SELANGOR APPEAL BOARD LAW REPORTS

[Section 36, Town and Country Planning Act, 1976 (Act 172)]

Volume 4, Issue 3 [SABLR/4/3/2014, Oktober 2014]

Tetuan The Ordinary Company Sdn. Bhd. V. MBPJ

Published By State of Selangor
Selangor State Town And Country Planning Department and Selangor Appeal Board
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HIGHLIGHTS

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October 2014

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Editorial
Y.Bhg. Dato' Abu Bakar b. Awang

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AWARDS REPORTED

FILE NO	PARTIES
LR. SEL. (256)MBPJ/05/2012	Tetuan The Ordinary Company Sdn. Bhd. V. MBPJ

LEMBAGA RAYUAN NEGERI SELANGOR

RAYUAN NO : LR. SEL. (256) MBPJ/05/2012

Di Antara

TETUAN THE ORDINARY COMPANY SDN. BHD - PERAYU

Dan

MAJLIS BANDARAYA PETALING JAYA - RESPONDEN

PER: RAYUAN TERHADAP PENOLAKAN KEBENARAN MERANCANG BAGI TUJUAN PERTUKARAN MATERIAL GUNATANAH DARIPADA ''KAWASAN LAPANG'' KEPADA "KOMERSIL'' DI LOT PT 16994, JALAN SS1/22 (JALAN BAIDURI) SS1, PETALING JAYA, MUKIM PETALING, DAERAH PETALING OLEH TETUAN THE ORDINARY COMPANY SDN. BHD.

Lembaga Rayuan

Dato' Abu Bakar Bin Awang	-	Pengerusi
Hjh. Norasiah Binti Yahya	-	Ahli
Ho Khong Ming	-	Ahli

Pendaftar

En. Saifuddin B. Marsuk

ALASAN KEPUTUSAN

1.0 THE PLANNING APPLICATION

In August 2011, the Appellant applied for lot PT 16994, Jalan SS1/22 (Jalan Baiduri) Mukim Damansara, Daerah Petaling, Selangor Darul Ehsan (hereinafter referred to as the said lot), to be rezoned as commercial in the Local Plan, or, alternatively, for approval of commercial development of the said lot.

In the Local Plan (Rancangan Tempatan Petaling Jaya 1, hereinafter referred to as RTPJ I), the said lot is zoned as open space. The land title of the said lot specifies *Kategori Penggunaan Tanah as Bagunan and Syarat Nyata as Bangunan Perniagaan.*

The said lot is triangular in shape (roughly a right-angled triangle), bordered by roads on two sides and a lane on the third, separating it from the backs of houses. The total area of the said lot is just less than 3,000 sq. metres but the tapering half of the lot, after considering set-backs and boundary clearance, is probably too narrow for the construction of any structures. The Appellant has indicated a 5-storey building but has not included a definite building layout. The Appeal Board is, however, satisfied that, as the issue of the Appeal is a matter of law and procedural form and not of details, the information supplied is sufficient for the Board to arrive at a decision.

Form C2, a refusal of planning permission, was issued to the Appellant in January 2012. The Respondent rejects the application on the ground that it does not conform with the provisions of Local Plan. The Appellant filed an appeal with the Appeal Board in February 2012.

2.0 GROUNDS OF APPEAL

The main grounds of appeal of the Appellant are as follow:

(1) The Respondent is failing to consider that the land use category imposed on the subject land under the National Land Code 1965 (hereinafter referred to as NLC) *shall prevail over the land use zoning under the Local Plan;*

(2) The application for a "material change of use" is the proper form of application for an amendment to the land use zoning of the Local Plan.

3.0 FIRST GROUND OF APPEAL

The Appellant relies on s.108 of the NLC:

> *Where any land affected by any by-law of, or restriction imposed by, any local authority or planning authority becomes subject by virtue of this Act to any condition which is inconsistent therewith, the condition shall prevail, and the by-law or restriction shall, to the extent of the inconsistency, cease to apply to the land.*

The Appellant further quotes the view of the Director General of Lands and Mines from "A Manual On The National Land Code", published by the Koperasi Pegawai Pentadbiran dan Pengurusan Tanah Malaysia Berhad 2002:

> *The approved plan, the structure plan or the local plan .... show... areas for certain purposes. The uses shown may be in conflict with the land use conditions under the NLC. It is to be noted that, under section 108 of the NLC, whenever there is a conflict, the land use conditions under the NLC prevail.*

4.0 RESPONSE OF THE APPEAL BOARD

The response of the Appeal Board to the first ground of appeal, that is, that the use condition of a land title prevails over the zoning prescription of a Local Plan, is that it is an incorrect interpretation of the law. Similarly, with all due respect to the KPTG, the Appeal Board begs to differ with his view.

In the opinion of the Appeal Board the Local Plan does not fall within the meaning of *"any by-law of, or restriction imposed by, any local authority or planning authority".*

5.0 THE INTENT OF s.108

The Appeal Board cannot purport to guess what was on the minds of the legislators enacting s.108 of the NLC. The Board can only suggest that it could only be referring to matters (plans, regulations, etc.) already in existence or known to the legislators at the time of their deliberations. In 1965 these would be the Town Plans prepared by the Town Boards under Chap. IX of the Town Boards Enactment. The legislators of the NLC could not have anticipated a completely new format for land use planning eleven years in the future that would be

introduced by the Town and Country Planning Act 1976 (hereinafter referred to as TCPA), or a new structure of local government brought into place by the Local Government Act 1976 that would replace the autonomous local governments existing in 1965. As an indication of a future unknown to the legislators of 1965 it may be noted that concepts such as community welfare, protection of the environment, public participation in planning, promotion of economic development and other related political and social concerns that affect land use had little or no influence on the NLC. These concepts permeate the TCPA. There was clearly an ideological paradigm shift in the decade separating the two Acts. The legislators of 1965 could not be seeking to impose their view of the world on the legislators of 1976. If they did attempt to, they certainly did not succeed.

The national planning system is a finely constructed system of mutually-reinforcing mandatory plans at the national, state and local levels, supported by optional additional plans (regional plans, special area plans) but the national planning system did not acquire its present complexity and complement of tools until the Town and Country Planning (Amendment) Act, (Act A1129), in 2001. It would have required extraordinary clairvoyance on the part of the legislators of 1965 to foresee the entire system, select one of the tools within it and forestall its efficacy. Nor could it have intended, as the KPTG seems to suggest, that the entire national system of statutory public plans should be blocked just to preserve an occasional *ad hoc* decision of the State Authority made under the NLC.

The KPTG has without legislative authority and without basis expended wording and meaning of ''any by law of, or restriction imposed by, any local authority or planning authority'' to include ''the approve plan, the structure plan or the local plan''. Structure Plans and Local Plans may be known to the KPTG writing in 2002 : but they were not known to the law-makers legislating S.108 of the NLC in 1965. Section 108 of the NLC does not specify the ''Structure Plan'' or the ''Local Plan''. Indeed, the terms ''Structure Plan'' and ''Local Plan'' were only introduced into Malaysian legal and planning vocabulary and their concepts added the Malaysian complement of conceptual tools by the TCPA 1976 in 1976. The term ''Structure Plan'' was first used in the UK Town and Country Planning Act 1968. No way could the legislators of 1965 have the prescience to be thinking about Structure Plan and Local Plan. No way can ''any by-law'' of s.108 be construed to mean Structure Plan or Local Plan. The disregard for chronological rigour on the part of the KPTG in using these terms in relation to s. 108 has corrupted popular perception of s.108 and given it a purported scope it never rightly has. We may not know what "any by-law" of s.108 is intended to mean, but we certainly do know what it cannot and does not mean.

While the Board is convinced that the wording of s.108 does not "mean" any of the statutory public plans provided by the TCPA 1976, the Board will examine, for the purpose of intellectual certainty, in the next few pages, whether it can be "applied" to the said plans, in particular the Local Plan. The Board is, of course, of the view that s.108 of the NLC is not intended to apply to, should not be applied to, and does not apply to, the Local Plan or to any of the statutory public plans in the national planning system under the TCPA.

6.0 THE LOCAL PLAN

Preparation of the Local Plan is not an optional or voluntary exercise for the local planning authority. It is a mandatory plan prescribed by the TCPA [s.12 (2)].

The Local Plan is not an isolated plan of a local planning authority but an integral component of national physical planning and forms the third level of a series of three plans or three levels of plans in the national planning system, one plan at the national level, one plan at each state level, and as many plans as may be deemed necessary at the local level. The three plans or three levels of plans, as provided by the TCPA, are the National Physical Plan, the State Structure Plan and the Local Plan.

Of the three levels of plans, only the Local Plan is of sufficient detail and exactness to be able to show the permissible use for every lot of land and, therefore, to be employed in development control. The Local Plan is, therefore, the definitive land use plan. Where it is in place, it is referred to as the "DEVELOPMENT PLAN". While the Local Plan is prepared by a local planning authority, it is approved by the State Planning Committee, assented to by the State Authority [s.15 (1c)], and gazetted for implementation.

(For clarification, it is to be noted that, where a Local Authority is in place, the Local Authority is the local planning authority and, for an area where a Local Authority is not in place, the State Director of Town and Country Planning is the local planning authority (s.5). For further clarification, the term "use condition" employed in reference to land titles and other matters in the NLC and the term "permissible use" employed in the Local Plan under the TCPA should be deemed to be equivalent even though the context of their employment is different and there are different nuances in their meanings.)

The Local Plan does not come into effect without the assent of the State Authority. It is a state approved plan and, therefore, a state statute. The contents of the Local Plan, including the zoning of land, are, therefore, decisions ratified by the State Authority and, ipso facto, State decisions.

Sovereignty over land and, therefore, power to determine the use of land, is vested in an authority, namely the State Authority, and not in any Act of Parliament. The significance of a decision made by a sovereign State Authority on land use under one Act of Parliament is of equal weightage as a decision made by the same sovereign State Authority on land use under another Act of Parliament. Both are decisions made by the same sovereign authority. There are not two State Authorities, one under the NLC, and one under the TCPA. There is only one State Authority. When it makes a decision on a matter under one enabling Act of Parliament that overlaps with an earlier decision on the same matter made under another enabling Act of Parliament the consequences should not be dismissed off-hand as if the first decision is permanently carved in stone and immutable. The actions of the State Authority must be presumed to be sane, sapient and sequential. Which decision prevails over which is a matter of the timing of the decisions. A later decision must prevail over an earlier decision. The later decision, on the same piece of land, for the same purpose of specifying a permissible use, if it contradicts the earlier decision, since the two decisions cannot be both valid concurrently, must be presumed to abrogate the earlier decision.

In addition, weightage should also apply to whether the decision is made to grant a private entitlement in respect of a single lot of land as against a decision to lay down a public policy applicable to the entire citizenry of a specified geographical area.

In summary, the ranking of two decisions made by the same authority on the same matter, where the decisions are at variance, should observe the following principles:

(1) a later decision should prevail over an earlier decision;

(2) a public policy should prevail over a private entitlement.

As such, the Appeal Board holds the view that, since the use condition of lot PT 16994 was entered in 1978 or soon after and the Local Plan RTPJ 1 came into effect in 2003 the permissible use on the zoning plan of RTPJ 1 replaces the permissible use or use condition in the title to lot PT 16994. This is reinforced by the fact that the zoning plan of RTPJ 1 is public policy applicable to the whole of Petaling Jaya while the use condition of PT 16994 is a private entitlement applicable only to a single lot, namely PT 16994. Indeed, it may be incumbent on the land owner of PT 16994 to apply for conversion to conform to the zoning plan.

The act of zoning land does not violate the fundamental right conferred by the NLC, that is, the right to own land, and, therefore, the indefeasibility of land titles.

The area of potential challenge is in the condition of use, that is, the permissible use of the land. Even with the right to ownership of land conferred by the State through alienation, the State retains the residual power to repossess the land through compulsory purchase if it is for a public purpose (Land Acquisition Act 1960). Zoning is a public purpose. While it may or may not involve State or public utilisation of the land, and therefore the necessity of repossession, its intent is to achieve the public purpose of harmony in the community's use of land and to ensure the welfare of the community.

The use class "open space" does not deny private use of the land. Only if the use class is "public open space" does it do so. Club grounds such as golf courses, commercial sports fields, commercial recreational fishing ponds and even open-air commercial car parks and periodic open-air markets, if licensed by the local planning authority, may be included under the use class "open space". There is, of course, an undeniable depreciation of value when compared with the use class "commercial". This depreciation of value may be a ground for litigation but it is not the issue at hand and, therefore, not a subject matter for the Appeal Board to deliberate on.

In the case where zoning enhances the value of land, as when agricultural land is zoned for urban development, or housing is rezoned for commercial use, there does not seem to be any protest about land use conditions on land titles prevailing over zoning prescriptions. Land owners will happily convert their land to conform to the zoning plan. Only when zoning affects the value of the land adversely does a land owner cry foul and retreat to the law for defence. One wonders whether the issue is law or lucre!

Implicit in the power to carry out public planning is the power to change permissible land use at the will of the State. Without the power to change permissible land use public planning is meaningless. Indeed, without the power to change permissible land use, public planning is impossible. Development will only happen at the whim and pace of individual land owners, haphazardly, in time and space and in the kind of development. It is imperative for the progression towards a functional modern economy for the State to have the power to direct changes in land use and not leave it entirely to individual decisions. For this reason the Local Plan is a development tool of the State as well as a regulatory plan, requiring the compliance of both the authority charged with its execution and the citizenry residing or owning propriety within its jurisdiction.

Where the land title protects the rights of the individual, the Local Plan protects the rights of the community. The Local Plan is the nearest thing to a written social contract between the governor and the governed.

7.0 THE NLC AND THE TCPA

The NLC empowers the State Authority to alienate land to persons and bodies and to prescribe the use condition at the time of alienation. It does not, however, empower the State Authority to change the use condition of any individual lot at will but only upon an application of the land owner for a change of use (conversion). The NLC, therefore, creates a static situation in land use permissibility, whereas the State Authority, in its role as a government, may be in need of powers to initiate change and promote development. Under the NLC, for any development to take place, the State, and the citizenry within the State, must await the separate and uncoordinated pleasure, financial capability and convenience of individual land owners.

It should be noted that prior to the zoning plan introduced by the TCPA, land use conditions were entered into land titles guided mainly by the layout plans submitted by developers for subdivision of their original lots. Otherwise use conditions were entered into land titles on an ad hoc basis, lot by lot, without the benefit of an overall plan or reference to neighbouring areas.

For the purpose of land management on a scale larger than the individual lot, there is, therefore, a lacuna in the NLC. It does not provide for collective or communal land use planning. This lacuna is filled by the TCPA. The TCPA provides the State Authority with a national framework in land use (the National Physical Plan), a state-wide perspective in land management (the State Structure Plan) and the necessary exactness and details for land use administration and control at the local or municipal level (the Local Plan).

Where the NLC does not provide the State Authority with the power to change permissible use at the will of the State, the TCPA provides this power through the preparation of Local Plans. Where, in changing land use permissibility, the State Authority is limited by the NLC to a yes or no response to a land owner's application for conversion, the TCPA provides flexibility to the State Authority to make changes appropriate to the particular locations and to changing economic circumstances, through land use zoning.

8.0 LIMITATION OF THE POWERS OF THE LOCAL PLANNING AUTHORITY IN THE PLANNING PROCESS

The process of zoning in the Local Plan is also not carried out arbitrarily at the whim and fancy of the local planning authority but according to an elaborate and controlled procedure prescribed by the TCPA. Throughout the procedure the power of the local planning authority is circumscribed.

8.1 CIRCUMSCRIPTION OF THE POWERS OF THE LOCAL PLANNING AUTHORITY IN REGARDS TO THE PREPARATION OF THE LOCAL PLAN

(i) The local planning authority has powers to initiate the preparation of the Draft Local Plan;

(ii) The local planning authority has powers to propose the contents of the Draft Local Plan;

(iii) However, the local planning authority has no powers to determine the final contents of the Local Plan;

(iv) The final contents of the Local Plan, including the configuration of the zoning plan, will emerge from the public participation and State Planning Committee deliberations.

(For convenience of reference a full extract of the relevant parts of the TCPA in regards to the preparation of the Local Plan, that is, sections 12 to 15, is appended below.)

Preparation of draft local plan

12 (3) A draft local plan shall consist of a map and a written statement and shall -

a. formulate, in such details as the local planning authority thinks appropriate, its proposals for -

(i) the development of;

(ii) the use of land in;

(iii) the protection and improvement of the physical environment of;

(iv) the preservation of the natural topography of;

(v) the improvement of the landscape of;

(vi) the preservation and planting of trees in;

(vii) the making up of open space in;

(viii) the preservation and enhancement of character and appearance of buildings in;

(ix) the improvement of communications in; and

(x) the management of traffic in the area of the local plan; and

b. contain such matters as may be prescribed or as the Committee may in any particular case specify.

(4) A draft local plan for an area shall contain, or be accompanied by, such diagrams, illustrations, and descriptive matter as the local planning authority thinks appropriate for the purpose of explaining or illustrating the proposal in the plan, or as may be prescribed by the Committee, or as may in any particular case be specified in directions given by the Committee; and the diagrams, illustrations and descriptive matter shall be treated as forming part of the plan.

(8) In formulating its proposals in a draft local plan the local planning authority shall secure that the proposals conform generally to the structure plan for the State ....

Publicity in connection with preparation draft local plan

12A Before commencing the preparation of a local plan, the local planning authority shall take such steps as will in its opinion secure-

(a) that publicity is given in its area to the draft local plan that will be prepared, its objectives and the purpose for the preparation, and matters that the local planning authority proposes to include in the plan;

(b) that persons who may be expected to desire an opportunity of making representations to the local planning authority in respect of those matters are made aware that they are entitled to, and are given, an opportunity of doing so.

Publicity in connection with draft local plans

13.(1) When the local planning authority has prepared a draft local plan, it shall.....make copies of the draft local plan available for inspection at its office and at such other place as it may determine, and each copy made available for inspection shall be accompanied by a statement of the time, as stated in the notice published under subsection (2), within which objections to or representations in respect of the draft local plan may be made to the local planning authority.

(2) Before making copies of a draft local plan available for inspection under subsection (1), the local planning authority shall publish, in three issues of at least two local newspapers, one of which being in the national language, a notice stating the date on which copies of the draft local plan will begin to be available for inspection, the places where they will be available for inspection, and the time, which shall not be less than four weeks from the date on which copies of the draft local plan begin to be available for inspection, within which objections to or representations in respect of the draft local plan may be made to the local planning authority.

(3) The time stated in the notice under subsection (2) for the making of objections to or representations in respect of the draft local plan may be extended once by the local planning authority by not more than four weeks on the application of any person.

Inquiries and hearings in respect of draft local plans

14.(1) For the purpose of considering objections to and representations in respect of a draft local plan, the local planning authority may cause a local inquiry or other hearing to be held by a committee of three persons appointed by the State Planning Committee.

(2) (Not pertinent to the matter of concern.)

Approval or rejection of draft local plans

15 (1) After the expiry of the period afforded for making objections to or representations in respect of a draft local plan or, if such objections or representations have been duly made during that period, after considering the objections or representations, the local planning authority shall submit the draft local plan or the

draft local plan as modified so as to take account of the objections or representations or of any matters arising therefrom, to the Committee for its approval.

(1A) The Committee may, after considering a draft local plan submitted to it, either approve it, in whole or in part and with or without modifications, or reject it.

(1B) In considering the draft local plan, the Committee may take into account any matters that it thinks are relevant, whether or not they were taken into account in the plan as submitted or resubmitted to it.

(1C) The Committee shall submit the approved draft local plan to the State Authority for the assent of the State Authority, and upon the assent being given the plan shall come into effect.

8.1.1 LOCAL PLAN RTPJ 1

The objection stage for the Draft of RTPJ 1 was carried out between 18.03.2002 and 18.05.2002. There is no record of the Appellant or the land owner of the subject lot at the time (Koperasi Pegawai-Pegawai Kerajaan Malaysia Berhad) having made an objection to the proposed zoning of the subject lot as open space. The Board regards this as a material fact for consideration.

The Local Plan RTPJ 1 came into force in March 2003.

The contention of the Appellant that "The Appellant believes that the Lot PT 16994 has been erroneously /mistakenly /inadvertently zoned as open space during the preparation of RTPJ1" is not credible and must be impugned.

The Appellant, or the land owner at the relevant time, has either acquiesced to the zoning, or committed an act of laches. In the absence of an objection the Respondent would rightly assume consent or acquiescence. Without such assumption there will be no closure to the objection stage and the process of local plan preparation could not proceed to the next stage of completion and approval.

It may also be noted that, as a normal practice, before the proposal of the configuration of the zoning plan of any Local Plan is commenced, a land use survey is conducted. The survey would pick up the current uses on the ground and this information would be incorporated into the zoning plan. Where a land owner has been using his land in compliance with the use condition on his title, there will be no discrepancy between the use condition of his title and the information incorporated into the zoning plan. This will automatically ensure that there will be no inconsistency between use conditions on land titles and zoning. It is only when the land owner has not been using his land as prescribed on his land title that a discrepancy may arise. Not using the land as prescribed on the land title includes leaving it idle or vacant. This is in fact the case in hand. At the time of this appeal Lot PT 16994 remains vacant and idle. However, the land owner still has the opportunity at the objection stage of the Draft Local Plan to rectify the information by objecting to the draft proposal. If he does not comply with the use condition on his land title and does not make use of the opportunity afforded to him to explain himself, resulting in a zoning prescription he does not like, then he has only himself to blame. The onus is not on the local planning authority to check the use condition in the title of every lot of land covered by a Local Plan.

Generally, the zoning plan reflects and accommodates existing land uses on the ground, and therefore existing use conditions on land titles - except where, for the purpose of "development", permissible land uses are being intensified or enhanced, which, as noted, are well received! There is therefore no inherent conflict between the provisions of the two Acts. Conflicts arise from human recalcitrance.

It is the observation of the Board that it has become the practice of State Authority, when approving new land titles in areas where a Local Plan has come into force, to prescribe the condition of use in conformity with the land use zoning of the Local Plan. This is a clear indication that land use zoning in Local Plans provides an orderly basis for land administration. Where previously State Authority plan land use without the benefit of a plan, they now have the Local Plan to guide them. New conflicts between the use condition on land titles and land use zoning in Local Plans are no longer being created. Conflicts, like the one being dealt with in the present case, continue only where land titles had been issued before the coming into force of a Local Plan. Conflicts are, therefore, a residue problem that will, over time, vanish.

8.2 CIRCUMSCRIPTION OF THE POWERS OF THE LOCAL PLANNING AUTHORITY IN REGARDS TO THE AMENDMENT OF THE LOCAL PLAN

S.16 Alteration, revocation and replacement of local plans

(1) The local planning authority may at any time make proposals for the alteration, revocation, or replacement of a local plan.

(2) Without prejudice to subsection (1), the local planning authority shall, if the Committee gives it a direction in that behalf in respect of a local plan, as soon as practicable prepare proposals of a kind specified in the direction, being proposals for the alteration, revocation, or replacement of the plan.

(3) Subsections 12(8) and (9), and sections 13, 14, and 15, shall apply in relation to the making of proposals for the alteration, revocation, or replacement of a local plan under this section and to any consequent alternation, revocation, or replacement of the plan, as they apply in relation to the preparation of a draft local plan under section 12 and to a draft local plan prepared thereunder.

Essentially, the TCPA requires the local planning authority, in the alteration, revocation or replacement of a Local Plan, to follow the same procedures as the preparation of a Local Plan, including the procedure for publicity, affording affected land owners and other affected parties a specified period to make representation and/or lodge objections, as well as submit the draft proposals for approval by the State Planning Committee and assent by the State Authority. For a local planning authority to approve an application for a change of zoning, and thus by-pass the prescribed process of Local Plan amendment, would be *ultra vires.* The local planning authority has only powers to propose the changes to the Local Plan, initiate the process for amending the Local Plan, but not the power to determine what the final changes shall be. Summary:

(i) Where a Local Plan is in force, the local planning authority has no powers to amend or vary the Local Plan, including the zoning plan;

(ii) The local planning authority has only powers to initiate the process of amending the Local Plan or, if directed by the State Planning Committee, the duty to do so;

(iii) The local planning authority has powers to propose amendments to the Local Plan;

(iv) The local planning authority has no powers to determine the final contents of the amendment, including whether a particular proposed amendment will be included or excluded: these will emerge through the public participation and deliberations of the State Planning Committee.

8.3 CIRCUMSCRIPTION OF THE POWERS OF THE LOCAL PLANNING AUTHORITY IN IMPLEMENTING THE LOCAL PLAN

S.22(4) The local planning authority shall not grant planning permission if

(a) the development in respect of which the permission is applied for would contravene any provision of the development plan

Once the Local Plan has come into effect, the local planning authority is required to comply with its provisions. The Local Plan is as much a restriction on the local planning authority as it is a restriction on the public.

9.0 CONCLUSION ABOUT THE STATUS OF THE LOCAL PLAN VIS-A-VIS S.108 OF THE NLC

Given the integral place of the Local Plan in the national planning system, its mandatory preparation, and the severe circumscription of the powers of the local planning authority with regards to its preparation, amendment and implementation, the Local Plan is clearly not "any by-law of, or restriction imposed by, any local authority or planning authority".

To allow the prescription of a land title, which is only a private entitlement, to override the Local Plan will be to vitiate the hierarchical structure and process of government. It would emasculate the power and ability of the State Authority to correct itself as it progresses through time, and fetter it to decisions it might have made with inadequate information. Furthermore, a private entitlement cannot be allowed to take precedence over public policy, especially when that public policy is arrived at through an elaborate process of public participation. Indeed the process of approving a Local Plan is more elaborate and democratic than passing an Act of Parliament! It is reminiscent of the grassroots democracy of the ancient

Greek polis, the very origins of democracy itself. In fact, it may even be "more democratic" than the Greek polis as the ancient Greek polis excluded the participation of two large classes of the population, namely, slaves and women. The modern city has no class of slaves and women are often the most vocal, vociferous and viable of participants at public hearings! To allow the entitlement of a land title to override the Local Plan would make a mockery of public participation.

The conclusion of the Board is that the wording of s. 108 of the NLC - "any by-law of, or restriction imposed by, any local authority or planning authority" - cannot be construed to mean any of the statutory plans in the national planning system emanating from the TCPA, and cannot, by any liberal interpretation, be "applied" to the Local Plan and, therefore, cannot override land use zoning.

10.0 SECOND GROUND OF APPEAL

The response of the Board to the second ground of the Appeal, that is, that the application for a "material change of use" is the proper form of application for an amendment to the land use zoning of the Local Plan is as follows:

The Appellant contends that:

> *The Act allows for the application for planning permission for a change in the material use of land.*

The meaning of "material change" as used by the Appellant differs from the meaning of "material change" provided in the TCPA by Section 2:

> *"development" means the carrying out of any building, engineering, mining, industrial, or other similar operation in, on, over, or under land, the making of any* ***material change*** *in the use of any land or building or any part thereof, or the subdivision or amalgamation of lands; and "develop" shall be construed accordingly;*

The relevant dictionary (Webster's) meanings of "material" are:

1. *being of real importance or great consequence; substantial (example: a material difference between two things).*

2. *requiring serious consideration by reason of having a certain or probable bearing on the proper determination of a law case or on the effect of an*

instrument or on some such unsettled matter (example: a material fact; a material piece of evidence).

S.2(3) of the TCPA further elaborates:

For the avoidance of doubt in determining for the purpose of this Act, what constitutes a material change in the use of a building, it is declared that -

(a) Any increase in the number of units in a building to more than the number originally approved by any authority empowered under any written law to give the approval involves a material change in the use of the building;

(b) The use as a dwelling house of a building not originally constructed for human habitation involves a material change in the use of the building;

(c) Any alteration or addition to that part of the building, whether in the interior or attached to the exterior of the building, that abuts upon any regular line of street as prescribed by or defined in any written law relating to buildings involves a material change in the use of the building.

(d) Any use of a building or part thereof that contravenes or is inconsistent with or contrary to any provision of the development plan involves a material change in the use of the building;

(e) The use for other purposes of a building or part thereof originally constructed as a dwelling house involves a material change in the use of the building.

Indeed, the Board would contend that the meaning of "material change" in the Act may give powers to a local planning authority to extend the meaning of "development" and to require the submission of an application for planning permission where such requirement may not be specified by the Act or normally exempted, for example, a change of use within the same use class but where the effect of the change is uncertain and potentially substantial. It is in fact a definition any would-be developer should be wary of, and, where angels fear to tread, avoid rushing in!

The Appellant contends that the particular meaning of "material change" he is using applies to the zoning of land use, whereas the provision of s.2(3) of the Act applies to buildings. The Board is, unfortunately, unable to find where in the Act the Appellant's rather special meaning applicable to land use zoning appears. As far as the Board is able to determine, the meaning of "material change of use" in the Act has nothing to do with changes in zoning.

Why can't the Appellant call a spade a spade? If he wants a change in zoning, why can't he apply for a change in zoning? The local planning authority, of course, as discussed earlier under amendment of the Local Plan, has no powers to grant a change in zoning. It has only powers to carry the proposed amendment through the process and procedures prescribed by the Act for the final approval by the State Planning Committee and assent by the State Authority [s.16 (3)]. So, irrespective of whether the application is for 'a change in zoning' or a 'material change of use' the local planning authority cannot grant it. But at least the Appellant/Applicant will be understood, instead of having to spend months and days and hours before the Board of Appeal explaining what he means.

The Appellant submits that he is following a guideline produced by the Jabatan Perancang Bandar dan Desa, Semenanjung Malaysia and included in "Manual Laporan Cadagan Pemajuan Edisi Kedua". As the said document is not a gazetted rule emanating from the TCPA or any other Act, the Board cannot recognize it and is not bound by it. It cannot override the provisions of a statute. The advice of the Jabatan Perancang Bandar dan Desa, if the reporting of the Appellant is faithful, is misleading the public and the Department should take steps to correct its advice.

Nevertheless, irrespective of whether the Respondent agreed or did not agree with the form of the application for a change of zoning, he diligently took action to assess the application. Notice was served on the owners of neighbouring lands informing them of their right to object to the application and to state their grounds of objections. This notice is in accordance with s.21(6):

(6) *If the proposed development is located in an area in respect of which no local plan exists for the time being, then, upon receipt of an application for planning permission ..... the local planning authority shall, by notice in writing served on the owners of the neighbouring lands inform them of their right to object to the application and to state their grounds of objection within twenty-one days of the date of service of the notice.*

However, as there is a Local Plan (RTPJ 1) in place, the action of the Respondent is supererogatory. Nevertheless, such practice is not discouraged as it conforms with good governance and provides a practical and democratic means to arrive at a consensus of what the environment of the neighbourhood should be, that is, the nearest to a "liveable environment", the oft lauded goal of the town planning profession. As it transpired, 13 responses were received, all objecting to the application for change of zoning from open space to commercial.

So, the Respondent was left with the comfortable option of rejecting the application because it did not comply with the provisions of the Local Plan [s.22(4)], or rejecting it because plausible objections in the consideration of the Respondent had been lodged against its approval [s.22(2)(c)], or, it simply had no powers to approve the application [s.16 (3)]! The Respondent had three grounds to reject the application, any single one of which would have been sufficient to do the job. The Respondent chose the first reason - that the application did not comply with the Local Plan. Perhaps the Respondent should have responded, not with a rejection but, in accordance with the implied instruction of s.16(3), with a "non possumus" (we cannot)!

The Board is aware that the TCPA does not make any provision for a private individual to initiate an amendment to the Local Plan. However, it also does not specifically preclude a private individual from making such a request. It is the advice of the Appeal Board that citizens can do what citizens have done from time immemorial, whether it is to change a law, reduce a tax, drain swamps, build roads, etc. The advice is to petition the relevant authority.

However, so long as the Local Plan RTPJ 1 remains in effect, any contrary provision in a land title cannot defeat the zoning prescription in it.

In closing the argument, the Board must remark upon the self-contradiction of the Appellant's actions and contentions. If the Appellant is so convinced that the land use condition imposed on a land title prevails over the land use zoning in the Local Plan, why is he applying for a change of zoning? If he is desirous of a change of zoning, why is he arguing for supremacy of the land use condition imposed on a land title?

SUMMARY OF THE APPEAL BOARD'S RESPONSE TO APPELLANT'S CONTENTION THAT AN APPLICATION FOR A "MATERIAL CHANGE OF USE" IS THE PROPER FORM OF APPLICATION FOR AN AMENDMENT TO THE LAND USE ZONING OF THE LOCAL PLAN.

The Board is of the view that this interpretation of "material change of use" is wrong and has no merit.

11.0 OTHER GROUNDS OF THE APPEAL

Having dealt with the first two grounds of appeal at length, the Appeal Board is reluctant to respond to the other grounds of appeal submitted by the Appellant as they do not help to make the appeal more cogent but only add to the length of the judgment. However, for the sake of completeness the Board will attempt to respond as briefly as possible.

(3) The Respondent or the Appeal Board need not slavishly adhere to the local plan;

The antithesis of this is: the Respondent or the Appeal Board cannot blatantly disregard the local plan. The areas of possible discretion for the local planning authority are in peripheral matters such as density, height of buildings, etc. The issue at hand is a fundamental matter of law and in it the local planning authority has no powers of discretion.

(4) The Respondent had clearly made a mistake to classify the landuse zoning as open space.

This has already been responded to at some length within the examination of the process of local plan preparation.

(5) Good planning rationale for designating the land for commercial use.

This is a point that should more appropriately be debated at the public hearing of the Draft Local Plan and not in a planning appeal. It is not within the purview of the Appeal Board to give directions on the contents of the Local Plan.

(6) Proposed development meets the respondent's planning guidelines.

Maybe. The Appeal is being determined on matters of law and principles and not on details.

12.0 PRECEDENT

The following case may be cited as precedent:

LR. SEL. (167) MPSJ/05/2010; Prominent Land Sdn. Bhd. v. Majlis Perbandaran Subang Jaya (2010)
The Appellant appealed against a rejection for planning permission. The application was for 14 units semi-detached and 2 units detached industrial premises on lots 1200 and 1190, Mukim Petaling, Daerah Petaling, Negeri Selangor.

The Appellant's lands were zoned for housing whereas the condition on his land titles was industrial. The said lots were located at the boundary between an industrial zone and a housing zone but included in the housing zone. The zoning of the lots concerned, it would seem, could have gone one way or the other. In the housing zone within which the lots were assigned, there were both industrial premises and houses existing cheek by jowl. The Board was of the opinion that due diligence might have been inadequate on the part of the local planning authority when preparing the Local Plan. However, the land owner did not object to the proposal in the Draft Local Plan at the time when objections were called. The lots concerned were vacant and idle. An assumption by the Respondent of acquiescence on the part of the land owner/Appellant was, therefore, not improper. An argument of laches was also available to the Respondent if the Appellant objected to the zoning only then at the time of the appeal. It was not within the jurisdiction of the Board to correct, or instruct on, the Local Plan. At the prospect of a dismissal of his appeal, the Appellant sought leave to withdraw his appeal, with liberty, in order to petition the local planning authority to amend the Local Plan. The Board granted the leave.

13.0 ORDER

Having perused and examined the submissions of the Appellant and of the Respondent, and having heard the representations of the Appellant and of the Respondent, on this day, the 5th of September 2012 at Shah Alam, the Board concludes the following:

1. That Section 108 of the National Land Code 1965 does not apply to the Local Plan prepared under the Town and Country Planning Act 1976, and therefore, does not apply to the Zoning Plan prepared therein, and that being so, the use condition in a land title does not prevail over the land use zoning in a Zoning Plan.

2. That the Local Planning Authority, as prescribed under Section 16 (1) and (3) of the Town and Country Planning Act 1976, has no powers to grant an application for a change or amendment of zoning and that, therefore, an application for a "material change of use" is not the proper form of application for an amendment to the land use zoning of the Local Plan.

The Appeal is disallowed.

No cost is ordered.

Bertempat di SHAH ALAM
Pada 05 September 2012

Dato'Abu Bakar b. Awang
Pengerusi,
Lembaga Rayuan Negeri Selangor

Saya setuju dengan keputusan dan perintah ini

Ho Khong Ming
Ahli Lembaga Rayuan Negeri Selangor

Saya setuju dengan keputusan dan perintah ini

Hjh. Noraishah bt. Yahya
Ahli Lembaga Rayuan Negeri Selangor

Bagi Pihak Perayu	- *En. Thangaraj Balasundram* - *En. Jackson Ho* - *En. Philipose Philips*
Bagi Pihak Responden	- *En. Mohd. Yusof b. Che Aziz* - *En. Arif Faisal b. Ariffin* - *Majlis Bandaraya Petaling Jaya*

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