The removal of the sixth schedule

ROBERT MUSUMECI

Dr Robert Musumeci is a warranted advocate and a perit. He also holds a Masters Degree in Conservation Technology in Masonry Buildings.

He is the founding partner of the architectural firm RMPERITI and prior to being admitted to the Maltese Bar in 2016, he had practiced as a perit since 1998. He is a former chairperson of the Building Industry Consultative Council (BICC) and presently holds the post of advisor within the office of the Prime Minister of Malta. Dr Musumeci was directly involved in the reforms which led to Malta Environment and Planning Authority's demerger and the establishment of the new Lands Authority in 2016.

Dr Musumeci has published several academic articles related to planning legislation. He was selected by the Faculty of Laws (University of Malta) for the prize of Best Doctor of Laws Thesis Award 2016 for his thesis entitled 'The Development Planning Act 2016 - A critical Appraisal'

---

1 The new Article 73(1)

Article 73(1) of the Development Planning Act, 2016 provides that ***'****the Planning Board may grant permission for the retention on land of any buildings or works constructed or carried out thereon, or for the continuance of any use of land, without permission under this Act or after such permission has ceased to be valid or operative'*. This means that the Authority is no longer bound by the limitations imposed in Article 70 of the Environment and Development Planning Act, which *inter alia* provided that illegal interventions (specifically the ones listed under the Sixth Schedule of the same Act[1]) could not be

[1]Schedule Six of The Environment and Development Planning Act of the Laws of Malta provided as follows: *' An application to regularise a development which exceeds the approved footprint or, increases the approved volume of the building and is not part of a registered livestock farm and is carried out after May 2008 in an area which falls outside areas designated for development as defined in the Structure Plan or in any other plan; or*
2. An application to regularise a development in a scheduled property; or

regularised solely through a sanctioning application even though such illegalities could possibly be sanctioned in terms of the relative plans and policies.

2 The Article 70 experience

During the first months which followed the enactment of the Environment and Development Planning Act, the MEPA was very adamant to scrupulously follow Article 70 of the said Act to the letter. Initially, the Planning Directorate even refrained from processing requests asking for sanctioning where it resulted at a *prima facie* level that Schedule Six illegalities were present. The matter was eventually clarified by means of a judgment delivered by the Court of Appeal (Inferior Jurisdiction) in the names **Mary Psaila vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar.**[2] In this case, the Planning Directorate had issued a screening letter[3] stating that applicant's request could not be processed since the proposal had included a number of illegalities which fell under the Sixth Schedule. The Directorate's decision was confirmed by the Tribunal despite applicant's insistence that he had every right to have his application processed and formally decided by the Environment and Planning Commission. The Tribunal's decision was eventually appealed before the Court of Appeal (Inferior Jurisdiction) and the Court held that the *prima facie* conclusions reached in a screening letter did not remove the applicant's right to have any type of sanctioning application duly processed.

With time, experience has shown a general tendency where the Environment and Planning Commission started to overlook the importance of Article 70 and planning applications were sanctioned notwithstanding the presence of illegalities listed under

---

3. An application to regularise a development carried out after May 2008 in an area protected under the provisions of this Act or any regulation made thereunder.'

[2]Mary Psaila vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar decided by the Court of Appeal (Inferior Jurisdiction) on 26th March 2015 - [Ap. No.6/13].

[3]Under The Environment and Development Planning Act, a screening letter was issued prior to the submission of a full development application. The letter would contain a preliminary opinion with respect to the proposed development.

Schedule Six. For example, in the application PA 8241/05, *To sanction use of site as meeting place for prayers and worship by Moviment Madonna tal-Konsagrazzjoni, to sanction alterations and additions and to erect bronze statue of Jesus*, decided on the 7th March 2012, the Environment and Planning Commission gave a permit for structural interventions which had taken place illegally, despite the location being a scheduled area. Evidently, the Commission went ahead with the decision as it envisaged no planning or environmental benefit in having the construction removed and reinstated in furtherance of a new application. If anything, the prospect itself of mobilizing demolition equipment on such a sensitive site would have envisaged more environmental harm. Having said that, in my opinion, the Commission's decision was illegal regardless.

In a separate instance, the Tribunal went even a step further and held that Article 70 is "*counterproductive*". In the case **Stefan Vella kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar,**[4] applicant made an attempt to sanction a canopy which was already fixed to an old scheduled building. In his submissions, the appellant's architect argued that the illegal extension *"improved the visual appearance of the building and provided a consistent neat/bold outline to the building frontage avoiding a setback in the projecting slab which would have otherwise looked too busy".* The Authority rightly rebutted '*that the provisions of the Sixth Schedule are quite specific and categorical",* adding that "*if a proposal falls within these provisions no sanctioning may be permitted – no ifs or buts"* and thus requested the Tribunal to dismiss the application on the basis of Article 70. Although the Authority was certainly correct in its legal interpretation, the Tribunal reasoned that the old building would risk being damaged should the illegal canopy be dismantled and consequently ordered the Authority to issue the permit.

While the Tribunal may have been technically correct in its assertions, the legal reasoning is quite baffling since no such a leeway was granted by law. At a particular point in time,

[4]Stefan Vella vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar decided by the Environment and Planning Review Tribunal on 15th October 2013 - [Ap. No. 214/12 CF. TR. No. 147273. PA1996/08].

MEPA itself had even published a series of Frequently Asked Questions on its official website[5], providing *inter alia* that *"Article 70 and the Sixth Schedule of the Environment and Development Planning Act apply only to applications submitted after 1st January 2011"* despite it being very obvious that such statement ran counter to the legal provisions of Chapter 504. In **Grezzju Zahra kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**[6] appellant relied on the said website information in his defense, only to find strong opposition from the same MEPA who published the information. In fact, MEPA's legal counsel rebutted appellant's defense and observed the following in his reply to the appeal:

> *"Ghandu jinghad ukoll illi l-frequently asked questions bl-ebda mod m'huma xi policies tal-Awtorita' izda semplicement informazzjoni informali. Certament la jbiddlu l-ligi u m'ghandhomx lanqas sahha ta' ligi ….Oltre` dan, dan l-istess Tribunal kif kompost diga` iddecieda kaz fit-28 ta' Lulju, 2011 fl-ismijiet Victor Portelli vs il-MEPA fejn dahal fil-fond fl-liema ligi applikabbli, w iddecieda li l-ligi applikabbli, in toto hi l-Att X tal-2010 anki ghall-applikazzjonijiet li dahlu qabel Jannar, 2011."*

It is therefore evident that the Schedule Six experience is laden with continuous contradictions and all things considered, government's decision to revisit Article 70 was duly warranted even though Din L-Art Ħelwa held that the deletion of Article 70 was tantamount to "*a retrograde step*".[7]

Although it may still be argued that the removal of the Sixth Schedule may give rise to rampant illegal development, it is to be noted that a daily fine is today imposed for every day after sixteen days from the date of notification of the enforcement notice until the

---

[5]www.mepa.org.mt.

[6]Grezzju Zahra vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar decided on 7th February 2012 by the Environment and Planning Review Tribunal - [Ap. No. 207/09 CF. PA 3907/06].

[7]Reactions to 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.

permit is approved or until the illegality is removed.[8] Indeed, daily fines are now inflicted for any illegal development which took place after 24th November 2012 by virtue of Legal Notice 276 of 2012 and such legislation was not in force when the Sixth Schedule came into effect. Consequently, it would thus be most daring to state that the elimination of the Sixth Schedule is tantamount to uncontrollable abuse. It could be argued further that abuses which took place between May 2008 and November 2012 may today be regularised, and possibly against a hefty fine, whereas under the previous law, such interventions were destined to remain illegal without the imposition of a fine once sanctioning thereof was not possible.

On a practical note, the author sees no benefit in having a building demolished simply to have a similar or identical building being reconstructed following a new application or, worse still, having the Authority acting illegally in circumventing the Sixth Schedule by searching for practical solutions to sanction illegalities against the law. The **Stefan Vella** case and the **Girgenti** application are just two examples where decision makers embraced their good intentions at the expense of breaking the law. Against this background, the author rebuts the idea that "*the removal of the Sixth Schedule implies that the 'no tolerance' policy previously adopted no longer applies*".[9]

[8]Legal Notice 276 of 2012 - Environment and Development Planning Act (Cap. 504) - Daily Penalty Regulations, 2012.
[9]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.