

Colloquium 2006 - Questionnaire on Motorway Case

Answers from Malta

1. Administrative Consent procedure:

Please give a short outline (no specific details) of the administrative consent procedure applying to project planning in your national legal order (procedural steps, time-limits, competent authorities, involvement of lobby groups and technical experts).

The applicant, including the Government, has to make an application containing his proposed development in the prescribed form and containing the prescribed information, to the Malta Environment and Planning Authority (hereinafter referred to as MEPA), which is a public authority having a separate legal personality. The proposed development is advertised in a newspaper and by means of a notice posted or affixed on the site of the proposed development. A copy of the application and the relative site plan is also given by MEPA to the local council (municipality) in whose locality the development is being proposed to be carried out. Any interested third party has a right to inform MEPA of his objections in writing, on the basis of issues relevant to planning, within fifteen (15) days from the date of publication in the newspaper. MEPA may, for major projects, extend this period for up to thirty (30) days.

The application is assigned to a MEPA case officer, who proceeds with internal and external consultations on the proposed development. The external consultations are conducted with government departments and government agencies. If a government department or agency does not respond in writing to MEPA not later than four weeks from the date of receipt of a request by MEPA, it is deemed not to object to such application. The internal consultations are with the various specialised internal units of MEPA, for example Nature Protection Unit, Pollution Prevention and Control Unit, Waste Management Team, Local Planning Unit, Transport Planning Unit and the Resource Management Unit. The Resource Management Unit will also decide whether an Environment Impact Assessment (EIA) is required. If an EIA is required the procedure for an EIA has to be followed, whilst the various consultations are still being conducted by the case officer.

When all necessary consultations have been made, and the EIA, where required, has been submitted, the case officer proceeds to draft the Development Plan Application Report. This report includes his recommendations on whether the proposed development is feasible or otherwise, and if it is feasible under what conditions it should be authorised. This report is available to the public. After the submission of the Development Plan Application Report, MEPA holds a public hearing during which the proposed development is discussed and it is either authorised or refused. Those interested third parties who had filed written

submissions within the fifteen day period after the first publication in the newspaper, will receive a personal invitation to attend for the public hearing.

MEPA must take a decision on any application for development which is -

(a) within a “temporary provisions scheme boundary” or a “development boundary” as indicated in a local plan; and

(b) in conformity with development plans and planning policies

not later than twelve (12) weeks after it has validated the application.¹ MEPA may extend this period by an additional period of twenty-six (26) weeks by posting a registered letter to the applicant giving the reasons, based on planning issues, for such an extension. Where the application does not satisfy requirements (a) and (b) above, for example a new projected motorway, MEPA must take its decision not later than twenty-six (26) weeks after it has validated the application.

Nevertheless, in those cases where MEPA, within the original or extended period mentioned above, has informed the applicant that the application requires an environmental impact assessment or where a traffic impact statement is required, or where MEPA requires consultation with government departments or agencies, or during such period when MEPA’s offices are closed as may be prescribed, the period taken for the submission by the applicant of an assessment or statement acceptable to MEPA, or for a response to be given by government departments or agencies, or when MEPA’s offices are closed as stated, shall not, in each case, be considered as forming part of the original or extended period mentioned above.

The time-limits mentioned above, original or extended, are also suspended during such period until the applicant, at MEPA’s request, submits amended plans, new information or a reply to any objection made by MEPA on any application.

Where the proposed development has been refused, the applicant can either request a reconsideration by MEPA or file an appeal to the Planning Appeals Board. An interested third party who has made his submissions within the time-limit of fifteen days can also file an appeal to the Planning Appeals Board.

However, such interested third party cannot request a reconsideration, even if he has made written objections within the time-limit of fifteen days. Both the applicant and the objectors, if any, will be informed of the date and time of the meeting of MEPA wherein the reconsideration will be discussed, and they can address MEPA with regard to the planning matters concerning the application in question. The applicant can file an appeal to the Planning Appeals Board from the decision of MEPA on a reconsideration.

¹ The application is validated when MEPA officially certifies that the application contains all the requisites and attachments (e.g. plans) as are required by the relevant laws and regulations.

Where an appeal to the Planning Appeals Board has been filed concerning an application for development submitted by a government department or agency, the Minister responsible for planning can, within fifteen days from the date he is notified of the appeal, either instruct the Appeals Board to proceed with the determination of the appeal or decide to refer the application to Cabinet for determination. Where the Minister does not decide to refer an application to Cabinet within the prescribed period, it is deemed that he has opted to refer the appeal to the Planning Appeals Board for its decision.

2. Public Involvement

- a) Is there any public involvement and/or hearing of individually affected parties during the administrative consent procedure?*
- b) If yes, at which stage(s) of the procedure and in which form?*
- c) Do affected parties lose their right to challenge the planning decision before the courts if they do not make use of this form of public involvement?*

As explained above, any interested third party can make his objections in writing to MEPA within the fifteen (15) days from the day when the first notice of the proposed development is published in the press. Any person can also attend and speak at the public hearing held by MEPA to discuss the application. Interested third parties who have made their objections in writing as aforesaid will be personally invited to attend this public hearing, and the public hearing which is held if a reconsideration of the application is requested.

If an Environment Impact Assessment is required, MEPA will publicise this fact in the press. The public is involved in two stages: (i) when the terms of reference are being drawn up and (ii) after the certification of the Environment Impact Statement.

When the terms of reference of the Environment Impact Assessment are being drawn up, MEPA must invite relevant government departments and local councils in which the development is planned to provide information, within twenty-one (21) days of notification, on what they wish to see included in the terms of reference. Moreover MEPA must also place an advert in a local newspaper, at the expense of the applicant, inviting the general public to inform it, within twenty-one days of publication of the advert, of issues that they would wish to see included in the terms of reference. A public meeting may also be convened, prior to the setting of the terms of reference, when it is considered that the proposed project is of major significance because of its scale, location, hazardous properties or other reasons.

After the certification of the Environment Impact Statement², the applicant must publish in at least one daily newspaper in the English language and in at least one daily newspaper published in the Maltese language, a notice specifying *inter alia* the place where the public may view the application together with the draft environment impact statement, the latest date on which these documents are available for inspection (being a date not less than fourteen days later than the date on which the notice is published) and informing the public that any person wishing to make representations about the application, can make them in writing, till the last day on which the documents are available for inspection. Subsequently MEPA must arrange for a public hearing to take place – after having duly advertised it in the press and in the Government Gazette - at which concerned members of the public may comment on the Environment Impact Statement and express their views on the impact of the proposed development. MEPA must give at least fifteen (15) days' notice but not more than thirty (30) days' notice of the public hearing. The views of the public as expressed during the public hearing and in any written comments made by the public before, during or up to seven days after the public hearing must be recorded and collated into a report by MEPA. A summary of all the comments must be presented as an appendix to the final environment impact statement. MEPA must make available copies of the final environment impact statement for sale to interested parties.

Moreover, where an Environment Impact Assessment is required and the Minister responsible for planning is aware that a project is likely to have significant effects on the environment in another state, or where a state likely to be significantly affected so requests, the Minister must send to that state as soon as possible and not later than when the public is informed that there is pending an application requiring an Environment Impact Assessment, the following:

- (a) a description of the project, together with any available information on its possible transboundary impacts;
- (b) relevant information regarding the Environmental Impact Assessment procedure; and
- (c) information on the nature of the decisions which may be taken;

and he must also accord that state a reasonable time in which to indicate whether it wishes to participate in the Environmental Impact Assessment procedure. If the state which receives information indicates to the Minister that it intends to participate in the Environmental Impact Assessment procedure, the Minister must, if he has not already done so, send to the state the information gathered regarding the proposed development. The state shall enter into consultations with the

² An "Environmental impact statement" means the result of a full environmental impact assessment study presented as a report which describes the development concerned and its effects on the environment indicating how these effects have been taken into account

Minister concerning, *inter alia*, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable timeframe for the duration of the consultation period. The state must forward its opinion to the Minister within this agreed time-frame, and the Minister must in turn forward such opinion to MEPA. The Minister must provide to the state the final decision on the proposed project along with the reasons and considerations on which it was based. When, following monitoring of a development with potential transboundary impacts, significant adverse transboundary impacts or factors that may result in such an impact are discovered, the Minister must immediately inform the affected state and enter into consultations on the necessary measures that may be undertaken to reduce or eliminate such impact.

Only those interested third parties who have made written objections to MEPA within the prescribed fifteen (15) day time-limit from the date of publication in the press of the application of the proposed development, are entitled to file an appeal from MEPA's decision to the Planning Appeals Board, and subsequently to the Court of Appeal on points of law decided by the Board in its decision.

These interested third parties will also be invited to attend the sitting of the Planning Appeals Board where the appeal is filed by the applicant from a refusal of the application. However, the practice of the Appeals Board is not to allow such third parties to speak during the sitting or participate in any way, whether written or oral, in the appeal proceedings. Such third parties are only allowed to make their submissions through MEPA, which is a party to the appeal. There is also case-law to the effect that since such interested third parties are not parties to the appeal before the Planning Appeals Board, they cannot appeal from a decision of that Board on a point of law to the Court of Appeal.³

3. Judicial Process

Please give a short outline (no specific details) of the judicial process applying to project planning decisions (pre-trial proceedings, time-limits, competent courts, appeal, interlocutory injunctions).

As already state, where the proposed development has been refused, the applicant can an appeal to the Planning Appeals Board, which is an *ad hoc* administrative tribunal which has jurisdiction to determine appeals from decisions given by MEPA. The appeal has to be filed within thirty (30) days from the date on which the decision is communicated to the applicant. An interested third party who has made his submissions within the time-limit of fifteen days can also file an appeal to the Planning Appeals Board. MEPA can file its written reply within thirty days of service upon it of the application. The case is set down for a public hearing

³ *Teresina Portanier v. Planning Authority* decided by the Court of Appeal on the 19th November 2001; *John Mallia vs. Development Control Commission* decided by the Court of Appeal on the 4th December 2001.

wherein the parties may make oral submissions and produce such evidence as the Board may allow.

The law grants a right of appeal to the ordinary courts, specifically to the Court of Appeal (composed of one judge)⁴ from the decisions of the Planning Appeals Board. However, this right of appeal is limited to points of law decided by the Board in its decision. The application of appeal has to be filed within 15 days from the date of the decision of the Board. The case is then appointed for oral submissions before the Court of Appeal. After the oral submissions have been made, the case is then adjourned for judgement. There is no right of appeal from the judgement of the Court of Appeal.

4. Standing

- a) *Do all of the above-listed plaintiffs have standing before your national courts?*
- b) *If not, which are the reasons for their exclusion?*

The inhabitant of the residential area, the municipality (in Malta it is called “local council”) and the farmer will be considered as having standing to file an appeal to the Planning Appeals Board and subsequently to the Court of Appeal – provided that they had submitted written comments within the prescribed time-limit when the application to carry out the development was published.

The national environment agency cannot file such an appeal because ~~because~~ the national environmental agency is MEPA itself and the Environment Protection Directorate of MEPA would have been consulted prior to the decision being taken by MEPA board.

The Court of Appeal has yet to decide whether associations like the national association for the protection of the environment and the association for the protection of the environment of the neighbouring state have a *locus standi* to file an appeal, in the light of amendments made to the relevant legislation in 2001. The reason why it can possibly be argued that such organisations do not have a *locus standi* is because the law speaks of “*an interested third party*” and hence it could possibly be argued that the law requires what in procedural law is called ‘juridical interest’. Under the Maltese law of procedure only persons who have a ‘juridical interest’ can institute proceedings. One of the requisites of this ‘juridical interest’ as defined by case-law, is that it should be personal, which means that there must be a determinate and actionable link between the parties to the action. In the case of these two environment associations it can possibly be argued that the planning decision is not in breach of one of their rights, and hence their interest is not a personal one. However, we still have to wait to see whether the Court of Appeal will adopt this interpretation or otherwise.

⁴ The Court of Appeal can also be composed of three judges.

5. Scope of Claims

Are the above-listed plaintiffs only allowed to claim infringements of their individual rights (e.g. illegal expropriation of farmland, pollution of their private property) or may they claim infringements of public interests (e.g. adverse effects on the environment) or the unlawfulness of the planning decision in general (e.g. because of procedural deficiencies) as well?

The above-listed plaintiffs are only allowed to claim infringements based upon planning considerations to justify their appeal. Hence, they are allowed to claim infringements of their individual rights, infringements of public interest as well as the unlawfulness of the planning decision in general, as long as these infringements have planning considerations. The adverse effects on the environment would be considered a relevant planning consideration.

However, the alleged illegal expropriation would not be considered as a planning consideration and hence would not give rise to a right of appeal to the Planning Appeals Board and subsequently to the Court of Appeal. Nevertheless, the farmer can challenge the lawfulness of the expropriation by instituting judicial proceedings before the ordinary courts for judicial review of the legality of the expropriation.

6. Scope of judicial review

Do your courts review the lawfulness of a planning decision in every procedural and substantive respect or is the scope of judicial review restricted (e.g. to procedural aspects or clear and serious infringements of national or Community law)?

The Planning Appeals Board has jurisdiction to review the lawfulness of a planning decision in every procedural and substantive respect. The Court of Appeal only has jurisdiction to determine appeals on points of law decided by the Board in its decision. In other words the Court of Appeal does not have jurisdiction to determine appeals on points of fact, or on points of law not decided by the Board in its decision.

7. EU environmental law: Which decision will your court take, if:

a) the environmental impact assessment prescribed by Community law has not or not duly been carried out in connection with the project in question?

The Planning Appeals Board will probably annul the planning decision and send the case back to MEPA so that the relevant procedures regulating the environment impact assessment will be complied with. If there is a point of law involved

which has been decided by the Board and the case has gone before the Court of Appeal, the Court of Appeal will probably do the same.

b) the project adversely affects a natural habitat which is eligible for designation as a special area of conservation in the sense of the EU-“Habitats Directive” but has not yet been transmitted to the Commission?

If the land in issue has not been designated as a special area of conservation under the Flora, Fauna and Natural Habitats Protection Regulations (Legal Notice 257 of 2003), the Planning Appeals Board will possibly not consider it to be a relevant consideration. If on the other hand, the land has been designated as a special area of conservation under this legal notice, then the Board will possibly consider it as a relevant planning consideration, and depending on the extent of the adverse effects on the natural habitat, the Board will either revoke the development permit or allow the permit subject to a number of conditions intended to off-set the adverse effects.

The Court of Appeal is not likely to give a decision on this issue, since its jurisdiction is limited to points of law decided by the Planning Appeals Board in its decision. Nevertheless, an appellant can possibly plead before the Court of Appeal that the Planning Appeals Board has committed an error of law, in refusing to take into consideration the fact that the project adversely affects a natural habitat which is eligible for designation as a special area of conservation in the sense of the EU-“Habitats Directive” although it has not been transmitted to the Commission, since this is a relevant consideration. In such a hypothesis, the Court of Appeal could possibly consider this issue to be a point of law, and could possibly hold that it is a relevant consideration which should reasonably be taken into consideration by MEPA and by the Planning Appeals Board in reaching their respective decisions.

c) the project adversely affects a natural habitat which has been transmitted to the Commission as being eligible for designation as a special area of conservation but which has not yet been placed on a Commission list?

(Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora – Official Journal L 206, 22/07/1992 p. 0007 – 0050)

The answer is the same as that in question 7(b) above.

d) the project adversely affects a birds sanctuary in the sense of the EU-“Birds Directive”?

(Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds – Official Journal L 103, 25/04/1979 p. 0001 – 0018)

If the land in issue has not been designated as a birds sanctuary under The Protection of Birds and Wild Rabbits Regulations (Legal Notice 146 of 1993), the

Planning Appeals Board will possibly not consider it to be a relevant consideration. If on the other hand, the land has been designated as a birds sanctuary under this legal notice, then the Board will possibly consider it as a relevant planning consideration, and depending on the extent of the adverse effects on the birds sanctuary, the Board will either revoke the development permit or allow the permit subject to a number of conditions intended to off-set the adverse effects.

The Court of Appeal is not likely to give a decision on this issue, since its jurisdiction is limited to points of law decided by the Planning Appeals Board in its decision. Nevertheless, an appellant can possibly plead before the Court of Appeal that the Planning Appeals Board has committed an error of law, in refusing to take into consideration the fact that the project adversely affects a birds sanctuary in the sense of the EU Birds Directive, since this is a relevant consideration. In such a hypothesis, the Court of Appeal could possibly consider this issue to be a point of law, and could possibly hold that it is a relevant consideration which should reasonably be taken into consideration by MEPA and by the Planning Appeals Board in reaching their respective decisions.

e) the project is likely to exceed the limit values of the EU-“Ambient Air Directive” (esp. those for PM10/particulate matter)?

(Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air – Official Journal L 163, 29/06/1999 p. 0041 – 0060)

The Planning Appeals Board will probably consider it as a relevant planning consideration, and depending on the gravity of the excess of the limit values, the Board will either revoke the development permit or allow the permit subject to a number of conditions intended to ensure that the limit values of the EU-“Ambient Air Directive” - which have been transposed into domestic legislation as the Limit Values for Nitrogen Dioxide, Sulphur Dioxide and Oxides of Nitrogen, Particulate Matter and Lead in Ambient Air Regulations (Legal Notice 224 of 2001) are respected.

The Court of Appeal is not likely to give a decision on this issue, since its jurisdiction is limited to points of law decided by the Planning Appeals Board in its decision. Nevertheless, an appellant can possibly plead before the Court of Appeal that the Planning Appeals Board has committed an error of law, in refusing to take into consideration the fact that the project is likely to exceed the limit values of the EU-“Ambient Air Directive”, since this is a relevant consideration. In such a hypothesis, the Court of Appeal could possibly consider this issue to be a point of law, and could possibly hold that it is a relevant consideration which should reasonably be taken into consideration by MEPA and by the Planning Appeals Board in reaching their respective decisions.

It should be pointed out that there is no domestic case-law on the above issues as yet.

8. Consequences of procedural and substantive deficiencies of the planning decision:

a) Are there – in your national legal order – any procedural and/or substantive deficiencies which regularly render a planning decision completely void?

Any shortcoming which amounts to a breach of the right of a fair hearing will render the planning decision null and void. Also any breaches of the relevant legislation will also render the decision null and void.

b) For which kinds of rulings does your national legal order provide in this case (e.g. cassation of the planning decision or declaratory ruling establishing its nullity)?

In practice, the Court of Appeal – if there is a point of law decided by the Planning Appeals Board involved - will declare the decision of the Planning Appeals Board null, and send the file back to the Board for it to take another decision in accordance with the law.

c) For which kinds of rulings does your national legal order provide if the planning decision has only minor deficiencies/is not completely void (e.g. modification of the planning decision by imposing additional requirements such as noise barriers, speed limits or reforestation)?

Breaches of the right to a fair hearing or of the relevant legislation will in practice always entail the nullity of the decision.

Where the planning decision is deficient on the merits of the planning development in issue, for example it does not impose sufficient noise barriers, the Planning Appeals Board can impose any conditions which MEPA itself can impose when granting the development permission. The Court of Appeal is precluded from taking cognisance of the merits of the planning development, since it only has jurisdiction over points of law decided by the Board in its decision.

d) Which rulings are likely to be given in the cases of the above-listed plaintiffs?

As already stated above, it does not make a difference who the appellants are, because any appellant – provided he has *locus standi* and has filed written

submissions within the fifteen day time-limit prescribed – can raise any grievance based on planning considerations.

As regards the grievance of unlawful expropriation, it has already been stated that the Planning Appeals Board and the Court of Appeal do not have jurisdiction to take cognisance of this grievance, and the farmer has to institute separate judicial proceedings in the ordinary courts for judicial review of the legality of the expropriation.

As regards the grievance that the local council (municipality) has divergent project plans for its territory, local councils in Malta are not given any functions in respect of development planning, for these functions are all vested in MEPA. Local councils can only make submissions like any other interested third party to proposed development applications, and proposed development plans. However, the local council, like any other interested third party, can make objections if the motorway goes against any approved development plans or planning policies.

As regards the grievances of unbearable traffic noise, air pollution, conflicts with other development plans or planning policies, negative effect on the environment and transboundary pollution, these amount to planning considerations, and depending on their gravity, the Planning Appeals Board will probably either revoke the development permit or confirm it subject to a number of conditions intended to off-set these adverse effects. The Court of Appeal is not likely to give a decision on these grievances, since its jurisdiction is limited to points of law decided by the Planning Appeals Board in its decision. Nevertheless, an appellant can possibly plead before the Court of Appeal that the Planning Appeals Board has committed an error of law, in refusing to take into consideration these allegations, since they are relevant considerations. In such a hypothesis, the Court of Appeal could possibly consider this issue to be a point of law, and could possibly hold that they are relevant considerations which should reasonably be taken into consideration by MEPA and by the Planning Appeals Board in reaching their respective decisions.

As regards the grievance that the motorway causes a serious threat to the species listed by the “Habitats Directive”, the Planning Appeals Board will possibly only consider it if the species in question are listed as protected in the Flora, Fauna and Natural Habitats Protection Regulations (Legal Notice 257 of 2003). Depending on the seriousness of the threat to the species listed in this legal notice, the Planning Appeals Board will possibly either revoke the development permit or allow it under a number of conditions intended to off-set the threat. The Court of Appeal is not likely to give a decision on this grievance, since its jurisdiction is limited to points of law decided by the Planning Appeals Board in its decision.

9. Remedy of deficiencies

May procedural or substantive deficiencies of the planning decision be remedied during the judicial process? If yes, on which conditions?

See answer to Question 8 (c) above.