

LECTURES IN
ADMINISTRATIVE LAW
XXI

Robert Musumeci

Biography



Dr Robert Musumeci obtained a PhD in Law from the University of Malta with his dissertation entitled '*Judicial Interpretation of Maltese development planning law. Eliciting the added value*' after having been previously selected by the same University for the prize of Best Doctor of Laws Thesis Award in 2016 for his work entitled '*The Development Planning Act 2016 – A critical Appraisal*'. Prior to being admitted to the Maltese Bar, Dr Musumeci had graduated as a *perit* in 1997 and then moved on to also obtain a Masters Degree in Conservation Technology in Masonry Buildings in 2004. He is a former chairperson of the Building Industry Consultative Council (BICC) and was later appointed as a government consultant in the reform which led to Malta Environment and Planning Authority's demerger, the establishment of the Lands Authority, the introduction of a regulatory framework for Estate Agents, the drafting of the constitutional amendments pertaining to the Gender Balance in Parliament Reform and the setting up of the Building Construction Authority. Dr Musumeci is a senior lecturer in planning law and administrative law at the University of Malta. He also authored the book '*Selected Principles of Maltese Planning Law*' (Kite Publications, 2021). Dr Musumeci is the first to hold warrants to practice both as a lawyer and a *perit* in Malta.

Taking Account of Irrelevant Considerations or Excluding Relevant Ones

In this section, I will address another facet of abusing discretion, namely the inclusion of irrelevant grounds or the exclusion of relevant factors in the decision-making process.

In the specific context I am addressing, I am excluding situations where there are conflicting considerations, all of which the authority is obligated to consider, and the authority intentionally prioritizes one consideration over the others to achieve a well-balanced resolution.

It is important to clarify that in such cases, the authority cannot be accused of taking into account irrelevant considerations. Say, the planning authority is reviewing an application for rehabilitating a heritage building that requires extensive alterations to meet current sanitary standards. The planning authority is legally bound to acknowledge the significance of preserving the cultural heritage of the building, yet it must also prioritize the health and safety of its occupants. The Planning Authority encounters the challenge of finding a balance between maintaining the historical value of the structure and ensuring the minimum sanitary distance requirements, which may involve structural modifications, such as removal of walls or raising the roofs. If the Planning Authority grants consent for the alterations, even if it means sacrificing the preservation of the original fabric, as it is *prima facie* obliged to do, it cannot be accused of ignoring relevant considerations in its decision-making process.

Therefore, what I am concerned here is either the inclusion of irrelevant grounds or the deliberate exclusion of relevant factors in the decision-making process.

However, before anything else, how can I differentiate a relevant consideration from one that is irrelevant? 'Relevant considerations' are derived from the provisions of the applicable statute, whether explicitly or implicitly, and must align with the purpose for which the power is granted. In cases where the statute does not explicitly specify, or imply by deduction these considerations, they should be considered irrelevant if they are taken into account.

Allow me to present an example that demonstrates the concept of a decision made with an "irrelevant consideration." Let's examine the scenario of Mr. Johnson, the proprietor of a supermarket chain, who intends to seek the required licenses and permits from the Planning Authority in order to establish an additional supermarket. To his surprise, his application for a supermarket permit is rejected not due to any planning concerns such as traffic generation or environmental issues, nor because the local plan prohibits supermarkets in that specific area. The reason behind the denial is that the Planning Authority believes that granting Mr. Johnson a permit for another supermarket would further solidify his dominance in the market, consequently negatively impacting small grocers in the surrounding villages. This case serves as a clear illustration of the Planning Authority considering factors that fall outside its purview, as the market balance is not a planning issue within the scope of the **Development Planning Act**.

Now, I will give an example where the public authority missed on a relevant consideration in its decision. Let's consider the case of Abu Baker, an immigrant who applied for citizenship in Malta. Unfortunately, the public authority responsible for reviewing his application denied it based on his criminal past. However, they overlooked a crucial consideration: Abu Baker provided compelling evidence of the potential harm and persecution he would face if deported. Despite this evidence, the public authority disregarded his concerns and unjustly denied his application. By ignoring the documented risks, he would encounter upon return to his home country, the authority neglected a significant aspect of his case. The decision can be considered problematic as it overlooked

a very relevant consideration.

Now let's discuss the distinction, if any, between acting for an improper purpose and considering irrelevant factors when reaching a decision outcome.

When it comes to the concepts of acting for an improper purpose which we discussed in an earlier section, and considering irrelevant factors, there can be a subtle distinction, although they can overlap in certain cases. Suppose a planning authority is reviewing a development proposal for a residential building in a designated green space. The authority's primary purpose, as outlined in the applicable laws and regulations, is to ensure responsible urban planning and preserve the environmental integrity of green spaces. In this scenario, if the planning authority rejects the proposal solely because they personally dislike the developer, despite the proposal meeting all relevant planning regulations and requirements, it would be considered acting for an improper purpose. The decision is based on personal bias rather than legitimate planning considerations. On the other hand, if the planning authority approves the proposal, but during the decision-making process, they consider irrelevant factors such as the developer's political affiliation or personal relationships, it would be a case of considering irrelevant factors. In both situations, the decision-making process of the planning authority is flawed. Acting for an improper purpose involves a wrongful motive or intention behind the decision, while considering irrelevant factors involves allowing unrelated considerations to influence the decision, even if the ultimate outcome aligns with the proper planning purpose.

There can also be instances where mixed considerations are involved. This means that an order or decision is partly based on relevant but also partly influenced by irrelevant factors. Determining the influence of improper grounds on an administrative authority's decision-making process and establishing whether the decision would have been issued solely based on valid grounds can however be challenging. One approach is to assess all the grounds together and determine if

the exercise of power would still be justified even if some grounds are deemed non-existent or irrelevant. However, I hold the view that reviewing courts cannot speculate on how the authority's subjective satisfaction would have been if those grounds were excluded.

After discussing the significance of avoiding irrelevant considerations in decision-making or excluding relevant ones, an important point arises: the need for detailed and motivated decisions. Without such information, it is impossible to determine whether irrelevant considerations were indeed present or whether relevant ones were excluded. When evaluating the validity of a decision and determining if improper or irrelevant factors influenced the outcome, having access to comprehensive and detailed reasons is crucial. Without reasons, it becomes challenging to discern the presence, if any, of irrelevant factors.

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