

The Environment and Planning Review Tribunal Was its role changed?

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1 Introduction

From an examination of section 11 of the current EPRT Act, an appeal may now be lodged from those decisions which are specifically listed in the law whereas under the previous Act, an appeal was indeed possible '*on any matter of development control*'¹ unless the law provided otherwise.²

Under the present legislation, the EPRT has jurisdiction to hear and determine '*all appeals made by the applicant from a decision taken following an application*' for:

¹Article 41(1)(a) of the Environment and Development Planning Act.

²For example, decisions from planning control applications and decisions on sanitary issues escaped the jurisdiction of the Environment and Planning Review Tribunal.

- A full development permission;
- A permission under a development notification order;
- A permission under a regularization process;
- A change in alignment under a planning control application;
- A permission for a project of common interest (PCI);
- Registration by the Registration Board;
- Screening letters, insofar as a request for additional submissions, studies, assessments and documentation and/or fees and/or contributions required to be paid to the Authority before submission of the application are concerned;
- A request for modification or revocation of permission.

An appeal before the EPRT can, in turn, be made by any person who feels '*aggrieved*' in the following instances:

- When a notice is issued under the provisions of Part IX of the Development Planning Act, 2015;
- When a decision is given in relation to scheduling and conservation orders;
- A decision on a request for modification or revocation of permission.

Any person or institution or any department or agency of Government having a direct interest and aggrieved may file an appeal in the following instances:

- Any decision, ruling or direction in relation to Building Regulations and Building Control Regulations, even where such a decision does not emanate from a development application process.

An appeal may be made by an interested third party who had submitted written representations within 30 days from the date on which the application is published in the local Government Gazette³, when a decision relates to:

- Application for development permission;
- A planning control application relating to a change in alignment.

An appeal before the EPRT can be made by an interested third party from a decision concerning:

- Scheduling and conservation orders.

An appeal before the EPRT can be made by a statutory external consultee who, during the application process, lodges a recommendation within the consultation period, either indicating that the application should be approved subject to conditions or that the application is objectionable stating the reasons, in the following instances:

- A development permission;
- A change in alignment following a planning control application;
- A permission for projects of common interest (PCI).

On the other hand, an appeal before the EPRT can be made by the Attorney General on behalf of the Government and any department, agency, authority or other body corporate wholly owned by the Government and who are not statutory consultees, notwithstanding that no written representations have been submitted during the application process.

³The period as established by the Planning Authority in terms of Article 71(6) of the Development Planning Act, 2016 is equivalent to 30 days.

2 New powers enjoyed by the EPRT

It should be immediately observed that the jurisdiction of the EPRT has been widened to include applications related to *'a change in alignment under a planning control application'*, *'projects of common interest'* and *'permissions under a regularization process'*. Furthermore, the EPRT has been granted the power to decide appeal with regard to *'any decision, ruling or direction in relation to Building Regulations and Building Control Regulations, even where such a decision does not emanate from a development application process'*.

It must be pointed out that the EPRT is now competent to determine appeals from planning control decisions in so far as *'changes in street alignments'* are concerned. On the other hand, *'changes in zoning'* remain immune from appeal proceedings.⁴ The situation was altogether different under previous legislation since all types of planning control applications could not be appealed before the Tribunal. For example, in **Joseph Cuschieri kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**,⁵ delivered on the 2nd May 2013, the EPRT highlighted that it was prevented from determining appeals involving planning control applications.

Prior to the enactment of the new laws, sanitary matters were also considered to be extraneous to the planning fora and had to be reviewed by the General Services Board. This principle was confirmed in **Godwin Abela u Lorraine Grech kontra L-Awtorita' ta' Malta ghall-Ambjent u l-Ippjanar u l-kjamat in kawza Edward Damato**.⁶

⁴Decisions on such applications are taken by the Executive Council as per Article 54 of the Development Planning Act, 2016.

⁵Joseph Cuschieri vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar, decided on 2nd May 2013 by the Environment and Planning Review Tribunal - [Ap. No. 165/12 CF.PC 0007/96].

⁶Godwin Abela u Lorraine Grech vs L-Awtorita' ta' Malta ghall-Ambjent u l-Ippjanar u l-kjamat in kawza Edward Damato, decided on 30th April 2015 by the Environment and Planning Review Tribunal - [Ap. No. 79/14MS. PA3359/13].

The EPRT is now also competent to determine appeals from sanitary decisions. This is due to the fact that the Planning Authority has simultaneous jurisdiction to decide sanitary matters whereas under previous legislation, sanitary decisions were taken by a Sanitary Engineering Officer who, in turn, was answerable to the Superintendent of Public Health. Essentially, this means that the application process need no longer be suspended once a sanitary dispute arises. The Authority may now pronounce itself on any sanitary matter without having to wait for the outcome of the General Services Board (GSB) or the Court of Appeal, should an appeal be subsequently presented against the GSB decision. With the introduction of the present law, an appeal before the EPRT may hence incorporate aggravations on both sanitary and planning merits subsequent to a decision of the Planning Board or the Planning Commission.

Although the EPRT is now also competent to determine an appeal from *'any decision, ruling or direction in relation to Building Regulations and Building Control Regulations, even where such a decision does not emanate from a development application process'*, it should be remarked that the operative article in the Planning Act was held in abeyance. It follows that appeals concerning building regulations shall, at least for the time being, continue to be regulated by the Building Regulations Act.

3 Who and when one may appeal

3.1 Instances when applicants may appeal

The instances when an applicant may file an appeal have been listed in Article 11(1) of the Environment and Planning Review Tribunal Act, 2016 and limited to '*decisions taken following an application*' for:

- A full development permission;
- A permission under a development notification order;
- A permission under a regularization process;
- A change in alignment under a planning control application;
- A permission for a project of common interest (PCI);
- Registration by the Registration Board;
- Screening letters, insofar as a request for additional submissions, studies, assessments and documentation and/or fees and/or contributions required to be paid to the Authority before submission of the application are concerned;
- A request for modification or revocation of permission.

But is '*a decision taken following an application*' necessarily tantamount to the final 'refusal' or 'approval' subsequent to an application? Or does it refer to any decision which is taken once the application process has been initiated? This matter was raised in **Ray Bugeja kontra L-Awtorita' ta' L-Ippjanar**.⁷ In this latter case, the Development and Control Commission requested appellant to revise the submitted drawings to show one habitable unit instead of two. Subsequently, applicant filed an appeal against the contents of the said letter but the Authority argued that the Planning Appeals Board had no jurisdiction to decide since the appealed document was not akin to a formal decision.

⁷Ray Bugeja vs L-Awtorita' Ta' L-Ippjanar, decided on 30th January 1995 by the Planning Appeals Board - [Ap. No. 131/94RR. PA1048/94].

Nonetheless, the Planning Appeals Board decided that, according to the appealed letter, the proposal 'as submitted' was clearly being rejected. The Appeals Board rightly concluded that the contents of the letter amounted to a decision, and thus applicant was certainly entitled to appeal. In fact, the Planning Appeals Board held as follows:

“Ghalkemm hu accettat li l-ittra tat-13 ta' Mejju, 1994 m'ghandhiex l-format li solitament jintuza biex jigi kkomunikat r-rifjut lill-applikant, m'hemmx dubbju li l-istess ittra tinkorpora decizjoni li effettivament qed tichad l-applikazzjoni kif giet proposta.”

From the said judgment, it ensues that a 'decision' takes effect once the following elements concurrently subsist:

- An application which is specifically listed in Article 11 is made to the Authority;
- Application is either approved, rejected or applicant was constrained to act in a manner, failure which his application would be rejected.

According to this line of thought, not each and every single controversy arising during the application process is thus tantamount to 'a decision taken following an application'. For instance, a request by the Planning Directorate to amend the drawings 'as submitted' is not tantamount to a decision in terms of Article 11(1) since the planning application would still have not reached determining stage. On the other hand, a 'request for additional submissions, studies, assessments and documentation and/or fees and/or contributions required to be paid' is construed to be a direction from the Authority to act in a manner, failure which the application would be rejected. Using the above logic, an appeal may be lodged against such direction regardless whether such request is accompanied with a screening letter as provided in Article 11(1)(b) of the Environment and Planning Review Tribunal Act, 2016.

3.2 Instances when a third party may appeal

As already seen, there are a number of instances when a third party may also file an appeal. In all these instances, a third party is not required to prove a personal interest in the appeal in terms of the doctrine of juridical interest but it is enough to submit *'reasoned grounds based on environmental and, or planning considerations to justify the appeal'*.⁸

Essentially, a third party has a right to appeal in the following circumstances:

- When a notice is issued under the provisions of Part IX of the Development Planning Act, 2016;
- A decision on a request for modification or revocation of permission;
- Any decision, ruling or direction in relation to Building Regulations and Building Control Regulations, even where such a decision does not emanate from a development application process;
- A decision following an application for development permission;
- A decision following a planning control application relating to a change in alignment;
- When a decision is given in relation to scheduling and conservation orders.

With regards to non executable permits, these are equally considered as a *'decision on an application for a development permission'* and thus may be appealed before the Environment and Planning Review Tribunal. Having said that, the EPRT Act is silent as to whether a third party could lodge an appeal once the full permit is eventually issued

⁸Article 22(1) of the Environment and Planning Review Tribunal Act, 2016 states: *'When an appeal has been lodged by an interested third party in terms of this Act, 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 such a person shall submit reasoned grounds based on environmental and, or planning considerations to justify his appeal.'*

following a non executable permit. A third party could possibly have an interest to appeal against a full permit that was allegedly issued despite the fact that applicant did not adhere to the conditions laid down in the non executable permit.

Furthermore, it should be noted that third party appellants are required to have submitted '*written representations as established by the Planning Authority in terms of Article 71(6) of the Development Planning Act, 2016*' at the onset of the application process in order to be entitled to appeal the eventual decision. In fact, Article 11(e)(i)-(iii) provides that '*an interested third party who had submitted written representations as established by the Planning Authority in terms of Article 71(6) of the Development Planning Act, 2016*' may appeal '*(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 and (iii) from a decision on scheduling and conservation orders.*' It is also very important that the written representations reach the Authority within the time frame stipulated by law. In **Chris Vassallo et. Kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Leonard Cassar**,⁹ the appeal from third party objectors was immediately thrown out after the Tribunal found that the said objectors had failed to make written representations within the stipulated sixteen day representation period at the onset of the application process.

On the other hand, third parties may not appeal before the EPRT against decisions from applications where the law does not provide for the possibility of written representations at the onset of the application. For example, in **Annamaria Spiteri Debono kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et.**¹⁰ the Tribunal dealt with a third party appeal against a permit issued for the removal of danger in terms of Legal Notice 258 of 2002. The Tribunal held that a third party has no right to appeal a permit decision unless

⁹Chris Vassallo et. vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Leonard Cassar, decided on 13th October 2011 by the Environment and Planning Review Tribunal - [Ap. No. 269/06 CF. PA 1176/00].

¹⁰Annamaria Spiteri Debono f' isimha propju u ghan-nom ta' Caren Preziosi vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar u l-kjamat in kawza Martin Testaferrata Moroni Viani f' isem il-familja Testaferrata Moroni Viani, decided on 13th June 2013 by the Environment and Planning Review Tribunal - [Ap. No. 18/13 CF. DS 116/12].

the right to register one's interest at the onset of the application process is specifically provided in the law. Using the same reasoning, third parties are not entitled to appeal before the EPRT from development notification orders and regularization applications given that there is no possibility for objectors to make written representations during the application process in such instances.

Nevertheless, an interested third party may inevitably institute an action before the Civil Court to '*enquire into the validity*' or declare such acts null in terms of Article 469A of Chapter 12 of the Laws of Malta due to the fact there is no alternative mode of contestation or of obtaining redress provided elsewhere. This principle was highlighted in the seminal judgment delivered in the names **Bunker Fuel Oil Company Ltd vs Paul Gauci et.**:¹¹

“L-eskluzjoni tal-gurisdizzjoni tal-Qrati li jistharrgu ghemil amministrattiv ghandha tkun gustifikata biss jekk il-Qorti tkun soddisfatta li, fil-prattika, persuna kellha rimedju effikaci u xieraq disponibbli ghalha u hija naqset li tirrikorri lejha bla raguni tajba.”

Nevertheless, in contrast to proceedings before the Tribunal, the person instituting an action in terms of Article 469A must *ab initio* satisfy the threshold of judicial interest and prove to the Court that he would suffer a prejudice in the enjoyment of his property as a direct result of the Authority's decision. Having said that, the interest of a third party does not have to be *stricto sensu* but a mere interest would suffice as elaborated upon in **Ġustu Debono vs Emanuel Buħaġiar**:¹²

“Biex jissejjes l-interess ġuridiku, jeħtieġ li l-parti attriċi turi li bittitliġħ tal-bini li hija tqis li sar b'mod abbużiv, hija tkun ġarrbet ħsara fit-tgawdija tal-ġid tagħha, kemm bil-ħolqien ta' servitu' jew b'kull mod ieħor.”

¹¹Bunker Fuel Oil Company Ltd vs Paul Gauci et. decided on 6th May 1998 by the First Hall, Civil Court.

¹²Ġustu Debono vs Emanuel Buħaġiar, decided on 21st October 2002 by the Civil Court of Appeal.

It is pertinent to note that *‘an interested third party who had submitted written representations as established by the Planning Authority in terms of Article 71(6)’* include the external consultees which are listed in the Third Schedule of the Development Planning (Procedure for Applications and their Determination) Regulations, 2016. The list includes the Environment and Resources Authority, which took over the role of the Environment Directorate within MEPA. As rightly highlighted by the Hon Owen Bonnici in Parliament, this is the first time that planning decisions may be appealed by a statutory environmental entity, since the Environment Directorate within the previous MEPA was legally prohibited to file an appeal against MEPA’s own decisions. In Parliament, the Hon. Bonnici¹³ had indicated the following:

“Infakkar ftit li għall-ewwel darba, quddiem dan it-tribunal se jkun possibbli li meta jinħareġ permess ta’ żvilupp mill-awtorità tal-ippjanar, dak il-permess se jkun jista’ jiġi appellat mill-awtorità ambjentali. Infakkar li minn meta jidhlu fis-seħħ dawn il-liġijiet ‘il quddiem, se jkollna żewġ Awtoritajiet on the same footing u m’aħniex se nibqgħu fis-sitwazzjoni li għandna llum, fejn l-ambjent huwa biss direttorat fil-MEPA, imma se jagħti ħafna iktar aċċess għall-ġustizzja.”

Article 11c(i)–(iii) further provides that *‘any person aggrieved’* may appeal against a *‘a notice issued under the provisions of Part IX of the Development Planning Act, 2016’*, *‘a decision in relation to scheduling and conservation orders’*, as discussed above, and *‘a decision on a request for modification or revocation of permission’*. In this sub section, there is indeed no reference for appellant to have registered a prior interest. Consequently, Article 11(e)(iii), which makes reference to prior written representations in the case of scheduling and conservation orders, appears to be superfluous.

On the matter under examination, the author thinks that *‘any person aggrieved’* could include *‘anyone’* with an grievance since Article 22(1) of the Environment and Planning Review Tribunal Act, 2016 clearly states that an interested third party need not prove that

¹³Parliamentary Sitting No. 292 held on 17th July 2015 – Parliament of Malta.

he has an interest in an appeal before the EPRT in terms of the doctrine of juridical interest.

In the case of '*notices*' one would also need to refer to Articles 16 and 36(1) of the EPRT Act. Article 36(1) expressly refers to '*any person who feels aggrieved by any stop or enforcement notice served on him in terms of Article 97, 98 and 99 of the Development Planning Act, 2015*' whereas Article 16 provides that '*an appeal from an enforcement notice or other notice shall also include a copy of the enforcement notice or other notice being appealed from*'.¹⁴ When taken together, these two sections *prima facie* suggest that, in order to appeal an enforcement or stop notice, the aggrieved must be formally 'served' with the said notice. By analogy, it follows that persons who may feel equally 'aggrieved' because of their interest in the property, such as a bare owner who was not equally served with the notice which was served, say, only to the usufructuary, are not entitled to appeal.

The right of appeal in so far as decisions concerning revocation of permits, on the other hand, appears to be unrestricted. Any person who simply feels aggrieved by such a decision may therefore appeal, even if not having registered any prior interest during the application process. In my view, such right could be abused and should have been limited to the person making the request, the applicant whose application is being considered and any interested party who formally registers his interest at the onset of the application process as identified above.

Moreover, it should be noted that any person or 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 Regulations*' has a right to appeal such decision before the EPRT '*even where such a decision does not emanate from a development application process*'. Although for the time being, appeals from these

¹⁴Article 16 of the Environment and Planning Review Tribunal, 2016.

rulings shall not be decided by the EPRT, the words '*having a direct interest*' appear to be in conflict with the spirit of Article 22(1) which provides that interested parties who lodge an appeal in terms of the Act are not required to prove that they have an interest in that particular appeal in terms of the doctrine of juridical Interest.

It is interesting to note that under previous legislation, no appeal was possible '*by an interested third party from any development control decision concerning a development which is specifically authorized in a development plan*'.¹⁵ This article, although rarely invoked, served to dismiss a third party appeal against an approved development or use which was expressly allowed in the relative Local Plan. For example, in **Kunsill Lokali Xewkija kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**,¹⁶ the Planning Appeals Board threw out an appeal by the Xewkija Local Council who objected against a permit for the increase of industrial activity within an established factory situated in close proximity to a residential area. The Planning Appeals Board held that, in this case, no appeal should lie by an interested third party since the approved industrial use was expressly authorized in the relative Local Plan.

Under the Environment and Planning Review Tribunal Act, this provision has been done away with. It follows that interested third parties are no longer restricted from appealing against planning decisions pertaining to a development or use which is specifically authorized in the planning policies. Undoubtedly, this is understandable since planning decisions are no longer solely determined on the basis of planning policies. More so, the possibility for the EPRT to turn down an application for a particular project which conforms to a 'development plan' having gone through Parliamentary scrutiny is equally dangerous, since the EPRT would thus be ignoring the will of the democratically elected representatives of the people.

¹⁵Article 15(1)(d)(ii) of the Development Planning Act (Chapter 356 of the Laws of Malta), which was eventually replaced by Article (1)(c)(ii) of the Environment and Development Planning Act (The Environment and Development Planning Act of the Laws of Malta).

¹⁶Kunsill Lokali Xewkija vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar, decided on 24th July 2009 by the Planning Appeals Board - [Ap. No. PAB 46/06 ISB. PA 6039/05].

3.3 Special rights enjoyed by the Attorney General

It should be noted that, specifically in the case of appeals from a decision on an application for development permission, a decision on a planning control application relating to a change in alignment and on a decision on scheduling and conservation orders, the Attorney General may appeal on behalf of the Government *'notwithstanding that he has not submitted representations in writing'*.¹⁷ In the 2015 Tribunal Bill, it was proposed that the Attorney General could only appeal when the *'department, agency, authority or other body corporate wholly owned by the Government'* was not *'an external consultee'*. This provision was eventually done away with. Further on, the Act today provides that *'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'*.¹⁸

Against this background, external consultees are as a general rule, required to submit their representations in writing in order to be eligible to submit an eventual appeal. Should an external consultee, on the other hand, fail to submit the representations within the stipulated time frames, an appeal may still be filed though through the office of the Attorney General. As for the remaining *'departments, agencies, authorities or other body corporates wholly owned by the Government'* not being external consultees but who were consulted during the process and failed to react, an appeal may be filed which, unlike in the case of external consultees, need not be signed by the Attorney General.¹⁹ Really and truly, it may be argued that there might be a discrimination in the law in that the Attorney General and third parties are not treated on the same footing due to the

¹⁷Article 11(e) of the Environment and Planning Review Tribunal Act, 2016.

¹⁸Article 11(e) of the Environment and Planning Review Tribunal Act, 2016.

¹⁹Article 11(e) of the Environment and Planning Review Tribunal Act, 2016.

fact that an ordinary citizen loses his right to appeal if he does not file his written representations within the statutory 30 day period.

3.4 Powers which were intended to be given exclusively to Environmental Non Government Organizations (eNGOs)

The 2015 Tribunal Bill also provided that *'an Environmental NGO shall always be deemed for all intents and purposes of the law to be a registered interested person or party, provided that the appeal is related to an Environmental Impact Assessment or an IPPC permit'*. Essentially, this meant that eNGOs were to be given the opportunity to file an appeal against an Environmental Impact Assessment or an IPPC permit without the need to have formally registered any prior objection. Eventually, this provision was substituted to the effect that *'all persons having sufficient interest shall have access to a review procedure before the Tribunal to challenge a 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 permit (IPPC) permit'*.²⁰

The effects of the amended provision go to show that *'anyone having sufficient interest'* - therefore not only Environmental NGOs - has a right to appeal any decision consequential to a decision relating to *'development or an installation which is subject to an environmental impact assessment (EIA) or an integrated pollution prevention and control permit (IPPC) permit'*. Hence, it should be observed that the appeal must relate to the decision relating to the development which is subject to the EIA and not the contents of the EIA *per se*.

²⁰Article 11(e) of the Environment and Planning Review Tribunal Act, 2016.

Moreover, the words *'having sufficient interest'*, once again, should not be taken to mean that an appellant must satisfy a certain threshold of interest. It must be constantly recalled that all appeals made in terms of the Act are admissible once appellant provides *'reasoned grounds based on environmental and, or planning considerations to justify the appeal'* without the need to prove that he has an interest in that appeal in terms of the doctrine of juridical interest.²¹ Therefore, it is not clear why the legislator felt that he should adopt the *'sufficient interest'* principle.

3.5 Special Powers enjoyed by the Superintendent of Cultural Heritage

A new provision was introduced by Parliament at Committee Stage to the following effect: *'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.'*²² This article must be read in conjunction with Article 38(1) of the Environment and Planning Review Tribunal Act, 2016 which *inter alia* states that *'The decisions of the Tribunal shall be binding on the Planning Authority, external consultees, registered interested third parties and any other person and, or entity affected by the decision.'* Essentially, this means that a decision of the EPRT should bind all external consultees with the exception of the Superintendent of Cultural Heritage whose special powers stemming from Part VII of the Cultural Heritage Act are not compromised.

To illustrate this point by way of an example, the National Commission Persons with Disability cannot invoke enforcement action in terms of Part VI of Chapter 413²³ should it consider that a development approved by the EPRT fails to satisfy the *'justifiable hardship'*

²¹Article 22(1) of the Environment and Planning Review Tribunal Act, 2016 states: *'When an appeal has been lodged by an interested third party in terms of this Act, 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 such a person shall submit reasoned grounds based on environmental and, or planning considerations to justify his appeal.'*

²²Article 2(2) of the Environment and Planning Review Tribunal Act, 2016.

²³Chapter 413 of the Laws of Malta – Equal Opportunities (Persons with Disability) Act.

thresholds to enable derogation from the relative '*access for all standards*'. On the other hand, where the development relates to a scheduled property, the Superintendent of Cultural Heritage may still impose restrictions in terms of Article 44(3) of Part VII of the Cultural Heritage Act.