Types of development planning permissions

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 Types of permissions

The Development Planning Act, 2016 contemplates four types of permissions – namely, outline development permissions, full development permissions, non-executable full development permissions and regularization permissions.

1.1 Outline Development Permissions

Outline development applications were introduced by way of the 1992 Development Planning Act and eventually abolished in 2010, only to be reintroduced six years later in the 2016 Planning Act. The current definition of an 'outline development permission', previously found in the Structure Plan, is as follows: an '*approval in principle to the proposed development*' subject to '*reserved matters which need to be included in a full*

development permit application or applications.' In an outline development permission, one is given a permit for a specified period of time constituting a binding obligation on the Authority. This principle was evidenced particularly in the judgment delivered by the Civil Court (Inferior Jurisdiction) in the names **Dr. Gerard Spiteri Maempel kontra l-Awtorita' ta' Malta dwar l-Ambjent u l- Ippjanar u l-kjamat in kawza l-Avukat Dottor Joseph Zammit Maempel LL.D**.[1]

It is established case law that an outline permit is tantamount to a 'vested right' which eventually overrules any emergent conflicting policy. Additionally, the reserved matters highlighted in the outline permit should not be construed as a stumbling block for the issuance of the full permit. These principles were highlighted in **Eucharist Bajada ghan-nom tas-socjeta` Baystone Ltd vs L-Awtorita'ta' Malta dwar l-Ambjent u l-Ippjanar**[2] and remain equally valid under the current Planning Act.

Several eNGOs expressed dismay towards the reintroduction of outline development permits. Front Harsien ODZ[3] argued that *'the Mistra experience has shown that commitments taken at outline stage are difficult to revoke at a later stage'* adding that '*it does not make sense to first approve something in principle without providing the full details*.' The Kummissjoni Interdjocesana Ambjent[4] argued on the same lines, insisting that *'when details are then worked out and a full application is presented, the succeeding planning commissions express dismay that their hands are bound because of a previous*

[1]Dr. Gerard Spiteri Maempel vs l-Awtorita' ta' Malta dwar l-Ambjent u l- Ippjanar u l-kjamat in kawza l-Avukat Dottor Joseph Zammit Maempel LL.D decided on 22nd October 2003 by the Planning Appeals Board - [Ap. No. PAB 393/02 TSC. PA 0598/02].

[2]Eucharist Bajada ghan-nom tas-socjeta` Baystone Ltd vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar decided on 31st May 2012 by the Court of Appeal (Inferior Jurisdiction) - [Ap. No.36/2011].

[3]Comments on 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.

[4]Comments on 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.

decision relating to an outline permit.' By contrast, the GRTU[5] took a totally different approach, expressing satisfaction at government's decision to reintroduce outline permits. The GRTU however insisted that once the Authority issues an outline development permit, it should subsequently bind itself to issue the corresponding Full Development Permit. Their views on this subject matter were as follows:

> *"GRTU notes that the possibility to obtain an Outline Permit is being re-introduced. Whilst GRTU views this as a positive move, it has reservations regarding the weight being given to such permits. GRTU believes that once an outline permit is issued, this should become binding. The difference between the outline permit as proposed and a full development permit is just the fees paid to the PA. Therefore once an outline permit is issued, a permit upon which entrepreneurs might base important and costly decisions such as the acquisition of property, it should become irrevocable and the applicant should only be asked to pay the PA fees."*

In the author's view, outline development applications must be viewed against the fact that development briefs,[6] previously introduced as an alternative to outline development applications in 2010, proved to be largely unsuccessful. As a fact, the MEPA did not approve one single development brief put forward by an individual applicant in the last six years. Undoubtedly, however, as rightly pointed out by the GRTU, outline development applications are considered to be an effective tool with which applicants may establish, with much a lesser expense, whether the Authority would eventually issue the full development permit. Having said that, the author tends to agree that outline permits should contain sufficient details and reserved matters be clearly spelt out with a view to overcome potential ambiguities at a later stage. In Parliament, the Hon. Dr. Michael Falzon[7] was of this same opinion. He argued as follows:

---

[5]Comments on the proposed MEPA Demerger from General Retailers and Trading Union (GRTU) downloadable from http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf - August 2015.

[6]Article 65(1) of the Environment and Development Planning Act.

[7]Sitting No. 287 held on 8th July 2015 - House of Representatives, Malta.

"Xi ħaġa li tipprovdi l-liġi – u naħseb li fuq din jista' jkollna diskussjoni fit-tul – hi li se terġà tħares lejn l-introduzzjoni mill-ġdid tal-konċett ta' outline development permit, jiġifieri fejn inti, qabel ma tagħmel l-applikazzjoni sħiħa, qabel ma tagħmel full blown application tkun tista' tapplika għal permess outline. Kienet teżisti fil-liġi mbagħad kien hemm diskussjoni u tneħħiet. Hawnhekk irridu nagħmluha ċara li hemm differenza minn kif kien l-outline development permit qabel u kif tħares lejh il-liġi l-ġdida. Fejn qabel forsi kellna esperjenza li għall-outline develoment permit wieħed jissottometti site plan u erba' Drawings fuq fuq, illum qed nagħmluha ċara li jrid ikun hemm dettalji suffiċjenti li verament wieħed ikun jista' jevalwa fuqhom. Qegħdin inħarsu lejn dan għaliex jagħmel sens ekonomikament imma fl-istess ħin irridu naraw li jkun hemm biżżejjed informazzjoni, kif għedt ftit ilu, li wieħed ikun jista' jibbaża l-valutazzjoni fuqha. Qegħdin inħarsu lejh f'każi ta' proġetti ta' ċertu daqs fejn l-iżviluppatur naħseb li għandu jkun jaf jekk żvilupp huwiex se jkun aċċettabbli għallinqas in prinċipju mingħajr ovvjament ma jkun daħal għall-piż li wieħed iħallas it-tariffi kollha mill-bidu nett. Hija miżura li hija ntiża li wieħed jinkoraġġixxi l-investiment. Hija miżura li kienet hemm imma tneħħiet u l-liġi ġdida qed tħares li terġa' tidħol b'mod differenti kif spjegajt li mhux sempliċement wieħed waddab site plan u ħareġ imma jrid jagħti dettalji biżżejjed biex wieħed jista' jieħu deċiżjoni. Naħseb li iktar minn kollox, fil-fond ta' qalbna lkoll nixtiequ li jkollna investiment f'pajjiżna u li dejjem jinħoloq il-ġid."

The legislator also deemed fit to limit the validity of outline permits to a period not exceeding five years.[8] In my view, such a period should have been restricted to two years since planning policies are likely to change with time. As much as possible, one should avoid a situation where decision makers are bound by an outline permit governed by a different policy regime.

1.2 Full Development Permissions

The Development Planning Act, 2016 deals with full development permissions in an identical manner as seen in previous legislation. A full development permission is required before any development can commence, whether or not preceded by an outline

[8]Article 71(2)(a) of the Environment and Development Planning Act.

development permission. Today, applicants may also obtain a full development permission through a 'summary Procedure Application' which is in turn determined by the Chairperson of the Planning Board or his delegate within six weeks from the publication of the application.

Summary procedures are only applicable to development included in Schedule Two of the Development Planning (Procedure for Applications and their Determination) Regulations, 2016, provided further that the proposal complies with all relevant applicable plans, polices and regulations. It must also be pointed out that when representations are received within the consultation period and the Chairperson of the Planning Board or his delegate deems that such representations carry planning merits, the application would then undergo the entire planning process and not be decided summarily. It should be noted that several developments, which previously qualified under the Notification order regime, now need to be processed 'summarily'.[9] In turn, this implies that interested third parties may now appeal against such developments, previously approved without the possibility of a third party appeal.

1.3 Non Executable Permissions

For the first time, the definition of 'non executable permits' was identified in a local piece of legislation through the current Planning Act although the MEPA already had already issued these type of permits. A non-executable full development permission is defined as a permit *'which approves the development but imposes conditions to be adhered to before a full development permission is issued.'*[10] Typically, non executable permits are issued when the applicant is required to effect a contribution towards the Urban Improvement Fund, an enforcement fine or a bank guarantee within a set time frame and such payment is not made within the stated period. On this particular matter, the Hon. Dr. Michael

[9]Regulation 18 of the Bill entitled Development Planning (Procedure for Applications and their Determination) Regulations, 2016 – Published April 2016.
[10]Article 71(2)(c) of the Environment and Planning Development Act.

Falzon[11] made the following observations:

> *"Punt ieħor innovattiv tal-liġi huwa li se jiġi formalizzat il-konċett ta' dak li huwa magħruf bħala non-executable permit. Dan huwa mezz kif ikun jista' jinħareġ il-permess imma x-xogħlijiet ma jkunux jistgħu jibdew sakemm l-applikant ikun irregola ruħu mal-kondizzjonijiet li jkollu dak in-non executable permit. Dan mhux qed nagħmluh b'kapriċċ imma għax ukoll fl-interess ta' kulħadd għax hija xi ħaġa li tista' twassal għal aktar ċertezza legali."*

It should be noted that the validity of non executable permits runs from the publication of the non executable decision and republication does not take place when the full development permit is eventually issued.[12] As a consequence, the time to lodge an appeal before the Environment and Planning Review Tribunal starts running from the date of publication in the Government Gazette.

1.4 Regularization Permits

Article 101(1) of the new Planning Act introduced the possibility for the Minister to make regulations setting parameters by way of which an illegal development may be subsequently regularized by the Authority subject to a fine. It should be noted that in drawing up such parameters, the Minister is not bound by any other provisions found in the Act - the Minister may for example decide that certain types of illegal development be regularized by way of a regularization application regardless of the fact that such development does not conform to sanitary regulations. Friends of the Earth[13] described the said proposal as *"a form of amnesty for illegal development which is unacceptable."*

---

[11]Sitting No. 287 held on 8th July 2015 - House of Representatives, Malta.

[12]Regulation 6(6) of the Bill entitled Development Planning (Procedure for Applications and their Determination) Regulations, 2016 – Published April 2016.

[13]Comments on the proposed MEPA Demerger from Friends of the Earth downloadable from http://environment.gov.mt/en/decc/Documents/environment/MEPA%20online%20submissions%202015%20-%20final.pdf - August 2015.

No similar provision was made in the Environment and Development Planning Act. Indeed, it was only possible to obtain a 'concession' for certain types of illegal development which were listed under Category B of Schedule Eight of the said Act and on the basis of which one was then entitled to have a supply of water and electricity[14] and further claim that an enforcement notice should not be executed.[15] That said, a concession was not tantamount to a sanctioning permit as commonly misconceived.

Category A developments under the same Schedule Eight were also immune from enforcement action if one were to claim such right. On the other hand, applicants having Category A developments were still not eligible to be given water and electricity supply, unless such development was first sanctioned. In fact, an application for *'development permission requesting amendments, alterations, additions or extensions'* relative to a site featuring a Category A illegality had to have the illegality either sanctioned upon application or removed prior to the application.

Under the new legislation, there no longer is any reference to previous Schedule Eight developments. Nonetheless, applicants will have an option to obtain a regularization permit which carries the same legal standing of a full development permit once regularization policies are in place. Eventually, a regularization permit would be immune from any possible enforcement action and applicants holding such permits would be equally eligible to the issuance of a compliance certificate.

Though this could be interpreted as a reward to past abuse, in reality it is my opinion that this would give more positive results due to the explanation given above on account of the legal uncertainties which shadow previous Schedule Eight developments.

[14]Article 92(2) of the Environment and Planning Development Act.
[15]Article 91(1) of the Environment and Planning Development Act.