

Mepa's Audit Office – What's next?

by John Ebejer

A person is presumed innocent until proven guilty. This is more than just a legal concept; it is a fundamental requisite of civilised behaviour between people.

The auditor of Mepa has turned this concept on its head. In several cases he investigated, he claims that he cannot exclude that there was collusion, abuse or even corruption. In other words, the auditor's logic is that people are presumed guilty until proven innocent. His "cannot-exclude-corruption" approach is interpreted by most people as confirmation that there was abuse.

With this approach, he tarnishes the reputation of DCC board members, case officers, applicants, architects and whoever comes under his scrutiny, and all this without any evidence of wrongdoing.

There is a large group of people who support the work of the auditor. That is their view and I respect it. There is, however, another group of people who no longer believe that the reports of the auditor are fair and impartial. From my perspective, my doubts on the auditor's impartiality and fairness have increased progressively over the past three years. This is my view and my choice and it is not likely to change, irrespective of the unquestioning support of the auditor by some environmentalists.

The need for accuracy in the auditor's reports

My doubts in the auditor office commenced several years ago following two reports. The first concerned a development application in Windsor Terrace (January 2007). This report contained factual errors (for example the auditor claimed that six floors and a penthouse were being allowed when in fact it was four floors and a penthouse). Moreover, it failed to include all the relevant information, particularly the fact that immediately behind the row of two-storey houses in Windsor Terrace, there is the back elevation of eight-storey apartment blocks. Irrespective of the actual conclusions of that report, it seemed very peculiar to me that an auditor's report should have such serious shortcomings.

The second was about a fireworks factory in Gharb, Gozo. The argumentation put forward by the auditor in this case was, in my view, fundamentally flawed. Mepa was right to issue the permit, yet a newspaper report (MaltaToday – 11 March 2007) presented a picture where Mepa was at fault. Worse than that, the newspaper report mentioned the name of the case officer. The reputation of this person was therefore tarnished unfairly (because the auditor was wrong in his

reasoning) and without being given adequate chance to defend himself. The office, which in my mind should be the one to promote fairness and equity, committed an injustice against this person.

Progressively, over subsequent months and years, I encountered more auditor reports with mistakes and questionable argumentation.

The need to maintain credibility with ALL stakeholders

From an office with an audit function, one would expect that maintaining the credibility of this office should take priority over all other considerations. This entails prudent use of the media and avoidance of unnecessary controversy. Mepa's auditor does the opposite and displays excessive zeal to give interviews to the media. Certain statements made by the auditor in some reports makes one question whether his intentions were to bring about improvements at Mepa or whether he was more intent on being sensational.

By his words and actions Mepa's auditor has created a polarised situation with one group of people hanging onto every word he says and another group dismissing his reports as being of little value because of their bias.

For an office with an auditing function, it is crucially important to maintain credibility with all stakeholders and not just a select few. If we take the Ombudsman for example, this office commands respect from everyone, even if one does not necessarily always agree with his conclusions.

The irony is that the more some individuals campaign in favour of the auditor, the more justified are the concerns about his impartiality. Is it a coincidence, for example, that days before he issued the report on the Windsor Terrace application, a statement in his support was issued by the very same NGO that had submitted the complaint? Could anyone be blamed for suspecting that the errors in that report were due to a bit of mutual back scratching?

The use of the audit office by politicians and political activists to further their own agenda further undermines its credibility. There are various instances where the auditor allowed his statements and reports to be used for a political agenda and he did nothing to avoid it. For example, giving repeated extensive interviews to One TV is hardly advisable. In one instance, he was actually drawn into making a political comment. In the various news items on One TV relating to the Bahrija permit, his mistaken assertion that the first permit was illegal was quoted ad nauseam.

To be effective, it is not enough for the Audit Office to be unbiased – it needs to be perceived to be totally unbiased by everyone. Attempts by

individuals, environmental NGOs or political parties to use the Audit Office for a narrow agenda, political or otherwise, instils doubt in people's minds on the impartiality of that office.

The need to adopt a correct approach

The auditor's way of doing things is also a matter of concern. He writes reports and expects everybody to accept his conclusions irrespective of other opinions. Sending reports to the Mepa chairman is one mode of communication but it is not the only one and, in some situations, it is not necessarily the most effective. To my knowledge, he never made any effort to discuss issues and solutions with Mepa's senior management.

In some instances, he adopted an approach that was least likely to achieve results. For example, on the issue of meetings between DCC chairpersons and applicants, he insisted that these were illegal, notwithstanding a legal opinion available to Mepa that contradicted him. One possible course of action for him was to advise for the law to be amended and, pending the legal amendment, for minutes to be taken of such meetings. Had he adopted this approach, he would probably have obtained the support of the Mepa board years ago.

The auditor is excessively dogmatic when he makes statements relating to legal matters, notwithstanding the fact that he is not a legal person. None of his declarations relating to legal interpretations were based on legal advice. Why should Mepa accept his interpretation of the law and reject that of its legal adviser?

Incidentally, on the auditor's claim that meetings between DCC chairmen are illegal, the court expressed a different view. In its decision relating to the application at Mistra, the court declared, "It is therefore apparent that these meetings could be legitimately held and there does not seem to be anything irregular...". Such meetings were described by the court as being "perfectly legitimate".

Recently, he ignored the Ombudsman advice by publishing a report on an application that was still subject to appeal. In a recent press release, the Ombudsman referred to an advice he had given two years ago and stated: "That advice was motivated not only because the publication of his report could potentially prejudice the outcome before the Appeals Board but also by the basic principle that every administrative body has the duty to respect judicial authorities and quasi judicial authorities, to avoid exerting undue influence to ensure that the final binding decision is taken serenely, fairly, free from external pressures and strictly according to laws and regulations."

Strait-jacketing the planning system

The auditor has successfully strait-jacketed the planning system by his excessive judgmental approach. In some audit reports the auditor harps about how Mepa is obliged to strictly follow the approved policies. He maligns the ones who attempt to exercise their discretion, suggesting negligence or even worse.

In other reports he denigrates the same people for not applying their discretion in interpreting policies. For the case officers and the DCC Boards, it is clearly a no-win situation. To some extent, he influences recommendations of Mepa case officers and the decisions of DCC members who have to second-guess what the auditor is likely to say.

The auditor should avoid entering into matters relating to interpretation of policy, other than in exceptional cases. Planning policies are not like laws and regulations; most policies allow for ample room for interpretation to cater for qualitative as well as quantitative criteria. Moreover, policy interpretation is subject to the specific circumstances of the site and of the proposed development.

The planning process is dependent on the use of the professional discretion of the case officers and of the DCC Boards in the interpretation of planning policy. The planning process already provides for a check against perceived erroneous interpretation of policies, namely the Reconsideration and the Appeals procedures. The introduction of a further version by the auditor on how the policies should be interpreted for a particular application is unnecessary and serves no other purpose than to create confusion in people's minds. Being a subjective matter, there is no reason why the interpretation of policies as given by the auditor is more correct than that adopted by the DCC Board composed of seven members.

What about the small applicant?

Case officers are reluctant to use their discretion in the use of planning policy (and therefore also to hold meetings with applicants) because they are afraid the auditor will chastise them in a report because of some triviality.

It is the small applicant who suffers most from this situation. When Joe Public submits a development application, the chances are that the case officer recommends his application for a refusal over some triviality. His efforts to communicate with the officer are likely to be met with a brick wall and if he has the great fortune of meeting the case officer, he will probably be told that it is not his job to be practical and reasonable because, after all, there is the auditor breathing down his neck. No one is willing to risk his name being unfairly bandied around in the newspapers or on a website, as has happened in the past, in some instances thanks to the auditor.

The need for constructive criticism

I do not doubt the integrity and good intentions of Joe Falzon. This article is about the office of the auditor and not about the person.

Some individuals base their support for the auditor on the grounds that he is a person of integrity. I disagree with this reasoning. Having integrity and good intentions does not preclude a person from making mistakes.

These same individuals interpreted the recent criticism of the auditor as an attempt to shut him up. I do not think this is the case. All institutions can make mistakes and therefore all institutions, the Mepa Audit Office included, need constructive criticism. Whoever maintains that the Audit Office should not be criticised is implying that the auditor is infallible.

The concept of “cannot-exclude-corruption” put forward by the auditor in several of his reports is totally unacceptable, especially coming from a public office which should uphold the highest standards of fairness and ethics. The concept is far too absurd for it not to be commented upon and criticised. This “cannot-exclude-corruption” approach is the one overriding reason why I, for one, no longer believe in the fairness and impartiality of the audit office. It is the one overriding consideration that has compelled me to write this article.

Inevitably, some over-zealous environmentalist will accuse me of doing the unpardonable – I have criticised the auditor. I will most likely be subject to colourful adjectives and accusations of “vested interests”. As a Maltese citizen foremost, and also as an urban planner and architect, I have an interest in having a planning system that is efficient and fair, which provides a good service to its customers and which provides for good quality development respectful of the environment.

My criticism of the auditor stems from disappointment. With the introduction of a Mepa auditor five years ago, I was optimistic that this office would be instrumental to bring about improvements in the planning system. Although the auditor did achieve some good results, so much more could have been achieved.

On a positive note, many lessons have been learnt from this experience. Hopefully, this will enable the legislator to provide a more robust legal backing for Mepa’s Audit Office with a proper definition of responsibilities and functions. In my view, new legal provisions on the audit office should be modelled on the Ombudsman Act.

John Ebejer is an urban planner and architect with over 15 years experience in planning. He is chairman of the Building Industry Consultative Council.