

DISCUSSION PAPER ON PROPOSED AMENDMENTS RELATED TO THE SUSPENSION OF THE EXECUTABILITY OF DEVELOPMENT PERMISSIONS

To amend the Environment & Planning Review Tribunal Act and Development Planning Act.

1. Introduction:

The Government is proposing a Bill to amend the Environment and Planning Review Tribunal (Cap. 551) and the Development Planning Act (Cap. 552) for the purpose to provide for an automatic suspension of the execution of a development permission in case that an appeal is submitted by a registered third party or an external consultee contesting such permission.

The imposed suspension of the execution of the development permission would require appeal decisions by the Environment and Planning Review Tribunal as well as the Court of the Appeal to be delivered within a specific timeframe.

The Government is also seeking to provide increased resources to the Tribunal to address the demands of the imposed legal timeframes, including the possibility to appoint designated officials to exercise some of the functions of the Tribunal.

2. Background:

When the third-party appeal was first introduced in 1997 following amendments to the Development Planning Act of 1992 (Act No. XXIII of 1997) there was no need for the Planning Authority to suspend the permission for development in case of such appeal, and the permit holder had the possibility to commence construction works, with the risk that the permission could be amended or revoked by the Board of Appeal, later replaced by the Environment and Planning Review Tribunal (under the Cap. 504, and Cap. 551), or quashed by the Court of Appeal.

In the Act of 2016, which established the Environment and Planning Review Tribunal (Cap. 551) under a separate Act from both the Development Planning Act (Cap. 552) and Environment Protection Act (Cap. 549), the possibility of suspension of the execution of the development permission was introduced albeit under limited circumstances.

In accordance with Article 33 of Cap. 551, the appellant, through an application submitted concurrently with the application for appeal, can request the Tribunal *“to suspend through partial decision, in whole or in part, the execution of any permit, pending a decision being delivered by the said Tribunal, under those terms, conditions and other measures as it may deem fit.”*

The same Article provides that the Tribunal *“shall not suspend the execution of such a permit unless it is satisfied, after hearing all the parties, that unless the execution of the permit is suspended the prejudice that would be caused would be disproportionate when compared with the prejudice caused by the staying of the actual execution of the permit. It shall also not suspend the execution of such a permit if it is satisfied, after hearing all the parties, that the development maybe easily removed or reversed or that the request is frivolous or vexatious.”*

So, in accordance with the current Act, the presumption is against the suspension of the permit, and the notion of comparability between the action of suspension against execution of permit, is more based on the nature of the development subject to appeal itself. For instance, in case of a new construction or change of use, this could be easily removed or reversed and thus the request for suspension will not likely be upheld by the Tribunal, but the damage caused to cultural or natural heritage for instance, is not deemed reversible and thus it is more likely that the request for suspension - in case a request is submitted - is upheld by the Tribunal.

In addition, in case that the request for suspension is upheld, the Tribunal shall need to grant its final decision within three months from the date of the first hearing of the appeal, or in case of specific projects of strategic significance as determined by the Minister responsible for Planning, the decision shall be delivered within one month. The current Act does not impose any timeframes on the Court of Appeal to deliver its decision if an application for appeal is submitted following the Tribunal's decision. In addition, the current law does not provide for any other provisions in case that the Court reverts the case to be determined again by the Tribunal.

The principle of access to justice on one hand, and the certainty of the development process on the other hand, are the basis for these amendments.

Naturally, a main challenge consequent to these amendments is the efficiency of the Tribunal and the Courts to determine the appeal cases without delay and to this is effect, it important to strike a balance between the adequate timeframes allocated for the Tribunal and Courts to deliver the decisions and a reasonable period for suspension of the execution of permits so as not to exert additional burden on the permit holder in terms of both logistical and financial considerations.

3. Proposals:

3.1 Article 33 of Cap 551 and sub-article 72(3) of Cap 552:

The principal article 33 of the Environment and Planning Review Tribunal Act (Cap 551) which specifically deals with the procedure of the execution of development with the procedure of suspension of the execution of development permission pending the outcome of the appeal as determined by the Tribunal will be deleted.

On the other hand, the suspension of the execution of the development permission will become automatic under the Development Planning Act (Cap 552) through amendment of sub-article (3) of article 72 of the Act. The current Act then provides for the suspension to be kept in force in case the Tribunal upholds a request for suspension in terms of Article 33 of the EPRT Act, which is now being deleted.

The proposed amendment will provide for the continuation of the suspension of execution of permit in case an appeal against permission is submitted until a definitive judgement is awarded whether by the Tribunal or by the Court of Appeal.

The new sub-article will also provide for a clear provision where following a definite judgement the permit is confirmed, the period of validity of the permit pending appeal proceedings during which the execution of the permit was so suspended shall be added to the term of validity of the permission.

3.2 Articles 34 and 35 of Cap 551:

Articles 34 and 35 of Cap 551 deal with the specific timeframes and procedure related to decisions by the Tribunal.

The proposed amendments will provide for different scenarios depending on the type of appeal submitted as follows:

(i) Appeals where the suspension of development permission is not applicable, such as appeals against refusal, screening process, planning control application, scheduling of property, revocation, or modification of development permission, where in such cases the appeal timelines and procedure will not be affected by the new amendments to the Act. In this regard, the appeal can still be decided within a year with a possible extension of six months, and in case it is not decided within such timeframes the case can be assigned to a new panel as per current procedure.

(ii) Appeals against development permission submitted by registered interested third parties or external consultees, and in such cases, the execution of development permission will be in force and the appeal shall be determined within a specific time-period.

Currently the law provides for a maximum period of three (3) months from the date of the first hearing of the appeal in case the request for suspension is upheld by the Tribunal. **The minimum three-month period shall be kept**, but further considerations shall be made following discussions with stakeholders and interested parties as part of the public consultation process to determine the optimum timeframes for the Tribunal to deliver its decision taking into account the number of third-party appeals submitted, and the Tribunal resources and efficiency, whilst ensuring fair hearing and adhering with the principals of natural justice.

(iii) in case of an appeal from an application which the Minister declares that 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 of other governments, the Tribunal shall deliver its decision within one month from the date of the first hearing of the appeal as per current procedure.

(iv) in case of appeal against summary procedure, the current Act provides for a limited period of three months for a decision to be delivered by the Tribunal. In effect these are appeals submitted by registered third parties and the execution of permit through summary procedure is likewise suspended in case of an appeal against permission, and thus the same procedure for third party appeal will be followed by the Tribunal.

3.3 Article 53 of Cap 551:

Article 53 regulates the proceedings before the Court of Appeal which shall be concluded in a timely manner. The Government is also seeking to impose a timeframe for delivery of decisions by the Court of Appeal for those cases where suspension of execution of permission is in force. The optimal timeframe is yet to be determined, following the public consultation.”

3.4 Other amendments:

The Government will seek the appointment of designated officials with the Tribunal to be specifically tasked to administer the oaths, take testimony of any person, and receive documents as part of the appeal proceedings. This provision will help to expedite the appeal proceedings and the sittings before the Tribunal will be more focused on the substance of the case.

In addition, the Act will provide that the notification of any acts, documentary, evidence, and written submissions lodged before the Tribunal can also be made by means of electronic mail to all the parties to the proceedings.

The new Act will also seek to provide for a clear timeframe to be adopted by the Tribunal following referral from the Court of Appeal, which timeframes shall be the same as those applicable to new appeals. This provision will seek to regulate the Tribunal proceedings in a more timely manner.

3.5 Third party appeals: strengthen the law against frivolous or vexatious appeals:

The law shall be strengthened to deter and limit appeals which are considered frivolous or vexatious.

According to the Act, an interested third party can secure the right to appeal in case the person had submitted written representations during the process of the application in terms of article 71(6) of the Development Planning Act. The latter specifies that not only the person shall declare an interest in a development subject to an application but shall also make representations in writing **based on issues relevant to environment and planning** and be received by the Authority within the stipulated period as established by the Authority, which procedure is regulated by the Subsidiary Legislation 552.13.

The Government will seek to enforce through proper legislation, the eligibility of the third party appeals in terms of the Act, namely that the basis of the appeal is based on environmental and planning grounds relative to objections which have already been submitted to the Planning Authority prior to the determination of the application. On the other hand, it will seek to provide better parameters for the Tribunal to impose the relative fines in case that the Tribunal declares an appeal to be frivolous or vexatious in terms of Article 43 of the Environment and Planning Review Act.