

What is development?

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 What is development?

As a general rule, 'any person, including a department of government or a body corporate established by law' wishing to carry out a 'development' is still required to obtain permission from the Planning Authority, unless the Development Planning Act, 2016 provides otherwise.

The question that often arises amongst practitioners is the following: what constitutes 'development'? The answer is found in Article 70 of the Development Planning Act, 2016 which defines 'development' as follows:

'Building, engineering, quarrying, mining or other operations for the construction, demolition or alterations in, on, over, or under any land

or the sea, the placing of advertisements or the making of any material change in use of land or building and sea’.

Essentially, the above definition is a reproduction of Article 67(2) of the Environment and Development Planning Act. In **Raymond Vella vs L-Awtorita’ Ta’ L-Ippjanar**¹ the Planning Appeals Board had held that the meaning of ‘*development*’ should, in any case, be given an extensive interpretation. The Board observed *inter alia*:

“.....t-tifsira tal-espressjoni ‘zvilupp’ kif definita f’dan is-subartikolu ghandha tifsira wiesgha hafna”

1.1 Developments specifically exempted from the need to obtain a permit

Under the previous planning laws, certain types of development were already exempted from the need of obtaining planning permission. These are ‘*maintenance operations*’ subject to certain parameters, ‘*the use of land for agriculture, animal husbandry and forestry (including afforestation)*’ as well as the change of use of buildings or other land within the same class specified in the use classes order. Additionally, developments orders which did not necessitate a reply were equally exempted. In furtherance to the promulgation of the Development Planning Act, 2016, the list has been widened to include emergency works carried out by government, uses which subsisted continuously from a period when such use was not considered illegal and did not require a permit, land reclamation carried out prior to 1994 as well as pre 1967 development.

1.1.1 Maintenance Operations

As above indicated, maintenance operations ‘*which affect only the interior of a building or*

¹Raymond Vella vs L-Awtorita’ Ta’ L-Ippjanar, decided on 11th November 1994 by Planning Appeals Board - [Ap. No. 160/94 KA. ECF 339/94.28/2013].

which do not materially affect the external appearance of the building.... and do not include demolition and rebuilding works, irrespective of the location where such demolition and rebuilding works are carried out' were already considered exempted from permit requirements. Nevertheless, experience has shown that it is not always an easy task to assess whether a particular intervention falls within the said definition. Consequential to this, there are a number of conflicting judgments. For example, in **Annunziato Bonello Bianco kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**², the Environment and Planning Review Tribunal (EPRT) concluded that the structural removal of a wall to pave way for a beam amounts to 'demolition and rebuilding works' which go beyond simple 'maintenance operations' exempted from development.

In **Godfrey Gialanze kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**³ the EPRT, on the other hand, concluded that the 'rebuilding' of a concrete platform was exempted from the need to obtain a permit after it held that the structure was in urgent need of repair. The Tribunal found that the external appearance of the platform was to remain unchanged and the repair works thus qualified as 'maintenance works' that do not necessitate a permit.

Although the approach taken by the Tribunal in **Gialanze** may appear sound on the face of it, it is submitted that the Tribunal should have adhered to the letter of the law and dismissed appellant's claim on the premise that 'rebuilding' works require a permit despite any urgency.

Nevertheless, the legislator should explore the possibility of exempting applicants from the need to obtain a permit for the reinstatement of dangerous structures in those cases where the engaged permit ensures that a similar construction methodology would follow.

²Annunziato Bonello Bianco vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar decided on 16th September 2014 by the Environment and Planning Review Tribunal – [Ap. No. 857/11E MS. ECF 539/11].

³Godfrey Gialanze vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar decided on 21st June 2012 by the Environment and Planning Review Tribunal - [Ap. No. 171/09E CF. ECF 780/09].

This certainly would be in line with the reasoning of the Tribunal in the **Gialanze** judgment.

1.1.2 Use of land for agriculture, animal husbandry and forestry

In the new Planning Act, *‘the use of land for agriculture, animal husbandry and forestry (including afforestation), except where such use consists of the erection of buildings or amounts to intensive raising of crops or animals’* shall equally remain exempted from the need to obtain a permit. Since this part of the definition remained unchanged, there is still a quandary as to whether animals can be kept in each and every niche on the island. It should be noted that the terms ‘land’ and ‘buildings’ are used interchangeably as defined in the introductory definitions of the Act. From the above definition, it follows – at least, in the author’s view - that the management and care of animals should be exempted from planning permission, regardless of location, provided that there is no ‘intense’ activity.

However, in **John Paul Grech kontra L-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar**⁴ the Tribunal observed that the keeping of a horse in a residential garage still required a planning permit since it constitutes a change of use in terms of law.

In this case, the Tribunal appears to have sought a practical solution to address the concerns of the neighbourhood at the expense of disregarding the letter of the law. To avoid further confusion, the law should identify those species which could be kept within a residential area without the need to obtain a development permit.

Moreover, it is opportune to point out that *‘the reclamation of land for agriculture by the deposit of material on such land which can be proven to have subsisted prior to 1994’* has

⁴John Paul Grech vs l-Awtorita’ ta’ Malta dwar l-Ambjent u l-Ippjanar decided on 29st January 2015 by the Environment and Planning Review Tribunal - [Ap. No. 14/14E. MS. ECF 329/13].

now been exempted from the need of obtaining a planning permit. It is however important to note that the deposit of soil material should have 'subsisted' since a time prior to 1994. A new permit is on the other hand required if the soil has been washed away over a period of time as held in **Angelo Abela kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**.⁵

1.1.3 Change of use within the same use class order

Uses carried out on '*buildings or other land*' falling within the same '*class specified in an order made by the Minister*' remained exempt from the need of a development permit. The various classes are now defined in Legal Notice 74 of 2014.⁶ That stated, certain uses, such as take away outlets and auto dealers, are specifically excluded from any class category and thus require a permit despite the previous approved on site use being similar.⁷

Although the effects of the above definition appear quite straightforward, it has been the subject of contrasting interpretations. For example, in **Kristian Fenech Soler u Pierre Nani kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**⁸, the Tribunal insisted that the change of use from a store to a kitchen within a licensed catering establishment still required a permit.

⁵Angelo Abela kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar. Kristian Fenech Soler u Pierre Nani vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar decided on 29th March 2012 by the Environment and Planning Review Tribunal - [Ap. No. 334/10 CF. PA 4939/08].

⁶Regulation 3(2) of Legal Notice 74 of 2014 provides that a change of use within the same class category is '*permitted development*' subject to prior development notification '*in the case when there is a change of use from either: (i) Class 3B to Class 3A or Class 4B to Class 4A or Class 4C to Class 4A or Class 4C to Class 4B or Class 4D to Class 4A or Class 4D to Class 4B or Class 4D to Class 4C or Class 5B to Class 5A or Class 5C to Class 5A or Class 5C to Class 5B, or (ii) when activities identified under Class 1(c) or Class 1(d) are undertaken in addition to those activities identified under Class 1(a) and/or Class 1(b)*'.

⁷Regulation 4 of Legal Notice 74 of 2014 - Environment and Development Planning Act (Cap. 504) - Development Planning (Use Classes) Order.

⁸Kristian Fenech Soler u Pierre Nani 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. 93/12E CF. ECF 472/11].

In the author's opinion, the Tribunal gave a wrong judgment in search of a safe approach. Although the respective room designations were indeed changed, the use of the building as a whole remained the same, namely a catering establishment. Thus, I beg to differ with what the Tribunal ruled in the aforementioned case, in particular that such intervention required a permit on the basis that the approved plans showed different designations. For some reason, decision makers always appeared hesitant to give an extensive interpretation of this provision and the law as amended still fails to address this issue.

1.1.4 Pre 1967 Developments

'Illegal works' are defined as *'any works on, in, over or under land, carried out after 1967 and not covered by a development permission issued by an authority related to development'*. *A contrario sensu*, it ensures that works carried out prior to 1967 without a development permission are construed as 'legal'. Although there was no equivalent provision in previous legislation, the MEPA had already on a number of occasions considered that buildings constructed prior to 1967 were 'legally established'. In **Joe Cassar kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**⁹, the Authority submitted that the farmhouse forming the merits of the appeal was 'legally established' on the basis that its construction dated prior to 1967. Moreover, the MEPA used to issue compliance certificates with regards to pre 1967 development without the need for applicants to submit any permit documentation.

For a time, it was equally uncertain whether developments carried out prior to 1978 were equally exempted from the need of a planning permit. This is because the Rural Policy and Design Guidance 2014¹⁰ introduced in 2014, provided that *'any intervention, including land-use change and land reclamation covered by development permission or that which is visible on the 1978 aerial photographs'* is considered to be 'legally established'. This

⁹MEPA submission in Joe Cassar vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar decided on 13th March 2014 by the Environment and Planning Review Tribunal - [Ap. No. 49/12 CF. PA 3679/09].

¹⁰MEPA: Rural Policy and Design Guidance Policy Document (2014).

issue was eventually clarified by the EPRT in **Carmela Muscat kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**¹¹ wherein it was concluded that such definition applies to pre-1978 development forming part of a planning application which is assessed in terms of the Rural Policy. Hence, it does not automatically follow that all pre-1978 buildings are 'legal'.

Notwithstanding the aforesaid, one should note that all buildings that constitute an injury to amenity by reason of their '*appearance or structural condition*' are not immune from an enforcement action in spite of their age.¹²

1.1.5 Display of advertisements

As with previous Acts, advertisements still require a planning permit unless specifically exempted by way of Legal Notice of 171 of 1993, which legal notice saw no amendments to it.

1.1.6 Development Orders

Development orders which do not require a reply remained exempt from the need to obtain a planning permit. From the other side of the coin, those development orders which require notification within 30 days may not be proceeded with prior to the issue of a notification. Whatever the case, the Planning Authority should be very cautious to ensure that notifications are issued in strict adherence with the law as these are otherwise deemed null and without effect. This principle was clearly outlined by the EPRT in **Charles Debono kontra l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar**.¹³

¹¹Carmela Muscat vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar decided on 28th May 2015 by the Environment and Planning Review Tribunal - [Ap. No. 23/15E MS. ECF2/15].

¹²Article 99(1) of the Development Planning Act, 2016.

¹³Charles Debono vs l-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar decided on 1st October 2015 by the Environment and Planning Review Tribunal - [Ap. No. 18/15 MS. DNO 1653/14].