

# The new Planning Authority - the main structural changes

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## 1 Introduction

The Development Planning Act, 2016 (also referred to as 'new Planning Act' or '2016 Planning Act'), the Environment Protection Act, 2016 (also referred to as 'new Environment Protection Act') together with the Environment and Planning Review Tribunal Act, 2016 (also referred to as 'Tribunal Act') repealed the previous Environment and Development Planning Act.<sup>1</sup>

Article 3 of the new Planning Act puts the onus on 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*

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<sup>1</sup>Chapter 504 of the Laws of Malta - The Environment and Development Planning Act.

*sustainable land use planning system.*' To achieve this aim, Part II of the said Act sets out six principles,<sup>2</sup> described as *'fundamental to the Government of Malta'*. The following Article states that these principles are *'not directly enforceable'* in a Court of Law but should nonetheless be *'employed in the interpretation'* of the Act.<sup>3</sup>

On the other hand, the Environment Protection Act, 2016 aims *'to protect the environment and to assist in the taking of preventive and remedial measures to protect the environment and manage natural resources in a sustainable manner.'*<sup>4</sup>

Consequently, the new Planning Act is concerned with the use of the land whereas the new Environment Protection Act deals primarily with the management of our environment and natural resources. Simply said, the responsibilities previously assumed by a single Authority – the Malta and Environment Planning Authority (the MEPA) – will henceforth be handled by two Authorities which shall work independently from each other, namely the Environment and Resources Authority and the Planning Authority.

## **1.1 The Planning Authority**

Article 5 of the Development Planning Act, 2016 provides that *'the Planning Authority shall consist of the Executive Council and the Planning Board'*. The Executive Council and the Planning Board are vested with different functions and their respective roles are highlighted in Articles 38 and 64 of the Act.

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<sup>2</sup>The six principles, found under Article 3 of the Development Planning Act, 2016, are as follows:

*'(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;*

*(f) to consider public values, costs, benefits, risks and uncertainties involved when taking any decisions.'*

<sup>3</sup>Article 4 of the Development Planning Act, 2016.

<sup>4</sup>Article 3 of the Environment Protection Act, 2016.

The new Planning Authority was designed *'to perform and succeed to the functions which were previously assigned to the Malta Environment and Planning Authority'*<sup>5</sup> in as far as planning legislation is concerned. At the same time, the scope of the Authority was widened to embrace new functions. Indeed, *'the functions which were previously assigned to the Building Regulation Board and the Building Regulation Office under the provisions of the Building Regulation Act'* have now been also assigned to the new Planning Authority<sup>6</sup> though at Committee stage, Parliament decided that such functions *'shall only come into force from such dates as may be established by notice in the Gazette, as prescribed by the Minister.'*<sup>7</sup> This signifies that building regulations are still temporarily governed by the Building Regulations Act.<sup>8</sup>

On the other hand, the new Planning Authority immediately took over the role of the General Services Board, in so far as sanitary regulations previously found in Part V of the Code of Police Laws are concerned. This is possible now since the Development Planning Act, 2016 confers upon the Minister or Parliamentary Secretary under whose portfolio the Planning Authority is included with a power to make regulations, *inter alia* providing for any *'sanitary'* matter<sup>9</sup> and concurrently he may also *'amend, substitute or repeal any of the provisions of Part V of the Code of Police Laws.... by order in the Gazette'* without the need to go to Parliament.<sup>10,11</sup> Indeed, the Development Planning (Health and Sanitary) Regulations, 2016<sup>12</sup> shall eventually replace the corresponding provisions in the

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<sup>5</sup>Article 7(2)(a) of the Development Planning Act, 2016.

<sup>6</sup>Article 7(2)(d) of the Development Planning Act, 2016.

<sup>7</sup>Article 35(5) of the Development Planning Act, 2016 states that *'The provisions of Articles 33(2)(c), 38(1)(o), 62, 64 (1)(b), (c), (d) and (e), 77(4), 86, 87, 88, 89, 90, 91 and 92 shall come into force from such dates as may be established by notice in the Gazette, as prescribed by the Minister.'*

<sup>8</sup>Chapter 513 of the Laws of Malta – Building Regulation Act.

<sup>9</sup>Article 85(2)(e) of the Development Planning Act, 2016.

<sup>10</sup>Article 93(1) of the Development Planning Act, 2016.

<sup>11</sup>Article 61(2)(o)(i) of the Environment and Development Act already provided the Minister with the power to *'regulate buildings and the construction, demolition or alteration thereof, as well as any other matter relating thereto, taking account of all relevant considerations, including safety, aesthetics, health, environment and sanitation'*. Therefore, the Minister could possibly enact sanitary regulations under previous legislation, even though such power was never utilized.

<sup>12</sup>Bill entitled Development Planning (Health and Sanitary) Regulations, 2016 – Published April 2016.

Code of Police Laws. Certainly, the new sanitary regulations are considered to mark a step forward in our planning system for different reasons. First of all, sanitary regulations were long overdue, some of which dated back to the nineteenth century. Moreover, the new regulations respond better to today's socioeconomic realities, making use of '*recognized standards as established from time to time*'<sup>13</sup> while having regard to technological advancements such as mechanically automated ventilation systems.<sup>14</sup> Another positive aspect to this change is that unlike what previously happened, the development application process need no longer be stalled until a controversy on sanitary matters is settled before the General Services Board because such sanitary issues are now dealt straightaway by the Planning Authority with reservation to an eventual appeal before the Environment and Planning Review Tribunal should the need arise.

The new Planning Authority will assume another role which, pending the introduction of the Development Planning Act, 2016, has been alien to our legal system. Today, the Authority has a role to '*facilitate and coordinate the permit granting process for projects of common interest*'.<sup>15</sup> These '*projects of common interest*' are rooted in Regulation (EU) No 347/2013 which in April 2013 was included to form part of the so called Energy Infrastructure package previously proposed by the European Commission in October 2011. The said Regulation is *inter alia* aimed to promote accelerated licensing procedures regarding the provision of electricity interconnections and gas pipelines that connect an EU Member State to an Energy Community Contracting Party.<sup>16</sup> In fact, Article

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<sup>13</sup>Article 10(1) of the Bill entitled Development Planning (Health and Sanitary) Regulations, 2016 – Published April 2016.

<sup>14</sup>Article 18 of the Bill entitled Development Planning (Health and Sanitary) Regulations, 2016 – Published April 2016.

<sup>15</sup>Article 7(2)(d) of the Development Planning Act, 2016.

<sup>16</sup>'Adoption and adaptation of the Regulation No. 347/2013/EU on Guidelines for trans European energy infrastructure and repealing Decision No. 1364/2006/EC ECS Note for the PHLG discussion in December 2013.' downloadable from [https://www.energycommunity.org/portal/page/portal/ENC\\_HOME/DOCS/2496182/ANNEX\\_3\\_31st\\_PHLG\\_Regulation\\_347-2013\\_18-11-2013.pdf](https://www.energycommunity.org/portal/page/portal/ENC_HOME/DOCS/2496182/ANNEX_3_31st_PHLG_Regulation_347-2013_18-11-2013.pdf).

8 of the said Regulation committed all EU Member States, including the Maltese Government, to *'designate one national competent authority which shall be responsible for facilitating and coordinating the permit granting process for projects of common interest'* by not later than 16<sup>th</sup> November 2013.<sup>17</sup> Consequently, as a result, the Planning Authority was identified in the 2015 Planning Bill as the *'competent authority'* to this effect. During public consultation which was triggered following the publication of the 2015 Planning Bill, the Kummissjoni Interdjocesana Ambjent<sup>18</sup> maintained that *"facilitating and granting permits at the same time points to a confusion of roles and functions which would lead to abuse."* On the same subject, planning consultant Dr. John Ebejer<sup>19</sup> stated that *"the role of the Planning Authority is to process applications for development and not to 'facilitate' any 'permit granting'".* At Committee stage, the Hon. Marlene Farrugia eventually moved an amendment to delete draft Article 7(2)(d) altogether and introduce the text *'to safeguard the common good and to ensure that permits issued for land development are so issued in the interests for the whole community'*. But still, the Hon. Farrugia lost sight of the principal purpose behind the said Article and came up with no alternative as to who should instead oversee such role. Naturally, the said amendment would have eliminated the possibility for government to meet the obligations set out in Regulation (EU) No 347/2013 and this latter amendment failed to make it through the final Act. The author is of the firm opinion that no one else but the Planning Authority is equipped with the necessary resources to *'organize the permit granting process'*. The alternative, which however would have made little sense in the circumstances, was to set up another *'competent authority'* in keeping with the obligations of the said Regulation.

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<sup>17</sup>Article 8 of Regulation (EU) No. 347/2013 which relates to organization of the permit granting process.

<sup>18</sup>Reactions to the proposed MEPA Demerger from Kummissjoni Interdjocesana Ambjent downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

<sup>19</sup>Reactions to the proposed MEPA Demerger from Dr. John Ebejer downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

## 1.2 The Executive Council

Part V of the Development Planning Act, 2016 is dedicated entirely to the Executive Council. The various functions of the Executive Council are listed in Article 38(1) of the current Act and include *inter alia* the provision of a centralized office where all development applications are duly processed by case officers and recommended for either approval or refusal. The Council is also responsible for the carrying out of national mapping together with street alignments/levels. The said roles were previously assumed by the Planning Directorate within the MEPA. Moreover, the Council handles the coordination of enforcement complaints and enforcement operations, which functions were previously handled by the Enforcement Directorate.

Although the Executive Council is now directly responsible for the said functions, it is obvious that such functions would still need to be delegated to a duly equipped technical set up. The only difference is that under the previous legislation, the Directorates and their respective functions were specified in the law whereas, under the new Planning Act, the relative Directorates are set up by the Council.

Additionally, the Council has the power to issue discontinuance and removal orders<sup>20</sup> as well as to issue scheduling and conservation orders.<sup>21</sup> Plans and policies<sup>22</sup>, minor modifications including planning control applications<sup>23</sup> and development orders<sup>24</sup> are also formulated by the Executive Council. In the past, it was the MEPA Board who was responsible for these functions.

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<sup>20</sup>Article 56 of the Development Planning Act, 2016.

<sup>21</sup>Article 57 of the Development Planning Act, 2016.

<sup>22</sup>Article 41 of the Development Planning Act, 2016.

<sup>23</sup>Article 63(2) of the Development Planning Act, 2016.

<sup>24</sup>Article 55 of the Development Planning Act, 2016.

Article 36 of the Development Planning Act, 2016 details the composition of *the Executive Council*. The Council is headed by an Executive Chairperson appointed by the Minister *‘for a period of three years which may be extended for further periods of three years each’*<sup>25</sup> as envisaged earlier in the Planning Bill. Subsequently, a provision was added at Committee stage so that *‘a member who has ceased to be a member of the Executive Council shall be eligible for reappointment, but no person shall be a member of the Executive Council for more than six years.’*<sup>26</sup> It follows that now the Executive Chairperson can have his initial three year appointment extended only once.

The Executive Chairperson is joined by six other members – the chairperson and deputy chairperson of the Planning Board *ex officio* , two independent members *‘who shall be appointed by the Minister’* and two members appointed by the Environment and Resources Authority. The latter shall only be present *‘whenever the Executive Council is considering matters related to policies, scheduling and planning control applications’*. The Superintendent of Cultural Heritage shall be called in when the Council is considering *‘scheduling, conservation orders and emergency conservation orders’*.<sup>27</sup> Moreover, the *‘Executive Council at the discretion of the Executive Chairperson’* may call in any of the observatory members listed in the Fourth Schedule of the Act to participate in any appointed Council meeting.

Initially, the 2015 Planning Bill proposed that the independent members would be *‘two permanent members who shall be well versed in matters related to building construction or health and safety or building services’*. More so, Dr. John Ebejer<sup>28</sup> had also suggested that these two same members should be *“appropriately qualified”* and insisted further that the law should establish *“the minimum qualifications for such members”*.

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<sup>25</sup>Article 37(1) of the Development Planning Act, 2016.

<sup>26</sup>Article 36(5) of the Development Planning Act, 2016.

<sup>27</sup>Article 36(2) of the Development Planning Act, 2016.

<sup>28</sup>Reactions to the proposed MEPA Demerger from Dr. John Ebejer downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

Considering that the Executive Council deals primarily with technical matters, the latter suggestion appears to have been well founded. Having said that, the Act did away with the suggestion that these two members are required *ex lege* to have any specific expertise and in the final Act, the said members are merely described as ‘independent’. Clearly, this indicates that the legislator wanted to have a wider option as to the eventual appointees.

It is to be noted that the presence of Environment and Resources Authority members on the Executive Council was also the subject of a long debate. The Dean of the Faculty of Laws, Professor Kevin Aquilina,<sup>29</sup> termed the status of these two members as “*second class members*”. The issue arose due to the fact that Article 36(2) of the 2015 Planning Bill provided that only four of the six members would be ‘*permanent members*’. Ebejer<sup>30</sup> also questioned whether “*the MEA representatives are permanent, supplementary or called in at the whim of the Executive Chairperson*” though the Hon. Dr. Michael Falzon<sup>31</sup> had already given an answer in Parliament:

*“Fuq dan il-kunsill qed nagħmluha ċara li se jkun hemm żewġ membri tal-awtorità l-ġdida tal-ambjent. Mhux li se jiġu konsultati okkażjonalment jew at whims and wishes tal-membri l-oħra tal-kunsill eżekuttiv kif hawn min qed jifhem imma se jkun hemm żewġ membri permanenti li jirrapprezentaw lill-awtorità tal-ambjent. Dan qiegħed hemm u minkejja dak kollu li jingħad, juri l-importanza li din l-amministrazzjoni, dan il-Gvern qed jagħti lill-ambjent..... fuq il-leġiżlattiv tal-awtorità l-ġdida tal-ippjanar se jkun hemm żewġ membri permanenti li jirrapprezentaw l-awtorità tal-ambjent. Dan qed ngħidu biex mill-ewwel naqta’ ras il-misconceptions li hawn. Naħseb li nistgħu ma naqblux fuq ħafna affarijiet, imma fuq din għandna naqblu.....Il-kunsill eżekuttiv li jkun il-policy making body tal-awtorità l-ġdida tal-ippjanar se jkollu żewġ membri permanenti li jirrapprezentaw lill-*

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<sup>29</sup>Kevin Aquilina: *Twenty reasons against MEPA’s Demerger*. Article published on maltatoday.com.mt. - 29<sup>th</sup> July 2015.

<sup>30</sup>Reactions to the proposed MEPA Demerger from Dr. John Ebejer downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

<sup>31</sup>Sitting No. 287 held on 8<sup>th</sup> July 2015 - House of Representatives, Malta.

*awtorità tal-ambjent. Dan għandu jassigura li kull policy - u din hija importanti – tal-ippjanar se jkollha mill-ewwel, mill-conception tagħha, mill-bidu tagħha, fit-tfassil tagħha, is-say ta' min iħares il-bżonnijiet ambjentali ta' pajjiżna. .... Dan huwa punt li qed nagħmluh ċar mill-bidu nett li dawn iż-żewġ membri huma permanenti, mhumiex qegħdin hemm biss għall-konsultazzjoni imma se jkunu involuti fit-tfassil ta' kull policy tal-ippjanar. Kull policy tal-ippjanar trid tgħaddi minn kunsill eżekuttiv li se jkollu l-preżenza ta' żewġ membri mill-awtorità tal-ambjent li se titwaqqaf.”*

In order to dispel any doubts as to whether the ERA members would only be “called in at the whim of the Executive Chairperson” as previously thought, Parliament eventually amended Article 36(2)(d), so that it is now more evident that the two ERA members ‘will always be called in and without fail, to attend meetings of the Executive Council by the Executive Chairperson whenever the Executive Council is considering matters related to policies, scheduling and planning control applications’. Clearly, government wanted to convey the message that all planning policies would still be vetted from an environmental point of view during the actual formulation. Nonetheless, it may be equally argued that such ‘assurance’ is open to abuse as it lies in the absolute discretion of the Executive Chairman to decide whether the matters under consideration are related to policies, scheduling or planning control applications.

Furthermore, the 2015 Planning Bill had envisaged the possibility for the Executive Chairperson to call ‘any other supplementary member’ representing any one of the entities listed in the Fourth Schedule of the Act ‘to attend meetings of the Executive Council’. Here, the idea was to also involve other government stakeholders in the actual formulation of planning policies. The Hon. Dr. Michael Falzon quoted the outside catering policy as a test example, which policy was being revisited by an *ad hoc* committee involving the MEPA, the Lands Authority, the Malta Tourism Authority and Transport Malta. This committee was incidentally set up a few weeks prior to the current Planning Act was discussed in Parliament and the Hon. Dr. Michael Falzon<sup>32</sup> took the

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<sup>32</sup>Sitting No. 287 held on 8<sup>th</sup> July 2015 - House of Representatives, Malta.

opportunity to explain that the Executive Council would now provide a permanent framework where similar policies may be drawn up with the joint participation of various government stakeholders:

*“...fit-tfassil tal-policies l-istess kunsill se jkun jista’ jlaqqa’ rappreżentanti ta’ entitajiet u rappreżentanti ta’ aġenziji oħrajn tal-Gvern. Hija xi ħaġa li rridu nibdew inħarsu lejha b’mod open ended, li naraw li jkun hemm l-involviment tal-stakeholders li huma entitajiet u aġenziji oħrajn tal-Gvern. Jekk qed nitkellmu fuq xi ħaġa li hija ta’ interess u ta’ relevanza għal oqsma oħra tal-Gvern, x’hemm ħażin li ninvolvuhom? Anke fil-preżent, ħdimna u qed naħdmu fuq l-outside catering policy fuq public spaces. X’hemm ħażin billi ddiskutejna u tkellimna ma’ Awtoritajiet oħrajn, ma’ aġenziji oħrajn bħalma pereżempju l-MTA u Transport Malta? Dik hija xi ħaġa li għandha twassal għall-approċċ iktar ħolistiku, approċċ iktar komprensiv. Preċiżament il-liġi se tagħti l-fakultà li l-kunsill eżekuttiv ikun jista’ jlaqqa’ rappreżentanti tal-entitajiet, aġenziji oħrajn tal-Gvern. Aħjar nagħmluha tajjeb mill-ewwel, aħjar ninvolvu lil min huwa interessat.”*

During public consultation, Dr. John Ebejer<sup>33</sup> had underlined that it was not clear “*which of the Council Members will have voting rights*”, and asked whether the supplementary members would also be given such voting rights. This position was later clarified in the final Article 36(2)(e), which confirmed that the supplementary members who ‘*shall be amongst those listed in ‘the Fourth Schedule’*’ enjoy merely an ‘*observatory*’ status and therefore are entrusted with no voting powers.

On the same subject, Perit Simone Vella Lenecker<sup>34</sup> positively pointed out that “*even with the best of intentions, it may be very easy for the Executive Chairperson to fail to call in members who are affected by a decision or a policy*”. Apart from the two ERA members, who ‘*will always be called in and without fail*’ with a right to vote and the

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<sup>33</sup>Reactions to the proposed MEPA Demerger from Dr. John Ebejer downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

<sup>34</sup>Reactions to the proposed MEPA Demerger from Perit Simone Vella Lenicker downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

Superintendent of Cultural Heritage who, following an amendment at Committee stage, shall *'always'* be called in as an observatory member *'when the Executive Council is considering scheduling and conservation orders and emergency conservation orders'*, it is correct to assert that the other members are only called in *"at the whim"* of the Executive Chairperson.

It should be further highlighted that the Environment and Resources Authority, which was initially listed in Schedule Four of the 2015 Planning Bill, was eventually removed from the list since its status on the Council was already dealt with in Article 36 of the new Planning Act. More so, Heritage Malta, which was previously identified as one of the supplementary members (this term was eventually replaced by *'observatory members'*) is now substituted by the *'Superintendent of Cultural Heritage'*. Indeed, it was Din L-Art Helwa<sup>35</sup> who during public consultation insisted that *"the list of supplementary members of the Executive Council should refer to the Heritage regulator, that is, the Superintendence for Cultural Heritage and not the heritage agency (Heritage Malta)."*

### **1.2.1 The Executive Chairperson**

The role of the Executive Chairperson is specifically dealt with in Article 37 of the new Planning Act. As discussed above, the Executive Chairperson's appointment by the Minister may not exceed an aggregate of six years in total. Initially, the Kummissjoni Interdjocesana Ambjent<sup>36</sup> opposed the idea that the Executive Chairperson could be dismissed by the Minister,<sup>37</sup> insisting that such proposal *"flushes down the drain all sense of organizational governance in the Authority"*. The Kummissjoni argued that *"if the*

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<sup>35</sup>Comments on the proposed MEPA Demerger from Din L-Art Helwa downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

<sup>36</sup>Reactions to the proposed MEPA Demerger from the Kummissjoni Interdjocesana Ambjent downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

<sup>37</sup>Article 37(3) of the Bill entitled Development Planning Act, 2015 – Published July 2015.

*Executive Chairperson in his/her conscience cannot accede to a request by the Minister, then he/she may be simply dismissed.”* On the matter under examination, Din L-Art Helwa<sup>38</sup> reiterated that *“the appointment/dismissal of the Executive Chairperson should rest with the Parliamentary Committee for the Environment and Development.”* To counter act this criticism, Article 37(3) of the Planning Act was eventually amended by Parliament so that today the Executive Chairperson may be only be dismissed by a Resolution of the House of Representatives *‘at any time for a just cause.’* This signifies that the Minister would still be able to take action against the Executive Chairperson should the latter fail to meet his expectations. The apparent difference is that the Minister would have to get Parliament on board prior to the Chairperson’s dismissal. In reality, today, this could be much easier since the Prime Minister has within his portfolio the responsibility of the Planning Authority and it is unlikely that the Members of Parliament of his own party would cross swords with him.

The responsibilities of the Executive Chairperson are delineated in Articles 38(2)(a)-(f) of the Act. These same responsibilities are principally directed to ensure *‘the implementation of the objectives of the Authority as set by the Executive Council’*<sup>39</sup> and include *inter alia* the supervision and control of the Directorates and departments *‘for the proper functioning of the Authority’*.<sup>40</sup> Directorates, along with the respective responsibilities, are established by the Executive Council.<sup>41</sup> On the other hand, departments may, unlike the Directorates, be set up directly by the Executive Chairperson.<sup>42</sup> At face value, it is possible to argue that all the executive power of the Authority is now concentrated in one office – the Executive Council. Certainly, this idea does not bode well with those who fear that ‘power corrupts and absolute power

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<sup>38</sup>Comments on the proposed MEPA Demerger from Din L-Art Helwa downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

<sup>39</sup>Article 37(2) of the Development Planning Act, 2016.

<sup>40</sup>Article 37(2)(a) of the Development Planning Act, 2016.

<sup>41</sup>Article 39(1) of the Development Planning Act, 2016.

<sup>42</sup>Article 39(2)(a) of the Development Planning Act, 2016.

corrupts absolutely'. The situation was very different under the Environment and Development Planning Act since the Directorates were then specifically established by law.

In addition, the Executive Chairman shall '*establish and co-ordinate working groups that are set up from time to time to formulate policies, plans or regulations*'.<sup>43</sup> This implies that the Executive Chairperson may choose to handle such working groups without prior endorsement from the Council, although failure to do so, in my opinion, would not be desirable. Incidentally, the Opposition spokesman on the MEPA Board had in 2013 publicly objected to the setting up of a number of working groups appointed by the then MEPA's Chief Executive Officer to formulate policy proposals without the Board's prior endorsement. Today, such an issue is unlikely to crop up particularly on two grounds. In the first place, members of the House of Representatives are not represented on the Executive Council. In the second place, the Executive Chairperson, as already indicated, is not bound to seek any direction prior to the appointment of working groups.

### **1.3 The Planning Board**

The functions of the Planning Board<sup>44</sup> are set out in Article 64(a)–(e) of the new Planning Act. Essentially, the Planning Board shall be responsible for the issuing of development permissions, taking over the decision role of the MEPA Board. Similarly as in previous legislation, planning decisions would still be subject to an appeal before the Environment and Planning Review Tribunal, whose decision shall be final unless an appeal is made to the Civil Court (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*'.<sup>45</sup>

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<sup>43</sup>Article 37(2)(b) of the Development Planning Act, 2016.

<sup>44</sup>Article 63(2) of the Development Planning Act, 2016.

<sup>45</sup>Article 39 of the Environment and Planning Review Tribunal Act, 2016.

This goes to show that Front ODZ's<sup>46</sup> statements to the effect that *“government's demerger of MEPA will also give too much power to the respective Minister, who can override Planning Authority decisions”* were ill founded.

Moreover, the Planning Board is now tasked with additional powers which previously fell outside the parameters of the MEPA's competence. These include the ability to dispense with or allow the relaxation of a requirement of building regulations and the examination of applications for the issuing of licenses of masons and consultants in the building industry. Nevertheless, the Planning Board shall be empowered to decide on such matters once the Minister so decides.<sup>47</sup>

The Planning Board will, on the other hand, no longer assume certain functions which the MEPA Board previously enjoyed. As already stated in the previous section, plans and policies,<sup>48</sup> minor modifications including planning control applications,<sup>49</sup> development orders,<sup>50</sup> discontinuance and removal orders<sup>51</sup> as well as scheduling and conservation orders<sup>52</sup> are now decided by the Executive Council - the policy making organ within the new Authority.

The Planning Board consists of a chairperson chosen from amongst five independent members *‘of known integrity and with knowledge and experience’* in different areas of interest. The other Board members are as follows: one member chosen from amongst the chairpersons of the Planning Commissions,<sup>53</sup> two members of the House of Representatives nominated by the Prime Minister and the Leader of the Opposition

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<sup>46</sup>Reactions to the proposed MEPA Demerger from Front Harsien ODZ downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

<sup>47</sup>Article 35(5) of the Development Planning Act, 2016.

<sup>48</sup>Article 41 of the Development Planning Act, 2016.

<sup>49</sup>Article 63(2) of the Development Planning Act, 2016.

<sup>50</sup>Article 55 of the Development Planning Act, 2016.

<sup>51</sup>Article 56 of the Development Planning Act, 2016.

<sup>52</sup>Article 57 of the Development Planning Act, 2016.

<sup>53</sup>The Planning Commissions shall be dealt with later.

respectively, a member representing the Environment and Resources Authority, a member nominated by environmental NGOs (eNGOs), three public officers and a member chosen by the Local Council who shall sit on the Board when a major project application lies within its boundary.

The independent members and the eNGOs representative shall hold office for *'a period of not less than three years'*<sup>54</sup> and *'may not be removed from office except by a resolution of the House of Representatives on the ground of misconduct or inability to perform the duties of their office.'*<sup>55</sup> Likewise, members representing the Local Council have their term of appointment expired once the Board decides the relative application<sup>56</sup> whereas the two Members of Parliament do not remain Board members once they are no longer elected members of the House.<sup>57</sup> On the other hand, the three public officers may be removed by the Minister's whim at any time.<sup>58</sup> Clearly, this undermines the perceived 'autonomy' of the Board. The legislator should have therefore considered whether such appointees are guaranteed the same security of tenure entrusted to the independent members. In all cases, however, no member may serve on the Planning Board for an aggregate period exceeding six years.<sup>59</sup>

Although the composition of the Planning Board appears to be the equivalent of the MEPA Board, there are remarkable differences which shall be identified. Namely, Mr. Alex Vella, a member of the Malta Ramblers Association, sat on the MEPA Board as an independent member despite the fact that government was not then legally obliged to appoint a member representing the interests of eNGOs. Today, the situation is different since the Planning Board shall specifically have *'a member representing the interests of*

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<sup>54</sup>Article 63(5) of the Development Planning Act, 2016.

<sup>55</sup>Article 63(6) of the Development Planning Act, 2016.

<sup>56</sup>Article 63(7) of the Development Planning Act, 2016.

<sup>57</sup>Article 63(8) of the Development Planning Act, 2016.

<sup>58</sup>Article 63(8) of the Development Planning Act, 2016.

<sup>59</sup>Article 63(9) of the Development Planning Act, 2016.

*environmental NGOs* and who shall be also nominated by the eNGOs themselves, although the said nomination would still need to be endorsed by government.

For the first time, Local Councils are also represented in the permitting process, even though in limited circumstances, namely *‘when the Planning Board is deliberating and deciding a major application between the boundaries of that particular local council’*.<sup>60</sup> The Act also envisages situations where a major project lies within multiple boundaries in which case the respective Local Councils shall choose between themselves one person to represent them. In that case, the members shall be nominated by the different Local Councils but then subsequently chosen by the Minister.<sup>61</sup> It is pertinent to point out that the Act simply states that the member must be *‘chosen’* by the Local Council and fails to mention whether such member must be an elected local councilor.

The environment regulator, namely the ERA, is also represented on the Planning Board and has a vote on planning decisions. By contrast, the role of the former environment Directorate within the MEPA was limited to recommending planning applications for a decision without having a say in the final permit. Of course, this was understandable since the Environment Directorate, then MEPA’s technical arm on environmental matters, could not act as a judge and jury within one and same Authority. Following the MEPA’s demerger, the environment regulator gained its autonomy and thus now may have a direct say in planning decisions.

In this respect, Front Harsien ODZ<sup>62</sup> was therefore incorrect to conclude that *“the proposed legislation weakens civil society participation in decision-making processes”*. If anything, the direct presence of Local Councils and environmental organizations on the Planning Board reflects a wider representation of civil society. Nevertheless, it must be

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<sup>60</sup>Article 63(2)(h) of the Development Planning Act, 2016.

<sup>61</sup>Article 63 (2)(h) of the Development Planning Act, 2016.

<sup>62</sup>Reactions to the proposed MEPA Demerger from Front Harsien ODZ downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

recalled that both Local Councils and the Malta and Environment Authority are ‘external consultees’ in terms of Schedule Three of the proposed application regulations<sup>63</sup> and are thus formally consulted during the processing of each development application. So what would be the position if the Local Council would have already expressed its objection to the application during its processing? Would the Local Council representative be still eligible to sit in judgment? There is no clear reply in our law. Such hypothetical scenarios are catered for under section 25 (2) of the UK Localism Act (2011) which provides that ‘a decision-maker is not to be taken to have had, or to have appeared to have had, a closed mind when making the decision just because the decision-maker had previously done anything that directly or indirectly indicated what view the decision-maker took, or would or might take, in relation to a matter, and the matter was relevant to the decision.’ Nevertheless, no equivalent provision finds solace in our current legislation. Thus, the legal situation where members express themselves prior to a planning decision remains nebulous.

#### **1.4 Does separation of powers really exist?**

During the second reading in Parliament, the Hon. Dr. Michael Falzon<sup>64</sup> justified the establishment of the Executive Council and the Planning Board as follows:

*“Fil-liġi l-ġdida, wieħed mill-prinċipji fundamentali huwa li qed inħarsu lejha li jkun hemm iktar separazzjoni tal-poter. Qed jiġi propost li jkun hemm organu li jvara l-policies, li jagħmel il-policies. Dak nistgħu nsejnhulu l-organu legiżlattiv, il-policy making organ, il-kunsill eżekuttiv imbagħad ikollok l-organu l-ieħor li jiddeċiedi l-permessi li huwa l-planning board. Nerġa’ ngħid, jekk nagħmlu analogija legali f’pajjiżi fejn għandek id-demokrazija, għandek dak li jista’ jittqies bħala l-legiżlattiv u dak li jista’ jittqies bħala l-eżekuttiv. Hija xi ħaġa li qed inħarsu lejha biex preċiżament ikollna mhux biss separazzjoni ta’ poter*

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<sup>63</sup>Bill entitled Development Planning (Procedure for Applications and their Determination) Regulations, 2016 – Published April 2016.

<sup>64</sup>Sitting No. 287 held on 8<sup>th</sup> July 2015 - House of Representatives, Malta.

*imma wkoll delineament ta' responsabilitajiet li fl-aħħar mill-aħħar hija xi ħaġa meqjusa standard, kwazi kwazi sine qua non f'amministrazzjoni pubblika."*

The Hon. Dr. Michael Falzon asserted that shifting the policy/executive functions away from the permit realm reflects the doctrine of separation of powers embraced in our administrative laws, though, in effect, the 'separation of power' is not complete as contended. Indeed, the chairperson and the deputy chairperson of the Planning Board both sit permanently on the Executive Council where planning policies are formulated whereas the ERA is represented on both the Executive Council and the Planning Board. Consequently, the Executive Council is more akin to a subset of the Planning Board which answers to a chief executive officer, who in turn has 'no say' in permit decisions.

In practice, having an Executive Council consisting of six members (at times, seven once the Superintendent for Cultural Heritage is called in) focusing on policy formulation should augur well in terms of a more efficient planning system. This should be seen in the light that the MEPA Board used to dedicate most of its time debating controversial planning decisions and thus giving minimal attention to policy making. This can be confirmed from the fact that the MEPA Board used to meet only once a week and its agenda was mainly directed to decision taking on pending applications. As already pointed out, the Executive Council has also the possibility to bring other stakeholders to assist it in policy making - a situation which was previously alien to our planning system. Also, since the chairpersons of the Planning Board and the Commission are both well versed with the issue of permits, their experience can be of great benefit to all and sundry.

As clearly anticipated, the current composition of the Council was met with substantial disapproval from both eNGOs and the Nationalist Opposition. In their reaction to the

Planning Bill, the Kummissjoni Interdjocesana Ambjent<sup>65</sup> asserted that *“the Council’s composition is weak and should have had a wider representation on the same line of the MEPA Board.”* The NGO Din L-Art Helwa<sup>66</sup>, described the Executive Council as *“the Planning Authority’s main board”* and further argued that the Executive Chairperson who *“will assume all the functions of the current Chief Executive Officer together with all the duties of the current MEPA Board and some duties of the current Director of Planning”* will be subjected to *“reduced accountability given the absence of an independent Board”*. Din L-Art Helwa further warned that the *“proposed system is manifestly less transparent, with far too much power vested in a smaller, politically appointed executive body and executive chairman”* and went on to suggest that *“the membership should be increased to include at least five independent members, at least one member representing eNGOs”*. As an alternative, Din L-Art Helwa had suggested a rather complicated structure where a chief executive officer would be answerable to the Executive Council headed by another chairperson.

In my view, the above criticism is not entirely justified. To begin with, the idea that *“the Executive Council is the Planning Authority’s main board”*<sup>67</sup> is a complete misnomer once the Planning Board has the ultimate say in planning decisions. It is to be emphasized that the Executive Chairperson has only a *‘right to be present and participate at all its meetings’* (of the Planning Board), without the right to vote.<sup>68</sup> Likewise, the interests of the environment are amply safeguarded since two out of the six members sitting on the Council actually represent the Environment and Resources Authority.

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<sup>65</sup>Reactions to the proposed MEPA Demerger from the Kummissjoni Interdjocesana Ambjent downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

<sup>66</sup>Comments on the proposed MEPA Demerger from Din L-Art Helwa downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

<sup>67</sup>Comments on the proposed MEPA Demerger from Din L-Art Helwa downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

<sup>68</sup>Article 11(2) of the Development Planning Act, 2016.

## 1.5 The Planning Commissions

The Planning Commissions<sup>69</sup> are the equivalent of the former Environment and Planning Commissions. The Commissions may determine all planning applications delegated to it by the Planning Board, except for those listed in Article 75 of the 2016 Planning Act.<sup>70</sup> There may be as many number of divisions dealing with different type of applications as the Minister may from time to time prescribe. In contrast with the former Environment and Planning Commission, the number of sitting members shall be reduced from five to three. The members are appointed for a period of four years which may be further extended to another four years and may be dismissed in the same manner as the independent members sitting on the Planning Board. The quorum of the Commission shall be two, in which case the Chairperson has a second or casting vote.<sup>71</sup> To avoid situations wherein a casting vote would be necessary, the legislator included a supplementary member concurrently with the other three permanent members but who shall only take part in the deliberations when any of the permanent members '*cannot for any reasonable cause, properly fulfill his duties*'.

## 1.6 Other Committees

The Development Planning Act, 2016 saw the introduction of two Committees – the Agricultural Advisory Committee<sup>72</sup> and the Design Advisory Committee.<sup>73</sup> Indeed, an Agricultural Advisory Committee had already been set up in August 2014 following the

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<sup>69</sup>Article 65 of the Development Planning Act, 2016.

<sup>70</sup>Article 75 of the Development Planning Act, 2016 provides as follows: '*(a) applications in respect of an activity or development of a national or strategic significance or affecting matters of national security or other national interests; (b) applications in respect of an activity or development which could affect the interests of other governments; (c) applications in respect of development which is subject to an environmental impact statement; (d) requests for reconsideration where the decision to be reconsidered was taken by the Planning Board itself.*'

<sup>71</sup>Second Schedule Development Planning Act, 2016.

<sup>72</sup>Article 66 of the Development Planning Act, 2016.

<sup>73</sup>Article 67 of the Development Planning Act, 2016.

promulgation of the Rural Policy and Design Guidance<sup>74</sup> but was not included in the previous Environment and Development Planning Act. The Committee's mandate was in fact clearly spelt out for the first time in the Development Planning Act, 2016<sup>75</sup> whereby, presently, the Committee is not only expected to evaluate proposals and provide expert advice in terms of sustainable agriculture, but also to *'collate information regarding applications related to agriculture.'*<sup>76</sup> This Committee is therefore expected to collect information from the relative Government Departments on behalf of applicants, which information may be required throughout the application process. The Hon. Dr. Michael Falzon<sup>77</sup> made the following observation in respect of the Agriculture Advisory Committee:

*"Xi ħaġa ġdida li se titwaqqaf ukoll bis-saħħa tal-liġi l-ġdida hija l-AAC, l-Agriculture Advisory Committee..... din il-liġi se tipprovi għal kumitat ta' konsulenza dwar l-agrikoltura. Ovvjament mhemmx dubju - u hekk għandu jkun - li l-għan ewlieni tiegħu se jkun li jassisti applikanti bdiewa u raħħala fil-ġbir tal-informazzjoni fejn ikun hemm bżonn, imma wkoll għandu - u naħseb li huwa hawnhekk fejn irridu nagħmlu l-quantum leap ilkoll kemm aħna - jħares ukoll lejn żvilupp agrikolu aktar sostenibbli u li jagħmel aktar sens."*

The Design Advisory Committee (DAC) is another novelty in the new Planning Act. Nevertheless, prior to 1992, planning permits were issued by the Planning Areas Permit Board (PAPB) subject to the endorsement of an Aesthetics Board. The role of the DAC is to make recommendations in relation to design in development applications related to urban conservation areas and major projects and, unlike the aesthetics board, their recommendations may be overruled by the Planning Board or Planning Commission as the case may be. The Hon. Dr. Michael Falzon<sup>78</sup> explained that the idea behind the

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<sup>74</sup>The said policy stipulates that certain rural development applications are required to be referred to the said committee.

<sup>75</sup>Article 66(4) of the Development Planning Act, 2016.

<sup>76</sup>Article 66(4) of the Development Planning Act, 2016.

<sup>77</sup>Sitting No. 287 held on 8<sup>th</sup> July 2015 - House of Representatives, Malta.

<sup>78</sup>Sitting No. 287 held on 8<sup>th</sup> July 2015. House of Representatives, Malta.

setting up of this Committee was to instill a culture in favour of better aesthetic design. These were his observations in Parliament:

*“Għall-ewwel darba wkoll qegħdin inħarsu lejn twaqqif ta’ kumitat ta’ konsulenza dwar id-disinn. Irridu naraw kif ma nibqgħux nitkellmu biss fuq il-kwantità jew kemm hu l-għoli jew mhuwiex. Irridu nħarsu wkoll lejn il-kwalità. Irridu nħarsu lejn kif se jiffittja l-element ta’ context driven kif għedt ftit ilu anke fid-dawl tad-DC15 u rrid nitilqu minn kultura li għax il-perit issottometta hekk - bir-rispett kollu lejn il-periti - allura jgħaddi.”*

Although one should praise the legislator’s efforts, the role of the Design Advisory Committee should have been extended to include sites within the development scheme and outside the development zone, thus eliminating the possible impression that aesthetic quality is not of major importance in such zones.

The Development Planning Act, 2016 concurrently saw the elimination of the Cultural Heritage Committee which consisted of two panels – the Cultural Advisory Panel and the Nature Advisory Panel.<sup>79</sup> Din L- Art Ħelwa reacted to this by stating that *“the removal of the Heritage Advisory Committee reduces transparency in the processing of development applications.”*<sup>80</sup> Nevertheless, Din L- Art Ħelwa’s concerns are not necessarily factual since all development applications will now be referred to the Superintendent of Cultural Heritage and the Malta Environment and Resources Authority for consultation at the outset of the application process.<sup>81</sup>

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<sup>79</sup>Article 37 of the Environment and Planning Development Act.

<sup>80</sup>Comments on the proposed MEPA Demerger from Din L-Art Ħelwa downloadable from <http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf> - August 2015.

<sup>81</sup>Regulation 8(1) of the Bill entitled Development Planning (Procedure for Applications and their Determination) Regulations, 2016 – Published April 2016.