Are Material Considerations and Planning Policies Equally Important in the Context of Article 72 of Chapter 552 of the Laws of Malta?

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This article by **Sarah Pisani** was previously submitted as part of ERL1001 and is being published with the author's permission. It analysis the legal framework of development planning in Malta, specifically focusing on the balance between material considerations and planning policies as outlined in Article 72 of the Development Planning Act 2016. The author examines the changes between the previous legislation (Article 69 of the Environment and Planning Development Act) and the current one, arguing that the shift from "shall apply" to "shall have regard to" has weakened the legal weight of plans and policies. Through the review of various court cases, the article highlights the inconsistency in judicial interpretation, where courts often prioritize policies over material considerations.

TAGS: Development Planning Law

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1. Introduction

Article 72 of the Development Planning Act, tackles the determination of the granting of a permission, which is the ultimate goal of the client, and it could also be of interest to a potential third party, to know whether a permit was granted or refused. Article 72(2) goes on to state the criteria in which an application is decided upon by the Planning Board, the authoritative body which has the 'power to grant or to refuse a development permission.'[1]

The Environment and Planning Development Act, which was repealed and reenacted through today's law, specifically in Article 69, it was clearly stated that, 'the Authority shall apply plans and policies,'[2] as well as 'shall have regard to any material consideration, including, environmental, aesthetic and sanitary considerations' which it may deem relevant and 'representations made in response to the publication of the development proposal.' In Article 72(2) of Chapter 552, the new Development Planning Act, the text 'shall apply plans and policies' found in the Environment and Planning Development Act (EPDA), was replaced with the words 'shall have regard to plans and policies,'[3] meaning that the Planning Board decision makers have to deal with 'plans and policies' in the same manner which concerns 'regulations made under this Act', 'any other material considerations, including surrounding legal commitments, environmental, aesthetic and sanitary considerations, which the Planning Board may deem relevant', 'representations made in response to the publication of the development proposal' and 'representations and recommendations made by boards, committees and consultees in response to notifications of applications'.

In legal English, the word 'shall' by itself 'is used to create a right, a duty, a precondition, a requirement, a prohibition,'[4] while the phrase 'regard to' is simply associated with the text 'to pay attention to,'[5] therefore, in the author's opinion, when the words are incorporated together, and the text 'shall have regard to' is formed, the meaning which is created appears to be less likely bound to apply, than when compared to the binding powers the text 'shall apply' has.

The result of this change in wording leads to the fact that 'plans and policies' are no longer considered to be superior as intended by the legislator

[1] Development Planning Act, 2016, Chapter 552 of the Laws of Malta, Article 72(1)
[2] Environment and Development Planning Act, Chapter 504 of the Laws of Malta, Article 69
[3] Development Planning Act, 2016, Chapter 552 of the Laws of Malta, Article 72(2)
[4] Olga A. Krapivkina, 'Semantics of the verb *shall* in legal discourse' (2017) 18.1 Jezikoslovlje 305
[5] 'Merriam Webster Dictionary' (Merriam Webster) < https://www.merriam-webster.com/dictionary/regard> accessed 3 January 2021

in the previous EPDA, and thus to be in compliance with the new Development Planning Act, 'decision makers are now bound to take cognizance of plans and policies on an equal footing as regulations, material considerations and external representations or recommendations.'[6]

2. Material Considerations and Planning Policies

When looking at decided Court judgments, it can be noted that when it comes to applying the text 'shall have regard to plans and policies', and 'any other material consideration' in practice, a tendency is shown by certain decision makers as well as the Court, to choose to issue the permit by adhering to 'plans and policies' and leaving 'material considerations' to be acknowledged only when the 'plans and policies' are strictly observed. For example, in *Winston J. Zahra vs L-Awtorità tal-Ippjanar*,[7] the application in subject involved the 'demolition of existing farm building and replacement by one habitable unit and ancillary landscaping works'. The Tribunal issued the permit on the account that Article 72(2) allows the deviation from the policy, since the proposal 'would result in a wider environmental benefit, provided the site is already serviced by a road network that would adequately cater for the proposed new use'. The Court stated that:

> *Din il-Qorti qieset l-uzu tal-kliem użat mill-leġislatur li l-Bord għandu jqis (sottolinear tal-Qorti) pjanijiet u policies imressqa quddiemu u għandu jqis ukoll kull ħaġa oħra ta' sustanza u hemm elenku ta' dawn l-elementi ta' sustanza. Fil-fehma tal-Qorti d-diċitura wżata ma biddel xejn mill-gurisprudenza kostanti ta' din il-Qorti tul l-aħħar snin. L-enfasi għandha tibqa' fuq osservanza ta' liġijiet, pjanijiet u policies tal-iżvilupp u fatturi oħra ta' sustanza għandhom jitqiesu u jiġu kunsidrati pero ma għandhomx waħedhom ixejnu l- liġijiet, pjanijiet u policies applikabbli għal kaz iżda jikkumplimentaw biss u mhux ixellfu, jissostitwixxu jew imorru kontra l-istess liġijiet, pjanijiet u policies.*

The Court continued to state that the Tribunal cannot depart from the fact that the material considerations alone cannot justify the issue of a permit, especially since the proposal is not strictly in line with the policy, but in legal reality, based on the wording of the law, in Article 72 of the new Act, the legislator intended a different approach than in Article 69 of the previous Act, which implied a certain superiority of 'plans and policies'. In the judgment, the Court also makes reference to *Michael Debrincat vs L- Awtorità tal-Ippjanar*,[8] where an application of a permit 'to sanction existing driveway/hard paving and proposed alterations and extensions/additions to existing dwelling in order to create a separate annex with swimming pool' was rejected by the

[6] Robert Musumeci, 'The Development Planning Act, 2016 – A Critical Appraisal' (LL.D. thesis, University of Malta, 2016)
[7] 1/2019 *Winston J. Zahra vs L-Awtorità tal-Ippjanar*, Court of Appeal (Inferior Jurisdiction), 16 May 2019
[8] 55/2018 *Michael Debrincat vs L-Awtorità tal-Ippjanar*, Court of Appeal (Inferior Jurisdiction) 24 October 2018

Tribunal on account of the environmental and visual impacts of the development:

> *minħabba ż-żieda ta' massing ta' bini fuq is-sit, il-krejazzjoni ta' blank party wall b'għoli ta' żewg sulari li jestendi barra mill-linja tal-iżvilupp, u kif ukoll it-telf ta' art naturali u ħamrija.*

The Tribunal decided that the alleged 'commitment', specifically in the case of an outside development zone (ODZ) development needs to be considered in its context, based on the individual facts of the case and not simply as a case which can be compared to other cases. The Court similarly to what it stated in the previous case, stated that:

> *Il-Qorti hawn tippreċiża illi ebda commitment ma jista' qatt jegħleb il-fatt li permess ma għandux jinħareġ jekk isir kontra l-liġi, pjan jew policy. Tant hu hekk illi l-artikolu 72(2) tal-Kap. 552 jipprovdi li l-Bord għandu jqis l-ewwel u qabel kollox pjanijiet u policies imressqa quddiemu u għandu jqis ukoll kull ħaga oħra ta' sustanza inkluż commitments.*

Here, the interpretation of the word of the law by the Courts reflects the lack of equality between the 'plans and policies' and the 'material considerations', as it goes on to encourage the Board to first and foremost adhere to the 'plans and policies', and then 'take note of any other material consideration'.

Similarly, in *Għaqda tar-Residenti ta' Santa Maria Estate vs L-Awtorità tal-Ippjanar*,[9] the Court uses words which are almost identical to the previous judgment, stating that: 'ebda commitment ma jista' jġib fix-xejn liġi, pjan jew policy,' emphasizing how 'material considerations', which in this case were the 'surrounding legal commitments', should be used only to complement the case and not for a permit to be issued solely based on said 'material considerations'.

The same principles were maintained in *Alexandra Fenech vs L-Awtorità tal-Ippjanar*,[10] where the appeal in question involved the sanctioning of works relating to alterations and extensions to an old residential building, as well as other installations, and the formation of an opening in an existing wall, so as to permit vehicular access into the premises. The Tribunal confirmed the decision of the Authority for the refusal of the permit and the Court accepted it, while also stating:

> *il-Qorti kemm-il darba sostniet illi l-element tal-'commitment' għalkemm hi kwistjoni ta' sustanza li għandu jiġi kunsidrat però dan qatt ma għandu jirrendi l-kelma ċara tal-liġi, pjan jew policy bħala ineffikaċi jew addirittura inapplikabbli.*

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[9] 43/2019 *Għaqda tar-Residenti ta' Santa Maria Estate vs L-Awtorità tal-Ippjanar*, Court of Appeal (Inferior Jurisdiction) 15 October 2020

[10] 36/2019 *Alexandra Fenech vs L-Awtorità tal-Ippjanar*, Court of Appeal (Inferior Jurisdiction) 15 October 2020

The occurrence of the Court maintaining that the validity of the 'material considerations' cannot compete with that of the 'plans and policies' is seen again in *Michael Stivala vs L-Awtorità tal-Ippjanar*,[11] where a permit 'to sanction extension of permanent and light weight shading canopy for ancillary seating to a class 4D outlet,' was issued. The proposed extension of light weight structure for ancillary seating also included the 'installation of a shop sign and protective glass enclosure'. It was established that there was already the issue of 'commitment' and therefore the permit was approved on the justification that the extension of the area with chairs and tables was already compromised, and that according to the process of the Malta Environment and Planning Authority (MEPA), the works which the appellants appealed on were now being done coherently with the 'policy'. It was also held by the Court that:

> *Ebda kwistjoni oħra rilevanti ma tista' ixxejjen dak li trid il-policy li hi wara kollox ir-rieda tal-legislatur għal dak li jirrigwarda żvilupp kemm jista' jkun konsistenti u omoġeniju fl-applikazzjoni prattika tiegħu.*

Although, the law makes it clear that 'plans and policies' as well as any other 'material considerations' should be interpreted on an equal level, the Court stated that any other relevant factor, which in this case were the 'surrounding legal commitments', cannot go counter to what the 'policy' states for the permit in question to be acquired.

In *John Cordina vs L-Awtorità tal-Ippjanar*,[12] the third party appealed against the decision of the Tribunal regarding the permission 'to sanction property as built, including supermarket extension stores, car parks and signs.' In the decision, the Tribunal acknowledged that in the application of the law one has to take into consideration the 'plans and policies' together with 'any material consideration', yet the Court concluded that it did not approve of the way Article 72(2) was applied to the case, and that the way the Authority classified the 'material considerations' should not have been as such and therefore decided on revoking the Tribunal's decision.

In *Silvan Agius vs L-Awtorità tal-Ippjanar*,[13] a third-party appeal took place, objecting against the Tribunal's decision which was in favour of issuing a permit 'to demolish existing, retaining facade, proposed restaurant class 4D at basement and ground floor plus overlying maisonette,' the proposal also included the conversion of an existing window into a door and restoration of an existing timber balcony. The Court once again decided to give the upper hand to relevant 'plans and policies' by mainly adhering to them, and then considering the 'material' in question, this is further supported by what the Court voiced in the judgment:

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[11] 69/2018 *Michael Stivala vs L-Awtorità tal-Ippjanar*, Court of Appeal (Inferior Jurisdiction) 4 March 2019
[12] 14/2018 *John Cordina vs L-Awtorità tal-Ippjanar*, Court of Appeal (Inferior Jurisdiction) 30 April 2018
[13] 66/2018 *Silvan Agius vs L-Awtorità tal-Ippjanar*, Court of Appeal (Inferior Jurisdiction) 30 January 2019

It-Tribunal għandu jqis diversi fatturi in linea mal-artikolu 72(2) tal-Kap. 552 prinċipalment dak li jridu l-pjanijiet u polilcies rilevanti kif ukoll fost affarijiet oħra opinjonijiet esperti fil-materja in kwisjtoni. Però ma hemmx l-obbigu fl-aħħar kaz li jsegwi tali opinijonijiet sakemm tingħata raġuni valida u raġonevoli għaliex opinjoni ġiet skartata jew ma ġietx segwita.

Undoubtedly, in *Salvu Buttigieg vs L-Awtorità tal-Ippjanar*,[14] the Court makes it clear that the application involving the 'internal and external alterations and change of use from a poultry farm to a residence', and which was denied by the Tribunal, cannot be decided in favour of the appellant, as it expressed that:

la darba l-appellant naqas li jsostni l-applikazzjoni a bażi ta dak li trid il-policy, kull kunsiderazzjoni oħra kienet irrelevanti għaliex it-Tribunal ma għandux jiddeċiedi applikazzjoni favorevolment jekk din tmur kontra dak li trid il-policy.

When looking at certain past judgments which were relevant in the eye of Article 69 of Chapter 504, one could notice that the Court's interpretation of the law did not change that much from the way current judgments are being tackled, regardless of having a new Act, and this is particularly seen in *Emanuel Formosa vs L-Awtorità ta' Malta dwar l-Ambjent u l-Ippjanar*,[15] where in similar words to present judgments, the Court held that:

din il-Qorti tagħmel distinzjoni bejn is-saħħa ta' pjan jew policy u kwistjonijiet ta' sustanza bħal ma hu 'commitment' fost affarijiet oħra…ebda kwistjoni ta' commitment ma tista' tmur kontra dak espliċitament promulgat fi pjan jew policy u kwistjonijiet ta' sustanza għandhom importanza fejn il-pjan jew il-policy hi siekta jew tħalli element ta' diskrezzjoni.

3. Conclusion

The text, 'any other material consideration, including …' found in Article 72(2) of the new Development Act gives the impression that the list of things which can constitute as a 'material consideration' is not exhausted in great detail, therefore, as there is no statutory definition found in the law, a 'material consideration' is not only 'surrounding legal commitments', it is not only an 'environmental consideration', it is not only an 'aesthetic consideration', and it is not only 'sanitary considerations,' there could be other 'material considerations' deemed relevant, and this could lead to the term 'material considerations' being abused.

[14] 28/2017 *Salvu Buttigieg vs L-Awtorità tal-Ippjanar*, Court of Appeal (Inferior Jurisdiction) 25 January 2018
[15] 82/2013 *Emanuel Formosa vs L-Awtorità ta' Malta dwar l-Ambjent u l-Ippjanar*, Court of Appeal (Inferior Jurisdiction) 26 June 2014

According to the United Kingdom's guidance for 'Determining a planning application,' what constitutes as a material consideration is very broad and so the courts often do not indicate what cannot be a material consideration,'[16] it goes on to state that whether something is a 'material consideration' or not depends on the circumstance of the case itself.

In the author's opinion, 'material considerations' should not only be linked to a Planning Authority matter, but must also be obviously material, and that any reasonable, ordinary man would be able to come to that same conclusion. It must also link and be compatible with Article 3 of Chapter 552, which basis itself on the fact that 'it shall be the duty of the Government to enhance the quality of life for the benefit of the present and future generations.'[17]

[16] 'Guidance Determining a planning application' (GOV.UK, 6 March 2014) <www.gov.uk/guidance/determining-a-planning-application >accessed 3 January 2021

[17] Development Planning Act, 2016, Chapter 552 of the Laws of Malta, Article 3

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