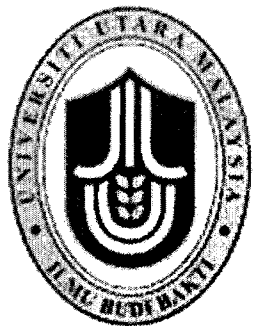




The Law Governing Housing Industry in Malaysia: Issues, Challenges and Prospects

Land Law Issues



UUM

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Dahlan ACIS

Institute for Governance and Innovation
Studies

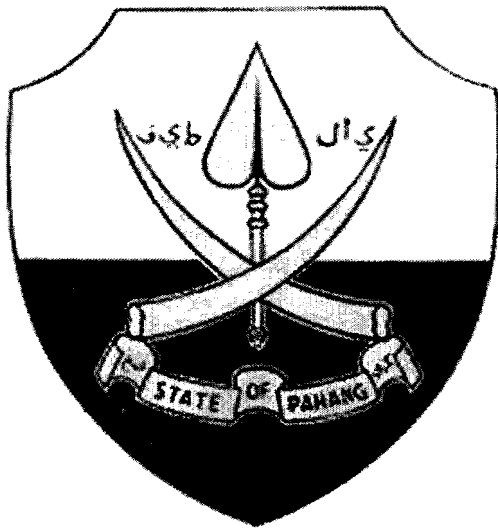
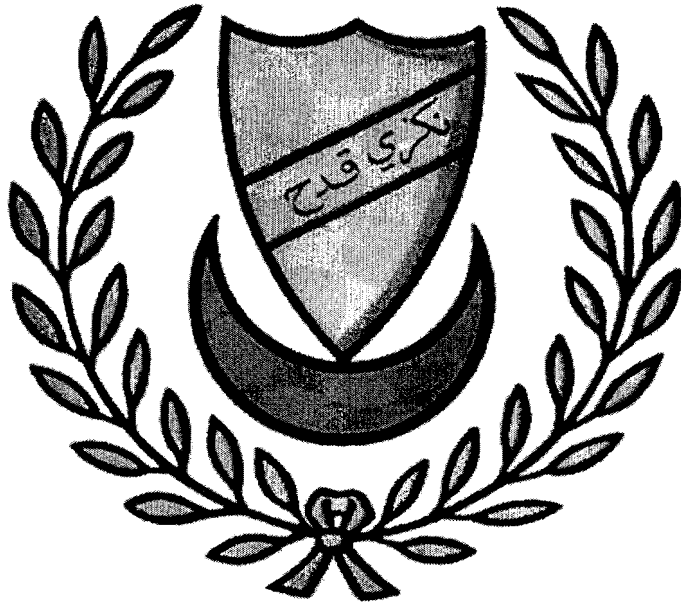
Universiti Utara Malaysia
nuarrualhilal@gmail.com;
hilal@uum.edu.my

Federal Constitution

- List II(2)(a) to 9th Schedule FC

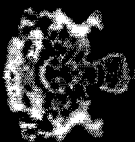


National Land Code



- Section 76 of the National Land Code 1965 ('NLC').
- The power to alienate land is vested in the State Authority.
- State Authority means the members of the state executive council or EXCO, headed by the Chief Minister or Menteri Besar - *Lebbey Sdn. Bhd v Chong Wooi Leong & Anor* [1998] 5 MLJ 368.
- Abdul Wahab J stated that: "State Authority...is defined...as the Ruler. For practical purposes, this means the Ruler acting upon the recommendation of the EXCO of the State"
- Section 75

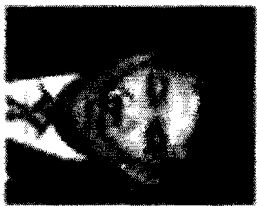
State's EXCO



AHLI MAJLIS MESYUARAT KERAJAAN



EXCO KERAJAAN NEGERI SEMBILAN 2013



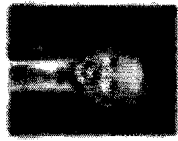
1. Dato' Seri Anwar Ibrahim
Menteri Besar
Menteri Kanan
Menteri Perumahan & Kerajaan Tempatan



2. Dato' Seri Ahmad Said
Menteri Kanan
Menteri Pertanian & Industri Asas Tani



3. Dato' Seri Saifuddin Abdullah
Menteri Pertanian & Industri Asas Tani
Menteri Pertanian & Industri Asas Tani



4. Dato' Seri Saifuddin Abdullah
Menteri Pertanian & Industri Asas Tani
Menteri Pertanian & Industri Asas Tani



5. Dato' Seri Saifuddin Abdullah
Menteri Pertanian & Industri Asas Tani
Menteri Pertanian & Industri Asas Tani



6. Dato' Seri Saifuddin Abdullah
Menteri Pertanian & Industri Asas Tani
Menteri Pertanian & Industri Asas Tani



7. Dato' Seri Saifuddin Abdullah
Menteri Pertanian & Industri Asas Tani
Menteri Pertanian & Industri Asas Tani



8. Dato' Seri Saifuddin Abdullah
Menteri Pertanian & Industri Asas Tani
Menteri Pertanian & Industri Asas Tani



9. Dato' Seri Saifuddin Abdullah
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Menteri Pertanian & Industri Asas Tani



10. Dato' Seri Saifuddin Abdullah
Menteri Pertanian & Industri Asas Tani
Menteri Pertanian & Industri Asas Tani



11. Dato' Seri Saifuddin Abdullah
Menteri Pertanian & Industri Asas Tani
Menteri Pertanian & Industri Asas Tani

Section 76

- “The alienation of State land under this Act shall consist of its disposal by the State Authority -
- (a) for a term not exceeding ninety-nine years;
 - (aa) in perpetuity –
- (i) where the Federal Government requires the State Authority to cause a grant in perpetuity to be made to the Federal Government or to a public authority or where the Federal Government and the Government of the state agree to make a grant in perpetuity to the Federal Government;
- (ii) where the State Authority is satisfied that the land is to be used for a public purpose; or
- (iii) where the State Authority is satisfied that there are special circumstances which render it appropriate to do so;
- (b) in consideration of the payment of an annual rent;



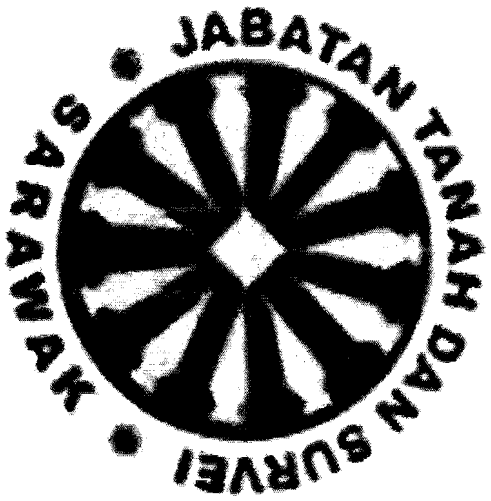
Section 76

- (c) in consideration, unless the State Authority thinks fit to exempt therefrom in any particular case, of the payment of a premium;
- (d) subject, unless the State Authority otherwise directs pursuant to sub-section (5) of section 52, to a category of land use determined in accordance with sub-sections (2) and (3) of that section; and
- (e) subject to such conditions and restrictions in interest as may be imposed by the State Authority under, or are applicable thereto by virtue of, any provision of this Act.
- Provided that nothing in paragraph (aa) shall enable the State Authority to dispose of any part of the foreshore or sea-bed for a period exceeding ninety-nine years; and paragraph (d) shall not apply to the alienation of land under this Act in pursuance of an approval given by the State Authority before the commencement thereof."

Application to Alienate Lands – The Practice, administrative



- Information of the applicant;
- Qualifications of the applicant in respect of section 43 and Chapter 33(1) NLC and restrictions under any written laws such as Malay Reservation Enactment and Kelantan Land Reservation, 1938;
- Proposed land use by the applicant;
- Location (should be provided in the plan) and descriptions of land;
- Views from related departments;
- etc



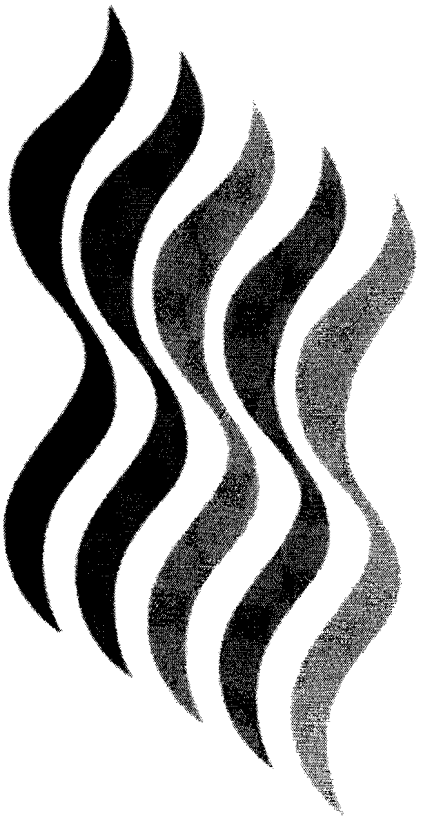
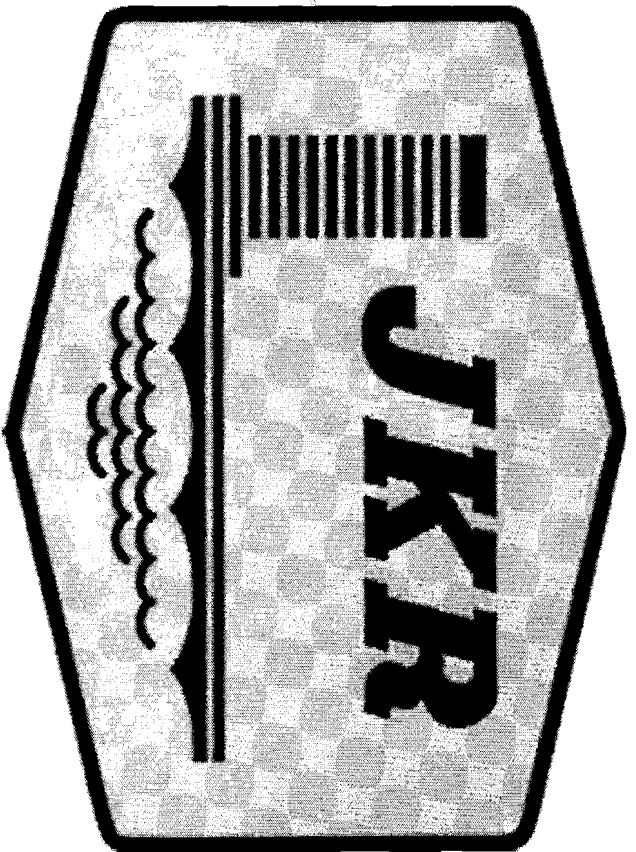
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PUSAT DATA DAN SURVEI
DENGAN



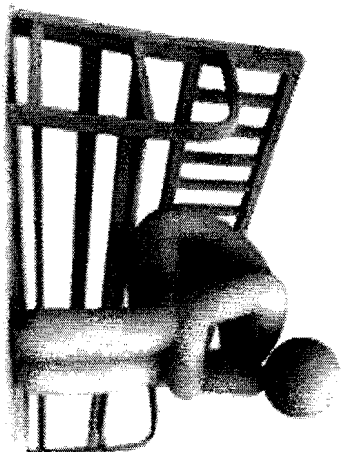
Views from technical agencies



- JPBD
- Local Authority
- Department of Agriculture
- Public Works Department (JKR)
- Department of Irrigation and Drainage (JPS)
- Ministry of Urban Wellbeing, Housing and Local Government – qualified developers
- etc



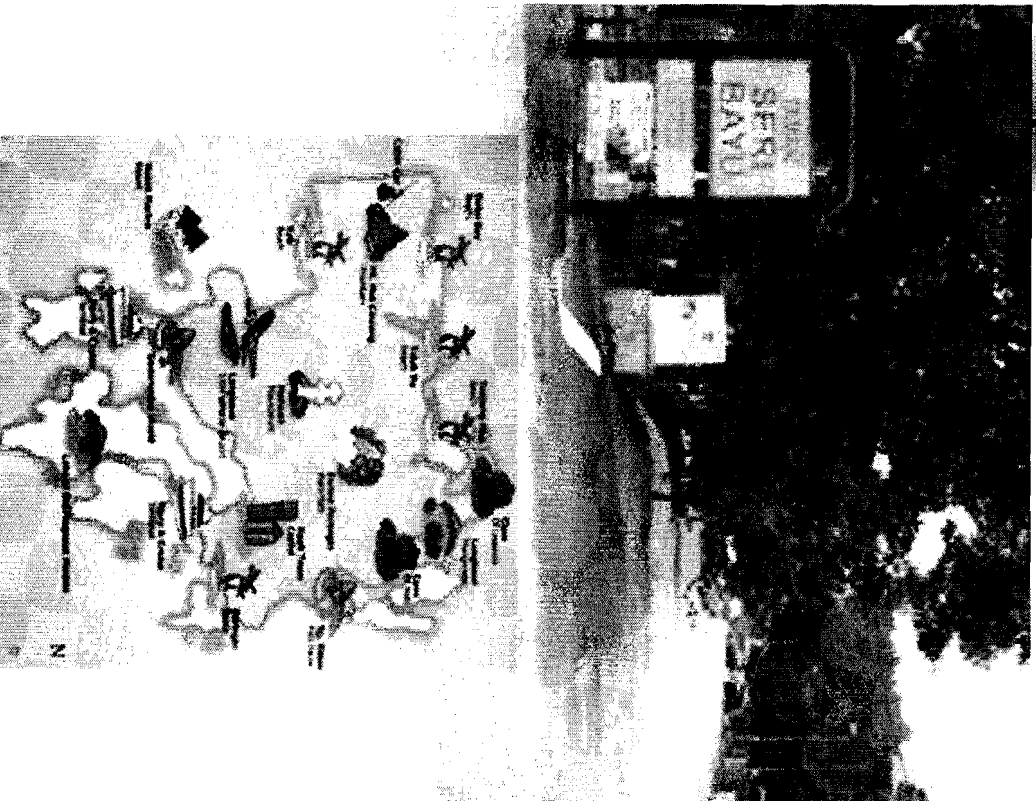
JPS MALAYSIA



Issues

- absolute power - section 108 of the NLC where there is a conflict between a by-law or restriction imposed by the planning authority and any conditions
- conditions imposed under the NLC, the latter shall prevail
- Unsuitable soils and land locations
 - Slime soil – Taman Harmoni, Balakong
 - Soil erosion – Taman Lingkaran Nur, Kajang
 - Hilly land, granitic hard rocks - Desa Kerayong Indah, Ijok, Selangor

Abandoned Housing Projects – Soil problems

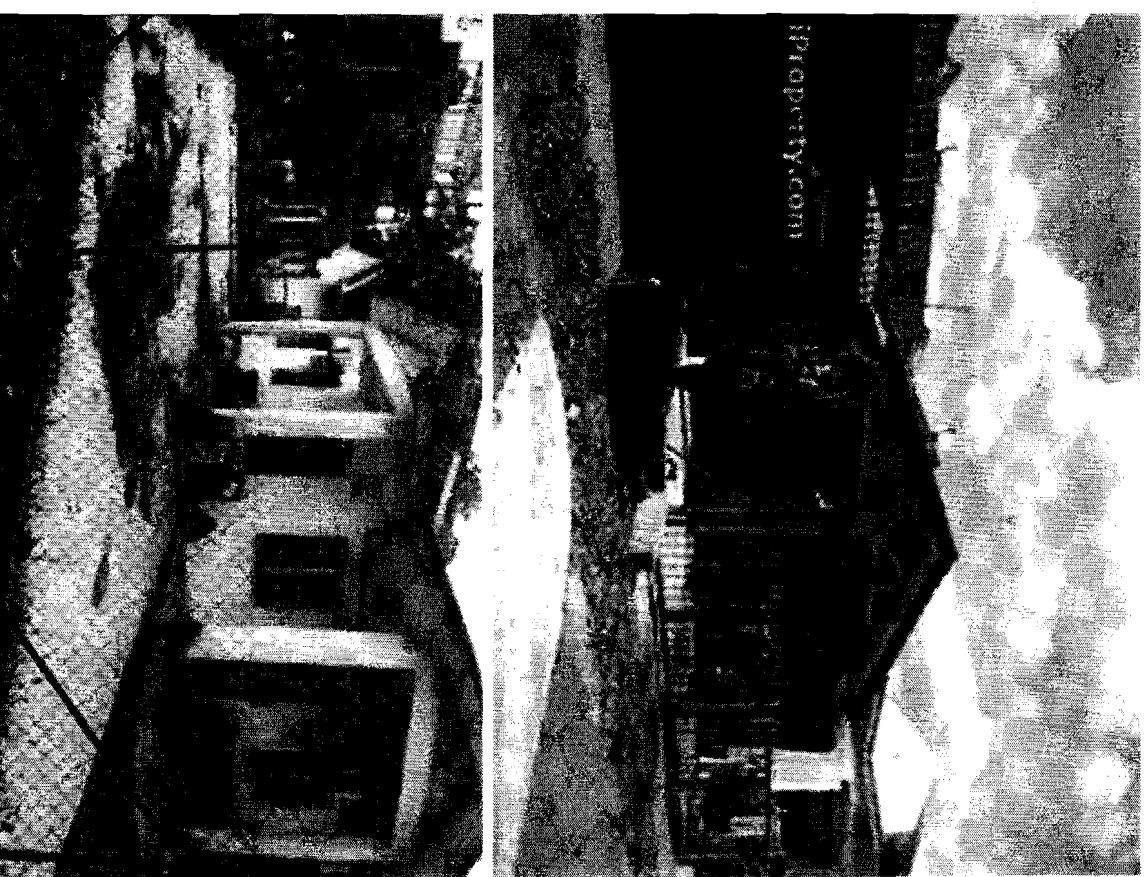
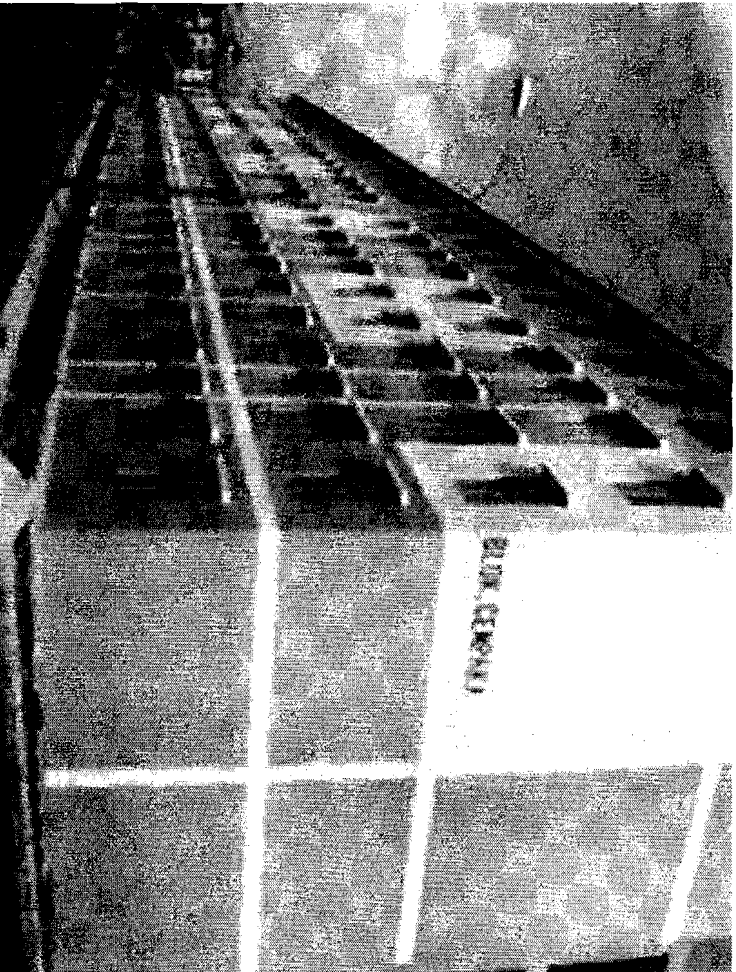


Taman Perwira, Phase 2,
Jerantut, Pahang -
geo-technical
problems

Taman Dayang, Mukim
Kuah, Langkawi,
Kedah

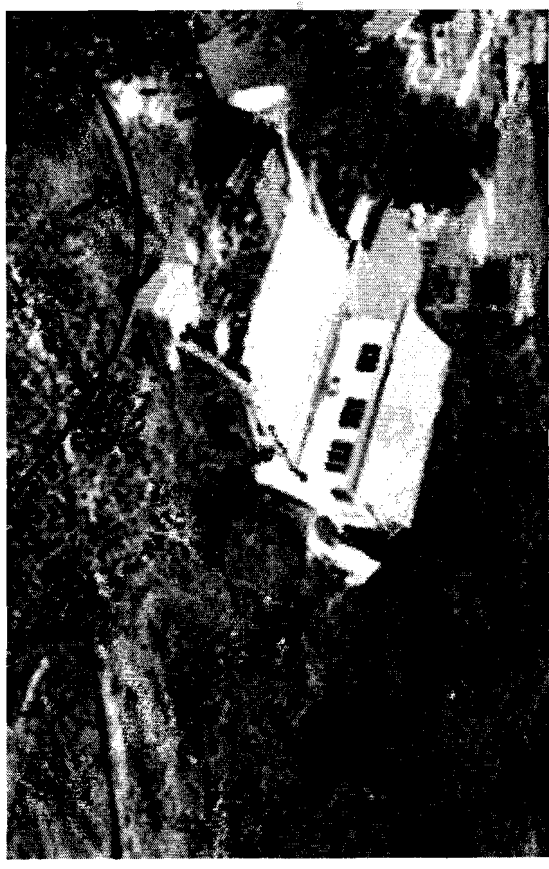
Taman Sri Bayu,
Seremban, Negeri
Sembilan

Taman Harmoni, Balakong, Kajang – slime soil



Desa Kerayong Indah, Ijok, | Selangor – granitic rock

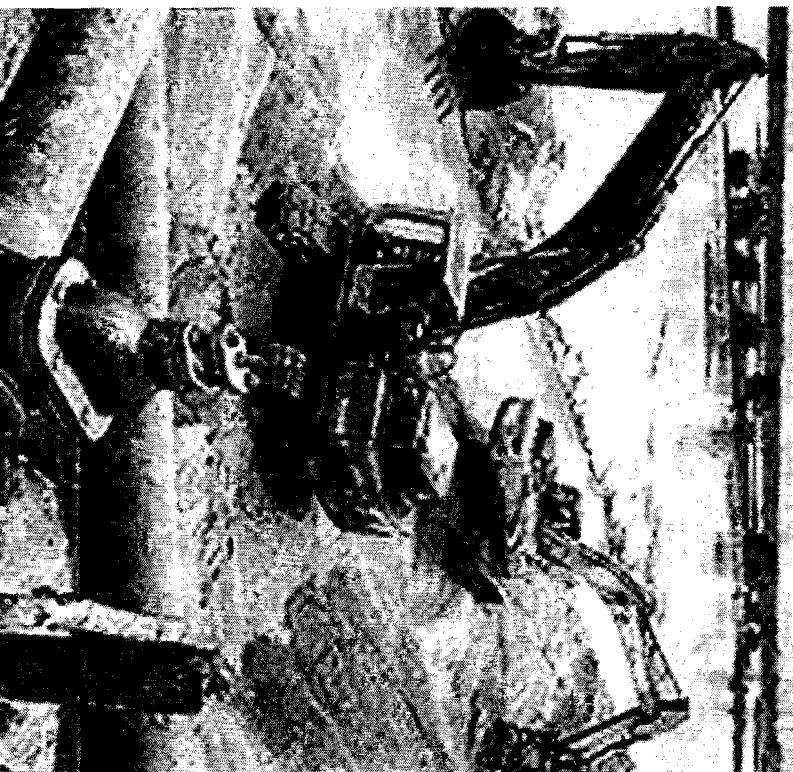
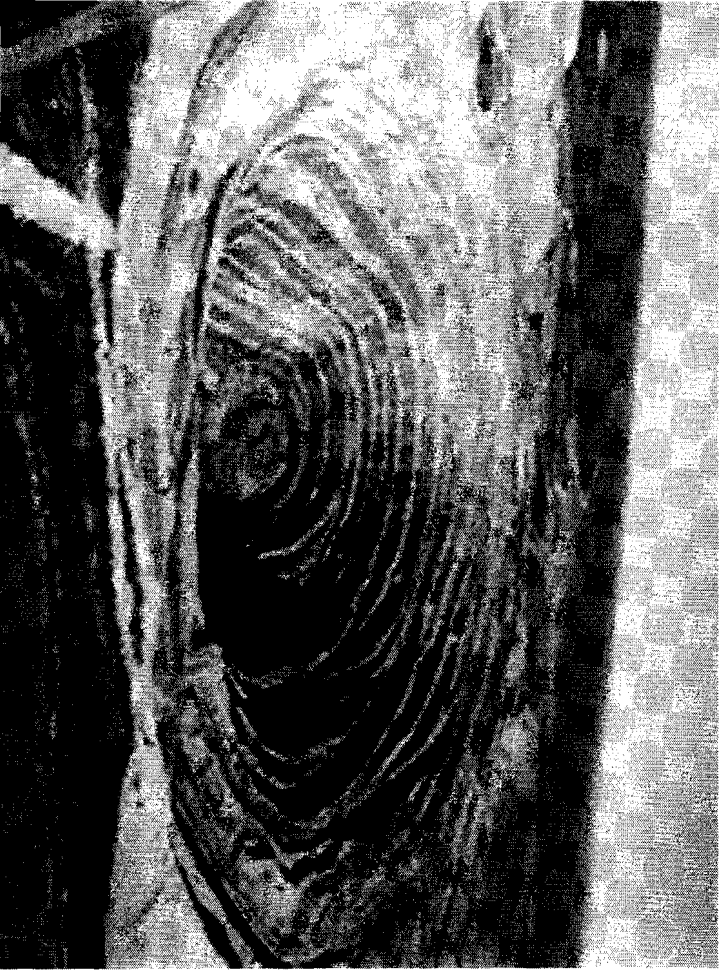




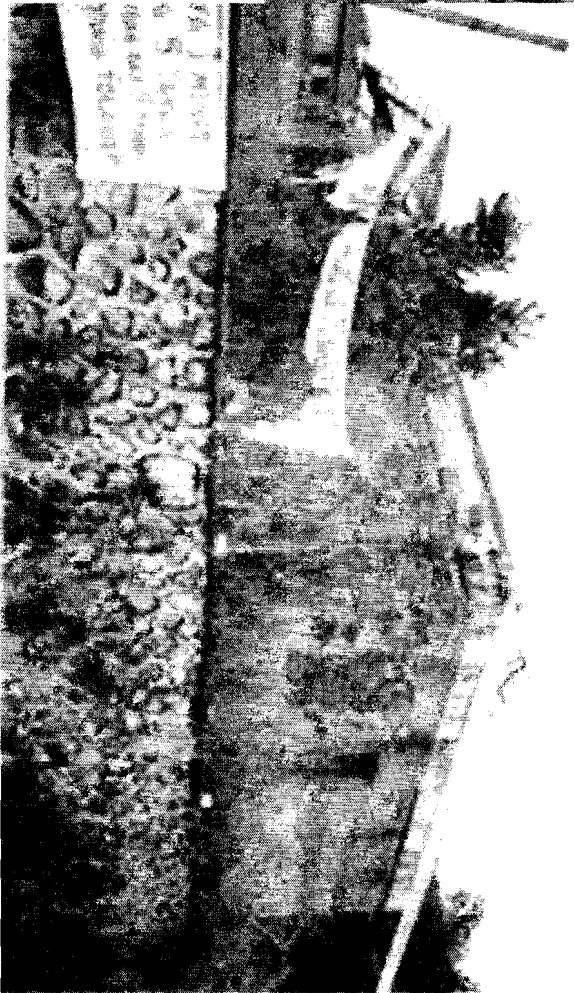
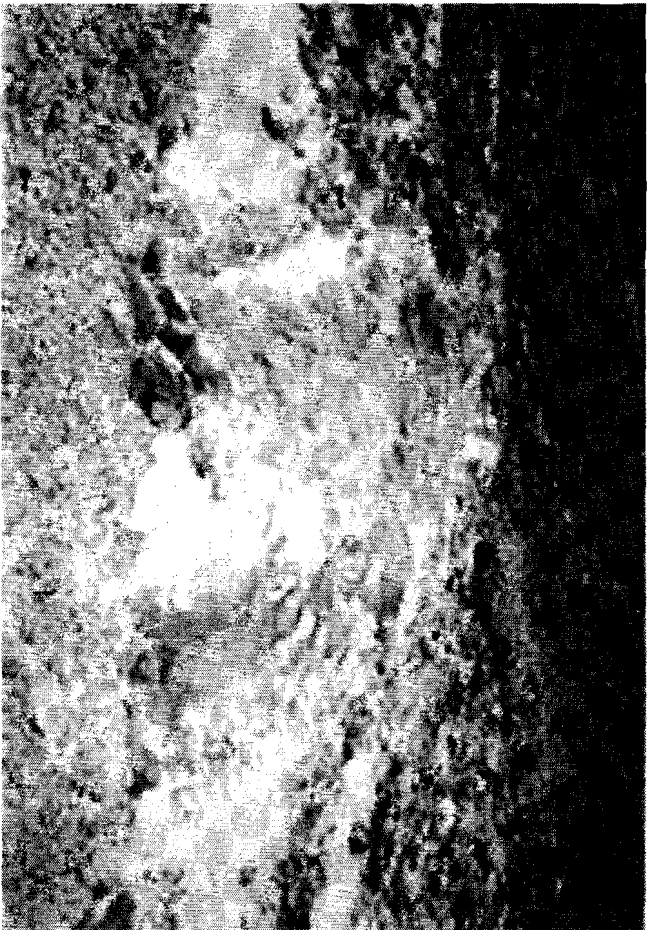
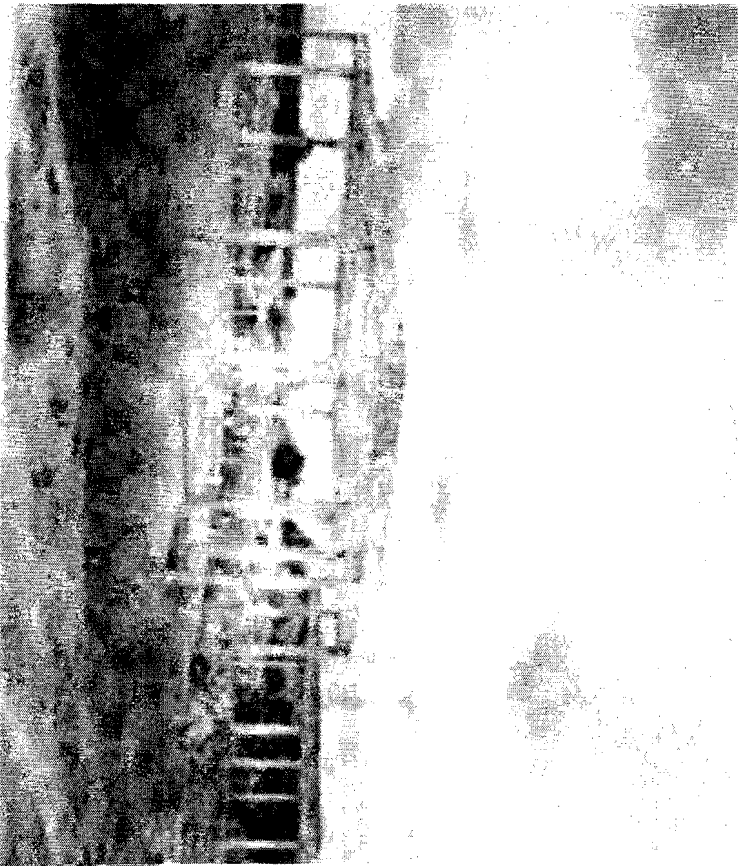
Soil erosion – Taman Lingkararan Nur, Kajang



Slime Soil



Granitic rock



Issues



- failure to get sufficient views, inadvertently or otherwise, from the relevant authorities (appropriate authorities and technical agencies)
- that the decision of the State Authority in alienation of land is not grounded on good information and professional considerations
- Appointment of unsuitable developers – in JV
- Imposition of unreasonable selling prices for the housing units – especially low cost houses

Issues



- an *ad hoc* decision and not suitable from the property, planning, building and housing perspectives (including the development plans as emphasized by 22(2)(a) of the Town and Country Planning Act 1976 (Act 172))
- sections 52(3) and 120(1) of the NLC relating to the power of the State Authority imposing a category of land use and express conditions and restrictions in interest on alienation of land do not require the State Authority to refer to the development plans and the planning authority for reference and views



Issues

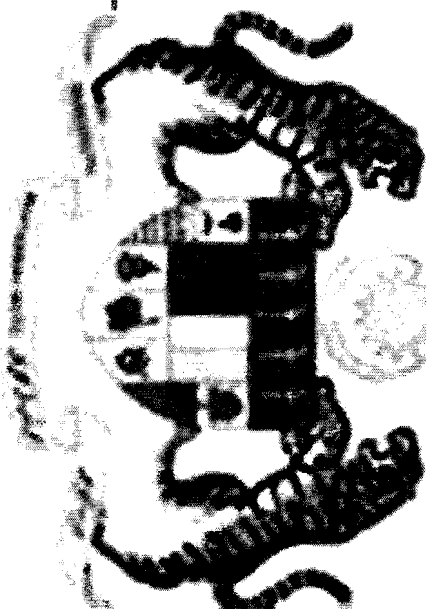
THE BIG ISSUE

- may lead to abuse of powers
- section 8 of the Delegation of Powers Act 1956 (Revised 1988) confers on the Menteri Besar certain delegated powers without having to be subject to the professional officers' approvals and views, thus reducing the functions and importance of certain professionals
- Indirectly, all the decisions made in the EXCO meetings can be monopolized and manipulated for their self interests, which may not, in fact, be practical and suitable from the view of certain relevant professionals

Issues

ISSUE
in
FOCUS

- Federal and state jurisdictional issues – tussle – inadequate coordination and uniformity of the law and practices – alienation of land
Federal circulars not binding including PEMUDAH, Jabatan Ketua Pengarah Tanah dan Galian Persekutuan, National Land Council
- ISO – not required



PEMUDAH

Pasukan Petugas Khas
Pemudahcara Permiaaan



Laman Web Rasmi

PEMUDAH

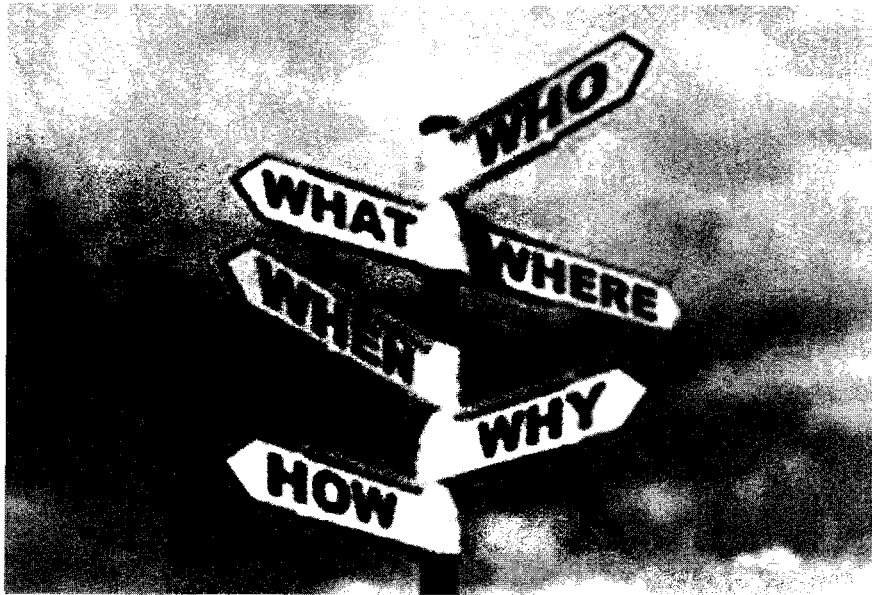
Urusan Anda Keutamaan Kami

Issues



- Delay – 3-5 years to complete
- Shortage of staff – tracers, settlement officers
- Overload work
- Negligence, breach of duty among the land officers
- Remuneration and perks package – not attractive?
- Inadequate funds to upgrade land offices and land administration?

Issues



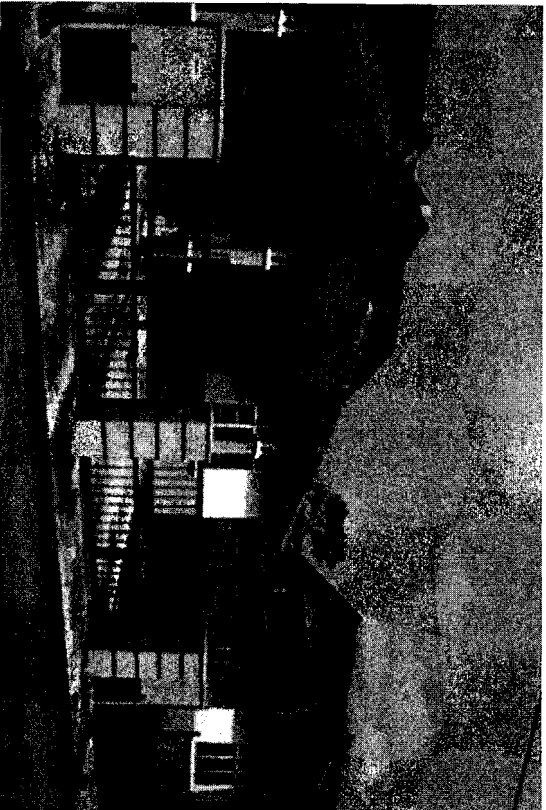
- Absence of multi-criteria evaluation and multi-criteria decision making ('MCDM') development plans, absence of comprehensive criteria or multi factors affecting housing development projects

Legal Analysis – some questions

- Whether the State Authority as a public authority is duty bound and under a legal responsibility in the alienation of lands for housing development projects to ensure public welfare, public benefit and well-being of their customers/stakeholders...for instance to provide and carry out all measures to avoid any possible occurrences of problematic housing projects?

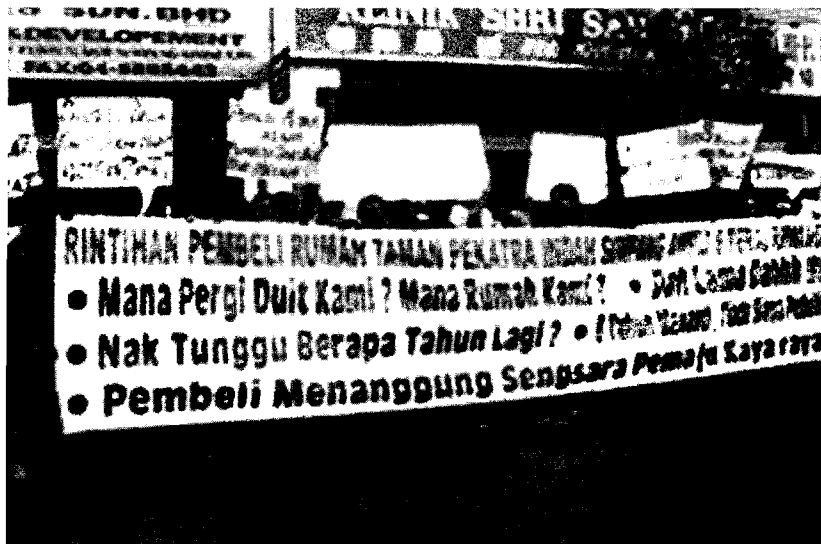


Legal Analysis – some questions



- Does the State Authority as a public authority owe a legal responsibility to implement a duty to act fairly and reasonably, in good faith and observe rules of natural justice in the exercise of their power to the effect of ensuring fitness and suitability of lands for alienation and selecting capable housing developers for the implementation of housing development projects?

Legal Analysis – some questions



- whether the aggrieved stakeholders in problematic housing development projects (including abandoned housing projects)... have any cause of action and/or *locus standi* to sue the State Authority and claim appropriate remedies... for all the losses and injuries they suffered and incurred for all the negligence, breach of a duty to act fairly and reasonably, failure to implement fairness in the decision making process and/or breach of natural justice and good faith....?

Legal Analysis



- The author has not found any reported case law that has directly dealt with the issue of the responsibility and liability of the State Authority in alienation of lands for housing development.

- Nonetheless, there are many reported cases that have directly and indirectly covered issues involving alienation of lands, not specifically for housing development.

Examples of cases involving alienation of land by the State Authority are as follows:



Legal Analysis

- *Rahamah bt Gujing @ Ibrahim & Ors v Liew Vui Yin & Ors*
(Government of the State of Sabah, third party) and another suit [2009] 7 MLJ 213 (High Court of Borneo in Sandakan)
- *Sa Mal (Sabah) Corporation Sdn. Bhd v Director of Lands and Surveys, Sabah* [1994] MLJU 398; [1994] 3 CLJ 229.
- *Hiew Kon Fah and Anor v Kwn Ngen Wah & Ors* [2008] MLJU 95 (High Court of Borneo at Sandakan)

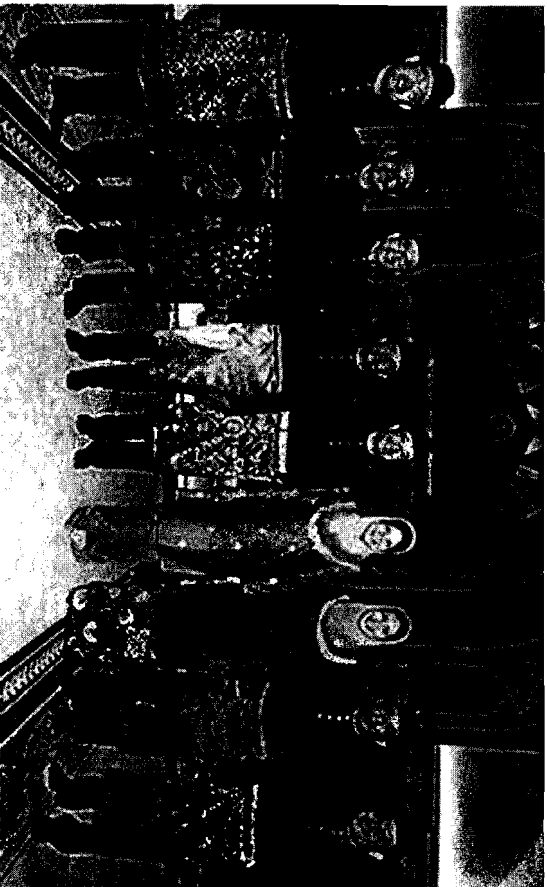


Legal Analysis

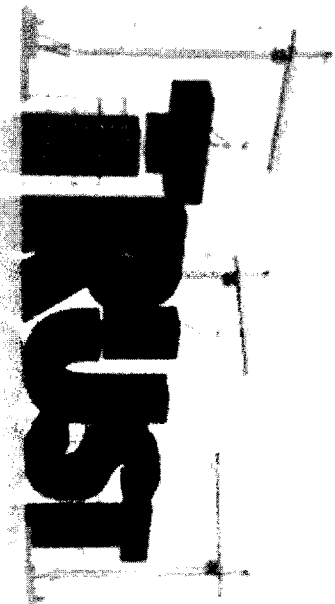


- ...despite the absolute power that the State Authority has in the alienation of land and its superiority over the planning and other authorities.. the State Authority is still subject to a legal duty to act fairly and reasonably in the exercise of alienation of land for housing development purposes.

- ...if it is proven that the State Authority fails to execute their statutory duties fairly and reasonably to the detriment of the housing developers and the purchasers, the stakeholders have a cause of action and *locus standi* against the State Authority and are entitled to certain legal and equitable remedies



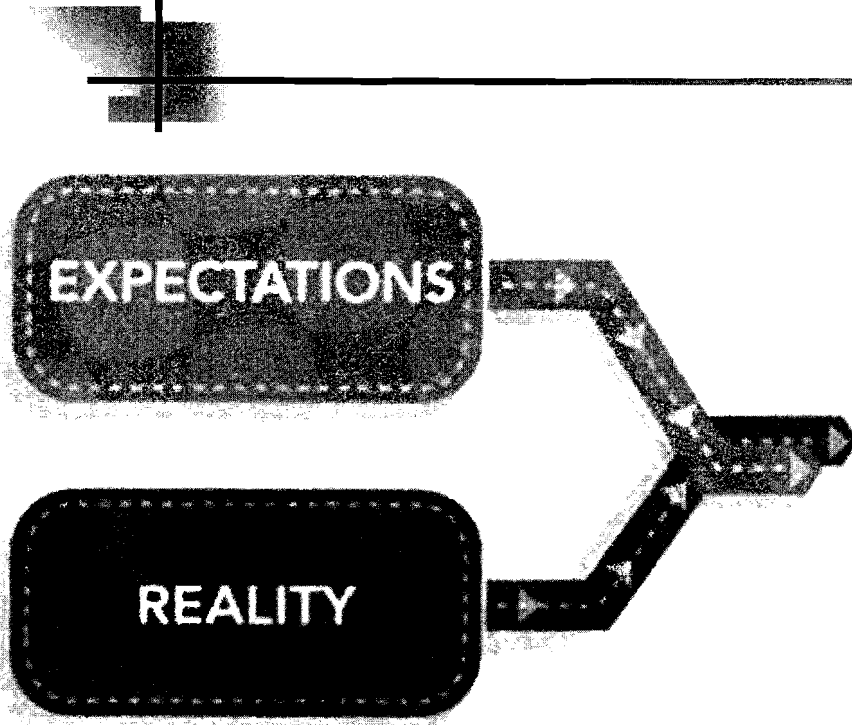
Legal Analysis – Ground 1



- There exists a fiduciary duty on part of the State Authority towards the public in dispensing their public duties.
- In respect of housing development, the public are the housing developers and the purchasers

Legal Analysis – Ground

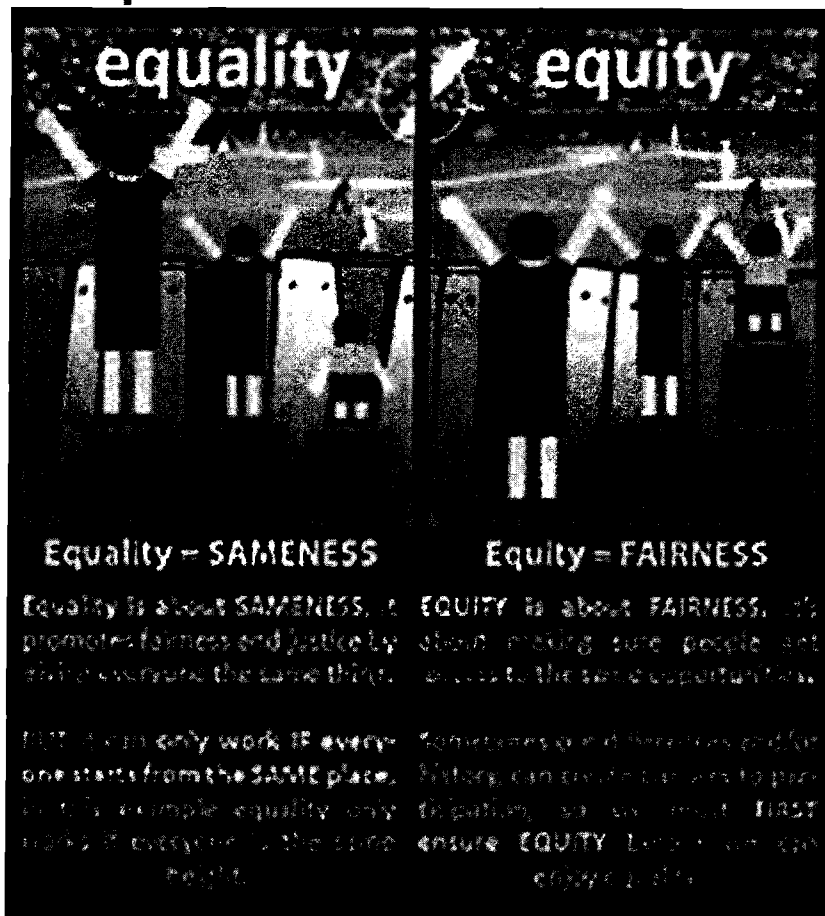
2



- There exists a legitimate expectation on part of the housing developers and the purchasers against the State Authority in that the State Authority should exercise their statutory and/or prerogative powers conferred by the FC in a fair and reasonable manner in the alienation of lands for housing development projects and appoint suitable and fit housing developers to carry out housing development for the benefit of its subject (the housing developers and the purchasers)

Legal Analysis – Ground 3

- Even though the State Authority has a wide discretionary and statutory power to alienate land and to appoint developers to carry out housing development projects, this statutory and prerogative power is not an unfettered one. This power is still subject to the principles of natural justice, equity, good faith and fairness.



Fiduciary Duty

- ...the duty of the State Authority to exercise due care in alienating land for housing development is a fiduciary one.



- The State Authority should ensure that the outcome of their decision in alienation of lands for housing development projects would benefit the public and should not cause any unnecessary... problems to the housing development projects...
- *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 (Court of Appeal)

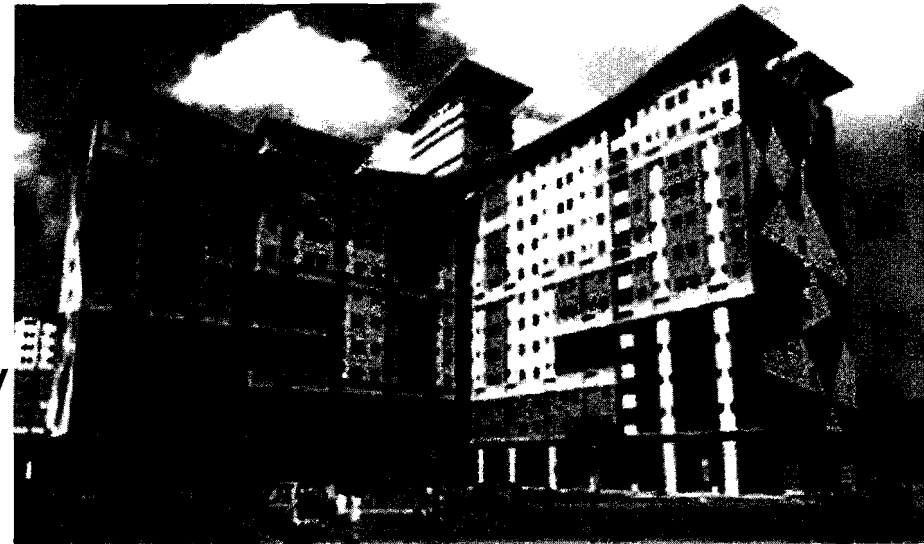
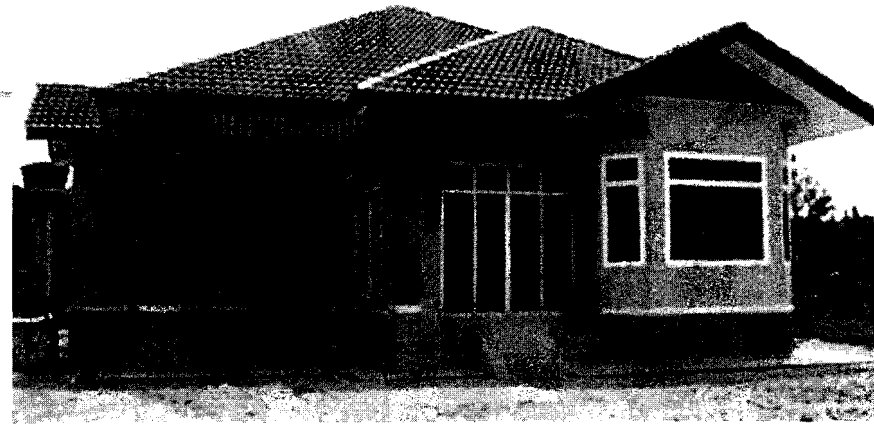
Legitimate Expectation

- The principle behind the doctrine of legitimate expectation is founded on the duty to act fairly as a necessity element or concomitant of good governance or good administration.
- to denote something less than a right which may nevertheless be protected by the principles of natural justice; or an expectation of receiving some benefit or privilege to which the individual has no right
- *Darahman bin Ibrahim & Ors v Majlis Mesyuarat Kerajaan Negeri Perlis & Ors* [2008] 4 MLJ 309 (Court of Appeal)



Legitimate Expectation

- the housing developers and the aggrieved purchasers in problematic housing projects... have a legitimate expectation, procedurally and substantively, that the State Authority, as a public authority, should have alienated or should alienate suitable lands... and that only suitable... housing developers should be appointed....
- Otherwise,... the projects may not succeed and as a consequence, abandonment may occur.



Legitimate Expectation

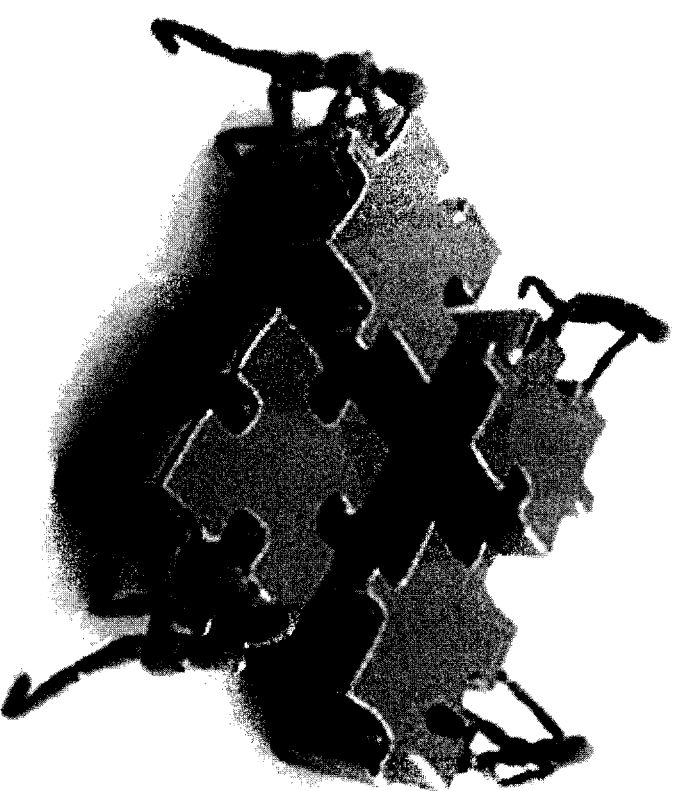


- ...the foundation for the creation of procedural and substantive legitimate expectation of the public toward the State Authority is derived from the election *manifestos* and the promises of the respective political members composing the State Authority and the inherent responsibility of the State Authority to carry out projects, programmes and activities for social justice, public good and public welfare/wellbeing.

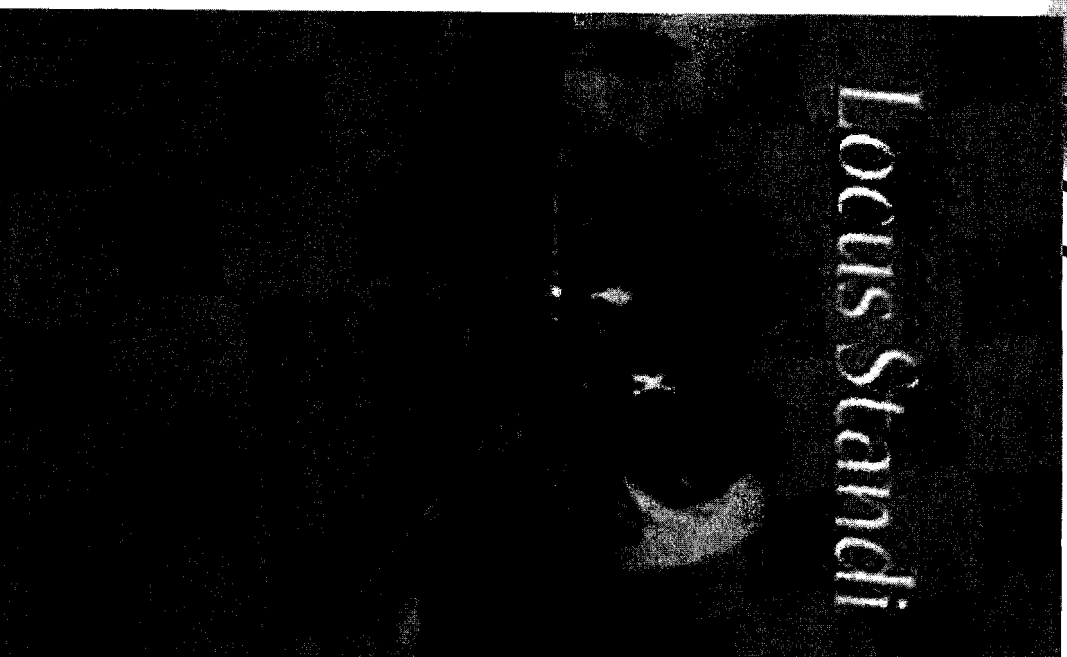
- Planning authority and the State Authority become one body

Findings and Suggestions

- For, coordination between the state authority and other authorities – bound by professional views – needs amendment on the NLC.
- need to revamp state authority and land authority
- Public participation – public exhibition of the plan to alienate lands – New South Wales



Findings and Suggestions



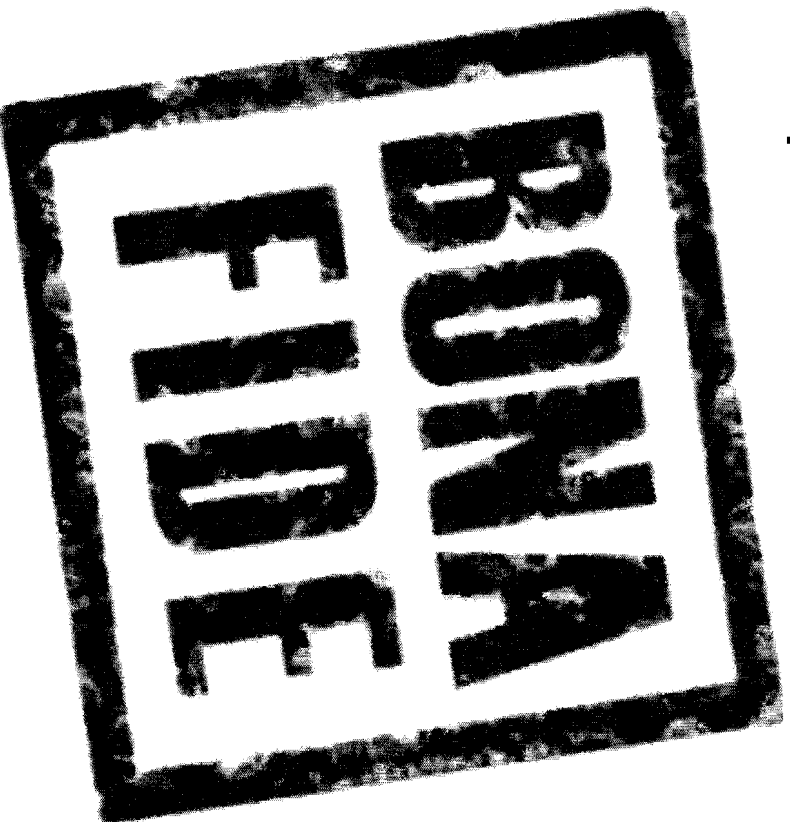
- The aggrieved parties... in problematic and abandoned housing projects have a cause of action and *locus standi* to claim legal and equitable remedies from the State Authority as a public authority, if it is proven that the latter has acted in breach of natural justice, fiduciary, statutory and legal duty and the doctrine of legitimate expectation (procedural and substantive) to act fairly, in good faith and reasonably in alienating unsuitable lands and appointing incapable developers for carrying out housing development projects

Findings and Suggestions

- The State Authority may be liable due to any wrongful acts, breach of duties and negligence,...
- The liability emanates from the principle of vicarious liability.
- The officials might have been negligent on breach of the duties, in that they failed to provide full information or carry out adequate investigation and elicit adequate views and advices from the relevant technical agencies...
- Because of the inadequacy of the information and data that have been provided, this has caused the State Authority to have committed wrong, unfair and unreasonable decision in the alienation of land



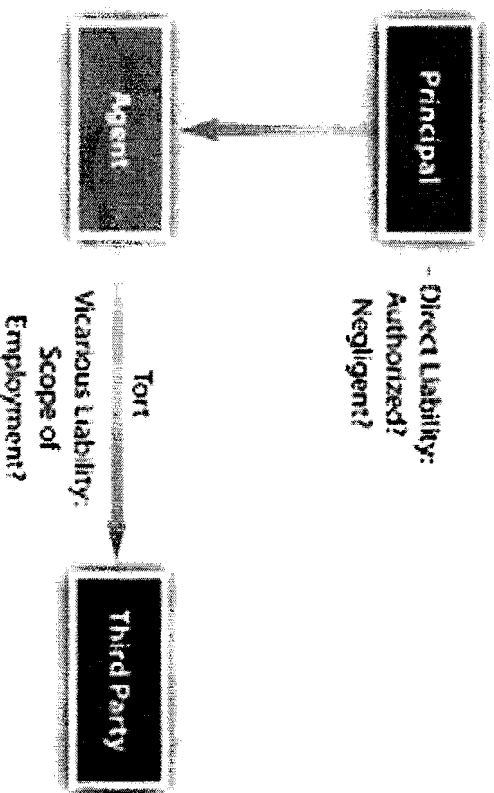
Findings and Suggestions



- Pursuant to section 22 of the NLC it provides that no civil suit shall be commenced against land officers ...if they have carried out all the powers prescribed under the NLC in good faith.
- It follows that if these land officers do not *bona fide* carry out the powers..., the affordable immunity covered by section 22 will lose.
- The State Authority and the State Government, as the employer principal, will also be liable for their land officers' *mala fide* acts in the execution of the powers prescribed under the NLC on the ground of vicarious liability

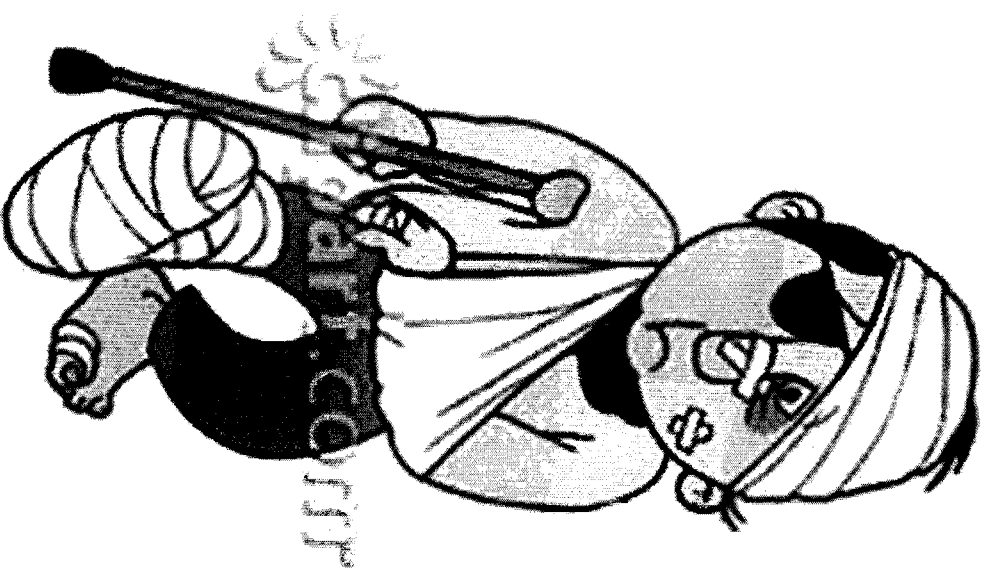
Findings and Suggestions

- Pursuant to section 5 of the Government Proceedings Act 1956 (Act 359) ('GPA'), the government of Malaysia and the states' government are vicariously liable for the tort committed by any public officer in the same manner and to the same extent as any employer or principle is liable for the tort of his servant or agent.
- Section 2 of the GPA define the word 'government' to include the Federal Government and the Governments of the States.

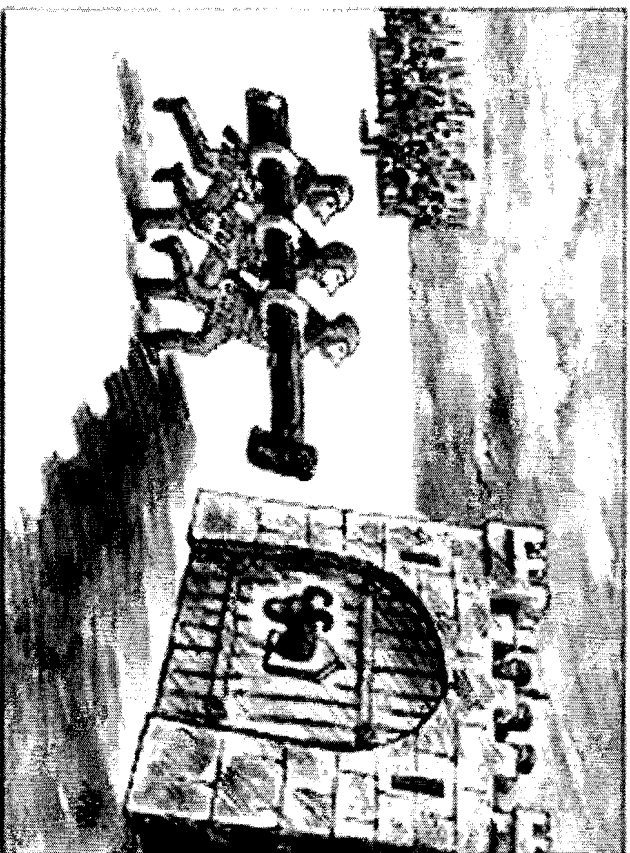


- The aggrieved parties to the alienation of land... can commence a civil action against the State Government and the State Authority for the wrong decision in alienating land for housing development. Pursuant to section 4 (Claims enforceable by proceedings against Government) of the GPA

Findings and Suggestions



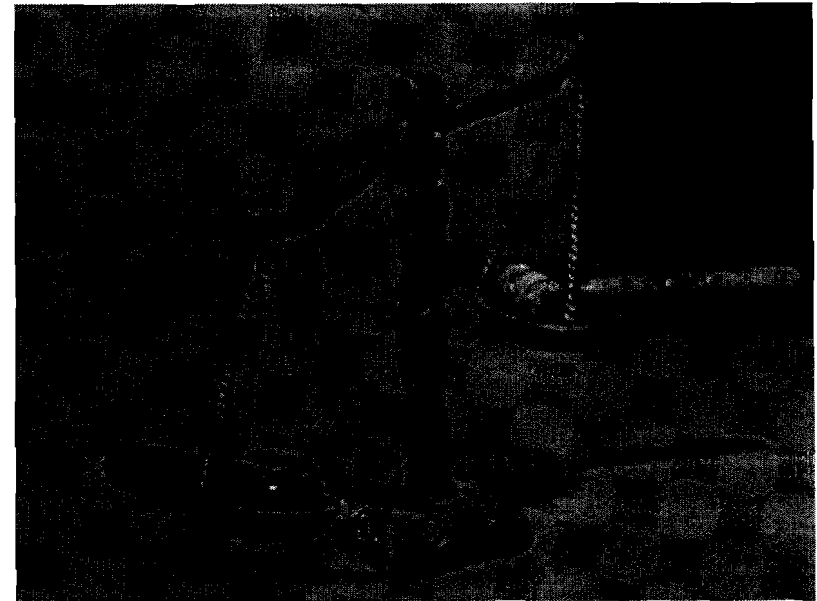
Findings and Suggestions



- Defence: The State Government and the public officer are absolved from any liability for any omission... to carry out any of its public duties pursuant to section 7 of the GPA as a defence to any wrong or negligent acts in the exercise of alienation of land for housing development.
- In the opinion of the author, this provision (section 7 of the GPA) is a general provision conferring an immunity on the government and its officer.
- This provision is qualified and overridden by section 22 of the NLC being a specific legislation governing land administration, the case law and other common law doctrines...

- Further, pursuant to a method of interpreting statutes—presumption against ousting the jurisdiction of courts, the ouster clause in section 7 of the GPA, should not be construed to absolve the government and its servants from any liability for misconduct, negligence, dishonesty, *mala fide* and unfair administration

Findings and Suggestions



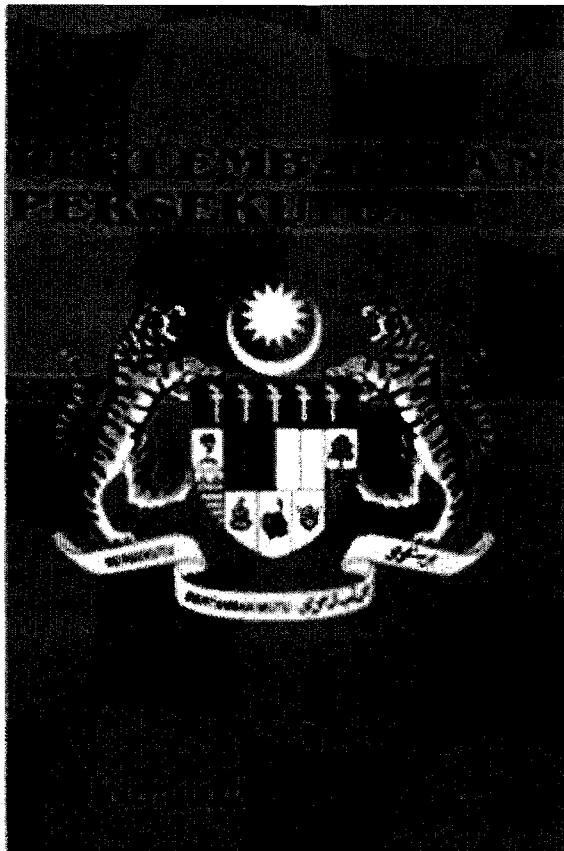
Findings and Suggestions

- To sue the State Authority and the land authority the aggrieved parties must comply with section 2 of the Public Authority

Protection Act 1948 (Act 198) which requires that the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof



Perlembagaan Persekutuan



- Perkara 10(1) ...
tiap-tiap warganegara
adalah berhak bebas
bercakap dan
mengeluarkan fikiran;
(note: warganegara)

Tertakluk kepada undang-undang

■ Maklumat Sulit (Confidential Information)

Tort

TOP

SECRET



We Protect Your
Important Data!



UNDANG-UNDANG RAHSIA RASMI

Official Secrets Act 1972 (Act 88)

Akta Rahsia Rasmi 1972 (Akta 88)



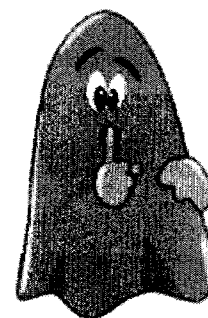
- Cabinet documents, records of decisions and deliberations including those of Cabinet committees;
- State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees;
- Documents concerning national security, defence and international relations.

UNDANG-UNDANG RAHSIA RASMI

Official Secrets Act 1972 (Act 88)

Akta Rahsia Rasmi 1972 (Akta 88)

- "official secret " means any document specified in the Schedule and any information and material relating thereto and includes any other official document, information and material as may be classified as "Top Secret ", "Secret " , "Confidential " or "Restricted " , as the case may be, by a Minister, the Menteri Besar or Chief Minister of a State or such public officer appointed under section 2B



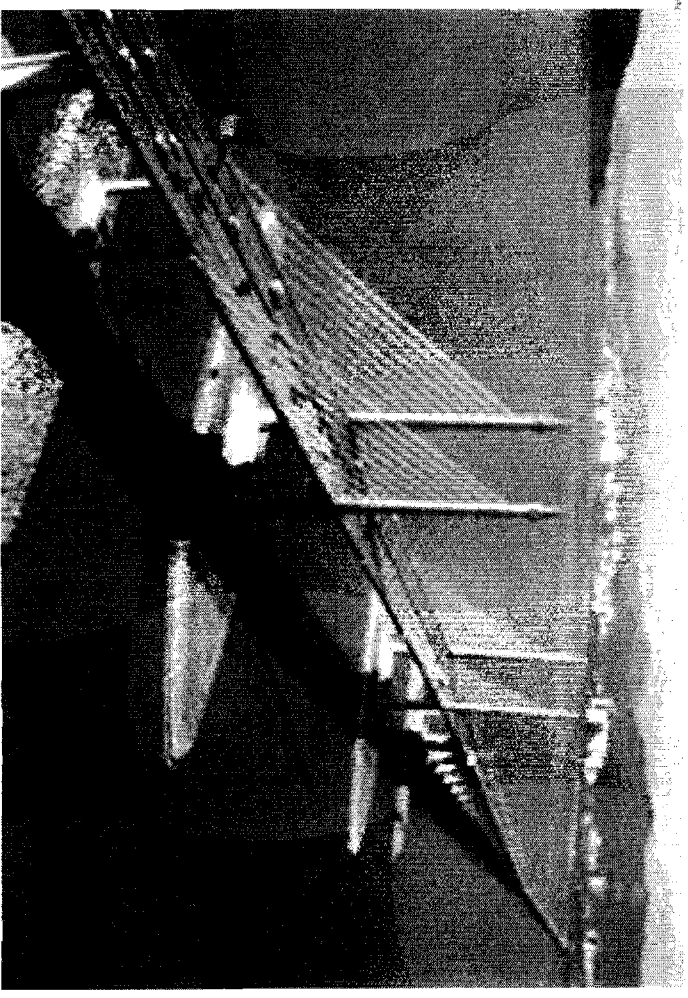
Shh!
TOP SECRET

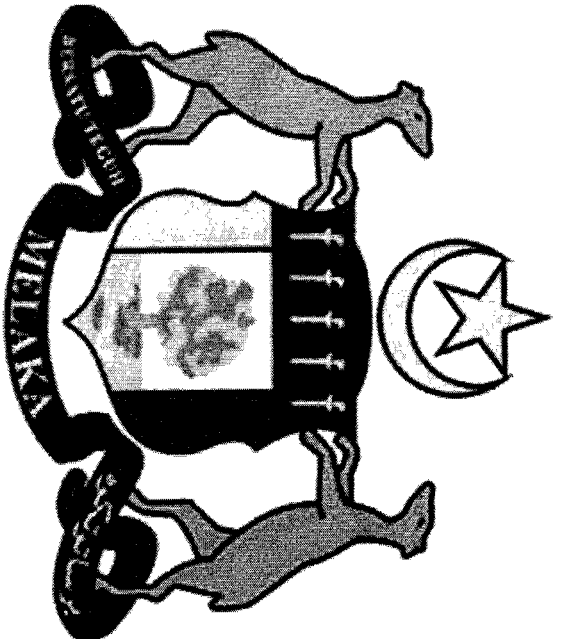
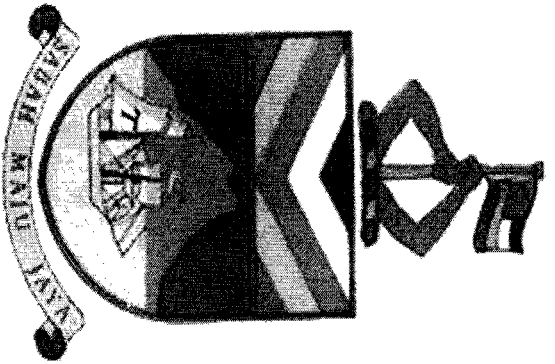
The Freedom of Information (State Of Selangor) Enactment 2010



- Right to information
- allowing the Malaysian public an access to the state documents including that of local councils, city halls and state government-linked companies

Penang Freedom of Information Enactment 2010





Thank You

