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Opinion paper by the Interdiocesan Commission for the Environment (KA) on the three Bills relating to Development Planning, Environment Protection and the Environment and Planning Review Tribunal

The KA's detailed opinion of the three Bills, article by article, as submitted, is elaborated below. The comments are listed in the order of the articles and are not listed in accordance with the seriousness of the issue discussed.

Development Planning Bill

Art 7(2) (d): The Bill proposes that one of the functions of the Authority shall be to "facilitate and coordinate the permit granting process for projects of common interest". Projects of common interest are defined as "projects necessary to implement the energy infrastructure priority corridors and areas set out in Annex I to Regulation EC no 347/2013 and which is part of the Union list of projects of common interest referred to in article 3 of Regulation EC no 347/2013 or other regulations applicable from time to time".

Comment: The KA cannot understand the role of the Authority "to facilitate and coordinate the permit granting process". If the Authority through its Planning Board is to grant permits, the fact that it would facilitate and coordinate the permit granting process for such projects, creates a conflict of interest for the Authority. The latter either sets policy (through its Executive Council) or grants permits (through its Planning Board). But facilitating and granting permits at the same time points to a confusion of roles and functions…and confusion has always led to abuse.

Recommendation: Art 7(2)(d) needs to be explained otherwise it should be deleted.

- **Art 7(4):** The Executive Council is to be fully informed of Government's "strategic directions" relative to development planning and "to monitor the proper execution of such policies".

Comment: A strategic direction is one thing while the execution and monitoring of such policies is a totally different matter. A strategic direction has to be translated into detailed policies which should be backed up by reasoned justifications for adopting one

policy option instead of another in order to achieve the strategy. This sub article is superfluous since the strategic direction will have been already stated in the SPED (even though the process for the adoption of the SPED has been flawed especially due to the lack of proper reasoned justification for its clauses). Strategic directions, in themselves, should last for a number of years and are not changed very often.

Recommendation: A Spatial Plan for the Environment and Development (SPED) that is formulated through the process that is currently available in the law (that is the current Development Planning Act with all the requirements of justifications for the policies) should be enough to have the strategic direction of Government known to all and sundry. The strategic direction cannot become equivalent to specific *ad hoc* projects.

- **Art 10 (1) and Art 37**: It is proposed that there would be an Executive Chairperson appointed by the Minister.

  Comment: For improved governance, there should not be an executive chairman. The Executive Council should delegate administrative and organizational duties to a CEO and the board should be headed by a chairman. The proposal that the executive chairperson, and not the Executive Council, shall be granted powers directly by the Minister will create a system of too much familiarity between the Minister and just one person in the Council. This is a system which introduces very weak governance that will not leave space for checks and balances. It will also create the environment for corrupt practices. A strong board headed by a chairman and to which board the CEO is answerable will create a better governance structure than the proposed setup.

  Ministerial involvement is aggravated by the proposal that the secretary of both the Executive Council and the Planning Board are to be appointed by the Minister. Moreover, the fact that the Executive Chairperson will be appointed by the Minister and that one of the functions of the Chairperson is to "carry out such other functions and duties as the Minister may assign to him from time to time" is a guarantee that there will be no checks and balances.

  According to the KA, it is dangerous that if the Executive Chairperson does not play game to the Minister's instructions then the Minister may dismiss him and this "shall be a just cause". Government may well decide to forget about splitting MEPA into two authorities and instead create two Government departments where the Minister can do as he pleases.

  Why call an entity an authority when it cannot appoint its own top staff, and where the Executive Chairman has to be on the Minister's leash all the time? The situation of total control by the Minister of the top officers of the Authority is confirmed by the proposal in Art 39 (2) that the directors of the different directorates shall be appointed only if the Minister approves of such appointments. This procedure puts the Authority in a worse situation than a Government Department where Directors are appointed by

the Public Service Commission, a body set up by the Constitution which is independent of the Minister or Government.

The KA is duty bound to make it clear and emphasize that creating a situation where the Minister exercises total control over the Executive Chairperson who has wide powers in the formulation of plans and policies and, more importantly, in the recommendations that are made to the Planning Board that will be taking decisions on development applications is paving the way for corrupt practices.. Since the setting of the Planning Authority in 1992, following years of abuse in the issue of development permits because of direct ministerial involvement in the development planning process, the proposed Development Planning Bill is again opening up such possibility for abuse.

Recommendation: The Executive Council should be headed by a Chairman appointed by the Minister. There should not be an Executive Chairperson but a CEO who will be appointed by a normal call for applications and the successful candidate appointed on the basis of competence and integrity and not because he is a Minister's puppet. The Minister should not have any say whatsoever in such an appointment so that the successful candidate serves the country and not a particular minister.

- **Art 32(1):** Declaration of assets.

  Comment: The declaration of assets should not be restricted to members of appointed bodies.

  Recommendation: The declaration of assets should be submitted by all persons appointed to positions under the Act as well as to high-ranking officers of the Authority. Moreover, the declaration of assets should be updated annually and apply also to the spouses of such persons and officers.

- **Art 33 (2):** Information to be accessible to the public.

  Comment: Apart from environmental impact statements, environmental planning statements and traffic impact assessments, documents that would be accessible to the public should also include feasibility studies that would have been submitted to justify a development outside development zone. In this way, the methodology and figures used to contest why a project cannot be feasible within development zones can be examined and contested. The reason that will probably be quoted for not making this information available would be that such information is commercially sensitive. If commercial information is sensitive, then the safeguarding of the Maltese countryside is equally sensitive at a national level.

  The KA wants to make it clear that it does not agree with the approach that was adopted in SPED paving the way for undefined developments outside development zones if they are just not feasible within development zones.

Recommendation: At the end of the second proviso of Art 33(2), there should be added "iv. feasibility studies carried out to justify a development outside instead of within a development zone".

- **Art 36**: The composition of the Executive Council is proposed to be made up of the Executive Chairperson, two permanent members who are the Chairman and Deputy Chairman of the Planning Board, two permanent members who are well versed in "building construction or health and safety or building services", and two temporary members from the Malta Environment Authority and any other temporary member/s from a list of organizations according to what is being discussed by the Executive Council. The Executive Council will be responsible for all directorates at the Planning Authority.

  Comment: The composition of the Executive Council is weak. A body such as the Executive Council which is responsible for plan and policy formulation and all Directorates of the Authority should have a wider representation on its Board in a similar way that the current Authority has and which the proposed Planning Board would have.

  It is at the formulation stage of plans and policies that the different interests have to be resolved and to ensure that undue development pressures are not made to bear on the members voting for a plan or policy.

  Recommendation: The Executive Council should be composed along the same lines of the Planning Board. Members of the Malta Environment Authority should be permanent members of the Executive Council as well as members of the Superintendence of Cultural Heritage. It is unacceptable that such members are invited "at the discretion of the Executive Chairperson". Cultural heritage is a hugely important asset for the country both in terms of its intrinsic value and in terms of its economic benefits to the country. No mistakes are to be allowed which would undermine the cultural heritage.

  A preferred alternative would be to scrap altogether the Executive Council and have the Planning Board act as the Authority as is presently the case, headed by a Chairman which would then appoint the CEO. With the environment protection function shifting to the Environment Authority, the Planning Authority Board should be able to carry out the functions of policy formulation, development control and management of the Planning Authority as a whole.

- **Art 37**: The Executive Council is proposed to be chaired by an Executive Chairperson whose duties include to "carry out such other functions and duties as the Minister may assign to him from time to time". He may also "be dismissed by the Minister at any time for a just cause and it shall be a just cause if the Minister determines that he has not achieved the targets and objectives set for him by the Minister".

Comment: This article relegates the proposed Executive chairperson to a puppet of the Minister. This article flushes down the drain all sense of organizational governance in the Authority

According to the KA, this article proposes that if the Executive Chairperson in his/her conscience cannot accede to a request by the Minister then he/she "may be dismissed by the Minister at any time for a just cause and it shall be a just cause if the Minister determines that he has not achieved the targets and objectives set for him by the Minister". Experience has shown that the "targets" and "objectives" can also mean orders that the Minister gives to the Executive Chairperson to change recommendations on development applications prepared by case officers and/or to exert pressure on Directors and case officers to amend recommendations for refusing or approving applications for development permits.

Recommendation: Delete all references in the Act relating to the Minister's powers to influence anybody in the Authority in carrying out their functions. The Minister should not be involved at all in appointments of employees of the Authority. There should be an independent Chairman appointed by the Minister but the role as currently envisaged for the Executive Chairman should be taken up by a CEO who will be appointed by the Council following a call for applications.

- **Art 36, 38, 40-44**: The Executive Council and the formulation of plans and policies.

Comment: The KA is, in principle, in favour of the split between the Planning function and the Environment Protection function because it wants the environment to be better protected in order to achieve sustainable development. However, having two *ad hoc* (and not permanent) members of the Environment Authority on the Executive Council, is not enough for the Environment Authority to be able to safeguard the interests of sustainable development in the formulation of plans and policies.

Recommendation: The KA proposes that the spatial strategy for environment and development, subsidiary plans and policies have also to be approved by the Malta Environment Authority and the Minister responsible for it before they can have effect.

The KA further suggests that plans and policies have also to be approved by the Superintendence of Cultural Heritage and the Minister responsible for it in so far as they have a direct or indirect impact on cultural heritage. In this way, ministerial powers are checked both through the institutions and through inter-ministerial checks and balances. The country cannot afford further unintentional mistakes or worse, intended damage, to its natural and cultural heritage.

- **Art 38 (1)(l)(ii):** publication of official manual

Comment: publication only of amendments to plans, policies and regulations may not give the whole picture of their impact on existing policy and plans.

Recommendation: the KA suggests that any main or subsidiary legislation, plan or policy which is amended should also be published in a consolidated version.

- **Art 43:** Strategic Environment Assessment (SEA) and other assessments

  Comment: The direction by the Minister to carry out an SEA or other assessments should not affect the powers of the Environment Authority to instruct the Planning Authority to carry out an SEA as proposed in the Environment Protection Bill. This would serve as a check on the governance of the Planning Authority.

  Recommendation: This article should state that such direction by the Minister does not prejudice any order by the Environment Authority to carry out an SEA that is issued under the Environment Protection Act.

- **Art 44:** Spatial Strategy for Environment and Development.

  Comment: As soon as the Development Planning Bill becomes law, the SPED will be short of the requirements as laid down by the law. The SPED does not provide any evidence that it has been prepared or contains the input for its formulation as required by the Bill. Art 44 (4) has also to stipulate that the surveys mentioned have also to be published. Moreover, the policies or elements of the Strategy need to be justified.

  Recommendation: The SPED needs to be revisited in order to live up to its name of being a strategy. Art 44 needs to be amended so that the SPED's policies and elements of the strategy need to be justified through surveys and studies that would have been carried out prior to its drafting and which are referred to in subarticle 4. Moreover the SPED should be accompanied by a document showing the key options that are available to implement the strategy and why the preferred strategic options are chosen out of the available ones.

  The process of drawing up the SPED should include a public consultation on the strategic directions that Cabinet would have prepared in consultation with the Authority. Different options which lead to the attainment of the strategic directions will be studied by the Authority. The options should then be open for public consultation and then decisions taken on the way forward with Cabinet approval. The final draft for public consultation and the approved SPED should be accompanied with an explanation of why a strategic direction was chosen instead of other available options. It should also be accompanied by surveys and studies which justify the chosen strategic options.

- **Art. 45(3):** Responses to representations made to the drafting of the SPED.

  Comment: Providing "responses" to the representations made is not enough.

Recommendation: The "responses" that the Executive Council has to provide have to be detailed reasons for accepting or rejecting any representations made.

- **Art 46:** Documents to be published

  Comment: The Bill does not allow for the publication of all documents used in drawing up the SPED.

  Recommendation: All documents referred to in Art 45(3) are to be published, including the representations received within the consultation period and the responses to the representations made, including the detailed reasons for accepting or rejecting them.

- **Art 52**: Order of precedence of plans and policies in case of conflict

  Comment: The order of precedence of plans and policies in the case of a conflict makes it absolutely important that the SPED is drawn up in a very careful way, unlike the exercise carried out for the one approved recently by Parliament. If the Spatial Strategy is flawed, as the KA has already expressed itself on the matter, then irreversible mistakes in the environment and land-use planning will ensue.

  Where a conflict between plans and policies arises, the principle should be introduced to give precedence to the policy or plan that provides better protection to the environment. For example, where a management plan of a Natura 2000 sites provides for some actions that grant a higher protection to the Natura 2000 site than any other policy or plan, then the local plan, subject plan or Spatial Strategy should not override such a "lower hierarchy" plan or policy.

  The same applies to current plans and policies and emerging plans and policies. In case there is a conflict between a current plan or policy and an emerging plan or policy, precedence should be given to the plan or policy that provides better environmental protection The negative impact of such a development permit application may not be evident until such time that it is being reviewed in the context of the current policies. If such plans or policies are deficient in some way or another, then for the sake of the common good, development permit applications have also to take into consideration emerging plans and policies.

  The approach to planning should be one that effectively safeguards sustainable development and not allow consultants to find loopholes in, and conflicts between, policies and plans, thus "rewarding" such consultants for finding such deficiencies. Government has to decide what is going to have precedence: protection of the environment and sustainable development or facilitation of projects that make use of loopholes in the law, plans and policies in order to promote restricted interests.

Recommendation: Where there is conflict between plans and policies, precedence should be given to those plans and policies that provide a higher environmental protection and higher level of sustainable development including emerging plans and policies which are already approved by the Authority but not yet so by the Minister.

- **Art 54(4):** The right to an appeal in case of minor modifications

Comment: The KA cannot understand why in the case of an application which seeks to change the zoning from, for example, residential to commercial, an appeal cannot be lodged by the residents who are aggrieved by such a decision.

Prior to an appeal, that is at application stage, minor modifications to plans which seek a change in zoning (example from residential to commercial or industrial), the approval of the Malta Environment Authority should be required prior to a permit being granted since such changes may have an impact on the wellbeing of residents such as, but not limited to, air quality and noise levels in a neighbourhood.

Recommendation: The right of appeal should be provided to third parties not only in the case of changes in the alignment of roads and buildings in a local plan, that is Art 54(4)(2)(a), but also in the case of changes in zoning, that is Art 54(4)(2)(b).

In the case of applications for minor modifications to plans which seek the change in zoning, the approval of the Malta Environment Authority should be required.

- **Art 55:** Development Orders

Comment: Development orders that permit developments without the need for a full development permit application have increased in scope in the last years. Although in many cases the orders make sense, there should be a revision of these orders especially in the case of outside development zones in order to ensure that such orders are not allowing developments which would otherwise have not been acceptable if the planning system provided for better scrutiny of such developments.

Recommendation: Development Orders should be reviewed in order to ensure that the application of multiple development orders will not result in a cumulative development which would otherwise have required a full development permit in order to safeguard the interest of non-applicants.

A development order should allow for the possibility of residents of properties abutting the site where the development order is to take place to submit their comments on a development order proposal.

The KA invites the Commissioner for Environment and Planning at the Office of the Ombudsman, an Office that is totally independent from MEPA), to carry out an

assessment of Development Orders and their impact on Outside Development Zones as well as Urban Areas where the individual or cumulative impact of such DNOs may have a deleterious impact on residents who would not be able to air their concerns through the planning system given that they would not be aware of the development to be carried out.

- **Art 57:** Scheduling of areas

  Comment: Scheduling of areas of landscape value should be prepared by the Malta Environment Authority and not the Planning Authority. The KA cannot understand why the scheduling, apart from the preparation, of areas falling under the remit of the Environment Authority, is to be carried out by the Executive Council of the Planning Authority. This approach needs clarification. Moreover, the descheduling of such areas cannot be decided upon only by the Planning Authority. The legislator should be careful about the different processes that are proposed to be adopted in the two authorities in the case of conservation orders.

  Recommendation: Art 57 (1)(b) which deals with scheduling to be carried out by the Environment Authority should include also areas of landscape value. The Environment Authority should prepare and effectively schedule such areas together with "areas of natural beauty, of ecological or scientific value". Otherwise, the KA cannot understand what autonomy the new Environment Authority will have with respect to the important conservation step of scheduling properties.

  Moreover, the KA believes that the Superintendence of Cultural Heritage should also be granted powers to schedule, or order the Planning Authority to schedule, property which falls under its competence, namely "areas, buildings, structures and remains of… cultural, archaeological, architectural, historical, antiquarian(or) artistic…importance" .

  Any descheduling of property which had been prepared and scheduled by the Environment Authority or the Superintendence of Cultural Heritage cannot be effective unless agreed to by the Environment Authority or the Superintendence of Cultural Heritage and the Ministers responsible for the Environment Authority or Cultural Heritage, as the case may be.

- **Art 57 (6):** Works to be carried out on scheduled property. This article states that "No works of any description should be carried out in or on any scheduled property and no scheduled property shall be demolished, altered or extended except with the permission of the Planning Board".

  Comment: Given that the Environment Authority is being created, then any such works or demolition should also require the permission of the Environment Authority where the scheduled property relates to areas (that is not buildings) or trees. If this consent is not forthcoming then the permit cannot be granted by the Planning Board.

The same applies to applications which will affect properties that fall under the remit of the Superintendence of Cultural Heritage. Such applications should not be granted a development permit if the Superintendence of Cultural Heritage does not consent to it. The KA believes that such an amendment to the draft bill is crucial if the MEPA demerger is to be of benefit to the environment or cultural heritage. Otherwise, the split would result in further devaluation of the natural and cultural heritage.

Recommendation: No works of any description should be carried out in or on any scheduled property and no scheduled property shall be demolished, altered or extended except with the permission of the Planning Board and the Environment Authority (where the scheduled property relates to areas, that is not buildings, or trees) or the Superintendence of Cultural Heritage in the case of property which falls under the remit of this entity.

- **Art 57(10):** Reconsiderations of scheduling of property

Comment: In the case of reconsiderations of scheduling of property, permission should be required also from the Environment Authority where such scheduling relates to areas (that is not buildings) or trees. An authorization from the Superintendence of Cultural Heritage would be required in the case of properties which fall under the remit of this entity.

Recommendation: In the case of reconsiderations of scheduling of property, permission should also be required from Environment Authority in the case of areas (that is not buildings) or trees. An authorization from the Superintendence of Cultural Heritage would be required in the case of properties which fall under the remit of this entity.

- **Art 59:** Development Fund

Comment: It should be clear what projects the funds are to finance.

Recommendation: The KA suggests that the aims of the Development Fund should be restricted to fund conservation projects and others relating to education for sustainable development.

- **Art 60:** The Standing Committee on the Environment and Development

Comment: The KA believes that this Committee should have a wider role than that which is currently suggested. The fact that a Parliamentary Committee is even listed in the Bill together with other policy advisory committees does not give this Committee the importance that it should deserve.

Recommendation: The Standing Committee on the Environment and Development should have more powers such as: giving its views (which are not binding on the Planning Board) on any application for a project proposed in an Outside Development Zone; giving its views (which are not binding on the Planning Board) on any development application that proposes to have a height which is substantially higher that that allowed in the local plan area irrespective of whether such height is allowed by the Floor-Area-Ratio policy; vetting and asking questions to the members that are to be appointed by the Minister on all boards of the Planning Authority in order to determine whether such nominees are fit for purpose.

- **Art 63:** Voting on the Planning Board

Comment: The Executive Chairperson (which the KA recommends that should be replaced by a CEO who is separate from the Chairman of the Authority) should not be allowed to have a vote on the Planning Board. He is responsible for policy making and also responsible for the Directorates that draw up recommendations to the Planning Board for a decision. This proposal goes against good governance since it is concentrating too much power in the hands of one individual who is in turn directly influenced and given instructions directly by the Minister.

Recommendation: The Executive Chairperson, given that he is involved directly in the recommendations made to the Planning Board, should not have a vote in the Planning Board.

- **Art 64(1)(a)** Function of the Planning Board to "to balance out any competing interests on the best use of the land and sea".

Comment: The phrase "to balance out any competing interests on the best use of the land and sea" is inappropriate. Some interests do not compete. They just run roughshod over others so there is no way how certain competing interests can be balanced out. This phrase should be deleted since it would create some legal arguments around it which will not favour sustainable development.

Recommendation: Delete the phrase "to balance out any competing interests on the best use of the land and sea".

- **Art 64(1)(b):** Building regulations

Comment: The KA views with caution the proposal for the Planning Board to deal also with building regulations. There is the possibility that the Planning Board instead of focusing on wider issues relating to a particular application and how it impacts on other developments, the environment and well-being of people may get bogged down in certain details which should be the competence of another board.

Recommendation: The advantages and disadvantages of having the Planning Board deal also with Building Regulations need to be clearly spelt out.

- **Art 65:** The Planning Commissions and types of applications to be decided by them

  Comment: The direct link between Minister and Executive Chairperson crops up again in this section. The Bill states that the Minister is to consult with the Executive Chairman when deciding which types of applications are to be dealt with by the different Planning Commissions. Good governance demands a better way of managing such an important organization.

  Recommendation: The Minister should consult with the Executive Council and not with his "buddy" on the Executive Council when deciding which types of applications are to be dealt with by the different Planning Commissions.

- **Art 65:** The Planning Commissions to be composed only of three members.

  Comment: Three is a very small number for a commission that will be deciding development applications. It has to be pointed out that such members do not enjoy the independence of judges in the exercise of their duties. So it is important that the number of members be increased to five. In such a case, the decisions of the Commission shall only be binding if they are supported by at least three members as opposed to the proposed two (Art 65(6)). In this way, pressures are made to bear less on individual members. When powers are delegated to a very small number of people, the chances of overdue pressures from interested persons and even the chance of corrupt practices will increase.

- **Recommendation:** The number of members should be increased to five. In such a case, the decisions of the Commission shall only be binding if they are supported by at least three members as opposed to the proposed two. Two members of the Planning Commission should be appointed by the Environment Authority. Such membership does not mean that approval by MEA is dispensed with in those cases where such authorization from MEA is required as proposed by KA.

- **Art 65(7):** Communication of decisions

  Comment: At law, communications should be done between Offices and not individuals.

  Recommendation: Decisions are to be communicated to the Executive Council and not to the Executive Chairperson.

- **Art 66(3) and Art 67(3):** Agricultural Advisory Committee and the Design Advisory Committee.

  Comment: The proposal that the Minister appoints even the secretary of advisory councils such as the Agricultural Advisory Committee and the Design Advisory Committee shows that the Bill is designed to grant too much power to the Minister even with respect to appointments relating to secretaries of such advisory committees.

  The KA is surprised that there is no mention of advisory committees relating to the natural and cultural heritage. This omission makes it all the more important to adopt the KA's suggestion to have the Malta Environment Authority and the Superintendence of Cultural Heritage exercise a veto on projects that affect areas and properties that fall under the competence of these entities.

  Recommendation: The KA believes that such appointments should be left to the Authority to decide if the Authority is worth its name.

  With respect to the Agricultural Advisory Committee, members should be appointed by the Minister responsible for Agriculture and the Minister responsible for the Environment and not by the Minister responsible for the Authority. This committee should also have independent members who are not Government employees.

  The same applies to the Design Advisory Committee. This Committee which should have at least five members and its members appointed by the *Kamra tal-Periti* and the Minister responsible for Cultural Heritage so that the message is conveyed that new architecture has to come up with new ways on how to improve the built environment in Malta with new designs that also are sensitive to Malta's cultural heritage.

- **Art 71(2)(a):** Outline permits

  Comment: Special attention has to be made with respect to outline permits. In the past, outline permits have been granted which then compromised the full development permission. An outline permit in itself cannot go into details. However, in many cases the number of apartments or floors for the development is decided at outline permit stage. 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 decision relating to an outline permit. This issue has to be studied further so that mistakes from the past are not repeated.

  Recommendation: The granting of outline permits needs to be rethought. The KA invites the Commissioner for Environment and Planning at the Office of the Ombudsman to carry out an exercise on the experience of outline permits and whether this practice has served the interests of a proper planning system which does not compromise good-sense decision-making in the interests of sustainable development.

- **Art 72(2)Plans and policies to be considered when deciding on an application**

  Comment: In case there is a conflict between an approved plan or policy and an emerging plan or policy, precedence should be given to the plan or policy that provides better environmental protection. The negative impact of a development permit application may not be evident until such time that such application is being reviewed in the context of the current policies. If such plans or policies are deficient in some way or another, then for the sake of the common good, decisions relating to development permit applications have also to take into consideration emerging plans and policies.

  The approach to planning should be one that effectively safeguards sustainable development and not allow consultants to find loopholes in, and conflicts between, policies and plans thus "rewarding" such consultants for finding such deficiencies. Government has to decide what is going to have precedence: protection of the environment and sustainable development or facilitation of projects that make use of loopholes in the law, plans and policies in order to promote restricted interests.

  Recommendation: Where there is conflict between plans and policies, precedence should be given to those plans and policies that provide a higher environmental protection and higher level of sustainable development including emerging plans and policies which are already approved by the Authority but not yet so by the Minister.

- **Art 72(2)(d)** Surrounding commitments

  Comment: The meaning "surrounding commitments" need to be defined when the Planning Commission grants a permit based on such a reasoning. Such term can be stretched too much to justify a development which would otherwise be undesirable.

  Recommendation: What qualifies as "surrounding" and "commitment" needs to be defined. In any case this definition should not apply to applications which are outside development zone.

- **Art 72(8) and (9):** Mining of minerals

  Comment: The KA believes that in the case of mining of minerals, given their environmental impact, an application for such development has also to require the authorization of the Environment Authority and if it affects an area or property under the competence of the Superintendence of Cultural Heritage, the authorization of such entity as well.

  Recommendation: An application for the mining of minerals is to require also the authorization of the Environment Authority and, if it affects an area or property under the competence of the Superintendence of Cultural Heritage, the authorization of such entity as well.

- **Art 73(5):** The Planning Commission's right to demand a bond

  Comment: The emphasis in the proviso to this sub-article is that the bond should be commensurate with the nature of the project. However it does not make reference to the environmental risks that the project may pose.

  Recommendation: The proviso to Art 73(5) should be qualified to the effect that the Planning Board has to take into consideration the risk to the environment of such project or activity. The bond has to be commensurate also with the risk that the project poses to the environment.

- **Art 78(3):** Call-in procedure by the Minister

  Comment: The procedure omits the publication of the Minister's recommendation.

  Recommendation: The Minister's recommendation with respect to a project that is referred for decision by Cabinet should be published and not merely made "available to the public".

- **Art 84(1):** Public consultation period for regulations.

  Comment: The proposed time frame of two weeks for public consultation is deemed to be too short. Considering what the public has to say is not an option, but an essential component of sustainable development and planning. Moreover, reasons for "urgency" are expected to be those related to factors that are exclusively outside the control of Government.

  Recommendation: the period for public consultation for regulations should be four weeks instead of two. Moreover, in the case of Art 84(2), where this timeframe is dispensed with for reasons of urgency, the Minister has to provide detailed reasons why such regulations are urgent.

- **Art 87:** Building Regulations

  Comments: The KA expresses reservation about the inclusion of Building Regulations in the functions of the Authority. If this suggestion creates an improved built environment to be enjoyed by applicants and neighbors, then it is a commendable move. However, if this added function will create excessive focus on the building itself without giving due attention to its external impacts on the environment and on adjacent properties then the proposal to introduce this function should be rethought.

  The Planning Board is not being obliged to provide detailed reasons for the dispensation or relaxation of building regulations for certain projects. Moreover, there

is no right of appeal to third parties against dispensation or relaxation of building regulations.

Recommendation: The inclusion of Building Regulations as one of the functions of the Authority has to be explained and justified.

The Planning Board has to provide detailed reasons for the dispensation or relaxation of building regulations for certain projects.

An appeal against dispensation or relaxation of building regulations should be provided to third parties.

- **Art 88(2)(a) & (b):** Design, construction, material alterations or extensions of buildings

  Comment: Clarification is required with respect to these two paragraphs. Where is the demarcation line between a planning issue and a building regulation issue?

  Recommendation: Paragraphs (a) and (b) need to be clarified so as to make it clear that issues relating to planning policies (including the design, building, alterations and extensions of buildings) do not become the remit of building regulations instead of planning policies.

- **Art 97(9):** Dismissal of application or appeal in case of non-observance of stop notice.

  Comment: The options of creating legal loopholes in enforcement procedures should be restricted further. In order to send the right signal to those who disregard completely any stop and/or enforcement notices, this sub-article needs to be amended to ensure that applications to regularize an activity or a development or an appeal to the Tribunal from a refusal "shall be dismissed" and not merely "may be dismissed" if the stop and/or enforcement notice have not been complied with.

  Recommendation: Applications to regularize an activity or a development or an appeal to the Tribunal from a refusal "shall be dismissed" and not merely "may be dismissed" if the stop and/or enforcement notice have not been complied with.

- **First Schedule**: Provisions with respect to the Executive Council

  Comment: The KA believes that this should be amended along the lines suggested in this opinion paper including rethinking whether there should be an executive council at all. If the Executive Council is to be retained, then it should be composed along the same lines of the Planning Board. Members of the Malta Environment Authority should be permanent members of the Executive Council as well as members of the Superintendence of Cultural Heritage.

Another much preferred alternative would be to scrap altogether the idea of an Executive Council and have the Planning Board act as the Authority as is presently the case, headed by a Chairman which would then appoint the CEO. With the environment protection function shifting to the Environment Authority, the Planning Authority Board should be able to carry out the functions of policy formulation, development control and management of the Planning Authority as a whole.

Recommendation: Scrap the idea of an Executive Council headed by an Executive Chairman and have the Planning Board act as the Authority as is presently the case, headed by a Chairman which would then appoint the CEO.

- **Second Schedule para 10**: Provisions relating to the Planning Board and the Planning Commissions

  Comments: Recommendations should be prepared by the Directorates. The Executive Chairperson, who according to the Bill, will be very close to the Minister and fired at will by the Minister, cannot be relied on to exercise independent professional judgement. Indeed, no self-respecting professional should accept to be in such a position. In the proposed position, the Executive Chairperson can amend any recommendation that is prepared by any of the Directorates on the instruction of the Minister.

  Recommendations: Recommendations for approving or refusing a development application should be prepared by the Directorates and not amended by the Executive Chairperson.

- **Third Schedule**: The Standing Committee on Environment and Development Planning.

  Comment: The role of this Committee is restricted in the current Bill.

  Recommendation: The Standing Committee on the Environment and Development should have more powers such as: giving its views (which are not binding on the Planning Board) on any application for a project proposed in an Outside Development Zone; giving its views (which are not binding on the Planning Board) on any development application that proposes to have a height which is substantially higher that that allowed in the local plan area irrespective of whether such height is allowed by the Floor-Area-Ratio policy; vetting and asking questions to the members that are to be appointed by the Minister on all boards of the Planning Authority in order to determine whether such nominees are fit for purpose.

Environment Protection Bill

- **Art 5:** This states that two articles relating to the duty to protect the environment by any person including Government "shall not be directly enforceable in any court".

  Comment: The KA believes that ideals that are not enforceable in a court have no place in legislation. Too many statements have been made purportedly in favour of the environment. But the resolve to turn words into concrete actions has often been lacking. The KA expected that following the promise of setting up a new Authority to protect the environment, these high ideals from the current law would have been resulted in concrete procedures, functions and powers for the new Authority with respect to the environment on land and sea. Marketing efforts and nice words about protecting the environment are now beyond their "sell-by" date.

- **Art 6(2)(b)(ii)** Members of the Authority

  Comment: It is interesting that "good governance" is being mentioned as a reason for appointing independent members on the Authority when good governance is being seriously eroded in the proposed Development Planning Bill as our comments for the latter Bill explain.

- **Art 8(7):** Government to inform Authority of its strategic directions

  Comments: The Bill states that the Authority is to be fully informed of Government's "strategic directions relative to the environment" and "to monitor the proper execution of such policies". A strategic direction is one thing while the execution and monitoring of such policies is a totally different matter. A strategic direction has to be translated into detailed policies which are backed up by reasoned justifications for adopting one policy instead of another in order to achieve the strategy. This sub-article is superfluous since the strategic direction will be stated in the Strategy already. Strategic directions, in themselves, should last for a number of years and are not changed very often.

  Recommendation: The National Strategy for the Environment should be enough to have the strategic direction of Government known to all and sundry. The strategic direction cannot become equivalent to specific *ad hoc* projects or activities.

- **Art 19 (1):** Authority's expenditure

  Comment: This sub-article is an error of cut-and-paste from the Development Planning Bill since no "Executive Council" is envisaged for the Environment Authority.

  Recommendation: Substitute "Executive Council" with "Authority"

- **Art 31:** The Standing Committee on the Environment and Development

  Comment: This Committee should have a wider role than that which is currently suggested. The Committee should vet and ask questions to the members that are to be appointed by the Minister on all boards of the Authority in order to determine whether such nominees are fit for purpose.

- **Art 32(3):** The Environment Fund

  Comment: It should be clear what projects the Environmental Fund is to finance.

  Recommendation: The KA suggests that the aims of the Environment Fund should be restricted to fund conservation and environmental restoration projects and other projects relating to education for sustainable development.

- **Art 37(1):** Declaration of assets

  Comment: The declaration of assets should not be restricted to members of appointed bodies.

  Recommendation: The declaration of assets should be submitted by all persons appointed to positions under the Act as well as to high-ranking officers of the Authority. Moreover, the declaration of assets should be updated annually and apply also to the spouses of such persons and officers.

- **Art 41-43:** Plans and Policies

  Comment: Rightly so, the "protection and effective management of the environment shall be regulated by plans, policies and regulations" (Art 41). The KA totally agrees that the definition of "environment" also means "land" and "sea" (Art 2). As explained in our comments under the Development Planning Bill , the KA proposes that the Spatial Strategy for Environment and Development, subsidiary plans and policies, development orders, scheduling and conservation orders, and emergency conservation orders (hereinafter referred to as the "plans, policies and orders") have also to be approved by the Malta Environment Authority before they can have effect.

  The KA has always been in favour of the split between the Planning function and the Environment Protection function because it wanted the environment to be better protected. In the KA's view, such a role for the Malta Environment Authority is crucial if it is to be relevant in the "protection and effective management of the environment".

  If the Authority does not agree with a plan or policy, then it should send its position statement to the Minister as is laid down in Art 43(4)(5). The process should be

designed in a way that it would be the two Authorities (that is the Planning Authority and the Environment Authority) that strive to resolve the conflict between them. If this is not resolved, then the issue should be resolved between the Ministers responsible for the two Authorities and if need be, at Cabinet level.

Recommendation: the KA proposes that the Spatial Strategy for Environment and Development, subsidiary plans and policies, development orders, scheduling and conservation orders, and emergency conservation orders (hereinafter referred to as the "plans, policies and orders") have also to be approved by the Environment Authority before they can have effect. If a conflict between the Planning Authority and the Environment Authority is not resolved between them, then the issue should be resolved between the Ministers responsible for the two Authorities and if need be, at Cabinet level.

- **Art 45:** National Strategy for the Environment. The Bill states that the "Minister shall prepare a policy document outlining the National Strategy for the Environment".

  Comment: The National Strategy for the Environment should not just be an "outline". The KA does not agree with the proposed process of formulating the strategy. Given that the environment affects and is affected by various economic and social considerations while taking into consideration the needs of future generations, the KA believes that it should be Cabinet, and not the Minister, that should draw up high-level strategic directions for the formulation of the Strategy.

  These strategic directions should be open for public consultation and then it would be the Authority that would draw up the National Strategy itself. There will be different options which lead to the attainment of the strategic directions. The options that would come out of the drawing up of the strategy should then be open for public consultation and then decisions taken on the way forward. Following approval by the Authority, Cabinet would then decide on the optimal options to be adopted. This process is much different from that which is being proposed. The Strategy should be accompanied with an explanation of why a strategic direction is being chosen instead of other available options. It should also be accompanied by surveys and studies which justify the chosen strategic options.

- **Art 46(1):** Publication of the National Strategy

  Comment: The publication of the National Strategy should also include the responses to the representations made explaining why such representations were accepted or rejected.

  Recommendation: Publish the responses to the representations made explaining why such representations were accepted or rejected

- **Art 69:** Scheduling of areas

  Comment: The KA has no problems with the possibility that both the Environment Authority and the Planning Authority be granted powers of scheduling. However, any descheduling of property which falls under the competence of the Environment Authority cannot take place unless the Environment Authority consents to it and such descheduling is also endorsed by the Minister responsible for the Environment. Moreover, specific reference should be made to the protection of species and trees.

  Recommendation: Conservation orders and Emergency Conservation Orders issued under the Environment Protection should have the same enforceability and effectiveness under the Development Planning as if they were issued under the latter Act. A specific reference to conservation orders for species and trees should be made in Art 69(1).

- **Art 76(7):** Dismissal of applications

  Comment: In order to send the right signal to those who disregard completely any stop and/or enforcement notices, this sub-article needs to be amended to ensure that applications to regularize an activity "shall be dismissed" and not merely "may be dismissed" if the stop and/or enforcement notice have not been complied with.

  Recommendation: Amend Art 76(7) to ensure that applications to regularize an activity "shall be dismissed" and not merely "may be dismissed" if the stop and/or enforcement notice have not been complied with.

- **Second Schedule para (e)** Preparation of subsidiary plan or policy

  Comment: the period of a one-month public consultation may not be enough for complex plans and policies

  Recommendation: Considering what the public has to say is not an option, but an essential component of sustainable development and planning. Therefore the period of consultation for the preparation or review of a subsidiary plan or policy should be for a period of not less than 6 weeks.

- **Second Schedule para (l):** Publication of responses

  Comment: the publication of amendments to plans may be difficult to compare with the current versions if a consolidated version is not available. Moreover, responses need to be detailed.

Recommendation: Any main or subsidiary legislation, plan or policy which are amended should also be published in a consolidated version. Moreover, when these are published the "responses" to the representations made have to provide detailed reasons for accepting or rejecting any representations made.

Environment and Planning Review Tribunal Bill

- **Art 4(1),(4) & (6):** Establishment of panels of the Tribunal and appointment of members

  Comment: Given that the Tribunal has a quasi-judicial status, it should be the President acting on the advice of the Prime Minister that establishes the panels and designates the categories of cases to be assigned to each panel. On the same lines, it should be the President that appoints the members on the advice of the Prime Minister.

  Recommendation: The President, acting on the advice of the Prime Minister shall establish the panels and designates the categories of cases to be assigned to each panel. Moreover, the President, acting on the advice of the Prime Minister, shall also appoint the members of the panels.

- **Art 4(2):** Composition of panels. The Bill suggests that each panel "shall consist of three members, with two of its members being well versed in development planning legislation and environmental legislation and the other member an advocate".

  Comment: With the proposed composition of members on the Environment and Planning Review Tribunal, the planning system in Malta is moving further towards a legalistic approach to planning which risks dispensing with a holistic approach to sustainable development. The product will be a planning system which gives less consideration to the effects of projects on the ground and more consideration on legalistic issues which compound matters on the ground. This situation encourages those who want to 'play the system' to discover ways of circumventing the law and continue unabated with their unsustainable plans.

  The members, apart from the advocate, should be well versed in development planning and environmental management or planning and not well versed in the legislation. The tribunal will not be deciding only points of law, especially procedural matters, but more importantly it will be deciding on matters of substance which affect the environment (including the land and sea) which a person versed only in legislation would not be able to decide upon.

Recommendation: The Chairman of the Tribunal should be an advocate while the other two members should be persons well versed in development planning and environmental planning or management. Moreover, it makes more sense to have at least one panel to decide appeals lodged under the Development Planning Act and another panel to decide appeals lodged under the Environment Protection Act.

- **Art 5:** Secretariat of the Tribunal. The Bill proposes that the Secretary and the administrative secretariat shall be appointed by the Prime Minister.

  Comment: It is not clear that there will be a normal recruitment procedure for the Secretary and the persons to work in the administrative secretariat so that their appointment is a permanent one.

  Recommendation: There should be a normal recruitment procedure for the Secretary and the administrative secretariat so that the staff chosen is competent for the required tasks.

- **Art 6:** Place of sittings of the Tribunal

  Comment: It is not clear why the Prime Minister has also to be involved in the issue of where the Tribunal should hold its sittings.

  Recommendation: Clarification is required as to why the Prime Minister should be involved in where the Tribunal should hold its sittings. The Tribunal should decide itself the place where to hold its sittings.

- **Art 7:** Registry of the Tribunal.

  Comment: Given that the Tribunal has a quasi-judicial status, it should be the President acting on the advice of the Prime Minister that establishes the functions of the Registry of the tribunal. The officers of the Registry should not be appointed by the Prime Minister but follow a normal recruitment procedure as is being proposed by the KA for the Secretary and the persons to work in the administrative secretariat of the Tribunal. In this way the staff would be permanent. The Bill does not spell out whether such appointments will follow a recruitment procedure.

  Recommendation: The President, acting on the advice of the Prime Minister should establish the functions of the Registry. The officers of the Registry should not be appointed by the Prime Minister but follow a normal recruitment procedure so that staff would be competent and permanent.

- **Art 9(2)(d):** Documents and information relevant to an appeal

  Comment: The Tribunal should ensure that even the Environment Authority will make available to the parties to the proceedings, the documents and information relevant to the appeal.

  Recommendation: Insert "and Environment Authority" after "Planning Authority"

- **Art 9(2)(d):** Documents and information relevant to an appeal

  Comment: Given that the Tribunal has a quasi-judicial status, it should be the President acting on the advice of the Prime Minister that makes regulations to implement and to give better effect to the provisions of this Act.

  Recommendation: The President, acting on the advice of the Prime Minister, should make regulations to implement and give better effect to provisions of this Act.

- **Art 11(1)(a) & (b):** Hearing and determination of appeals.

  Comment: The Bill does not define key phrases which are included in the list of appeals namely "regularization process" and "screening of a proposed development". Moreover, the KA cannot understand the specific mentioning of "project of common interest (PCI)". A project falling under the latter definition would be a project that would need a development permit application which if granted may cause a third party to lodge an appeal. The specific mentioning of such a project needs clarification.

  The KA cannot understand why in the case of a permit which grants a change in zoning from, such as for example, residential to commercial, an appeal cannot be lodged by the residents who are aggrieved by such a decision (Art 11(1)(e)).

  Recommendation: Define "regularization process" and "screening of a proposed development". Clarify why "project of common interest (PCI)" is specifically mentioned.

  An appeal should be provided to third parties in the case of permits that grant changes in zoning.

- **Art 11(1)(e):** Appeals by the Environment Authority

  Comment: The proviso to Art 11(1)(e) seems to exclude the possibility that the Environment Authority can appeal against decisions of the Planning Authority since in the proviso the term "authority" has the meaning assigned to it in Art (2) which is the "Planning Authority" and therefore cannot refer to the Environment Authority.

  Recommendation: Clarify the proviso to ensure that the Environment Authority has the right to appeal any development permissions granted by the Planning Authority.

- **Art 11(1)(e):** Appeals by an Environment NGO

  Comment: The granting of a right of appeal to NGOs (even though a written representation was not made in the application process) is restricted to permits that require an Environmental Impact Assessment or an IPPC. Sometimes some permits that are granted and which cause a public uproar due their lack of sensitivity to the environment are permits which would not have required an Environmental Impact Assessment or an IPPC. Moreover, some permits that require a Traffic Impact Assessment may not require an Environmental Impact Assessment but their negative impact on residents would be high.

  Recommendation: NGOs should be granted the right of appeal (even though a written representation was not made in the application process) in the case where an application required an Environmental Impact Assessment or IPPC permit or Traffic Impact Assessments or is in an outside development zone or affects any scheduled property.

- **Art 11(2):** Prime Minister to order any other decision of the Planning Authority to be subject to the jurisdiction of the Tribunal

  Comment: The KA does not understand the purpose of this Article and its specific reference to the Planning Authority without referring to the Environment Authority. Is it meant to deal with administrative issues at the Planning Authority? If yes, the Tribunal should not involve itself in such issues.

  Recommendation: This role of the Prime Minister in this sub-article needs to be clarified.

- **Art 33(1):** The Tribunal "may not grant a suspension of the execution of a permit in relation to an application for a development which, in the opinion of the Minister responsible for the Planning Authority, is of strategic significance or of national interest, related to any obligation ensuing from a European Union Act, affects national security or affects the interests of the Government and, or other governments". Such cases do not apply in the case of an application which requires an IPPC or Environmental Impact Assessment.

  Comment: Although the KA understands the need for this sub-article in the case of very special and very limited circumstances, abuse can be made of it. The "interests of Government, and or other governments" can have a very wide meaning. Moreover, an application relating to an obligation ensuing from a European Union Act can also have its meaning stretched.

  Recommendation: The "interests of Government and, or other governments" and also "obligation ensuing from a European Union Act" should be better defined in order to restrict them.

Moreover, the cases to which this sub-article should not apply should include applications that will have an impact on scheduled property.

- **Art 35(c):** Decisions relating to fast-track applications

  Comment: "Fast-track applications" are not defined in the Act.

  Recommendation: Define "fast-track" applications

- **Art 37(2):** Appeals from scheduling and conservation orders. The Bill proposes that the Tribunal shall seek the endorsement of the Minister responsible for the Planning Authority when descheduling a property.

  Comment: The Minister in this case is acting as a final arbiter in descheduling a property. However, the law does not stipulate whether the Minister is obliged to approve or otherwise such scheduling. Moreover, descheduling of property that falls under the remit of the Superintendence of Cultural Heritage would need to be endorsed by the Minister responsible for Cultural Heritage.

  Recommendation: It should be specified that the decision to deschedule a property cannot be effective unless the Minister approves such descheduling within a period of 3 months. Descheduling of property that falls under the remit of the Superintendence of Cultural Heritage should be endorsed by the Minister responsible for Cultural Heritage and not by the Minister responsible for the Planning Authority. If the Minister does not approve of such descheduling within 3 months, then the Tribunal's decision is effectively annulled.

- **Art 40:** Grounds on which the Tribunal bases its decisions. The Bill states that the Tribunal "shall indicate, with sufficient clarity, the grounds on which it bases its decisions".

  Comment: Apart from deciding on points of law, the Tribunal cannot base its reasons other than those that the Development Planning Act and the Environment Protection Act provide for the Planning Authority and the Environment Authority to base their decisions on when determining an application.

  Recommendation: It should be specified that the Tribunal can only base its decisions on points of law and reasons which the Development Planning Act and the Environment Protection Act provide for the Planning Authority and the Environment Authority to base their decisions on when determining an application.

- **Art 49:** Minister responsible for the Environment Authority is required to approve a Tribunal decision to deschedule a property.

Comment: The Minister in this case is acting as a final arbiter in descheduling a property. However, the law does not stipulate whether the Minister is obliged to approve or otherwise such scheduling.

Recommendation: It should be specified that the decision to deschedule a property cannot be effective unless the Minister approves such descheduling within a period of 3 months. If the Minister does not approve of such descheduling then the Tribunal's decision is annulled.