

Climate change mitigation as a consideration in the determination of an application for development permission.

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In this article, **Miguel Cauchi** discusses the recent case of *Charles Falzon vs Planning Authority* and its relevance to the general issue of solar rights in Malta.

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To operate effectively, solar panels require unshaded access to the sun's rays during peak sunlight hours. Some landowners are reluctant to invest in rooftop solar panels because they fear that a neighbour will erect a structure or grow a tree on a nearby property that shades their panels.¹

In the dissertation entitled 'Solar Access Rights of Property Owners in Maltese Law – Is Access to Sunlight Guaranteed to Investors in Photovoltaic Systems?',² this author researched various legal principles and analysed their possible applicability in solar access disputes, considering the installation and operation of a photovoltaic system as an exercise and enjoyment of ownership.³ In this context and up to this point in time, no legislation in Malta guarantees solar access to investors in photovoltaic systems, and this despite Government private investment incentives.

In *Frank Zammit vs Planning Authority et al*,⁴ the plaintiff argued, *inter alia*, that the development of the neighbouring property, as envisaged in the development application, challenged by the same proceedings would hinder access to sunlight on his roof, rendering the operation of the installed solar panels inefficient. In this case, the Court of Appeal⁵ explained that the interference of a development on the operation of a photovoltaic system is a civil law issue, rather than a planning one, and underlined that a development permit is *in ogni caso* issued without prejudice to third party rights,⁶ including the safeguard of civil rights. This deliberation of the Court was made despite Article 72(2)(d) of the Development Planning Act⁷ requiring the taking into account of environmental considerations in the determination of an application. Hence, the Court may be said to have simply dismissed the implied argument that the solar user's ability to use natural light received by his property to generate electricity should be protected in the public interest. In a subsequent judgement⁸ in relation to the same development application, the Court of Appeal, on other considerations, revoked the decision of the Tribunal and, consequently, decided to consider the development permit without effect.

¹ Troy A Rule, 'Shadows on the Cathedral: Solar Access Laws in A Different Light' [2010] University of Illinois Law Review 851.

² Miguel Cauchi, 'Solar Access Rights of Property Owners in Maltese Law – Is Access to Sunlight Guaranteed to Investors in Photovoltaic Systems?' (LL.B. (Hons.) dissertation, University of Malta 2022).

³ *ibid* 33.

⁴ *Frank Zammit vs Planning Authority et al*, Environmental and Planning Review Tribunal 24 September 2020.

⁵ 17/2020 *Frank Zammit vs Planning Authority et al*, Court of Appeal (Inferior) 25 February 2021.

⁶ Development Planning Act, Chapter 552 of the Laws of Malta, Article 72(1).

⁷ *ibid* Article 72(2)(d).

⁸ 17/2022 *Frank Zammit vs Planning Authority et al*, Court of Appeal (Inferior) 7 December 2022.

The deliberation made in the mentioned case may be contrasted with the decision of the High Court in the case *R (on the application of William Ellis McLennan) v Medway Council et al.*⁹ In this judicial review case, the plaintiff argued that the Council acted unreasonably and irrationally in failing to take into consideration the fact that the extension proposed to the neighbouring building would result in a shadow over his property, particularly over his solar panels, thereby compromising the performance thereof.¹⁰ In fact, the Court agreed and quashed the grant of the development permit, underlining that ‘*the council was not entitled to reject the impact of the proposed development on the claimant’s renewable energy system*’.¹¹

The Planning and Compulsory Purchase Act¹² of the United Kingdom demands that the determination of development applications ‘*must be made in accordance with the [development] plan unless material considerations indicate otherwise*’.¹³ Reference is made to Section 19(1A) which stipulates that the development plan must include ‘*policies that are designed to secure that the development and use of land in the local planning authority’s area contribute to the mitigation of, and adaptation to, climate change*’.¹⁴ In the *McLennan* case,¹⁵ the Court deliberated that not only the relevant local plan and the national planning policy framework recognised the positive contribution of small-scale renewable energy systems in climate change mitigation, but that the impact on the operation of the plaintiff’s solar panels, in particular, had to be categorised as a material planning consideration.

Comparatively, the Development Planning Act¹⁶ provides that in the determination of an application, regard shall be had to, *inter alia*, plans, policies, regulations, material considerations deemed relevant, representations made in response to the publication of the application, and representations and recommendations made in response to the notification of the application. The Planning Board is obliged to make such considerations; however, it is not bound to provide a record of the considerations made. It is also notable that the Planning Board’s discretion, in taking into account these factors, is not defined. Nonetheless, the legislator only chose to qualify the deliberation made regarding material considerations by the phrase ‘*the Planning Board may deem relevant*’. The factors as listed in Article 72(2) should all be taken into account, and should be considered with the same relevance and importance in the determination of an application.

⁹ *R (on the application of William Ellis McLennan) v. Medway Council and Ken Kennedy* [2019] EWHC 1738 (Admin).

¹⁰ James Souter, ‘High Court sheds light on solar panels’ (*CharlesRussell Speechlys*, 31 October 2019) <charlesrussellspeechlys.com/en/news-and-insights/insights/construction-engineering-and-projects/2019/high-court-sheds-light-on-solar-panels> accessed 25 March 2023.

¹¹ Katherine Evans, ‘Solar panels have a right to light’ (*Lexology*, 9 September 2019) <lexology.com/library/detail.aspx?g=1a906017-d060-4e32-b62d-4b875a936cb7> accessed 25 March 2023.

¹² Planning and Compulsory Purchase Act 2004 (UK).

¹³ *ibid* section 38(6).

¹⁴ *ibid* section 19(1A).

¹⁵ *R (on the application of William Ellis McLennan) v Medway Council et al* (n 9).

¹⁶ Development Planning Act (n 6) Article 72(2).

The recent case of *Charles Falzon vs Planning Authority*¹⁷ revolved around an application for the construction of four apartments with underlying four car space garage in the middle of a row of terraced houses. With relevance to this Article, the Court considered that ‘*il-height limitation tal-pjan lokali hu rekwiżit li jillimita l-oġhla massimu mhux jekk l-iżvilupp hux idoneju għaċ-ċirkostanzi fattwali fiż-żona immedjata fejn qed jiġi propost*’.¹⁸ Would the installation and operation of photovoltaic systems on the roofs of the surrounding properties constitute such a circumstance that limits the development up to that height that does not overshadow the mentioned photovoltaic systems?

Of course, within the context of limited developable area and an ever increasing population, it must be understood that vertical development in Malta is a necessity.¹⁹ On the other hand, the installation of photovoltaic systems on rooftops for the generation of electricity is also required to enhance the efforts to mitigate climate change.²⁰ Therefore, a balance must be reached between the interest of the solar user, that is to continue to be able to access sunlight to generate electricity, and the right of the other property owner to develop his property within the published policies. Such balance may be achieved by amending²¹ Article 72(2)²² to insert climate change mitigation measures of the planning proposal and the surrounding properties as a consideration to be taken into account in determining an application. Solar users should make representations that enable the Planning Board to consider the potential impact the proposal in the application will have on the generation of electricity. Proposals could be made by interested solar users for the modification of the planning proposal, whereby less shading is produced by the proposed development, or the solar installation is re-oriented or relocated in a way that the solar user continues to enjoy from electricity generation.²³ Though a form of compromise, payment in the form of compensation for the calculated loss due to the obstruction of sunlight defeats, up to a certain extent, the purpose of having operating small-scale renewable energy systems on rooftops.

¹⁷ 75/2022 *Charles Falzon vs Planning Authority*, Court of Appeal (Inferior) 15 March 2023.

¹⁸ Translation: ‘*the height limitation of the local plan is a requirement that limits the maximum high not if the development is suitable for the factual circumstances in the immediate area where it is being proposed*’.

¹⁹ Cauchi (n 2) i.

²⁰ *ibid* 1.

²¹ *ibid* 28-29.

²² Development Planning Act (n 6) Article 72(2).

²³ Cauchi (n 2) 30.



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