) of the constitution while an appeal from a EPRT decision was pending before it. In one case[1014], the EPRT had refused a sanctioning application on the basis of Section 70 and the Sixth Schedule of the EDPA, which prevented the possibility of sanctioning illegal interventions located outside the development zone. Plaintiff appealed the EPRT's decision before the Court of Appeal (Inferior Jurisdiction) together with a concurrent request to allow a constitutional reference in terms of Section 46(3) alleging breach of legitimate expectations and vested rights due to Section 70 having been introduced during the pendency of proceedings before the EPRT. The court of appeal, however, held the question to be premature since the issues raised by the plaintiff were still to be determined by it.

[1013] *Aurelio Schembri v L-Awtorita' tal-Ippjanar (gja Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar) u Mary Rose Schembri* [26th January 2018] (CAInf) (19/2017)
[1014] *Tereza Grima v L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar* [8th October 2014] (CAInf) (14/2014)

The same reasoning was more or less applied in a subsequent case.[1015] The Authority had ordered plaintiff to move out of his illegally-built residence since it was located outside the development zone. While an appeal before the EPRT for having been denied permission for the sanctioning of the rooms was pending, plaintiff made a constitutional reference to the Court of Appeal on the basis that he was being deprived of his possessions. Yet again, the Court of Appeal skirted around the issue by saying that a final decision on the planning application had not been given as yet since proceedings were, at that stage, still ongoing before the EPRT.

Notwithstanding the myriad of instances in which the enjoyment of property rights and development planning converge, the standard reply given by the courts has been that the interested party should seek constitutional redress through the institution of a separate application made in terms of Section 46(2) of the Constitution before the First Hall, Civil Court.

6 CONCLUSIVE REMARKS

This chapter demonstrated that *'a point of law decided by the Planning Appeals Board'* was initially held to be an issue debated explicitly before the PAB and decided upon.[1016] With time, this expression was given a broader interpretation to include anything extending from a breach of the principles of natural justice to an *ultra vires* act. For the first time, the EPRT Act also referred to the possibility of appealing a breach of fair hearing following an EPRT decision before the court of appeal. Notwithstanding so, the

[1015] *Joseph Genovese et v Kummissjoni ghall-Kontroll tal-Izvilupp et* [2nd May 2013] (CAInf) (47/2012)
[1016] *Francis Mugliett v L-Awtorita' ta' l-Ippjanar* [31st May 1996] (CA)

Act did not specify that an appeal is available in case the EPRT has failed its duty to give reasons or a member sat in judgment despite having a conflict of interest.

In practice, however, much of the appellate cases over the years was concerned with the principles of natural justice. An overview of jurisprudence shows that, since early days, the court revoked many decisions of the PAB containing matters raised *ex officio* without the parties being allowed to air their views. From the earliest days, the court revoked a good number of decisions in which the PAB or the EPRT would have chosen to disregard the plaintiff's arguments or deal with them superficially. This was particularly true when plaintiffs referred to other permissions for similar development issued to third parties to give credibility to their cases, only to be ignored by the EPRT. Failure on the part of the EPRT to give parties an equal opportunity to make their case was also the reason for many of its decisions to be revoked by the court.

Notwithstanding the judicial willingness to affirm the principle of fair hearing at the very outset, the court's approach when it came to the production of witnesses and the carrying out of site inspections was somewhat different. The position held by the court on these two matters has always been that it should be within the EPRT's discretion to decide whether a site inspection was required or whether to allow a witness to testify.

The duty to give reasons was also the subject of various appellate judgments right from the very outset. As discussed earlier in this Chapter, the giving of reasons is very important because, first and foremost, the parties need to be in a position to assert what conclusions the EPRT had in mind and reasonably assess the prospects of succeeding should they decide to lodge an appeal on a point of law.

Even if the EPRT could have sufficient grounds to give credibility to a party, an explanation why the EPRT chose a route instead of another is always warranted. The courts went even a step further, saying that the EPRT should, in its decision, come forward with its own findings and not merely reproduce what the parties had to say. The courts have also stated that the duty to give reasons should be applicable both in the final judgment as well as when interlocutory decrees are given.

All things considered, the courts acknowledge that it is equally unrealistic to think that a conclusion should be drawn on each and every single argument raised during proceedings. What is missing from jurisprudence, however, is a standard demanded from the decision-maker to ensure that he does not fail this duty of administrative propriety. Although there is some force in saying that the EPRT should address all matters that are '*of substance'*, that is by no means a clear criterion. Further so, the situation has not been made any better with Section 9(h) of the EPRT Act that enables the EPRT to comment solely on those pleas that '*are deemed decisive for the outcome of the appeal'*. This provision could raise an issue because the EPRT can always dismiss a complaint as one that is not critical to the decision without providing due explanation.

This chapter also exposed the willingness of the court to investigate issues of conflict of interest under the premise of '*a point of law decided by the Tribunal*.' All the jurisprudence on the matter was concerned with members of the PB that ought to have abstained due to them having an alleged conflict of interest.

The most notorious examples are those cases where a member had a pecuniary interest.[1017] Whereas the court had viewed pecuniary interest as a no-go area, a lenient approach has been taken with members of the PB representing statutory consultees who would have already been consulted to express their views on the matter to be decided, such as ERA. Specifically, as has been seen, the court found that there was no conflict of interest with an ERA representative sitting on the PB, so long as the member had not expressed his voting intentions in public. Odd as it may seem, the implications here are that a previous objection does not equate to an intention to vote against the planning application.

The decision of **Joseph Cassar ghan-nom ta' Gozo Prestige Holdings Ltd -vs- L-Awtorita' tal-Ippjanar (gia l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar)**[1018], which remains pending, will cast more light on the matter since it will establish whether the strident Mayor, who had campaigned publicly against the proposed development, should have recused himself from partaking in the decision.

It has also emerged that nearly every time there was a failure to observe a prescribed formality, the whole thing failed and the proceedings that followed upon it were all void. It would seem that the Maltese courts consider that the use of word '*shall'* concludes the matter, no matter the design and the context in which it is enacted. Surely, the vast majority of court decisions which we have seen are broadly welcomed because had they

[1017] *Kunsill Lokali Pembroke, Kunsill Lokali San Giljan, Kunsill Lokali Swieqi, Moviment Graffitti, Friends of the Earth Malta, Zminijietna – Voice of the Left, Din l-Art Helwa, Flimkien Ghal Ambjent Ahjar, Alison Pullicino, Sonya Tanti, Rita Zammit, Norman Zammit, Mario Sultana, Adrian Grima, Josef Buttigieg, Stephanie Buttigieg, u Arnold Cassola v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar) u l-kjamat in kawza Silvio Debono ghan-nom u in rapprezentanza ta' DB San Gorg Property Limited* [19th June 2019] (CAInf) (11/2019)

[1018] *Joseph Cassar ghan-nom ta' Gozo Prestige Holdings Ltd v L-Awtorita tal-Ippjanar (gia l-Awtorita ta' Malta dwar l-Ambjent u l-Ippjanar)* [24th October 2018] (CAInf) (24/2018)

not ordered the EPRT decision to be annulled, a legal anomaly would have been allowed to subsist. There is no doubt that revoking a permission that was granted without having any supporting justification as legally required was the appropriate thing to do. Making sure the appeal application contains the grounds of contestation and presented within the statutory timeframe is just as important. Ensuring that no prejudice is caused to the substantial rights of interested third parties is equally fundamental.

However, there are times when the non-compliance of a particular provision caused no inconvenience or injustice, and even then, the court has insisted that it should be followed. This happened, for example, when a written objection reached the Authority before commencement of the public consultation period, and not within. If nothing else, the applicant could claim to have been prejudiced if the objection was lodged after termination and not before the end of the consultation period.

The same can be said about the court's recent tendency to revoke partial EPRT decisions on the assumption that one decision on both the preliminary plea and the merits must be delivered at the end of proceedings in accordance with the second principle of administrative behaviour. In this case, the object of the law is not being defeated by non-compliance with it and neither are litigants materially deprived of some substantial right. Insistence on a strict compliance with this provision is not likely to result in serious general inconvenience of injustice to the parties. More so, the violation of this provision does not result in denial of fair hearing or causes prejudice to the parties. Still, the court's concern is the phraseology of the provision, that is to say the language in which the legislator's intent is clothed rather than the entire provisions of the enactment and the scheme underlying it.

Worse still, the court would not overrule the strict adherence to the letter of the law even if it is likely to result in the loss of an advantage or the destruction of a right or the sacrifice of a benefit of an individual through no fault of his. That was the case, for example, when an outline permission was found to have lost its legal effect due to the Authority having failed to issue a screening letter in time. It was also the case when the Authority failed to mount a site notice as required by law and applicant had his permission subsequently revoked.

The mishandling of laws and policies was also regarded as a key reason why a good number of EPRT decisions have been revoked on a point of law. This chapter identified three separate contexts in which a law or policy could be mishandled. Firstly, when a law or policy relied upon was not applicable to the facts in issue or made use of when removed from statute by the time judgment is given. Secondly, when a policy was misinterpreted or wrongly applied to the established facts. Thirdly, when a policy was applied to wrong or inexistent facts.

In the first scenario, the court's settled position seems to suggest that an EPRT decision based on a policy which is legally invalid at the moment of the decision is null and void. On the other hand, it was observed that the court was not always prepared to consider whether the EPRT had mistakenly relied on a policy that does not apply to the facts of the case.

As to the second scenario, that is when the EPRT allegedly misinterpreted a law or policy, the court's starting position was not to intervene at all. In other words, the court was not concerned about the law not being applied correctly so long as the EPRT had the

information in hand. With time, the court started to consider a meaning to a law or policy that could not be retrieved by reading the relative text as an error of law unless the language employed was capable of being understood in more than one sense or meaning.

With regard to the third scenario, the court appeared to have changed its position with the passing of time. Until recently, the court would outrightly reject any attempt to have it reassess the facts as held by the EPRT. Nonetheless, in recent judgments, a number of EPRT decisions were nullified due to their being based on some supposition of fact which was found not to exist. Other times, the court interestingly observed that it would be willing to interfere with the EPRT's findings should it detect a '*zball grossolan ta' fatt li kien il-fattur determinanti ghad-decizjoni'*.[1019] What is a '*zball grossolan ta' fatt*' could, however, be open to interpretation, even if it is safe to say that '*a gross error'* presumes a manifest disregard of the true facts and not just any error.

In the latter part, this chapter assessed whether constitutional complaints surrounding a decision of the EPRT fall within the definition of a '*point of law*' due to the fact that, by right, a constitutional matter is one aspect of law. The standard reply given by the courts, however, has always been that constitutional redress should be sought by the interested party through the institution of separate proceedings before the First Hall, Civil Court by means of an application made in terms of Section 46(2) of the Constitution. Even so, this was seen to be hardly surprising since a similar stance is taken by the First Hall, Civil Court when a constitutional complaint in terms of judicial review is brought before it.

[1019] 'a gross error of fact that was the determining factor in the decision'

CHAPTER SIX
Conclusions

1 ANSWERING THE RESEARCH QUESTIONS

Having completed the detailed discussion of each area examined in the chapters above, we are now in a position to consider the overall picture that emerges from this study. After having compiled and reviewed current literature on the subject matter, we had posed the question whether there was anything left to analyse insofar as the issuance of development permissions was concerned. The reason for this was that many of the fundamental issues appeared, at least by way of principle, to have been addressed by established literature. This dissertation, however, demonstrated that some specific, yet important matters connected to the Maltese reality were as yet under-analysed and required significant further analysis. As is evident from this study, Maltese legislation is still replete with ambiguous drafting, badly interconnected definitions, incomplete provisions and inconsistent scope of application. Fundamentally, therefore, this dissertation has been about developing new ideas and proposing solutions to bridge the numerous legal *lacunae* encountered in the course of the decision-making process surrounding planning applications, whether the same are taken by the Planning Authority, the Tribunal or the Court of Appeal.

This dissertation started with the premise that the Maltese courts have been making a fair contribution to finding solutions to problems encountered in the decision-making process when it comes to development planning permissions. Having developed a methodology for analysis based on established jurisprudence, this study went on to assess how the court dealt with the issues along a continuum, examining each process along that route. By utilising, as our foundation, the assumption that the court is our optimal source of

reference, we were able to simplify our analysis and to approach challenging issues in a more integrated manner.

Through the process, however, it was kept in mind that while the court's analysis is interesting and fresh, it definitely does not answer all the questions. Moreover, even though the court has given its fair share of contribution towards solving many of the arising issues, several fundamental questions remain. This is probably because the court's reasoning is, sometimes, too broad in scope or flawed. At other times judgments are inconsistent with previous jurisprudence and, occasionally, the court's arguments simply do not hold water. Nevertheless, the court's contributions were critically analysed with a view to bringing out both their positive and negative aspects, both of which are necessary components towards further insight as to what is necessary to understand the subject matter more fully in order to bridge the current legal *lacunae*.

It is also true that a number of challenges were pinpointed towards in the course of this research which may not have been discussed, let alone addressed, by the court. As a case in point, the four-year-old EPRT Act contains a number of legal gaps, however, only a few found their way to court, which might in turn have provided the practitioner with additional guidance. In instances such as these, this doctoral dissertation made it a point to propose its own solutions to the perceived problems by ploughing its own intellectual furrow.

The inquiry of this dissertation was organized around the following five research questions:

- *Could it be said that a mere planning application confers on the applicant a right to freeze the policy regime at the outset of the application?*
- *To what extent does a planning permission confer a right against the retroactive application of plans and policies?*
- *Has Section 72 of Act X of 2010 reversed the previous approach taken by the Court in terms of Section 69 of the EDPA in that planning policies can now be overruled?*
- *Did the Environment and Planning Review Tribunal Act, 2016, address the legal lacunae which existed prior to its enactment?*
- *How can 'a point of law decided by the Tribunal' be defined in the light of court developments?*

The next step is to answer the above questions individually. Each question shall be supported by a summary of the key arguments and findings that were made in earlier chapters.

QUESTION ONE: *'Could it be said that a mere planning application confers on the applicant a right to freeze the policy regime at the outset of the application?'*

One of the most pressing issues concerning planning applications is whether they should be determined in accordance with the laws in force when they were validated or those *in vigore* at decision stage. This is understandable since applicants may find themselves in a position they could not envisage at the onset of the application due to a change in policy in the process. A lot of arguments are pertinently made by practitioners, frequently based on the idea that applicants have a legitimate right to expect that their application will be evaluated in accordance with what was known to them by the time they chose to submit the application.

Therefore, we have to assess whether a policy in force at the time of submitting the planning application is tantamount to '*an express promise given on behalf of a public authority'* as a result of which '*the applicant could reasonably expect to continue'* in line with the doctrine of legitimate expectations. In particular, it has to be seen whether the notions that a public authority should not be permitted to go back to a policy and that a planning application amounts to a procedural benefit made to an individual bear any relevance here.

The current DPA has introduced a provision which states that renewal applications should be determined according to the '*new policies'* unless '*the application is already committed by the original development permission in relation to these plans and policies'*.[1020] This seems to suggest that, by default, new policies should take precedence.

Still, the DPA gives absolutely no indication as to what happens when '*new policies'* take effect once a planning application, including a renewal request, is set in motion. Although there were times when the courts had ruled otherwise the now established position taken by domestic courts is that a decision on a planning application must be taken according to the laws and policies in force at the moment of the decision.

The court defended this idea for three main reasons. Firstly, the Authority is empowered by law to change planning plans and policies at any given time for the sake of public interest, and this is something that applicants are completely aware of. Secondly, deciding planning applications under the applicable legal regime at the very moment of the decision gives a sense of consistency and legal certainty. Finally, a planning application

[1020] Development Planning Act 2016, proviso to s 72(4)

simply shows applicants' intentions in contrast to an acquired planning permission which constitutes a vested right which cannot arbitrarily be taken away.

Still, the downside to having the goal posts changed while a planning application is in process is that applicants can be exposed to unforeseeable investment risk. Moreover, the Planning Authority is in a privileged position to modify the rules as it likes on the assumption that discretion on its part is always deemed to be exercised reasonably, however in the absence of an effective mechanism with which the policy could be challenged.

The situation can become more acute when policy amendments are made at a time when the decision on a planning application has already been taken by the Authority and proceedings are pending before the Tribunal. Subscribing to the court's formula implies that the Tribunal would need to function as a Board of First Instance, which is something which practitioners have seen happening.

Further complications can arise when a permission is granted by the Authority and a third-party lodges an appeal to the Tribunal for the said permission to be revoked. In such instance, it is uncertain whether or not the permit holder may claim to have a vested right protected against new policies because, strictly speaking, the application will still be in process of being obtained as it cannot be said to be *res judicata* until the appeal decision is meted out. Yet again, the court has failed to provide a satisfactory solution in connection with this situation.

The situation can be equally critical when it comes down to appeals from enforcement notices since the retroactive application of a law or policy which could not have been reasonably foreseen at the point when the illegality was committed is contrary to the basic tenets of the rule of law.

Against this backdrop, the present situation can be improved if the following recommendations are put in place:

— A provision should be made in the DPA to state in no uncertain terms that a planning application should be decided upon according to the laws and policies in force at the time of a decision. Deciding planning applications in line with latest policies should, therefore, be the default position unless the new planning policy contains a caveat making the contents inapplicable to planning applications which would have already been validated on the day of its coming into force.

In Section 72(2) of the DPA the words *'Provided that the applicable subsidiary plans and policies are to be those in force at the moment of determination of the application'* should thus be added as a first proviso, immediately after the words *'(b) policies*:' and the word '*further'* should be added after the word '*Provided'* in the second proviso.[1021]

On the basis of this same reasoning, the following words shall also be added to Section 31 of the Environment and Planning Review Tribunal Act, 2016[1022]:

[1021] See Appendix (1. Amended Development Planning Act, s 72(2))
[1022] See Appendix (2. Amended Environment and Planning Review Tribunal Act 2016, s 31)

> *'Provided further that when the appeal is on a planning application which has been refused permission by the Authority, the Tribunal shall comply with the provisions of section 72(1) and 72(2) in reviewing the appealed decision and the applicable laws and policies shall be those in force at the moment of the decision of the Tribunal.'*

— On the other hand, a permit holder should not risk having a planning permission revoked if it is subjected to a third-party appeal before the Tribunal and during the pendency of the appeal proceedings the legislator embarks on a change in policy which change would adversely affect the planning permission. If anything, a permission should be revoked on appeal if the PA is found to have decided wrongly in the first place. That implicitly means that any re assessment should be carried out in relation to the policies which the Authority had relied upon in arriving at its decision. Consequently, when the Authority issues permission and that permission is appealed, the Tribunal's decision must be taken according to the laws and policies in force when the Authority took the decision.

The following words shall therefore be added to Section 31 of the Environment and Planning Review Tribunal Act, 2016[1023]:

> *'Provided further that when the appeal is on a planning application which has been granted permission by the Authority, the Tribunal shall comply with the provisions of section 72(1) and 72(2) in reviewing the appealed*

[1023] *Ibid*

decision and the applicable laws and policies shall be those in force at the moment of the decision of the Authority.'

— Insofar as appeals from Tribunal decisions before the Court of Appeal (Inferior Jurisdiction) are concerned, the same reasoning should apply in the sense that the decision of the Court of Appeal (Inferior Jurisdiction) should be taken in relation to the laws and policies, upon which the Tribunal had relied on in its decision.

The words *'Provided that when a law or a policy changes after the decision of the Tribunal is delivered, the Court of Appeal (Inferior Jurisdiction) shall base its judgment on the laws and policies applicable at the moment when the Tribunal delivered its judgment'* shall thus be added immediately after the words '*before the Tribunal'* in Section 52 of the Environment and Planning Review Tribunal Act, 2016.[1024]

— Insofar as appeals from enforcement notices are concerned, plaintiffs should not be convicted of a wrongdoing that was not so considered at the time of undertaking. A provision should therefore be included in the DPA stating that an enforcement notice applies only if there is enough evidence that the alleged wrongdoer was in breach of the applicable laws at the time of the undertaking.

In Section 36(1) of the Environment and Planning Review Tribunal Act, 2016 the words '*when the illegality took place'* should thus be inserted between the words '*in respect thereof*' and *'as the case may be'*.[1025]

[1024] See Appendix (3. Amended Environment and Planning Review Tribunal Act 2016, s 52)
[1025] See Appendix (4. Amended Environment and Planning Review Tribunal Act 2016, s 36(1))

— Additionally, it is submitted that there should be a possibility prior to a planning policy being endorsed by the Minister, for a challenge to be brought forward contesting its lawfulness before an independent body. A challenge could be brought with regard to the policy having been allegedly changed for an improper purpose, for instance, or because the PA has not complied with prescribed procedure. It might also be argued that the policy was unlawful because it is irrational, or because it breaches the Strategic Plan for the Environment and Development. This way, an applicant who has his planning application decided according to policies which he could not envisage at the outset of the process cannot accuse the PA of having changed the policy for the wrong motives.

While it is true that Local Plans have been challenged by requesting judicial review in terms of Section 469A, experience has shown that such a process before the Court could take months, if not years, to conclude. It would therefore be more opportune to have Local Plans or planning policies reviewed by an independent body which is closer to home, such as the EPRT, and the decision delivered within a short period of time. Moreover, it would make more sense if a challenge could be brought forward after the plan or policy is published by the Executive Council, however prior to the Minister having formally endorsed it. In that way, the possibility of the Minister endorsing a plan or policy which is later declared unlawful is avoided.

Thus, a challenge could be brought before the EPRT within a prescribed time frame, for instance, ten days from the day the policy is published for Minister's endorsement, even if that means eliminating the possibility of instituting proceedings in terms of Section

469A due to a mode of contestation being made available.[1026] The policy will subsequently come into effect as soon as the period to lodge a complaint before the Tribunal expires unless a complaint is lodged. In such an instance, when the Tribunal or the Court of Appeal (Inferior Jurisdiction), as the case may be, pronounces judgment.

To meet the above stated objectives, a new provision, it is proposed that Section 53(k) should be introduced after Section 53(j) in the DPA to read as follows[1027]:

> *'53(k) Prior to referring a subsidiary plan or policy as adopted by it to the Minister, the Executive Council shall cause publication on the website of the Authority, informing the public of its intention to refer such subsidiary plan or policy for the Minister's approval. Any person shall have the right to contest the lawfulness of the said subsidiary plan or policy before the Environment and Planning Review Tribunal within ten days of publication by means of an application. The Tribunal shall decide whether the Authority has acted lawfully in the process of compiling the subsidiary plan or policy, which decision shall be made public within 60 days from the date of the application. The decision of the Tribunal shall be final saving the provisions of Article 39 of the Environment and Planning Review Tribunal Act, 2016. The decree of the Tribunal or the Court of Appeal (Inferior Jurisdiction), as the case may be, shall be communicated to the Minister.'*

[1026] Code of Organization and Civil Procedure, s 469(A)(4) states: *'The provisions of this article shall not apply where the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal is provided for in any other law'*

[1027] See Appendix (5. Development Planning Act, s 53(k))

QUESTION TWO: *'To what extent does a planning permission confer a right against the retroactive application of plans and policies?'*

This research has found that the DPA, as well as its counterparts, acknowledge vested rights against the application of subsequent policies only so far as they arose '*from a valid development permission'*.[1028] On the other hand, the law is silent with regard to what happens once the development takes place and the permit expires.

It is therefore crucial to establish whether we should adopt the theorem that a perpetual right to hold on to the permit could be automatically claimed when substantial works have been carried out and when substantial amounts of money are invested on the project, or both, or whether we should find another route altogether. Moreover, we have to decide whether to blindly accept the notion that there can never be a magical rule which converts a violation into a vested right.[1029]

According to the reviewed jurisprudence, once a permit is granted, this constitutes a vested right and any development carried out in conformity therewith cannot be negatively influenced by subsequent policy and neither can it be tampered with. When, on the other hand, works are found not to have been carried out in line with the given permission, no similar right can be claimed. What the court failed to take note of, though had it been requested to do so, it would probably still have not commented due to such matter being seen as a point of fact, is that, in practice, it would be practically impossible to have a building built in full compliance with the approved permit. For a fact, it is

[1028] Development Planning Act 2016, proviso to s 72(2)(b)
[1029] *Town of Derry v Simonsen* [1977] 117 NH 1010

reasonable to expect that up to the point a building is constructed in its entirety, a few variations are likely to crop up.

When it comes to deciding whether to renew or otherwise a planning application due to the works not being completed on time, the situation today is that the Authority has to assess whether the site is *'committed by the original development permission in relation to these plans and policies'*.[1030] Clearly, the legislator wanted to introduce a guiding principle that until its introduction had been missing. The problem with the said principle is that it is uncertain whether it means that if new policies were to apply, the work already built as permitted must be removed. One more thing is that the law offers no explanation as to whether a commencement notice submitted during the operative period can be tantamount to a '*commitment'* in this respect. One thing for sure is that the court has, on occasion, equated '*commitment'* in the context of renewal applications to the degree of interventions carried out on site and the prejudice applicant would suffer if permission were not granted.

Another issue that courts face is whether planning rights are lost once a building perishes. The current view held by the courts is that all rights from planning permissions are lost once a building no longer exists. The downside to this is that a right may be '*lost*' through no owners' fault, because of fortuitous circumstances such as, for example, a fire outbreak or an unintended structural collapse.

Against this backdrop, this legal impasse could be addressed if the following recommendations are adopted:

[1030] *Ibid* : proviso to s 72(4)

— The DPA should make it clear that a vested right against the application of subsequent policies does not only arise '*from a valid development permission'* but is also firmly kept in place after a development permission expires and works have been completed in line with that permission. This would remove any doubt that vested rights could be lost once a planning permission is no longer valid;

— As pointed out above, however, it is pertinent to highlight that, in practice, it is impossible to have a building built in full compliance with the approved permit. Albeit the fact that the obvious solution in those circumstances would be to sanction the deviations by means of a new planning application, there might be situations wherein the policies would have changed by the time the new application is decided, making it impossible for an applicant to regularize the illegal development. For this reason, it would be practical to recognize as a vested right a right arising from a building which is not a hundred percent built according to plan, however for which the degree, seriousness and the nature of the departure was minimal in relation to the context of what was approved;

— One difficulty here is that what constitutes a minimal departure is for the Planning Authority and the Tribunal to decide and that could lead to inconsistency between decisions. On the other hand, however, it makes little sense to hold applicant unable to claim a vested right when the deviations are fairly and reasonably related in scale and kind to what was approved.

In Section 72(2) of the DPA the words *'or works carried out in accordance with a development permission'* should thus be added immediately after the words '*issued prior to 1994*' and the words '*provided further that when works were not carried out in*

accordance with a development permission and the deviations are, in the opinion of the Planning Board, deemed to be minimal, a vested right is still considered to have accrued.' should be added immediately after.[1031]

— With regard to planning applications that are up for renewal, it should be clarified whether *'commitment by the original development permission in relation to the new plans and policies'* means that if new policies were to be applied, works already carried out need to be removed or otherwise. This would eliminate the perception set in various judgments that an applicant would have had to suffer some type of '*prejudice'* for the new rules not to apply in renewing a permit. The term '*prejudice'* carries subjective connotations, depending on one's thoughts and opinions, and it would therefore make more sense if one were to evaluate whether restoration works are needed to comply with the new regulations. At the same time, any suggestion that a commencement notice submitted during the operative period amounts to a *'commitment'* in terms of a renewal application, which is something that, from a planning perspective, makes hardly any sense because a planning permission could be rendered perpetually valid simply by filling up a form once in five years, is ruled out.

In Section 72(4) of the DPA the words *'by the original development permission in relation to these plans and policies:'* should be replaced by the words *'in such a way that if the new plans and policies were to be applied, works covered by permission are required to be removed'*[1032]:

[1031] See Appendix (1. Amended Development Planning Act, s 72(2))
[1032] See Appendix (6. Amended Development Planning Act, s 72(4))

— When a building perishes through no fault of the land-owner, allowance should be made for a person adversely affected by the happening of such event to apply to restore the building works within reasonable time and without prejudice to the plans and policies in force. This is considered to be an equitable solution to those who, as things currently stand, cannot claim any vested right should a building in their possession perish through no fault of their own.

To meet the above stated objectives, a new provision, Section 72(11) should be introduced after Section 72(10) in the DPA to read as follows[1033]:

> *'72(11): Notwithstanding the provisions of this section, the Planning Board shall issue a full development permission to redevelop a building that was partially or completely destroyed after a fortuitous event, subject to an application made to the Authority by not later than two years from the date of the said event and on condition that the design of the redeveloped building is as close as possible to what existed previously.'*

QUESTION THREE: *'Has Section 72 of Act VII of 2016 reversed the previous approach taken by the Court in terms of Section 69 of the EDPA in that planning policies could now be overruled?'*

This study also focused on the legal interpretation of Section 72 of the current DPA. Previously, decision makers were required to '*apply*' plans and policies and '*have regard to'* material considerations and third-party representations. The manner Section 72 is formulated seems to indicate that decision makers are no longer required to *'apply'* plans

[1033] See Appendix (7. Development Planning Act, s 72(11))

and policies but simply *'have regard'* thereto, along with material considerations and third-party representations.

As held by Lord Guest in **Simpson v Edinburgh Corporation**[1034], ''*to have regard to' does not mean 'slavishly to adhere to''* but *'it requires the planning authority to consider the development plan',* however '*does not oblige them to follow it ....'*.

It is therefore safe to say that Parliament's intention in enacting Section 72 was to allow decision makers discretion to give priority to plans and policies, material considerations and representations as they deemed fit. In practice, that would mean giving decision makers the possibility to attach more weight to material considerations at the expense of not abiding with planning policy.

Having said this, also after the enactment of Section 72, the court seems to be of a different opinion and keeps on insisting that plans and policies should take priority, even though the law was changed. Indeed, the court went as far as saying that Section 72 brought no change in legislation and is therefore unwilling to depart from its previous interpretation that the decision-maker could be faulted were he to fail to comply with the relevant plans and policies.

Consequently, it would seem that the court's well-established position is at odds with the intentions of the legislator. At face value, it would thus seem that the court is failing one

[1034] *Simpson v Corporation of Edinburgh* [1961] S.L.T. 17: 318-319

of the most important requirements of the Rule of Law in that the court must respect Parliament's intentions.

Of course, it is not arguable that for a sustainable planning strategy to succeed, plans and policies should ideally be the starting point in the process of decision making. This is because written policies help to secure legal certainty through predictability. Another obvious advantage of policies is that they save time and promote uniformity. In other words, having policies accessible to everybody puts citizens in a position to know their rights as well their duties *a priori*. Moreover, decision makers are prone to be more consistent in the exercise of their discretionary powers even though policies are framed in language whose application to a given set of facts requires the exercise of judgment. Stability is essential for citizens to have confidence in the planning system and helps develop a common understanding among stakeholders with different interests.

That is not to say, however, that the plan led approach, which the court insists on preserving at all costs, does not have limitations. First of all, it is impossible for policy makers to envisage all the problems that might crop up in the future and in a continuously developing society, it becomes necessary for policies to keep pace with time and changing conditions and this becomes difficult due to the lag there is until policies are codified. As things stand, policies can be amended only through a formal process, which, as we have seen, is very time consuming. This means that by the time a decision on a planning application is taken, a plan or a policy could be out of date. More so, not all policies are the model of clarity and this is evident to anyone practicing in the field of development planning, be it an architect, a planner or a lawyer. For example, it is a known fact that a

number of local plans are, at best, ambiguous when applied to the existing situation on site.

In this context, it would seem sensible to address this divergence by making it clear that insofar as development plans and policies are material to an application for planning permission, the decision must be taken accordingly unless, however, there are material considerations that require otherwise. In a way, this mirrors the reasoning underpinning Section 38(6) of the Planning and Compulsory Purchase Act 2004 which similarly requires that a determination made under the planning acts must be made in accordance with the development plan unless material considerations indicate otherwise. Incidentally, the way Section 38(6) has been largely interpreted by English courts is that a decision maker must first consider whether the proposal is in accordance with the development plan and then move to consider whether any material considerations justify departing from policy. As long as development plan policies are properly understood and engaged with and proper regard is paid to the statutory priority of the development plan, decision-makers need not therefore expressly determine whether a development proposal is in accordance with the development plan.[1035]

Going back to the Maltese context, the author thinks that the decision-maker should, therefore, still be obliged to, first, consider the proposal in the context of the relevant plans and policies and make a proper interpretation of them. There may be some points in a plan or policy which support the proposal but there may be some considerations pointing in a conflicting direction. At the same time, the decision-maker should also identify all the other material considerations which are relevant to the application and to

[1035] *R (on the application of Wright) v Forest of Dean DC & Resilient Energy Severndale Limited* [2017]

which he therefore should have regard to. At that juncture, he is to decide whether there are any material considerations of such weight as to indicate that the plans and policies should not be accorded the priority which the DPA has given to them. In recommending so, therefore, the PB or the PCom cannot be accused of determining planning applications as they please but if they decide to depart from an established plan or policy, they do so for good reason.

As the law stands, however, decision makers may rely on whatever material consideration they *'deem fit'.* Certainly, this approach has *prima facie* limitations since it is easy for decision makers to take account of some consideration which is irrelevant to the application or, worse still, disregard important material considerations which they ought to have regard to. The proposition that public bodies, when exercising their function, should take account of relevant considerations and ignore irrelevant considerations is, after all, one of the well-established principles, and most regularly invoked, in administrative law.

Unfortunately, there are no locally reported cases in which a formula to demonstrate when a consideration is deemed permissible and relevant was devised. This is not to say that the situation in other jurisdictions is far better. The settled position in England seems to be that a material consideration must display a planning purpose, fairly and reasonably relate to the permitted development[1036] and be one that it would have been irrational for the Authority not to take it into account.[1037] Whichever way one looks at it, these criteria are highly subjective and do not link back to the statute in any way.

[1036] *Aberdeen City & Shire Strategic Development Planning Authority v Elsick Development Co Ltd* [2017] UKSC 66
[1037] *Faraday Development Ltd v West Berkshire Council* [2018] EWCA Civ 2532

To address this issue, it would, therefore, make sense for the law to make an objective test available to determine whether a material consideration is relevant to the extent that it overrules the statutory presumption that a planning permission is to be decided in accordance with plans and policies.

One possible formula to consider is that decision makers should take note of those considerations that are so obviously material to the decision, notwithstanding the silence of the statute. What is obviously material within a planning context could be achieved by falling back to the general public law approach to reasonableness in the sense that the consideration would be so obviously material to the decision maker that no reasonable authority would fail to take it into account. Still, in their choice, decision makers are to ensure that the selected material considerations are governed by policy and objects of the governing statute set out in Section 3 of the DPA.[1038] Moreover, and again in line with the general principles of administrative law, decision-makers are made to provide clear and convincing reasons for their choice of material considerations at the expense of departing from established policy.

With this in mind, the text *'(a) plans; (b) policies:'* in Section 72(2) of the DPA shall be deleted and substituted with the following text[1039]:

[1038] Development Planning Act, s 3 states:
'It shall be the duty of the Government to enhance the quality of life for the benefit of the present and future generations, without compromising the ability of future generations to meet their own needs, through a comprehensive sustainable land use planning system, and to that effect:
(a) to preserve, use and develop land and sea for this and future generations, whilst having full regard to environmental, social and economic needs;
(b) to ensure that national planning policies are unambiguous, accessible and clear to the general public;(c) to deliver regular plans in accordance with the needs and exigencies from time to time;
(d) to identify regional planning shortcomings and address any problems found in relation thereto;
(e) to apply scientific and technical knowledge, resources and innovation for the effective promotion of development planning; and
(f) to consider public values, costs, benefits, risks and uncertainties involved when taking any decisions.'
[1039] See Appendix (1. Amended Development Planning Act, s 72(2))

> *'Plans, policies and regulations made under the Act insofar as the plans, policies and regulations made under the Act are material to the development and unless material considerations require otherwise.*
>
> *Provided that the Planning Board shall only refer to plans, policies or regulations that have been finalised and approved , and published by the Minister or the House of Representatives, as the case may be;*
>
> *Provided further that the words 'material consideration' are taken to mean any consideration, including any representation made in response to the publication of the development proposal by interested parties, boards, committees and consultees, that does not conflict with Article 3 of this Act and which is so obviously material that no reasonable decision maker would fail to take it into account.'*

Furthermore, in Section 72(2) of the DPA, it is proposed that paragraphs (c), (d), (e) and (f) are to be deleted.[1040]

Moreover, in order to ensure that reasons are given by the PB or the PCom on each and every occasion, and not only when the recommendation of the Executive Chairperson is overturned, paragraph 10 of the Second Schedule of the DPA shall be substituted as follows[1041]:

[1040] *Ibid*
[1041] See Appendix (8. Amended Development Planning Act, second schedule, para 10)

> *'Where the Planning Board takes a decision, it shall register in the relevant file the specific planning reasons adduced by it justifying the taking of such decision.*
>
> *Provided that the Planning Board may also delegate to the Chairperson or any of its members, the power to endorse any documents or plans relating to any matter under its consideration*.'

QUESTION FOUR: ***Did the Environment and Planning Review Tribunal Act, 2016, address the legal lacunae which existed prior to its enactment?***

The role played by the now-defunct PAB and its replacement, the EPRT, which entered the scene in 2010, were also examined in detail. The study assessed whether things have actually improved by the introduction of the Environment and Planning Review Tribunal Act.

It is appropriate to say that the situation with appeal proceedings improved over time. To begin with, the Tribunal's jurisdiction in the Environment and Planning Review Tribunal Act has been better delineated since Section 11 specifies the instances when an appeal from a ruling of the PA is available. Prior to that, jurisdiction of the Tribunal was limited to '*any decision of the Planning Authority on any matter of development control, including the enforcement of such control'* and that gave rise to occasional uncertainty.

Appointing members for a specific time period without the option of being reappointed was clearly intended to underline the Tribunal's independence from the Executive since that would reduce the possibility of members wanting to appease the Executive for their

term of office to be extended. Having said that, a member whose mandate is definite can still be prone to please the government of the day to grant him another public appointment once his term of office expires.

There is no doubt that the scope of public participation in appeal procedures has increased over time. Not only can anyone appeal a decision on a planning application as long as he registers a written objection at the outset of the application process even though he has no juridical interest but appeals to environmental matters are open to '*any person*' without the need to have registered his or her interest prior to the decision.

However, the use of some of the terms to qualify third parties entitled to appeal could be regarded as a source of confusion. It makes no sense, for instance, to say that appeals on environmental matters are open to *'any person'* when a challenge on a decision subject to an EIA is open to members of the public having '*sufficient interest'*.

Similarly, it is uncertain whether '*a person aggrieved'* in the context of an appeal from an enforcement notice includes a person who is not served with a notice (not being an owner or occupier) but who has a direct interest in the matter.

When it comes down to revocation of a planning permission, Section 80(3) of the DPA appears to have reserved such right to the applicant and, or the interested person making the request for revocation whereas Section 11(1)(c) of the EPRT Act says that the appeal is open to *'any person'*.[1042] Whether an *'interested person making the request for revocation'* is taken to mean *'any person'* or a person who had acquired an interest due

[1042] Environment and Planning Review Tribunal Act, 2016, s 11(1)(c)

to him having previously registered an objection at the onset of the planning application process could thus be open to question.

Some other problems with the drafting of the Tribunal Act were noted. The same provisions were, at times, echoed under different sections in the same Act. In its own right, this is not an issue because, if at all, the same legal principle is reinforced in that it is stated twice.

On the other hand, this study identified a particular provision which, legally, cannot stand. Section 11(1)(e)(iii) offers a remedy of appealing decisions on scheduling, and/or conservation orders to interested third parties who submitted a representation in terms of '*Section 71(6) of the Development Planning Act, 2016'* when the said Section 71(6) is connected to development planning applications and has nothing to do with scheduling orders.

The introduction of the principles of good administrative behavior is also considered to be a step in the right direction because members have clearer guidelines on what to rely on. At the same time, some issues have been noticed with regard to the said guidelines. In particular, Section 9(h) which directs the Tribunal not to comment on those pleas that are not decisive for the outcome of the appeal might convey a wrong message saying that the Tribunal is allowed to decide itself when it ought to give reasons and when not.

In every planning reform undertaken thus far, efficiency of proceedings was always at the top of the agenda. The introduction of timelines within which Tribunal decisions are to be delivered is something everyone agrees to. Nevertheless, it was noted that the Act fails

to stipulate any time frames for a second panel to which the case is assigned should the first panel fail to abide by the statutory deadlines. It is unclear whether this was specifically intended to avoid any possibility of the second panel not meeting deadlines.

Another recent provision intended to expedite proceedings was to have preliminary pleas decided together with merits of the case in one single judgment. It has been shown, however, that having preliminary pleas determined in the final judgment after hearing the merits could defeat the whole purpose whenever a plea not to engage in the substance of the case is entertained.

Moreover, the idea of allowing the Tribunal to request fresh drawings which do not affect the '*substance of the matter'* was a convenient move to give applicants an opportunity to update their drawings without having to lodge a new planning application and start afresh. There is, of course, the argument that, by allowing this, the role of the Tribunal has been converted into one of first instance. An additional problem also seems to exist because '*substance'* is very often equated to '*material'* as held in Legal Notice 163 of 2016, when in reality the two terms do not mean one and the same thing. A change could not be material in terms of the Legal Notice 163 of 2016 but could change the substance of the proposal altogether. Moreover, it was observed that there is no provision at law which allows the plaintiff to make the request himself, even though, in practice, that is already happening very frequently. Up until now, there has been no reported cases where the Tribunal was challenged on this matter although there is always a defense that the Tribunal could, by law, regulate its own proceedings.

Finally, it was pointed out that that the decisions of the Tribunal are binding on all stakeholders[1043], albeit, without prejudice to the powers of the Superintendent of Cultural Heritage emanating from the Culture Heritage Act.[1044] We are therefore faced with the odd situation where a potential stakeholder in the appeal process can eventually choose to veto a decision to which he is a party.

In the light of the aforesaid, the following changes in the Environmental and Planning Review Tribunal Act are being recommended:

— The method of appointing Tribunal members remains in the hands of the Prime Minister notwithstanding the recent conclusions by the Venice Commission on the rule of law in Malta[1045] which held that the Executive enjoyed too much power when it comes to judicial appointments. More so, a member whose mandate is definite can still be prone to please the government of the day to grant him another public appointment once his term of office expires. Consequently, the direct involvement of the Executive in appointing and removing members should be reduced. Members could possibly be appointed after a hearing held before the Standing Committee on Public Appointments as is the case for Ambassadors and certain posts in Government Agencies.[1046] Meanwhile, as is the case with the judiciary, members should be removed by two thirds majority of the House of Representatives and not the President acting on the advice of the Prime Minister. That is one way of providing Tribunal members with security of tenure with guarantees against interference by the Executive in a discretionary or arbitrary manner.

[1043] Environment and Planning Review Tribunal Act 2016, s 38(1)
[1044] Culture Heritage Act, s 59(1)
[1045] 'Malta Opinion On Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement' (2018) <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)028-e> accessed 29th March 2020
[1046] Public Administration Act, s 37

Against this background, Section 4(4) of the Environment and Planning Review Tribunal Act, 2016 is to be replaced as follows[1047]:

> *'All members sitting on each panel, including the Chairperson and the deputy Chairperson, shall be nominated by the Prime Minister after being referred to the Standing Committee on Public Appointments constituted in terms of the Public Administration Act for a pre-appointment hearing. Upon the conclusion of the pre-appointment hearing, the Committee shall, unless it needs to discuss or clarify any matter with the Prime Minister, give its advice together with a copy of the minutes of the Committee relative to the hearing to the Prime Minister. The said hearing shall be held on a date not later than five days from the notification to the Committee. The said hearing shall be held in public but the committee may where it is satisfied that it is appropriate, decide that the hearing should be held in camera.'*

Section 4(8) of the Environment and Planning Review Tribunal Act, 2016 is to be replaced as follows[1048]:

> *'In the exercise of their functions under this Act, the Chairperson and the members of the Tribunal shall not be subject to the control or direction of any other person or authority, and shall not be removed from their office except by the President upon a request by the House of*

[1047] See Appendix (9. New Environment and Planning Review Tribunal Act 2016, s 4(4))
[1048] See Appendix (10. Environment and Planning Review Tribunal Act 2016, s 4(8))

> *Representatives supported by the votes of not less than two-thirds of all the members thereof and praying for such removal on the ground of proved inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour.'*

— Section 11(1)(e)(iii) which offers a remedy of appealing decisions on scheduling, and/or conservation orders to *'an interested third party who had submitted written representations as established by the Planning Authority in terms of Section 71(6) of the Development Planning Act, 2016'*[1049] should be repealed. The reason for this is that Section 71(6) of the DPA, 2016 refers to the mechanism whereby '*interested parties'* could forward written representations following a planning application and has nothing to do with a decision on a scheduling or conservation order takes place. Meanwhile, an alternative provision is not required since Section 11(1)(c)(ii) already offers an appropriate remedy to *'any person… aggrieved by a decision in relation to scheduling and conservation orders'*;

— The term *'person having sufficient interest'* in the context of challenges on the substantive or procedural legality of decisions relating to EIA or an IPPC permit is misleading when Section 47(1) of the Tribunal Act stipulates that appeals concerning environmental matters are open to *'any person'*.

[1049] Development Planning Act 2016, s 71(6) states the following:
'Any person may declare an interest in a development and, on the basis of issues relevant to environment and planning, make representations on the development. Such declaration of interest and representations shall be in writing and is to be received by the Planning Board within such period as established by regulations prescribed by the Minister. A declaration that is not submitted within this stipulated period shall be considered null and may not be considered by the Planning Board.'

In this context, the words *'person having sufficient interest'* in Section 11(1)(e) should be replaced by the words *'any person'*.[1050]

— Whether requests for modification or revocation of permission should be open to '*any person*' and not restricted to individuals who had registered their objections at the onset of the relative application should be clarified. In the author's view, such requests should be open to '*any person'* not only to give a strong message against abuse but also because Section 80 involves acts that interfere with public order.

In this scenario, the words *'The applicant, or the interested person making a request under this article'* in Section 80(3) of the DPA shall be replaced by '*any person'*.[1051]

— As discussed, the prevalent idea is that preliminary pleas are to be decided in the final judgment together with the merits of the case. This is seen as being counterproductive especially when the preliminary plea is dismissed and the Tribunal would have still devoted unnecessary time and effort in hearing the merits of the case. It should thus be possible for partial decisions to be delivered prior to the Tribunal engaging into the merits. At that point, an appeal from the partial decision of the Tribunal to the court of Appeal (Inferior Jurisdiction) should be possible if the partial decision denotes finality of proceedings.

For this reason, Section 9(2)(b) of the Environment and Planning Review Tribunal Act, 2016 is to be replaced as follows[1052]:

[1050] See Appendix (11. Amended Environment and Planning Review Tribunal Act 2016, s 11(e))
[1051] See Appendix (12. Development Planning Act, s 80(3))
[1052] See Appendix (13. Environment and Planning Review Tribunal Act 2016, s 9(2)(b))

> *'The time within which the Tribunal shall take its decisions shall be reasonable depending on the circumstances of each case. The decision shall be delivered as soon as possible. An appeal from a partial decision of the Tribunal may only be filed together with an appeal from the final decision of the Tribunal.'*

— Another issue which seems to not have been fully addressed concerns the timeframes within which appeal decisions should be delivered. Although the secretary is now obliged to assign the case to another panel in the eventuality that a first panel fails to comply with the statutory timelines[1053], the second panel is not bound by any timeline within which to deliver judgment. To counter this, the second panel should be likewise regulated by a time frame.

For this reason, the words *'and decided within two months from the date of assignment'* shall be added immediately after the words '*the appeal shall be assigned by the Secretary to another panel'* in Section 35 of the Environment and Planning Review Tribunal Act, 2016.[1054]

— One other issue that has been singled out is the power of the Tribunal to request parties to present new drawings and documents during proceedings as long as they not alter the *'substance of the matter'*. Even so, the idea of the Tribunal being in a position to request the parties to submit additional documentation prior to delivering judgment, even more so, alter the proposal, makes little sense. If anything, the law should be drafted in a

[1053] Environment and Planning Review Tribunal Act 2016, proviso to s 35
[1054] See Appendix (14. Environment and Planning Review Tribunal Act 2016, s 35)

way so as to allow applicants request the Tribunal to be allowed to submit fresh drawings so long as these changes are not substantial. Indeed, as things stand, this already happens. Another thing is that one should also consider replacing the expression *'substance of the matter'* with *'material as defined in Legal Notice 163 of 2016'*, the reason being that *'substance of the matter'* might be open to various interpretations whereas *'material change'* is defined very clearly by the statute.

For the above reasons, the words *'Provided that the Tribunal may, according to circumstances'* up to *'to be decided upon again by the Planning Authority.*' in Section 31 of the Environment and Planning Review Tribunal Act, 2016 shall be replaced by the following text[1055]:

> '*Provided that the Tribunal may, upon a request from applicant and before confirming, revoking or altering the decision, allow the applicant to submit fresh documents and plans. In the case that there are no material changes, the Tribunal shall invite the other parties to make their comments on the new documentation. In the case that there are material changes, the Tribunal may give such directions as it may deem appropriate and redirect the documents and plans to be decided upon again by the Planning Authority.'*

— It was further revealed that even if the decisions of the Tribunal bind all stakeholders[1056], the powers of the Superintendent of Cultural Heritage that come from

[1055] See Appendix (2. Amended Environment and Planning Review Tribunal Act 2016, s 31)
[1056] Environment and Planning Review Tribunal Act 2016, s 38(1)

the Culture Heritage Act continue to take precedence.[1057] Consequently, we do have an odd situation where the Superintendent, who is a potential stakeholder, and possibly a party to an appeal, can choose to veto the Tribunal's decision. In these circumstances, one should seriously consider whether planning applications in which the Superintendent would have voiced his objection at consultation stage should be vetoed at that stage unless the lawfulness of the decision of the Superintendent is contested in terms of judicial review in terms of Section 469A and the court declares it null.

In this context, the following words shall be added to the current Regulation 9 of Legal Notice 162 of 2016[1058]:

> *'Provided that when the Superintendent of Cultural Heritage does not issue an authorization, the application shall be suspended unless such an authorization is issued or unless the lack of authorization is declared unlawful by a court of law.'*

Furthermore, Section 2(2) of the Environment and Planning Review Tribunal Act, 2016[1059] is to be deleted completely.

[1057] Culture Heritage Act, s 59(1)
[1058] See Appendix (15. Amended Development Planning Act, regulation 9)
[1059] Environment and Planning Review Tribunal Act, 2016, s 2(2) states: *'The provisions of this Act shall be without prejudice to the provisions of the Cultural Heritage Act and in particular they shall not affect the powers of the Superintendent of Cultural Heritage under that Act and the exercise of the Special Powers of the State under Part VII of the said Act.'*

QUESTION FIVE: *'How can 'a point of law decided by the Tribunal' be defined in the light of court developments?'*

The final part of this study dealt with the role of the Court of Appeal (Inferior Jurisdiction) with regard to its role in deciding appeals '*on a point of law decided by the Tribunal and any matter relating to an alleged breach of the right of a fair hearing before the Tribunal'* as per Section 39 of the Environment and Planning Review Tribunal Act, 2016, It was immediately pointed out that the phrase *'a point of law decided by the Tribunal'* is a source of confusion to practitioners because it is not defined anywhere in the law. Meanwhile, one of the key objectives of this research was, indeed, to provide a comprehensive definition of the same.

In order to achieve this aim, an analysis was made of the most common challenges brought in front of the court under the pretext of *'a point of law decided by the Tribunal'*. This study revealed that, initially, *'a point of law decided by the Planning Appeals Board'* was held to be a legal matter debated explicitly before and decided upon by the PAB. With time, however, this expression was given a broader interpretation to include *inter alia* any matter that was akin to the traditional grounds of judicial review.

The court's approach is hardly surprising. As with any area of law, it is unlikely for a court not to exercise its discretion in order to quash a decision which it finds to be illegal. This is, after all, in line with the aim of giving the public concerned wide access to justice in line with the doctrine of separation of powers.

Broadly speaking, an overview of jurisprudence has in fact shown that the EPRT and, before that, the PAB, were held to account for the following types of violations:

— Breaches of the principles of natural justice, namely when the Tribunal disadvantaged a party by not giving it a fair hearing, when lack of reasons were detected in the Tribunal's decision and when issues of conflict of interest had been overlooked by the Tribunal;

— Non-compliance with rules of procedure was also reason for the courts to interfere;

— The mishandling of laws and policies was also regarded as a key reason why a good number of Tribunal decisions have been revoked '*on a point of law*'. This study identified three separate contexts in which a law or policy could be mishandled. Firstly, when a law or policy relied upon is not applicable to the facts at issue or made use of despite not forming part of the statute at the time judgment is given. Secondly, when a policy is misinterpreted or wrongly applied to the established facts and thirdly when a policy is applied to wrong or inexistent facts;

The above categories of possible legal wrongs that can be committed by the Tribunal are a useful starting point in answering this research question, paving the way to formulating a definition of a '*point of law'*. This is not to say that, in our path towards that destination, there are no aspects that merit further discussion. Prior to proceeding further, a few issues need to be made clear and these will be individually tackled in the next paragraphs.

Breaches of the rules of natural justice: The essence of modern law concerning judicial review is that decisions which involve breaches of the rules of natural justice are treated as *ultra vires* by the courts. It is therefore not surprising that, from the outset, the court has demonstrated a constant willingness to invalidate those decisions in which it was

found that the PAB and, after that, the EPRT had had no regard to the principles of natural justice.

It is safe to argue that the fact that the Environment and Planning Review Tribunal Act, 2016 introduced a number of provisions to mark the importance of all three principles of natural justice, carries the conclusion that the courts are subsequently entitled to insist on their enforcement.

Yet, it is unclear as to why Section 39 of the Environment and Planning Review Tribunal Act, 2016, makes mention of *'…any matter relating to an alleged breach of the right of a fair hearing before the Tribunal'* as a ground which opens the path to judicial review and then stops short of referring to the duty of the Tribunal to give reasoned decisions and act impartially.

In no way is this taken to mean that the duty of the Tribunal to give reasoned decisions and to act without bias are no longer regarded as points of law susceptible to an appeal before the court. For a fact, this research has revealed the court's renewed proclivity to investigate breaches of all three principles of natural justice after the promulgation of the Environment and Planning Review Tribunal Act, 2016. This notwithstanding, the author sees no reason why Section 39 should only refer to the fair hearing principle. It is, therefore, recommended that reference to '*natural justice'* as being one of the possible grounds of challenge pursuant to a Tribunal decision be made instead.

Non-compliance of prescribed procedures: In general, the non-compliance with prescribed procedures on the part of the Tribunal was also held by the court to be

tantamount to a point of law decided by the Tribunal. Once again, this is not surprising since one of the fundamental principles of judicial review is that the courts should intervene to ensure that the powers of decision-making bodies are exercised lawfully. It should not be doubted that when Parliament lays down a statutory requirement for the exercise of legal authority, it expects its authority to be obeyed to the letter.

In this study it was noted that the word '*shall'* in development law provisions was generally interpreted by the court as decisive, regardless of the context, subject matter and object of the provision in question. In other words, when the word '*shall'* was used in a legal provision, the court thought that decision-makers had no option but to abide by the directions set out by the legislator. Notwithstanding this, it is believed that the court gave insufficient attention to creating a distinction between those instances when fundamental obligations were flagrantly ignored and those instances when a defect in procedure was trivial and causing no problem or injustice to anybody.

The reality is that the use of the word '*shall'* should not be deemed as conclusive on the question on whether a provision is a mandatory or a directory one. Before taking a decision as to whether to annul an EPRT decision on a failure to observe a rule of procedure, the court should determine if such failure has caused an inconvenience or injustice to any one of the parties. If this results in the positive the court should have no option but to annul the decision. Conversely, when the procedural defect is found to have no effect on the outcome of proceedings, the Tribunal's decision should be deemed to be valid. In a nutshell, what is being argued is that the law of procedure should not be reduced to a matter of mechanical application of the rules where acts are invalidated for

insignificant procedural defects. Having said that, the final arbiter of such significance or insignificance remains the sitting court.

In this context, it is recommended that failure to comply with a prescribed formality emanating from statute is considered to qualify as a point of law so long as the non-compliance is likely to cause an inconvenience or an injustice to anyone of the parties.

Application of a wrong law or policy: The application of a wrong law or policy due to its not forming part of the statute at the time judgment was meted out, was consistently seen to amount to a question of law. Chapter two talked about the court's insistence on decision makers to apply the laws and policies applicable at the moment of the decision, the failure of which renders the decision null and void. That is the accepted position today, subject to a number of changes which the legislator should seriously consider as highlighted in the answers to questions 1 and 2 elaborated on in this conclusion.

On the other hand, the court's approach has not always been that way in cases where the wrong policy was applied to the appraised facts. This study identified several instances in which the court refused to ascertain whether the selected policies were relevant to the facts at issue after having held that such an evaluation was one of planning judgment that should be left in the hands of the Tribunal. On the face of things, it would appear that, in determining so, the court was cautious not to intrude into technical territory due to the fact that the Tribunal is in a better position to do so. This approach, however, is, to say the least, questionable since Parliament could not intend allowing decision makers to rely on a plan or a planning policy without a connection to the circumstances of the case. It would seem pointless to allow decision makers to mistake the law applicable to the facts

as it had found them and, as a result, proceed to ask the wrong questions in the course of reaching a decision.

In the author's view, there should be no shield against interfering with the decision makers' relying on inapplicable laws and policies, regardless of whether the inapplicability derives from the fact that the law or policy no longer forms part of the statute or because it is unrelated to the facts.

For this reason, a point of law should arise not only when a decision of the Tribunal is founded on a wrong law or policy due to it not being legally valid at the moment of the decision but also when it results clearly that the chosen law or policy is not applicable to the appraised circumstances.

Misinterpretation of a law or policy: As to whether policy misinterpretation should amount to a point of law, we have seen that the Court of Appeal changed its opinion over time. Initially, the position held by the court was that it would not second guess the way a policy was interpreted by the PAB. Yet, the supervisory jurisdiction of the court as it has now developed is that it is entitled to intervene when the meaning assigned by the Tribunal to a law or a policy cannot be retrieved by reading the relative text of the law or policy and also when parts of the applicable law or policy are simply overlooked. It is therefore necessary for the Tribunal to ensure that it understands the aims and the context in which a law or policy was produced in sufficient depth to then give a ruling on its meaning.

The court's more recent approach is, therefore, another illustration of the *ultra vires* principle for the Tribunal cannot do away with exercising its discretion outside the specifications and limits set out in the relative laws and policies. Indeed, it is not very difficult to accept that the Tribunal should be supervised by a court with a view to ensuring that it does not undermine the purpose for which a law or policy was written.

It is implicit in the above arguments that the court is entitled to assess whether a law or policy was interpreted objectively by the Tribunal and in accordance with the language used and in its proper context. This is also true if the process of finding the one correct meaning of a policy involves the interpretation of some technical concept that does not form part of the day to day legal jargon which judges are normally accustomed to.
It is important to note that at no point was it argued that the court should investigate the provenance and evolution of a plan or policy, such as what a local plan should include or how it could have been better drafted. Neither it was said that the court should interfere when the Tribunal has an option to decide which policy should be given greater weight when two or more policies point in different directions. What is being emphasised is that the question of whether a law or policy was given the correct meaning should be left for the court to ascertain.

This means that a definition of '*a point of law'* should set out clearly that the court is entitled to assess whether the Tribunal gave the policy a meaning it is legally capable of bearing, even if it means that judges are drawn into an area which traditionally pertained to architects and planners.

Application of wrong or inexistent facts: With regard to whether wrong or inexistent facts which led the Tribunal to decide one route and not another amount to a point of law, it was seen that the court's position today is different than it was in the past. Until recently, the court would outrightly reject any attempt to have it reassess the facts as held by the Tribunal. Yet, the court's position today is that a decision based on some supposition of fact which was found not to exist or a '*żball grossolan ta' fatt*' are tantamount to a point of law if they were found to have had a logical connection with the Tribunal's conclusion.

It is thus possible to argue that in holding to such a position, the court's reasoning has extended too far. On the other hand, however, it is equally legitimate to say that a Tribunal judgment should not continue to stand if it is determined that it would have legally failed had the correct facts been taken into consideration.

Having said so, the term *'grossolan'* could be open to varying interpretations, even though it is safe to say that what the court had in mind is that the error had to be such that it was manifestly evident in such a way that no reasonable decision-maker would have doubted it to be so. That is, after all, the classic Wednesbury language which has long been used as a basis for inferring legally invalid acts in the context of judicial review.

However, the danger of using '*reason*' as a preamble lies in its being taken to suggest that a finding of fact may be overturned by the court because it holds a different opinion than that of the Tribunal and not necessarily due to the findings not being within the parameters of lawfulness. In that scenario, the court would be straying into a territory which, in the author's view, requires it to pass judgement on the merits of the case rather than the process by which a decision was made and actions taken.

One test to address this impasse is for the court to, first, confirm whether the alleged mistaken facts were central to the outcome of the Tribunal's decision. In that event, the next step would be for the court to assess whether the facts established by the Tribunal consist of statements that admit no more than one conclusion. If that is the case, the error of fact should be considered as one of law. For example, the Tribunal cannot but not conclude that a rectangular plot having a width of 6 metres and a depth of 20 metres measures 120 square metres since no other outcome is possible. Whatever other amount of area that could potentially yield a different conclusion than that which the Tribunal must reach when looking at an area of 120 square metres is tantamount to an error of law. When on the other hand, the findings established by the Tribunal are a matter of opinion, the error should be considered as one of fact and the court should not intervene. That would be the case, for instance, if the Tribunal were to conclude that a proposed design is out of context with the surroundings. Although the judge might have different views due to him having different architectural tastes, a court whose jurisdiction is limited to reviewing points of law should refrain from engaging in fact discretion.

The downside to this test is that it fails to consider whether the opinion held by the Tribunal is unreasonable so as to constitute irrationality. This, when '*unreasonableness'* is traditionally considered to be an independent ground for review to ensure that public bodies have no unfettered discretionary powers. Yet, the author is very skeptical with having the court acting as an arbiter of the rationality of one technical view over another. As stated above, the danger of using '*reason*' as a yardstick increases the likelihood of the court being drawn to substituting the technical opinion of the Tribunal with its own.

With this in mind, the definition of a point of law should therefore acknowledge a wrong or inexistent fact as a point of law so long as it does not admit a variance of conclusions which could be contested and the error was a determining factor to the outcome of the Tribunal decision.

The words 'decided by the Tribunal' in Section 39: Having discussed the above, it is clear that the phrase *'decided by the Tribunal'* in Section 39 should be done away with since it could only open the possibility that, one day, the court reverts to the position that it is not enough for the complaint to have been one having a legal import, but that it also needs to been one on which a position was taken by the Tribunal in the appealed decision. Consequently, the time has come to break with any reference to the phrase *'decided by the Tribunal'*

— With the above in mind, Section 39 of the Environment and Planning Review Tribunal Act, 2016 can be reworded as follows[1060]:

> **'***The decisions of the Tribunal shall be final and no appeal shall lie therefrom, except on a point of law.*
>
> *A 'point of law' is said to arise in any of the following circumstances:*
>
> *(i) when the Tribunal breaches the principles of natural justice;*

[1060] See Appendix (16. Amended Environment and Planning Review Tribunal Act 2016, s 39)

(ii) when the Tribunal fails to comply with a prescribed formality emanating from statute, the non-compliance of which is likely to cause an inconvenience or an injustice to anyone of the parties;

(iii) when a Tribunal decision is founded on a wrong law or policy due to it not being legally valid at the moment of the decision and, or applicable to the appraised circumstances;

(iv) when the Tribunal makes a wrong interpretation of a law or policy by ascribing a meaning that cannot be found from a reading of the entire relative text;

(v) when a Tribunal decision is founded on an error of fact, which fact was determining to the outcome of the Tribunal decision and which fact as established does not admit a variance of conclusions which could be contested.'

2 FINAL REMARKS

Despite the major overhaul that took place with the introduction of the DPA and the Tribunal Act in 2016, this dissertation has revealed that Maltese development planning law is still replete with uncertainty. This dissertation turned to jurisprudence as a preliminary source for answers however solutions were not always forthcoming. Indeed, at times the court's reasoning was unconvincing at best and at worst, only served to compound an already existing problem.

The reason for this is that cobbling together traditional legal reasoning and applying it to planning issues is not always a simple task. To make matters worse, judges have to

balance their legal knowledge with their technical capabilities, the latter of which could indeed be limited. As a result, the standards of interpretation adopted by judges could be different from those envisaged by planners. On top of that, the court's preference to appear consistent with what has been decided before and to try and avoid having to revisit their decisions in the future could stifle the very aims of development planning that are governed by different practical dynamics.

As far as the planning decision process is concerned, it is believed that this dissertation has achieved its intended goal of developing an intellectually autonomous space in the literature of development planning law by responding to what the court thus far has been unable to answer. Bridging these gaps indicates the originality of this work.

This is not to suggest that there is no scope for further scholarly research in other areas where legal gaps are still evident. One such area would include the legal interplay between development planning law and the Maltese Civil Code, particularly so when it comes to dealing with ownership rights and servitudes created by the law. Incidentally, a lot of discussion is currently happening on whether or not the Authority should be obliged to verify ownership declarations attached to planning applications albeit it is not a court of law.[1061] Of equal concern is whether a planning policy is tantamount to an easements created by law for purposes of public utility established by special laws or regulations[1062] and, as a result, works covered by a planning permission issued in breach of planning policy could be stopped by a servient tenement independently of the validity

[1061] 'Gozitan developer magnate claims promise of sale for Qala Development' *Newsbook* (26th January 2020) <https://newsbook.com.mt/en/gozitan-developer-supremo-claims-promise-of-sale-in-place-for-qala-development/> accessed 29th March 2020

[1062] Civil Code, s 402(1)

of the permission.[1063] Another pertinent issue is whether property obligations resulting from other laws, such as one's obligation to raise the party wall up to 1.8 metres when access to the roof is by stairs[1064] still requires planning permission in terms of the DPA notwithstanding there being a clear obligation arising from a law. Unfortunately, within the confines of the present dissertation, word limitations do not permit an evaluation of these issues.

[1063] See for example: *George Felice, Emmanuel Falzon, Carmel sive Charles Demicoli u martu Maria Carmela sive Marlene Demicoli, Albert Gauci u martu Carmen Gauci u b'digriet datat 17 ta' Marzu 20161 stante l-mewt tal-attriċi Maria Carmela sive Marlene Demicoli l-atti ġew trasfużi f'isem Clive u Edward aħwa Demicoli v Keith Attard Portughes, Alex Nandwani u l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar għal kull interess li jista' jkollha.* [11th October 2019] (FH) (502/2014)
[1064] Civil Code, s 427(1)

APPENDIX
Legislative Proposals

1. AMENDED SECTION 72 OF THE DPA

72(2): In its determination upon an application for development permission, the Planning Board shall have regard to plans, policies and regulations made under the Act insofar as the plans, policies and regulations made under the Act are material to the development and unless material considerations require otherwise.

Provided that the Planning Board shall only refer to plans, policies or regulations that have been finalised and approved by the Minister or the House of Representatives, as the case may be, and published;

Provided that 'material consideration' is any consideration, including any representation made in response to the publication of the development proposal by interested parties, boards, committees and consultees, that does not conflict with Section 3 of this Act and which is so obviously material that no reasonable authority would fail to take it into account.

Provided further that subsidiary plans and policies shall not be applied retroactively so as to adversely affect vested rights arising from a valid development permission or a valid police or trading license issued prior to 1994 or works carried out in accordance with a development permission.

Provided further that when works were not carried out in accordance with a development permission and the deviations are, in the opinion of the Planning Board, deemed to be minimal, a vested right is still considered to have accrued.

2. AMENDED SECTION (31) OF THE ENVIRONMENT AND PLANNING REVIEW TRIBUNAL ACT, 2016

31: The Tribunal shall have the power to confirm, revoke or alter the decision appealed from and give such directions as it may deem appropriate:

Provided that the Tribunal may, out of its own motion or upon request from appellant, according to circumstances, and before confirming, revoking or altering the decision, allow the applicant to submit fresh documents and plans, in which case the Tribunal shall justify its decision to allow the production of such documents after ensuring that there are no material changes. The Tribunal, where it deems that the substance of the matter as presented before the Planning Authority shall change, may give such directions as it may deem appropriate in the circumstances with respect to the respective claims by redirecting the documents and plans to be decided upon again by the Planning Authority.

Provided further that when the appeal is on a planning application which has been refused permission by the Authority, the Tribunal shall comply with the provisions of Section 72(1) and 72(2) in reviewing the appealed decision and the applicable laws and policies shall be those in force at the moment of the decision of the Tribunal.

Provided further that when the appeal is on a planning application which has been granted permission by the Authority, the Tribunal shall comply with the provisions of Section 72(1) and 72(2) in reviewing the appealed decision and the applicable laws and policies shall be those in force at the moment of the decision of the Authority.

3. AMENDED SECTION 52 OF THE ENVIRONMENT AND PLANNING REVIEW TRIBUNAL ACT, 2016

52: The decisions of the Tribunal shall be final and no appeal shall lie therefrom, except on a point of law decided by the Tribunal or on any matter relating to an alleged breach of the right of a fair hearing before the Tribunal.

Provided that when a law or a policy changes after the decision of the Tribunal is delivered, the Court of Appeal (Inferior Jurisdiction) shall base its judgment on the laws and policies applicable at the moment when the Tribunal delivered its judgment.

4. AMENDED SECTION 36(1)(a) OF THE ENVIRONMENT AND PLANNING REVIEW TRIBUNAL ACT, 2016

36(1): On any appeal by any person who feels aggrieved by any stop or enforcement notice served on him in terms of Sections 97, 98 and 99 of the Development Planning Act, 2016, the Tribunal:

(a) if satisfied that a permission was granted under the Development Planning Act, 2016, or under any other law which preceded the Development Planning Act, 2016, regulating the activity in question or building permits, for the activity or the development to which the notice relates, or that no such permission was required in respect thereof when the illegality took place, as the case may be, and that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates or such part thereof in respect of which the Tribunal is satisfied as aforesaid;

[…]

5. NEW SECTION 53(k) OF THE DPA

53(k): Prior to referring a subsidiary plan or policy as adopted by it to the Minister, the Executive Council shall cause publication on the website of the Authority, informing the public of its intention to refer such subsidiary plan or policy for the Minister's approval. Any person shall have the right to contest the lawfulness of the said subsidiary plan or policy before the Environment and Planning Review Tribunal within ten days of publication by means of an application. The Tribunal shall decide whether the Authority has acted lawfully in the process of compiling the subsidiary plan or policy, which decision shall be made public within 60 days from the date of the application. The decision of the Tribunal shall be final saving the provisions of Section 39 of the Environment and Planning Review Tribunal Act, 2016. The decree of the Tribunal or the Court of Appeal (Inferior Jurisdiction), as the case may be, shall be communicated to the Minister.

6. AMENDED SECTION 72(4) OF THE DPA

72(4): A development permission may be granted for a limited period but shall cease to be operative if the activity or development has not been completed within the period specified in the development permission, if any:

Provided that the Planning Board shall, on the application of the person holding the full development permission, renew the said permission on receiving a valid renewal application while the previous development permission is still operative, to such further period or periods as it may consider reasonable:

Provided further that where there has been a change in plans or policies applicable to the requested renewal development permission, these new plans and policies shall be taken into account unless the site subject to the application is already committed in such a way that if the new plans and policies were to be applied, works covered by permission are required to be removed:

Provided further that if the applicant fails to submit the commencement notice relative to the permission, such development permission shall be considered as never having been utilised.

7. NEW SECTION 72(11) OF THE DPA

72(11): Notwithstanding the provisions of this section, the Planning Board shall issue a full development permission to redevelop a building that was partially or completely destroyed after a fortuitous event, subject to an application made to the Authority by not later than two years from the date of the said event and on condition that the design of the redeveloped building is as close as possible to what existed previously.

8. PARAGRAPH 10 OF THE SECOND SCHEDULE – PROVISIONS WITH RESPECT TO THE PLANNING BOARD AND PLANNING COMMISSION OF THE DPA

10: Where the Planning Board takes a decision, it shall register in the relevant file the specific planning reasons adduced by it justifying the taking of such decision.

Provided that the Planning Board may also delegate to the Chairperson or any of its members, the power to endorse any documents or plans relating to any matter under its consideration.

9. AMENDED SECTION 4(4) OF THE ENVIRONMENT AND PLANNING REVIEW TRIBUNAL ACT, 2016

4(4): All members sitting on each panel, including the Chairperson and the deputy Chairperson, shall be nominated by the Prime Minister after being referred to the Standing Committee on Public Appointments constituted in terms of the Public Administration Act for a pre-appointment hearing, Upon the conclusion of the pre-appointment hearing, the Committee shall, unless it decides that it needs to discuss or clarify any matter with the Prime Minister, give its advice together with a copy of the minutes of the Committee relative to the hearing to the Prime Minister. The said hearing shall be held on a date not later than five days from the notification to the Committee. The said hearing shall be held in public but the committee may where it is satisfied that it is appropriate, decide that the hearing should be held in camera.

10. AMENDED SECTION 4(8) OF THE ENVIRONMENT AND PLANNING REVIEW TRIBUNAL ACT, 2016

4(8): In the exercise of their functions under this Act, the Chairperson and the members of the Tribunal shall not be subject to the control or direction of any other person or authority, and shall not be removed from his office except by the President upon an address by the House of Representatives supported by the votes of not less than two-thirds of all the members thereof and praying for such removal on the ground of proved inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour.

11. AMENDED SECTION 11(e) OF THE ENVIRONMENT AND PLANNING REVIEW TRIBUNAL ACT, 2016

11(1): Subject to the provisions of the Development Planning Act, the Tribunal shall have jurisdiction to:

[….]

(e) hear and determine all appeals made by an interested third party who had submitted written representations as established by the Planning Authority in terms of Section 71(6) of the Development Planning Act:
(i) from a decision on an application for development permission;
(ii) from a decision on a planning control application relating to a change in alignment;
(iii) from a decision on scheduling and conservation orders:

Provided that -
(i) the Attorney General on behalf of the Government; and
(ii) any department, agency, authority or other body corporate wholly owned by the Government, not being an external consultee which had been consulted and had not objected shall always be deemed for all intents and purposes of law to be an interested third party notwithstanding that it shall not have submitted representations in writing:

Provided that any person shall have access to a review procedure before the Tribunal to challenge the substantive or procedural legality of any decision, act or omission relating to a development or an installation which is subject to an environmental impact assessment (EIA) or an integrated pollution prevention and control (IPPC) permit:

Provided further that the Planning Authority shall not be construed as an interested third party for the purposes of this paragraph.

12. AMENDED SECTION 80(3) OF THE DPA

80(3): Any person shall, if he feels aggrieved by the decision taken by the Planning Board, have a right to appeal the Planning Board's decision to the Tribunal within thirty days from the date of the hearing when the decision was taken.

13. AMENDED SECTION 9(2)(b) OF THE ENVIRONMENT AND PLANNING REVIEW TRIBUNAL ACT, 2016

9(2)(b): The time within which the Tribunal shall take its decisions shall be reasonable depending on the circumstances of each case. The decision shall be delivered as soon as possible. An appeal from a partial decision of the Tribunal may only be filed together with an appeal from the final decision of the Tribunal.

14. AMENDED SECTION 35 OF THE ENVIRONMENT AND PLANNING REVIEW TRIBUNAL ACT, 2016

35: The Tribunal shall:

(a) whenever a request for suspension of the execution of a permit has not been made, grant its final decision on the merits of the appeal within one year from the first hearing of the appeal which period may be extended only once by a further period of six months in exceptional cases, in the interests of justice;

(b) whenever a request for suspension of the execution of a permit has not been upheld, grant its final decision on the merits of the appeal within one year from the partial decision, which period may be extended once by a further period of six months in exceptional cases in the interests of justice;

(c) in relation to appeals from special summary proceedings applications, grant its final decision on the merits of the appeal within three months from the first hearing of the appeal:

Provided that in the event that the original period is extended as above stated, no evidence or submissions shall be lodged during the extension period:

Provided further that in the event that a final decision is not granted within the time-frames above indicated, the appeal shall be assigned by the Secretary to another panel within two months from the date of assignment.

15. AMENDED REGULATION 9 OF LEGAL NOTICE 162 OF 2016

9: Recommendations by the external consultees, other consultees and representations by the Agricultural Advisory Committee and the Design Advisory Committee are not binding on the final decision of the Planning Board. When the recommendation of the external consultees and, or other consultees indicates an approval subject to a condition that a further authorization is required from the relevant external consultee and, or other consultee, and the Planning Board decides to grant a development permission, it shall include this condition requiring and authorization from the relevant consultee and, or external consultee as part of the development permission.

Provided that when the Superintendent of Cultural Heritage does not issue an authorization, the application shall be suspended unless such an authorization is issued or unless the lack of authorization is declared unlawful by a Court of Law.

16. AMENDED SECTION 39 OF THE ENVIRONMENT AND PLANNING REVIEW TRIBUNAL ACT, 2016

39: The decisions of the Tribunal shall be final and no appeal shall lie therefrom, except on a point of law.

A 'point of law' is said to arise in any of the following circumstances:

(i) when the Tribunal breaches the principles of natural justice;

(ii) when the Tribunal fails to comply with a prescribed formality emanating from statute, the non-compliance of which is likely to cause an inconvenience or an injustice to anyone of the parties;

(iii) when a Tribunal decision is founded on a wrong law or policy due to it not being legally valid at the moment of the decision and, or applicable to the appraised circumstances;

(iv) when the Tribunal makes a wrong interpretation of a law or policy by ascribing a meaning that cannot be found from a reading of the entire relative text;

(v) when a Tribunal decision is founded on an error of fact, which fact was determining to the outcome of the Tribunal decision and which fact as established does not admit a variance of conclusions which could be contested.

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